HARMONISATION OF CORPORATE GOVERNANCE LAWS IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

A Mini-thesis submitted in partial fulfilment of the requirements of the degree of Magister Legum, in the Faculty of Law, at the University of the Western Cape.

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KEYWORDS

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Harmonisation

Organisation for the Harmonisation of Business Laws in Africa

Organisation for Economic Co-operation and Development

Regional Integration

Southern African Development Community

ACRONYMS

AFDB	African Development Bank
AU	African Union
AUSCIGIE	Acts Relating To Commercial Companies and Economic Interest Group
CCJA	Cour Commune de Justice et d'Arbitrage
CEO	Chief Executive Officer
CISG	Contracts for the International Sale of Goods
CSR	Corporate Social Responsibility
ECA	European Court of Auditors
ECB	European Central Bank
EEC	European Economic Community
ERSUMA	Ecole Régionale Supérieure de la Magistrature
EU	European Union
FATF	Financial Action Task Force
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
G20	Group of 20
ICGN	International Corporate Governance Network
ILO	International Labour Organisation
IMF	International Monetary Fund
NCCG	National Code of Corporate Governance of Zimbabwe
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation pour l'Harmonisationen Afrique du Droit des Affaires
RISDP	Regional Indicative Strategic Development Plan
ROSC	Reports on the Observance of Standards and Codes
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
WHO	World Health Organisation
WTO	World Trade Organisation

DECLARATION

I Emmanuel Themba Junior Makwaiba declare that the thesis **Harmonisation of Corporate Governance Laws in the Southern African Development Community** is my own work, and that it has not been submitted before for any degree or examination in any other university.

Student Signature ……..

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Supervisor Signature ……..

Prof. Riekie Wandrag

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DEDICATION

This thesis is dedicated to my late parents Lieutenant Colonel Hope Victor Makwaiba and Kaneho Makwaiba.

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CHAPTER 1

TOWARDS THE HARMONISATION OF CORPORATE GOVERNANCE LAWS IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

1.1 Introduction

The movement towards globalisation has brought about the need for countries to depend on each other. As a result of this there is now a great number of International Organisations which have been created to deal with the different global issues such as the World Trade Organisation, the International Labour Organisation, and the World Health Organisation amongst others. In addition to the global organisations there has also been a proliferation of regional agreements in the past years.[1] Regional integration is the process by which two or more nation-states agree to co-operate and work closely together to achieve peace, stability and wealth.[2] Its importance has resonated in the area of trade with its significance brought out in articles XXIV of GATT[3] and V of GATS.[4] It has become a means to increase competitiveness in global trade, enhance negotiating capacities, improve access to foreign investment, and to help integrate countries in regional groupings into the world economy.[5] For instance, in relation to the aspect of the increase of competiveness these agreements make provision for the preferential treatment of developing countries in trade.[6] These provisions seek to afford the less developed countries an opportunity to trade with each other and in so doing try to promote trade among the developing countries. This allows them to combine national markets into a single market and thereby have better competition leading to diversification as well as attract foreign investment in the continent.[7]

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[1] Carlsnaes W *etal* *Handbook of International Relations* (2002) ch 25
[2] EU learning available at *http://carleton.ca/ces/eulearning/introduction/what-is-the-eu/extension-what-is-regional-integration /* (accessed 18 April 2014)
[3] General Agreement on Tariffs and Trade 1994
[4] General Agreement on Trade in Services 1995
[5] Buthelezi *Regional Integration in Africa: Prospects and challenges for the 21st Century* (2006) 54.
[6] Article 1 of the General Agreement on Tariffs and Trade 1994
[7] Mupangavanhu Y *The Regional Integration Of African Trade Mark Laws: Challenges And Possibilities* (unpublished thesis University of the Western Cape 2012)33

Furthermore, it is argued that regional integration is one of the rational responses to the challenges faced by continents with many small national markets and landlocked countries.[8] It is argued that migration from the landlocked countries such as Zimbabwe to the coastal economy South Africa through the implementation of SADC Protocols for example allowing freedom of movement of people would close the wage gap and bring efficiency gains to the region.[9] However this has its challenges because of the obligation that the country has to its own people before allowing people from other countries to access jobs.

As a result of the high number of regional agreements the harmonisation of laws has become an important tool in some of the regions so as to ensure the proper functioning of regional organisations. In regions such as the European Union there is a great deal of harmonised laws in different issues such as banking law, trade laws and corporate governance laws amongst others. Similarly, in Africa the Organisation for the Harmonisation of Business Law (OHADA) also boasts of a robust system of business laws and implementing institutions adopted by sixteen West and Central African nations.[10] The Southern African Development Community (SADC) also has a number of Protocols on Investment and Trade amongst others but it does not have any framework in the field of corporate governance.

Corporate governance is argued to have become as important in the world economy as the government of countries.[11] It is because of the global financial crisis which was attributed to issues of corporate governance that it has become very important so as to avoid a repetition of the crisis.[12] During the crisis boards of most banks and companies failed to consider risk factors before approving the company strategy which meant that companies' disclosures on foreseeable risk factors and monitoring as well as managing risk were lacking in many banks.[13] It is argued that the financial crisis exposed the inadequacy of the corporate governance because it did not serve it purpose of safeguarding against this excessive risk

[8] Hartzenberg T 'Regional Integration in Africa' *Staff Working Paper ERSD* (2011)2
[9] De Melo J and Tsikata Y ´Regional integration in Africa :Challenges and prospects` *United Nations University Wider Woking Paper* (2014) 9
[10] Organisation for the Harmonisation of Business Law in Africa Treaty 1997
[11] Breandle C *et al* ' Development of Corporate Governance' available at http://www.virtuspress.org/.../sample_chapter01 (accessed 14 January 2015)
[12] Kumar N and Singh L 'Global Financial Crisis: Corporate Governance Failures and Lessons' *Journal of Finance, Accounting and Management Volume* (2013)25
[13] Kumar N and Singh L 'Global Financial Crisis: Corporate Governance Failures and Lessons' *Journal of Finance, Accounting and Management Volume* (2013)25

taking in a number of financial services companies.[14] It is further argued that the framework proved to be insufficient when it came to accounting standards and regulatory requirements.[15] One can argue that if corporate governance has become so important in the global economy especially in the western countries it is also needed in Africa, particularly the SADC region as shall be shown throughout this paper.

1.2 Problem Statement

Arthur Levitt the former chairman of the US Securities and Exchange Commission once said that:

> 'If a country does not have a reputation for strong corporate governance practices, capital will flow elsewhere. If investors are not confident of the level of disclosure, capital will flow elsewhere. If a country opts for lax accounting and reporting standards, capital will flow elsewhere.'[16]

This statement is a reflection of the challenges that countries with poor corporate governance face in terms of investments because investors are unwilling to invest in their countries.[17]. Some SADC countries face this threat, for instance a concrete example of a subpar framework would be that of Zimbabwe. It is only recently that a draft National Code for Corporate Governance (NCCG) framework which will guide and govern how Zimbabwean companies will be directed and controlled is now complete and currently going through refinement.[18] This can also be seen in the example of Lesotho as well which does not have very good corporate governance where in a report by the Africa Development Bank (AFDB) raised issues on the protection of minority shareholders as well as the outdatedness of the legal framework dealing with corporate governance. Similarly, Malawi is also in need of

[14] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends* Pre-publication version for Vol.1 (2009)1
[15] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends* Pre-publication version for Vol.1 (2009)1
[16] Muradzikwa S 'Development Policy Research Unit Working Paper' (2002)14
[17] Muradzikwa S 'Development Policy Research Unit Working Paper' (2000)14
[18] A national code for corporate governance available at *http://www.theindependent.co.zw/2012/10/05/a-national-code-for-corporate-governance/* (accessed on 16 January 2014)

improvements to its corporate governance after it was assessed and found that it was found to be nascent.[19]

Whereas on the other hand, South Africa boasts of the King Code III which follows what is referred to as the 'enlightened shareholder' model as well as the 'stakeholder inclusive' model of corporate governance, meaning that the board of directors should also consider the legitimate interests and expectations of stakeholders other than shareholders.[20] This is a very robust system in line with international standards. Similarly, Swaziland is also in line with the international standards and boasts of provisions that protect minority shareholder rights and sixty percent of OECD principles of corporate governance in their Companies Act of 2009.[21] Henceforth, in light of these differences arises the need for SADC as a regional unit to improve and level the playing field in terms of the governance of companies through harmonising corporate governance laws.

Moreover, the issue of predictability of laws is also a very important objective to the cause of regional integration in SADC. However, one of the challenges facing this envisaged outcome is that of different legal systems in the region due to the influence of colonial laws. SADC has about 4 different systems amongst its membership, namely civil, common law, hybrid system (Civil and Common law) and the Roman-Dutch system. Botswana, South Africa, Lesotho, Zimbabwe, Namibia and Swaziland make use of a Roman-Dutch system, Angola, Mozambique, Democratic Republic of Congo and Madagascar subscribe to Civil Law Zambia, Tanzania, Malawi and Mauritius are Common Law jurisdictions [22] and Seychelles uses a hybrid system.[23] Each of these countries also comprises of other many different systems of law, especially including traditional customary laws.[24] This translates into an

[19] 'Promoting the APRM Codes and Standards on Corporate Governance in Southern Africa' *http://www.iag-agi.org/IMG/doc/paper_governance_in_southern_africa_final_draft.doc.* (accessed 13 September 2013)
[20] Corporate and Commercial/King Report on Governance for South Africa 2009
[21] Kabir H ´Swaziland corporate governance with regard to the new Companies Act of 2009` *Procedia - Social and Behavioral Sciences Journal* Volume 25 (2011)45
[22] Ndulo N 'The Need for the Harmonisation of Trade Laws in SADC', *Cornell Law Faculty Publications* (1996) 196
[23] Syechelles legal system available at *http://www.actoffshore.co/about-seychelles/legal-system* accessed on 18 March 2015
[24] Ndulo N 'The Need for the Harmonisation of Trade Laws in SADC', *Cornell Law Faculty Publications* (1996) 196

obstacle to regional investments as there is no uniform set system of laws in SADC dealing with trade, and especially corporate governance amongst other issues.

In relation to corporate governance, civil laws give investors weaker legal rights than common laws do.[25] The most striking difference is between common law countries, which give both shareholders and creditors the relatively speaking strongest protections, and French civil law countries, which protect investors the least.[26] This does not assure investors to invest in countries with subpar laws which do not protect their interests thus impacting on the foreign direct investment of the region.

1.3 Rationale of the study

In terms of the SADC Regional Indicative Strategic Development Plan (RISDP), the main objective of the community is to achieve a monetary union through the creation of a regional central bank by 2016 and adoption of a single currency by 2018 in a systematic and progressive manner.[27] The envisaged monetary union in the SADC is premised on a number of economic and financial regulations aimed at stimulating efforts by member states to achieve deeper forms of regional integration.[28] The latter imperatives include a harmonised payment system as well as a corporate governance system among others. Nonetheless it is surprising how the pace of the process has been very subpar taking into consideration that it is the year 2015 and there has been no clear carved out legislation in any form which deals with the aspect of corporate governance raises concerns.

This study serves as not only a reminder but also gives guidelines to taking progressive steps towards harmonised systems of law to ensure the efficient running of companies in SADC. This study is predicated upon other successful systems and the lessons that SADC could make use of as examples in creating a robust system of laws to ensure good corporate governance and in the long run the fulfilment of the concept of a monetary union.

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[25] The National Bureau of Economic Research working paper 5661(1996)5
[26] The National Bureau of Economic Research working paper 5661 (1996)5
[27] SADC Regional Indicative Strategic Development Plan 1999
[28] SADC Regional Indicative Strategic Development Plan 1999

1.4 Research Objectives

The paper seeks to discuss harmonisation as a medium to the removal of poor corporate governance practises in SADC countries.

The question is how can a system of common corporate governance regulation be achieved in SADC?

Harmonisation of laws will act as a levelling ground between companies in different countries with different corporate governance.[29] It will allow for the improvement of laws in the countries with out-dated systems and those with poor systems.[30] It will also enhance accessibility and predictability of corporate governance laws, because of this single body of laws in the region investors or companies will be aware of the laws hence allowing the establishment of foreign companies and further investment in existing companies. This study shall look at international laws around corporate governance and also how other regional blocks have gone about implementing harmonised laws. The latter will provide recommendations on how to embark on the project of harmonising corporate governance laws in the SADC region.

1.5 Research Methodology

The thesis is a desktop examination of primary sources, such as the legislation of the selected regions, international instruments governing corporate governance as well as secondary sources such as textbooks, internet sources and journal articles. This thesis shall present evaluations of the harmonisation processes in the OECD, OHADA and EU countries. By so doing this will bring out strengths and weaknesses of each process so that there is an in depth understanding of the corporate governance laws in order to make well rounded recommendations.

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[29] ShumbaT *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)17
[30] ShumbaT *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)17

1.6 Chapter Outline

Chapter 1 discusses the need for harmonisation in corporate law in SADC, the challenges and problems possibly to be faced in the process of harmonisation.

Chapter 2 will provide the theoretical framework of the study through discussing harmonisation, SADC and Corporate Governance.

Chapter 3 will discuss the OECD Principles of Corporate Governance as a blueprint which can be followed. It will the tools of the OECD and examine how it has been important in the creation of harmonised laws in non-member countries of the OECD.

Chapter 4 will question whether the OHADA laws could serve as a model for harmonisation in the SADC region and whether SADC Member States should join the OHADA or merely use the OHADA Uniform Acts as a model for creating a harmonised system of corporate governance.

Chapter 5 will focus on the European harmonised laws on corporate governance. It shall examine the different regulations or directives which have been enacted within the EU and whether these could be used as recommendations for SADC.

In Chapter 6 conclusions and recommendations will be presented on the harmonisation of corporate governance in the SADC region.

CHAPTER 2

THEORETICAL FRAMEWORK

2.1 Introduction

The concept of corporate governance as mentioned in the previous chapter has now become very important in the global economy following the events of the global financial crisis of 2008. Some SADC countries such as Zimbabwe, Lesotho and Malawi among others are not in tandem with the developments in corporate governance.[31] This chapter will discuss the concept of corporate governance in terms of its theories, the concept of harmonisation and lastly will look at the institutional make up of SADC to explore the feasibility of the harmonisation of corporate governance in the SADC region.

2.2 Corporate Governance

The concept of corporate governance has been very important to the running of companies for a very long time. It is said to be as old as the history of corporations.[32] Until the beginning of the 17th century partnerships were the dominant form for organising jointly owned business firms.[33] It was later with the growth of business in these partnerships that the entity called a corporation was created so as to raise capital for the bigger businesses.[34] This was due to the risk that the owners incurred in running the business because they were practically the business which meant that the losses of the business were also theirs. Thus there was a great need for separation between them and the business through the Limited Liability Act in Britain 1855.[35]

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[31] 'Promoting the APRM Codes and Standards on Corporate Governance in Southern Africa' *http://www.iag-agi.org/IMG/doc/paper_governance_in_southern_africa_final_draft.doc*. (accessed 13 September 2013)
[32] Breandle C *etal* ' Development of Corporate Governance' available at *http://www.virtuspress.org/.../sample_chapter01* (accessed 14 January 2015)
[33] Breandle C *etal* ' Development of Corporate Governance' available at *http://www.virtuspress.org/.../sample_chapter01* (accessed 14 January 2015)
[34] Adelopo I ' Auditing, Corporate Governance and Market Confidence' available at *http://www.ashgate.com.../Auditor-* (accessed 14 January 2015)
[35] Farrar, J.H 'A Brief Thematic History of Corporate Governance,' *Bond Law Review: Vol. 11: Iss. 2, Article 9* (1999) 259

Due to the creation of companies and the concept of limited liability which meant that the company was a separate entity there was a need for this new entity to be governed.[36] In 1932 Berle and Merlings' study into the operation of the company entities spearheaded this concept of corporate governance.[37] They identified some of the major problems that came along with the division between ownership and management which are reflected in the statement below,

> 'Management, in the absence of a countervailing power, have a tendency to pursue their self-interest at the expense of the corporation'[38]

In the above statement one finds that there was a necessity for companies and countries to have laws and rules in place in order to prevent the pursuit of self- interest, hence the laws regulating corporate governance were and are of great importance.

2.2.1 Theories on Corporate Governance

In view of the different needs of companies and due to the financial crises the concept of corporate governance evolved to meet the new requirements. There are different theories or approaches of corporate governance that exist. An understanding of these theories would be important in choosing which model SADC has to make use of in order to be competitive in getting investment as well as safeguarding the interests of parties involved with the company entity.

2.2.1.1 Agency Theory

The Agency theory is also known as the narrow view of corporate governance and it refers to the formal system of accountability of the board of directors to its shareholders (owners of the business) with the purpose of maximising profits for the benefit of shareholders.[39] In terms of this theory the managers of the company take the role of agents whilst the

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[36] Cassim MF *Contemporary Company law* 2edition Juta Law (2012) ch 2
[37] Adelopo I ' Auditing, Corporate Governance and Market Confidence' available at *http://www.ashgate.com.../Auditor-* (accessed 14 January 2015)
[38] Farrar, J.H 'A Brief Thematic History of Corporate Governance,' *Bond Law Review: Vol. 11: Iss. 2, Article 9* (1999) 260
[39] Koma SB 'Conceptualization and Contextualization of Corporate Governance in the South African Public Sector: Issues, Trends and Prospect*' Journal of Public Administration, Vol.44, N.o.3* (2009) 4

shareholders as a group are the principal.[40] The agency theory is said to be flawed because it assumes that the managers who are the agents will almost always act in the interest of the shareholders as opposed to acting in their own interest which is not necessarily the case.[41]This can be seen in the *Enron* case where the managers concealed the real value of the company so that the company could get more investments and be seen as a big company thus, the managers would profit from the company's system of compensation which was designed to retain and reward its most valuable employees.[42] It also poses the threat of shareholders preventing the managers from using their discretion in issues where they must be afforded this due to their expertise.[43] However, though shareholder restraint on the discretion of the directors may sound draconian one can argue that it minimises reckless decisions by the directors and the taking of unnecessary risks which is one of the reasons for the 2008 economic meltdown.[44]

2.2.1.2 Stewardship Theory

This theory is premised on the notion that managers are to act as good stewards holding the company in trust for the owners and furthering their interest without an individualistic motive.[45] It is argued that in order for one to be a steward, psychological factors such as motivation and personal will should steer the manager's choice to be a steward.[46]

The theory assumes that the steward, who was the agent in the previous theory, perceives that the gains from collaborative behaviour with the principal are higher than gains which are gained by the agent through self-serving behaviour.[47] This ensures that there is minimal

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[40] Solomon J *Corporate Governance and Accountability* 2nd edition (2007)17
[41] Solomon J *Corporate Governance and Accountability* 2nd edition (2007)17
[42] 'Presenting the Enron Case: Testing the Agency Theory: Re-evaluating the Shareholder and Management Trust relationship' available at *http://www.geocities.ws/yourwritingspecialist/Thesis.doc*. (accessed on 13 September 2015)
[43] Clarke T *Theories of Corporate Governance : The Philosophical Foundation of Corporate Governance* (2004)4
[44] Kumar N and Singh L 'Global Financial Crisis: Corporate Governance Failures and Lessons' *Journal of Finance, Accounting and Management Volume* (2013)25
[45] Clarke T *Theories of Corporate Governance : The Philosophical Foundation of Corporate Governance* (2004)9
[46] Madisson K Agency *Theory and Stewardship Theory Integrated, Expanded, and Bounded by Context: An Empirical Investigation of Structure, Behaviour, and Performance within Family Firms* (Doctorate thesis University of Tennessee 2014) 12
[47] Pastoriza D and Miguel A 'When Agents Become Stewards: Introducing Learning in The Stewardship Theory' *Working Paper IESE Business School* (2009)4

conflict between the agent and principal as they are *ad idem* on the agenda as well as the goals of the company.[48] However it can be argued that it is far-fetched that in a region with high corruption like SADC agents / stewards will act solely in the interests of the principal and not in self-interest.

2.2.1.3 The Stakeholder Theory

The Stakeholder theory which is sometimes regarded as corporate governance in its broadest sense refers to the informal and formal relationship between the corporate sector and its stakeholders (creditors, suppliers, customers, trade unions, civil society groups, together with the impact of the corporate sector on society in general).[49] This type of corporate governance can be seen through examples such as of the Organisation for Economic Co-operation and Development (OECD) Guidelines which embody the principles of the stakeholder model of corporate governance.[50] It is argued that it has become a global benchmark on corporate governance and countries, either members or non-members, as well as the World Bank and the International Corporate Governance Network have endorsed its good corporate governance principles. [51] One can argue that this theory champions the concept of corporate social responsibility (CSR).

> 'Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large'[52]

This can be seen through the commitment that the stakeholder theory has to the interests of stakeholders including employees and the society which is what CSR is about. In relation to the harmonisation of SADC corporate governance this paper will evaluate as well as give recommendations which are in line with this model of stakeholder corporate governance.

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[48] Clarke T *Theories of Corporate Governance : The Philosophical Foundation of Corporate Governance* (2004)8

[49] Mongalo T 'The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa, SALJ, (2003) 173

[50] OECD Principles of Corporate Governance 2004

[51] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' (2005) 4

[52] Holme L and Watts R 'Corporate Social Responsibility' available at *http://megamindservices.in/pdfs/CORPORATE%20SOCIAL%20RESPONSIBILITY.pdf* (accessed 13 September 2015)

2.3 Harmonisation

In order to understand the concept of harmonisation of laws this paper shall make a few comparisons of it to that of unification. Unification seeks to suppress the differences and conflicts of form and make them compatible with the objectives of the region.[53] It is the total substitution of two or more legal systems with one legal system.[54] For instance in OHADA unification is achieved through Uniform Laws where countries are directly bound by the uniform laws as well as in the case of the Regulations of the European Union.[55] It has the characteristics of hard law where these laws are binding to the member states and must be applied regardless of conflict between them and the national law.

Harmonisation on the other hand is more subtle and is a process of ascertaining uniformity not through unification but through reducing the differences in the law.[56] It is argued that it is a way of achieving standardisation of the legal system with minimal interference with the sovereignty of member states.[57] It has nuances of the soft law approach usually achieved through voluntary and non-binding forms of law such as norms, model laws, recommendations and guidelines.[58] An example of such would be the Contracts for the International Sale of Goods (CISG) as well as the OECD Guidelines which will be discussed the next chapter. Hence harmonisation offers Member States the choice of implementing the harmonised regional law in a way that fits in with their own circumstances. In view of the above it can be argued that it best suits SADC which is a region which has problems with authority as shall be discussed below in relation to the disbanding of the Tribunal.

[53] Lazar A 'Rules applicable to the International Sale of Goods developed in the OHADA' available at *http://www.internationallawreview.eu/fisiere/pdf/rules-Ancapdf.*pdf (accessed 18 April 2014*)*
[54] Bhatia K *Textbook on Legal Language and Legal Writing* (2010)243
[55] 'EUROPA - Regulations, Directives and other acts' available at *http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm* (13 September 2015)
[56] Bhatia K *Textbook on Legal Language and Legal Writing* (2010)242
[57] Fagbayibo B 'Towards the harmonisation of laws in Africa: Is OHADA the way to go?' *Comparative & International law Journal of Southern Africa* (2009) 42
[58] Desta M 'Soft law in International law: An Overview' in Bjorklund K et al *International Investment Law and Soft Law* (2012)41

2.4 The Southern African Development Community

In order to establish the plausibility of harmonisation in SADC corporate governance law one must scrutinise the organisation itself. The Southern African Development Community (SADC) of today first started as was the Southern African Development Coordination Conference (SADCC), which was formed in on 1 April 1980 in the capital of Zambia, Lusaka with the first states being Angola, Botswana, Lesotho, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.[59] However, it changed from the Southern African Development Coordination Conference (SADCC) into the Southern African Development Community (SADC) after the signing of the SADC Treaty in 1992.[60] It now comprises the following member states: Angola, Botswana, Democratic Republic of Congo Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.[61]

2.4.1 Objectives of SADC

In terms of Article 5 of the Southern African Development Community Treaty of 1997, the role of SADC is to: promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication; enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective; consolidate, defend and maintain democracy, peace, security and stability; promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; achieve complementarity between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the region; achieve sustainable utilisation of natural resources and effective protection of the environment; strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the

[59] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)169
[60] Southern African Development Community Treaty 1997
[61] SADC membership available at *http://www.sadc.int/member-states/* accessed on 09 April 2015

region; combat HIV/AIDS or other deadly and communicable diseases; ensure that poverty eradication is addressed in all SADC activities and programmes; and mainstream gender issues in the process of community building.[62]

Article 5(2) of the SADC treaty explains how these objectives are to be achieved and particularly in relation to the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States.[63] One of the obstacles to the injection of capital in SADC is that there are poor corporate governance laws for example Lesotho, Zimbabwe and Malawi. South Africa has the King Code III which is highly rated in Africa while Swaziland and Mauritius have budding corporate governance regimes alongside most of the other states.[64] The answer would be the improvement of these law as well as eliminating the differences through a collective effort of harmonisation of the corporate governance laws of the region. Harmonisation is in line with the objectives of SADC and there is mention of harmonisation of political and socio- economic policy as well as in the field of international relations. One can see examples of such harmonisation in the Protocol on Trade,[65] the Protocol on Trade in Services[66] as well as policies like the Harmonised Seed Regulation System which is a set of rules, standards and procedures necessary to facilitate the movement of seed between countries in the region.[67]

Furthermore, in line with the objectives of harmonisation, in 2009 in a paper by United Nations Economic Commission for Africa, *Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC* there is mention of a harmonised system of corporate governance through integration of laws in the Central Bank model law so as to govern financial

[62] Southern African Development Community Treaty 1997
[63] Southern African Development Community Treaty 1992
[64] 'Promoting the APRM Codes and Standards on Corporate Governance in Southern Africa' available at *http://www.iag-agi.org/IMG/doc/paper_governance_in_southern_africa_final_draft.doc* (accessed 13 September 2013)
[65] SADC Protocol of Trade 1996
[66] SADC Protocol on Trade in Services 2012
[67] 'The SADC Harmonized Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries' available at *http://www.fanrpan.org/documents/d01457/hassp_policy_study_20121122.pdf* (accessed 14 September 2015)

institutions.[68] This paper also makes mention of the plan that SADC has to include corporate governance practices in the Central Bank model law so as to ensure the accountability of the members of the central bank in the decisions they make.[69] The paper also discusses the importance of transparency in the Central Bank's corporate governance so as to ensure that bank provides sufficient information to the people at all times through media briefings, Interactive websites and publish bulletins about their activities.[70] Therefore, it can be noted that corporate governance is in tandem with the objectives of SADC and though the above explanation deals only with the Central Bank it is important in all sectors of business and this paper shall look at a general law which can be applied in different sectors.

2.4.2 SADC Institutions

In order to achieve harmonisation of corporate governance laws the depth and effectiveness of the institutions of SADC must be analysed so as to see the possible challenges as well as their role in this agenda. The institutions as per Article 9 of the Treaty are: Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Tribunal; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat and the SADC National Committees.[71]

2.4.2.1. The Summit

The Summit is primarily responsible for the direction which SADC will assume in its policy.[72] It comprises of the Heads of States of the Member States.[73] The Summit also appoints Council Executives and decides on the admission of new members.[74] Of importance with regards to the issue of harmonisation of corporate governance or any other law is the

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[68] United Nations Economic Commission for Africa 'Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC' (2009)45
[69] United Nations Economic Commission for Africa 'Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC' (2009)45
[70] United Nations Economic Commission for Africa 'Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC' (2009)46
[71] Southern African Development Community Treaty 1992
[72] Article 9 of Southern African Development Community Treaty 1997
[73] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)169
[74] Southern African Development Community Treaty 1997

provision in terms of Article 22 which affords the summit the power to adopt legal instruments for the implementation of the provisions of the Treaty; or it may delegate this authority to the Council or any other institution of SADC as the Summit may deem appropriate.[75] If the need for the improvement of corporate governance laws is listed as an issue then it is this Summit with the power to adopt a Protocol on Corporate Governance law to the countries. However, one has to be mindful of the fact that there will be no enforcement mechanism with the new position regarding the jurisdiction of the Tribunal which is discussed below. Furthermore, adoption of a protocol requires a majority of two thirds of the Member States to ratify or sign the agreement and with other countries already having good frameworks this would be a problem.[76] This paper will give the alternatives that can be taken in face of these challenges to ensure the harmonisation of SADC corporate governance law.

2.4.2.2 Organ on Politics, Defence and Security Co-operation

The Organ is tasked with the responsibility of promoting peace and security across Southern Africa, protecting the region's people from instability due to the breakdown of law and order, developing a common foreign policy throughout the region, and cooperating on matters related to security and defence.[77] It also includes the co-ordination of the participation of its members in international and regional peacekeeping operations, addressing extra-regional conflicts which impact on peace and security in Southern Africa.[78] It is comprised of 3 committees which are: Ministerial Committee of the Organ (MCO) which consists of the Ministers of Defence, Foreign Affairs, Public and State Security and it reports to the chair as well as oversee that plans of the organ.[79] It also has the Interstate Defence and Security Committee which is subcommittees of the above comprising of Director Generals and

[75] Southern African Development Community Treaty 1997
[76] SADC Protocols available at *http://www.sadc.int/about-sadc/overview/sa-protocols/* (accessed 14 September 2015)
[77] SADC Protocol on the Organ on Politics, Defence and Security Co-operation 2001
[78] Cilliers J 'The SADC Organ for Defence, Politics and Security' available at *http://dspace.africaportal.org/jspui/bitstream/123456789/31600/1/paper_10.pdf?1* (accessed 14 September 2015)
[79] Organ on Politics, Defence and Security Co-operation available at *http://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defense-and-security/* (accessed 14 September 2015)

Permanent Secretaries.[80] The last one is the Inter-state, Politics and Diplomacy Committee which comprises of the Ministers of Foreign Affairs.[81]

2.4.2.3 Council and Integrated Committee of Ministers

It consists of at least two Ministers from the member states and assumes among other responsibilities that of: overseeing the activities of the core areas of integration in trade, finance, investment etc.[82] These duties indirectly include corporate governance as it may hinder investment. So they have a *quasi-duty* to also oversee the state of corporate governance and recommend the harmonisation as a platform to improve company governance in a bid to improve investment. It can also be suggested that since corporate governance law has such an impact an amendment of the Protocol on Finance and Investment[83] to include corporate governance could be a way to harmonise corporate governance in SADC. Moreover, the Council has a mandate to monitor and control the implementation of the Regional Indicative Strategic Development Plan.[84] As shall be mentioned below the region is failing to meet its goals and there is a need to address this and improve integration and law important to the ideal of a regional Bank amongst other objectives. The Council is aided by the Integrated Committee of Ministers which is also comprised of 2 Ministers of each member state.[85] It is has more of the same duties as that of the Committee which may raise questions of whether it is just a duplication or allows for more interaction in the members to ensure the reaching the objectives of SADC. One can argue that SADC is a small region and should have lesser institutions in order to ensure more efficiency in meeting its objectives and thus duplications such as these are not of much help to the region.

2.4.2.4 Tribunal

The Tribunal is tasked with the obligation to give advisory opinions on such matters as the Summit or the Council may refer to it and the decisions of the Tribunal are supposed to be

[80] Article 6 SADC Protocol on Politics, Defence and Security 2001
[81] Article 7 SADC Protocol on Politics, Defence and Security 2001
[82] Article 11(2) Southern African Development Community Treaty 1997
[83] SADC Protocol on Finance and Investment 2006
[84] Article 11(2)of the Southern African Development Community Treaty 1997
[85] Article 11(2)of the Southern African Development Community Treaty 1997

final and binding.[86] However, it was suspended following the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [87] concerning the land reform in Zimbabwe where the decision of the Tribunal was disregarded hence leading to it being disbanded.[88] In 2014 the new Protocol was signed by 9 countries out of the 15 members and is still not in force.[89] In Article 33 of the new Protocol it stipulates that the Tribunal will only have jurisdiction over the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.[90] This Tribunal is very important in the application of a new harmonised corporate governance law but one has to take this with a pinch a salt because the Tribunal may further be dismantled if decisions go against countries not willing to implement the decision of the Tribunal. It has to be kept in mind that history may yet repeat itself or the countries which did not sign this new protocol may just decide to defy any decision by the Tribunal because it is yet again Zimbabwe which has not signed including South Africa.

2.4.2.5 Standing Committee of Senior Officials

The Standing Committee is an advisory committee to the Council.[91] Apart from this task nothing much is said about this organ in terms of its mandate. The Standing Committee processes documentation from the Integrated Committee of Ministers to the Council. It has to report to and is accountable to the Council. The Committee meets four times a year.[92] The call for harmonisation has been there in a number of issues in SADC, including Contract Law, Sales Law through various authors and now in this paper on harmonisation of corporate governance law it is the mandate of these officials to advice on the need of the speeding up of these processes amongst other pressing issues.

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[86] Southern African Development Community Treaty 1997
[87] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe 2008
[88] New Protocol on SADC Tribunal available at *http://www.mikecampbellfoundation.com/page/new-protocol-on-sadc-tribunal* (accessed 17 July 2015)
[89] New Protocol on SADC Tribunal available at *http://www.mikecampbellfoundation.com/page/new-protocol-on-sadc-tribunal* (accessed 17 July 2015)
[90] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe 2008
[91] Article 13 of the Southern African Development Community Treaty 1997
[92] Article 13 of the Southern African Development Community Treaty 1997

2.4.2.6 Secretariat

For the purposes of this discussion the mandate of the Executive Secretary shall be discussed under the heading of the Secretariat. The duties of the latter encompass strategic planning and management of the programmes of SADC; the coordination and harmonisation of the policies and strategies of Member States; the development of capacity, infrastructure and maintenance of intra-regional information communication technology and undertaking research on Community building and the integration process amongst many more other duties but these have been chosen because of the relevance to the issue at hand of a harmonised corporate governance statute.[93] All above mentioned would be quite instrumental for instance research on the integration processes in successful regions such as Europe which this paper seeks to achieve and the coordination of the effort in the policies of the countries particularly those that lack in the field of corporate governance.The Executive Secretary performs duties which are identical to the ones of the Secretariat.[94] The Secretary is appointed for a period of four years with the option of a renewal of another period not exceeding four years.[95]

2.5 Conclusion

In view of the discussion above it can be concluded that if there is the political will in SADC and if these institutions are operating efficiently in their given roles it is not impossible to achieve the envisaged result of a harmonised law on corporate governance. SADC does show promise with Protocols such as the one on Trade and Trade in Services among others. In the next chapter this paper shall examine the OECD Principles on Corporate Governance and question how they can be of use in the process of the harmonisation of corporate governance in SADC.

[93] Southern African Development Community Treaty 1997
[94] Southern African Development Community Treaty 1997
[95] Southern African Development Community Treaty 1997

CHAPTER 3

INTERNATIONAL CORPORATE GOVERNANCE: ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) PRINCIPLES ON CORPORATE GOVERNANCE

3.1 Introduction

The Organisation for Economic Co-operation and Development (OECD) Principles on Corporate Governance are said to have become the international yardstick for corporate governance as they have successively formed the basis for a number of reform initiatives, both by governments and the private sector.[96] The OECD definition of corporate governance has managed to rise to its influential position because of its hybrid nature due to the inclusion of both the broad and narrow definitions of corporate governance.[97] The OECD defines corporate governance as the procedures and processes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation such as the board, managers, shareholders and other stakeholders and lays down the rules and procedures for decision-making.[98] In rising up to this formidable force in the governance of a business, the OECD has developed internationally accepted standards, practices, guidelines and principles for corporate governance.[99] The OECD's open ended set of guidelines have catapulted it into an internationally user friendly platform for dialogue in the promotion of corporate governance.[100] In carrying out its mandate of solidification of corporate governance and drafting frameworks it has managed to share experiences across and within countries.

The guidelines have managed to influence key corporate governance policies internationally and also in different countries such as South Africa in the form of the King Code III , the

[96] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005) 4
[97] Organisation of Economic Corporation and Development Principles of Corporate Governance 1999
[98] OECD definition of corporate governance available at *https://stats.oecd.org/glossary/detail.asp?ID=6778* accessed 17 August 2015)
[99] UNEP and KPMG 'Carrots and Sticks Current Trends and Approaches in Voluntary and Mandatory Standards for Sustainability Reporting', (2010) 18
[100] Shelton J et al *Corporate Governance Corporate Governance in Asia A Comparative Perspective* (2001)37

Olivencia Code of Italy and the Peterson report in the USA.[101] The abovementioned policies are evidence of the influence of the OECD guidelines.[102]

This chapter will discuss the history and structure of the OECD guidelines on corporate governance in relation to their impact on the improvement of the corporate governance of non-members as well as internationally. Then it will explain the guidelines and critically evaluate the value of the OECD guidelines and finally determine whether the Guidelines will be helpful in the process of harmonising the corporate governance laws in SADC.

3.2 Organisation for Economic Co-Operation and Development (OECD)

The OECD came into existence in September 1961 with the mandate of improving the economic well-being of people but was initially known as the Organisation for European Economic Co-operation (OEEC) which was formed in 1948.[103] The OEEC was formed in order to administer American and Canadian aid under the Marshall Plan for reconstruction of Europe in the aftermath of World War II.[104] To date it has a membership that comprises of Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States, Japan, Finland Australia, New Zealand, Mexico, the Czech Republic, Hungary, Poland, Korea and the Slovak Republic. [105] Since the establishment of the OECD it has been instrumental in issues of tax, multinational business, education, agriculture, anti-corruption, nuclear energy and corporate governance amongst other issues.[106] In terms of the 1961 Convention the main function of the OECD is to ensure direct co-operation among the governments of its member countries.[107] A brief outline of the OECD's structure is subsequently provided so as to understand the operation of the organisation.

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[101] Kirkpatrik G *Corporate Governance: A Survey of OECD Countries* (2004) 51
[102] Robinett D e tal 'Experiences from the Regional Corporate Governance Roundtables' (2003) 9 available at *http://www.oecd.org/daf/ca/corporategovernanceprinciples/23742340.pdf* (accessed 07 August 2015)
[103] Davies K *Understanding European Union Law* 5th edition (2013)7
[104] Wolfe R *From Reconstructing to Europe Constructing Globalisation: The OECD in Historical Perspective* in Mahon et al *The OECD and Transnational Governance* (2008)25
[105] Organisation for Economic Co-operation and Development Guidelines on Corporate Governance 2004
[106] The issues OECD deals with available at *http://www.oecd.org/about/* (accessed 26 May 2015)
[107] Organisation for Economic Co-Operation and Development Convention 1961

3.2.1 Organisational Structure of the OECD

The OECD is comprised of three structures which are the Council, Secretariat and the Committees which ensure the operation of the organisation.[108]

3.2.1.1 The Council

The OECD Council is made up of ambassadors from all member states and their function includes the guidance and control over the organisation: through authorising the Secretary General to direct the secretariat to scrutinise reports, adopt acts and look at subject matters to be discussed.[109] It is also the most powerful decision-making organ in the OECD.[110] It is tasked with the formulation of the overall goals of the OECD keeping in mind its future course.[111] In terms of Article 8 the Council is mandated to elect a Chairman every year and his task is to preside at its ministerial sessions with the help of two Vice-Chairmen.[112] It also takes on the responsibility for collective foreign policy issues, including the crucial area of relations with non-member countries[113] which is very important for the purposes of this paper since Southern Africa Development Community members are not members of OECD. Hence if there are attempts to harmonise the SADC corporate law through consultation with the OECD there is a need for understanding between the latter and the Council.

[108] Functions of the OECD available at *http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1027* (accessed 26 May 2015)
[109] Woodward R *The Organisation for Economic Co-operation and Development (OECD)* (2009)47
[110] 'What the OECD does and how?' available at *http://www.oecd.org/about/whodoeswhat/* (accessed 26 May 2015)
[111] 'Functions of the OECD' available at *http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1027* (accessed 26 May 2015)
[112] Organisation for Economic Co-Operation and Development Convention 1961
[113] Organisation for Economic Co-Operation and Development Convention 1961

3.2.1.2 The Committees

The Committees consist of specialists from member countries tasked to deal with particular subject areas, such as, environment, investment, governance, tax among others.[114] It also is highly populated by professional economists since the main objective of the organisation is economic liberalisation.[115] The number of committees has risen to about 250 committees, working groups and expert groups.[116] These are established by the Council in terms of Article 9 of the convention in furthering the objectives of the OECD.[117] For instance, the Executive Committee is mandated to contribute to work that will improve policy making through assisting the Council in the preparation of its decisions on reports and proposals.[118] The Committees must have meetings with the Council to ensure dialogue and so as to report on their performance in respect of their achievement of expected goals.[119] They have a more grass roots approach as they are more informed on the issues within countries and are very important to the operations of the OECD.

3.2.1.3 The Secretariat

Similarly, the secretariat consists of different professionals ranging from economists, scientists, lawyers, administrative staff and other professionals who support the work of the committees with research, analysis, data collection and policy recommendations.[120] The latter is very important to the way that the OECD operates in ensuring the achievement of its goals in their different ventures.[121] The secretariat identifies common ways to rank the compliance of countries to the Treaty as well as the guidelines.[122] They do most of the ground work in operations of the OECD. It can be argued that it is mostly through the work of the Secretariat

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[114] Functions of the OECD available at http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1027 (accessed 26 May 2015)
[115] Porter T and Webb M *Role of OECD in Orchestration of Global Knowledge Networks* in *Perspective* in Mahon et al *The OECD and Transnational Governance* (2008)43
[116] Woodward R *The Organisation for Economic Co-operation and Development (OECD)* (2009)52
[117] Organisation for Economic Co-Operation and Development Convention 1961
[118] Woodward R *The Organisation for Economic Co-operation and Development (OECD)* (2009)52
[119] Woodward R *The Organisation for Economic Co-operation and Development (OECD)* (2009)52
[120] Functions of the OECD available at http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1027 (accessed 26 May 2015)
[121] United States Mission for Organisation for Economic Co-Operation and Development of available at http://usoecd.usmission.gov/mission/work.html (accessed 26 May 2015)
[122] Mahon R and McBride S *Introduction* in Mahon et al *The OECD and Transnational Governance* (2008)7

that the Tax Convention, Guidelines on Money Laundering and most importantly the Guidelines on Corporate Governance have been published.

3.3 OECD Principles on Corporate Governance

The first of the OECD Guidelines on Corporate Governance came about as a result of the Asian financial crisis in 1997.[123] The OECD Council in one of the Ministerial meetings called upon the OECD to formulate a set of corporate governance standards and guidelines.[124] The principles were adopted in 1999 were later revised in 2004.[125] They have been recently been updated in 2015 as well. The principles are widely recommended and have gained a lot of credibility as they have been recognised by the World Bank, International Monetary Fund, and non-OECD countries, among others.[126]

3.3.1 The Role of the OECD Principles on Corporate Governance

The role of the OECD throughout has been to facilitate participants' access to the global policy dialogue to strengthen corporate governance and to set a framework for the sharing of experiences across and within countries.[127] The OECD has developed standards, practices and guidelines together with the principles for corporate governance.[128] They mainly apply or service publicly traded companies but also find a place in the governance of non-traded companies.[129] The OECD formulated this set of principles so as to provide practical suggestions for stock exchanges, investors, corporations and other parties that have a role in the process of developing good corporate governance.[130] Though the principles are not

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[123] Kirkpatrik G *Corporate Governance: A Survey of OECD Countries* (2004)13
[124] Kirkpatrik G *Corporate Governance: A Survey of OECD Countries* (2004)13
[125] Jesover F and Kirkpatrick G _The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005) 127
[126] Feinerman J V 'New Hope for Corporate Governance in China? ' (2007) *The China Quarterly*, 191 590- 612
[127] Robinett D et al 'Experiences from the Regional Corporate Governance Roundtables'(2003)9 available at *http://www.oecd.org/daf/ca/corporategovernanceprinciples/23742340.pdf* (accessed 07 August 2015)
[128]UNEP and KPMG 'Carrots and Sticks Current Trends and Approaches in Voluntary and Mandatory Standards for Sustainability Reporting', (2010) 18
[129] Organisation for Economic Co-operation and Development Corporate Governance Guidelines 2004
[130] Ngum PC *Using the OECD Principle of Corporate Governance as an International Benchmark: A Comparative Analysis of Corporate Governance Legislation in the UK, US and South Africa* (published thesis 2009)29

binding on its members, they offer a standard of good practice.[131] As per the preamble these principles are not intended to substitute or override the powers of the government, semi-government or private sector initiatives to develop more detailed "best practice" in corporate governance.[132]

3.3.2 The OECD Principles on Corporate Governance 1999

In 1999 the OECD members agreed on the OECD principles on corporate governance and identified the following elements as vital to good corporate governance: I) The rights of shareholders; II) The equitable treatment of shareholders; III) The role of stakeholders; IV) Disclosure and transparency; and V) The responsibilities of the board.[133] These elements have mostly been retained by the revised principles but however as a result of the global economic crisis including the *Enron/Worldcom* failures which pointed out deficiencies in accounting standards and issues surrounding the Audit Committee there was a need for the revision of the principles.[134] Similarly, the *Parmalat and Ahold* cases in Europe also exposed the deficiencies in the OECD 1999 concerning corporate governance deficiencies which led to actions by international regulatory institutions such as International Organisation of Securities Commissions (IOSCO) and by national authorities as well as a response from the OECD in terms of the 2004 principles.[135]

3.3.3 The OECD Principles on Corporate Governance 2004

In the revised version of the corporate governance guidelines the OECD, identified the following elements or mechanisms governing good corporate governance; I) Ensuring the basis for an effective corporate governance framework, II) the Right of shareholders and key ownership functions, III) The equitable treatment of shareholders, IV) deals with the role of

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[131] Feinerman J V 'New Hope for Corporate Governance in China? ' (2007) *The China Quarterly*, 191 590- 612
[132] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)1
[133] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (1999)4
[134] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends Pre-publication version for Vol.1* (2009)1
[135] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends Pre-publication version for Vol.1* (2009)1

stakeholders, V) Disclosure transparency, VI) the responsibility of the board.[136] The plight of the financial crisis was very important in the exposure of the extent of the failures and weaknesses in the 2004 OECD corporate governance arrangements.[137] This crisis showed that when the guidelines such as those of the OECD on corporate governance were needed the most they failed to serve their mandate to safeguard against excessive risk, poor accounting standards insufficient regulatory systems as well poor remuneration strategies.[138]

During the crisis the boards of most banks and companies failed to consider risk factors before approving the company strategy which meant that companies' disclosures on foreseeable risk factors and monitoring and managing risk were obviously lacking in many banks.[139] Accounting and Regulatory environments were not transparent because complex financial products, like collateralised debt obligation were opaque in terms of their financial reporting to shareholders.[140]

With regards to the remuneration policies for managers it is argued that they were designed in a manner that they led to unnecessary high-risk taking.[141] The invectives included stock options and exit packages for top executives which allowed the executives to incur higher risk but still be rewarded regardless of their failures.[142] This extreme risk taking was driven by this faulty remuneration structure which was driven by the need to make all these unnecessary risks in banking and financial institutions is one of the catalysts that led to this crisis.[143]

It is disappointing to note that though the OECD principles covered most of the issues that were the reason for these failures, but when the need came for it to be implemented to curb these effects it seems as if the guidelines failed to achieve this objective. The 2004 Guidelines

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[136] 'Carrots and Sticks Current Trends and Approaches in Voluntary and Mandatory Standards for Sustainability Reporting', (UNEP, KPMG 2010) 18.

[137] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends Pre-publication version for Vol.1* (2009)2

[138] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends Pre-publication version for Vol.1* (2009)2

[139] Kumar N and Singh L 'Global Financial Crisis: Corporate Governance Failures and Lessons' *Journal of Finance, Accounting and Management* Volume (2013)25

[140] Laeven L et al 'Lessons and Policy Implications from the Global Financial Crisis' available at *http://ssrn.com/abstract=1562412* (accessed 20 June 2015).

[141] Kumar N and Singh J 'Global Financial Crisis: Corporate Governance Failures and Lessons' *Journal of Finance, Accounting and Management* Volume (2013)25

[142] Berrone 'Current Global Financial Crisis: An Incentive Problem' available at *http://www.iese.edu/research/pdfs/OP-0158-E.pdf* (accessed 20 June 2015).

[143] Kumar N and Singh J 'Global Financial Crisis: Corporate Governance Failures and Lessons' *Journal of Finance, Accounting and Management* Volume (2013)25

have also been updated by the new G20/ OECD Guidelines of 2015 which have retained most of these elements and addressed some of the issues raised by the problems of the 2004 Principles.

3.3.4 The G20/ OECD Principles on Corporate Governance 2015

In view of the issues raised against the 2004 Guidelines the new Guidelines of 2015 were created with new additions with principles on remuneration, risk management and an inclusion of institutional investors as a chapter. These principles though not tested appears to have addressed the issues of the 2008 crisis and are better rounded.

3.3.4.1 Ensuring the Basis for an Effective Corporate Governance Framework

The principle of the OECD on issues of ensuring the basis of effective corporate governance stipulates that:

> The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.[144]

This principle stresses that there must be an appropriate and effective legal, regulatory and institutional foundation established for market participants to establish their private contractual relations upon.[145] It follows from the above that there is need for collaboration between regulatory and legal players in achieving the overall economic outcomes of the company.[146] Hence the framework has to be flexible enough to meet the needs of corporations operating in widely different circumstances and is not a one size fits all approach. [147] This is done through a mix of regulations, laws, self-regulation and business practices that the companies chose themselves.[148] This would entail that the SADC

[144] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)17
[145] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)29
[146] Tarantino A *Manager's Guide to Compliance: Best Practices and Case Studies* (2012)ch12
[147] Tarantino A *Manager's Guide to Compliance: Best Practices and Case Studies* (2012)ch12
[148] Padgett C *Corporate Governance: Theory and Practice* (2012)185

framework should consider that there are small, large, listed and unlisted corporations and thus these are to be treated differently as opposed to one size fits all approach in the 1999 principles. The framework also has the task of facilitating their development of new opportunities to create value and to determine the most efficient deployment of resources. [149] Moreover, the framework must be consistent with the rule of law and in order for this consistency to exist there has to be consultation with government and other regulatory authorities and other stakeholders.[150] This ensures that there is transparency in the companies which enhances the transparency of the market as a whole.[151] Transparency is to be achieved through the auditing of financial reports of the companies.[152]One can argue that if there is transparency in SADC companies then there would be transparency in the market and hence might lead to better investment and sustainable companies.

The element on ensuring the basis of an effective corporate governance framework also stipulates that the division of responsibilities among different authorities in a jurisdiction should be clearly articulated as well as also ensures that the public interest is taken into consideration.[153] This is due to the different things that influence corporate governance such as company law, securities regulation, insolvency law, accounting and auditing standards, contract law, labour law and tax law.[154] Moreso, the importance of stock markets is outlined in the 2015 guidelines on corporate governance. The principles state that the quality of the stock market's rules and regulations that establishing listing criteria for issuers and that govern trading on its facilities is therefore an important element of the corporate governance framework.[155] This means that the laws of each countries stock exchange are to set a standard on the supervision and enforcement of corporate governance in the stock exchange.[156] The

[149] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)29
[150] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)29
[151] Kyepia T *Integrating National Oil Companies in The Corporate Governance Discourse: A Comparative Analysis Of The Norwegian State Oil Company (Statoil) And The Proposed National Oil Company Of Uganda* **(**unpublished thesis University of the Western Cape 2011)64
[152] T Kyepia *Integrating National Oil Companies in The Corporate Governance Discourse: A Comparative Analysis Of The Norwegian State Oil Company (Statoil) And The Proposed National Oil Company Of Uganda* **(**unpublished thesis University of the Western Cape 2011)64
[153] Tarantino A *Manager's Guide to Compliance: Best Practices and Case Studies* (2012)ch12
[154] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)31
[155] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)16
[156] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)16

issue of international cooperation is also highlighted as a necessity in cross-border ownership and trading which are increasing greatly.[157]

3.3.4.2 The Rights of Shareholders and Equitable treatment of Shareholders and Key Ownership Functions

The OECD principle on the rights of shareholders stipulates that:

> The corporate governance framework should protect and facilitate exercise of shareholder's rights.[158]

In terms of the above principle effective corporate governance entails shareholders as owners have a legally recognised and divisible share of a company.[159] It allows for the shareholders to have the right to convey their interest in the company. [160] Furthermore, shareholders are allowed the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures that govern general shareholder meetings.[161] It also affords them the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate change.[162]

The above principles champion the idea of the protection of shareholders rights and the ability of shareholders to influence the behaviour of corporations.[163] It lists some basic rights that accrue to the shareholders and these include the right to obtain relevant information about the company, to share in residual profits, to participate in basic decisions, to be afforded fair and transparent treatment during changes of control, and to be able to use their

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[157] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)17
[158] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)18
[159] Gregory J.H 'Corporate Governance: What It Is and Why It Matters' Presented at the 9th International Anti-Corruption Conference in Durban, South Africa (1999)9
[160] Gregory J.H 'Corporate Governance: What It Is and Why It Matters' Presented at the 9th International Anti-Corruption Conference in Durban, South Africa (1999)8
[161]Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)18
[162]Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)18
[163] Nestor S and Jesover F 'OECD Principles of Corporate Governance on Shareholder Rights and Equitable Treatment: Their Relevance To The Russian Federation' *Corporate Governance: An International Review* (2001)3

voting rights fairly.[164] Shareholders as the legal owners of corporations should expect to be able to enjoy these rights in all jurisdictions.[165] There must also be effective corporate governance laws, procedures must be made and followed in order to protect this property right and ensure ownership, registration and free transferability of their shares in a secure manner. [166] The new additions to the 2004 principles are information technology at shareholder meetings, the procedures for approval of related party transactions and shareholder participation in decisions on executive remuneration.[167] Of importance is the participation of shareholders in remuneration of executives which is a response to the failures of the 2004 principles pointed out above.[168] The principles on related party transactions is also an important addition and it allows for the shareholders to be given a say in approving related party transactions, with exclusion of the interested party.[169] Due to the different types of shares held by the shareholders there was a need to address the relationship between these types of shareholders. The principle on the equitable treatment of shareholders holds that:

> The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.[170]

The principle emphasises that all shareholders, including minority and foreign shareholders, should be treated equitably by controlling shareholders, boards and management. Insider trading and abusive self-dealing should be prohibited.[171] This would speak to issues of indigenisation in Zimbabwe where there is law which states that at least 51 per centum of the shares of every public company and any other business shall be owned by indigenous

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[164] Nestor S and Jesover F 'OECD Principles of Corporate Governance on Shareholder Rights and Equitable Treatment: Their Relevance To The Russian Federation' *Corporate Governance: An International Review* (2001)3

[165] Nestor S and Jesover F 'OECD Principles of Corporate Governance on Shareholder Rights and Equitable Treatment: Their Relevance To The Russian Federation' *Corporate Governance: An International Review* (2001)3

[166] Gregory J.H 'Corporate Governance: What It Is and Why It Matters' Presented at the 9th International Anti-Corruption Conference in Durban, South Africa (1999)8

[167] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)5

[168] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)23

[169] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015) 27

[170] Organisation for Economic Co-operation and Development (2004) 20

[171]Nestor S and Jesover F 'OECD Principles of Corporate Governance on Shareholder Rights and Equitable Treatment: Their Relevance To The Russian Federation' *Corporate Governance: An International Review* (2001)7

Zimbabweans.[172] This will lead to decisions in the company being taken by the majority which are the locals hence prejudicing the foreign shareholders hence the need for law to deal with such issues. Harmonisation through the use of the OECD as a platform will bring a solution to this before the law has caused damage and this can be learnt through the success of Russia. Although they are a communist state they have protected these rights of different shareholders through the assistance of the OECD.[173] The principles also plays a great role in the call for transparency with respect to the distribution of voting rights and the ways voting rights are exercised and the disclosure of any material interests that managers and directors have in transactions or matters affecting the corporation.[174]

3.3.4.3 Institutional investors, stock markets and other intermediaries

Institutional investor, stock markets and intermediaries were for a long time not mentioned in the OECD Guidelines, but with the introduction of the 2015 Guidelines there is now a whole chapter dedicated to them. The principle on institutional investors states that

> The corporate governance framework should provide sound incentives throughout the investment chain and provide for stock markets to function in a way that contributes to good corporate governance.[175]

The new principles recognise the importance of institutional investors and recommend that institutional investors disclose their policies with respect to corporate governance.[176] One can argue that this is important in cases such as the Zimbabwean scandal of Premier Service Medical Aid Society (PSMAS) were directors were earning between $120 000 and $200 000 per month. [177] Such a recommendation will allow for aspects such as the remuneration of the directors to be reported and hence such things would not go unnoticed. It also allows for

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[172]Indigenisation and Economic Empowerment Act 2008
[173] Nestor S and Jesover F 'OECD Principles of Corporate Governance on Shareholder Rights and Equitable Treatment: Their Relevance To The Russian Federation' *Corporate Governance: An International Review* (2001)7
[174] Nestor S and Jesover F 'OECD Principles of Corporate Governance on Shareholder Rights and Equitable Treatment: Their Relevance To The Russian Federation' *Corporate Governance: An International Review* (2001)7
[175] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)31
[176] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)31
[177] Psmas' Dube fired available at *http://www.dailynews.co.zw/articles/2014/01/28/psmas-dube-fired* accessed on (19 June 2015)

shareholders in the case were there are intermediaries to choose to be informed of all upcoming shareholder votes and may decide to cast some votes while delegating some voting rights to the custodian.[178] This will ensure that their rights are safeguarded and not left at the mercy of the custodian. It also requires that if there is a possibility of conflict of interest the intermediaries should disclose this to ensure the integrity of their advice or analysis.[179] In relation to stock markets the principles state that they must provide fair and efficient price discovery as a means to help promote effective corporate governance.[180]

3.3.4.4 The Role of Stakeholders in Corporate Governance

In this new dispensation of corporate governance the important characteristic of good corporate governance is its ability to balance the interests of the stakeholders and the shareholders. Stakeholders in this regard includes: employees, creditors, management, trade unions, suppliers, customers, future generations and the community.[181] The principle on the role of stakeholders in cognisance of the above stipulates:

> The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.[182]

The principle states that governance frameworks should recognise that the interests of the corporation are served by recognising the interests of stakeholders.[183] The principle states that corporations should take into cognisance the contributions of stakeholders as a valuable resource in the building of competitive and profitable companies which in turn contributes to the sustainability of the corporation.[184] This has pushed the membership of the OECD to

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[178] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)31
[179] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)32
[180] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)35
[181] Frémond O 'The Role Stakeholders' available at *http://www.oecd.org/daf/ca/corporategovernanceprinciples/1930657.pdf* (accessed on 08 August 2015)
[182] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)21
[183] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)46
[184] *Organisation for Economic Co-Operation and Development Policy Framework for Investment User's Toolkit* (2011)ch6

crystallise the rights of stakeholders through numerous laws (e.g. labour, business, and commercial and insolvency laws) or by contractual relations.[185] In areas where stakeholder interests are not legislated, many firms make additional commitments to stakeholders, and concern over corporate reputation and corporate performance often requires the recognition of broader interests.[186] The 2015 principles support stakeholders' access to information on a timely and regular basis and their rights to obtain redress for violations of their rights.[187]

3.3.4.5 Disclosure and Transparency

In terms of the disclosure and transparency principle the OECD guidelines state the following

> The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.[188]

This objective is to ensure that information about the activities of the company is in the public domain.[189] The annual audit is one of the mechanisms for disclosure and is the cornerstone of corporate governance.[190] Disclosure needs to occur so that all shareholders ranging from actual to the prospective shareholders have access to timely information to boost their confidence.[191] This information must be sufficiently detailed for the shareholders to have an overall knowledge of the overall status of the company so as to allow them to be confident in the managers as well as the majority shareholders among others.[192] Disclosure does not only work for the shareholders but it promotes transparency which is a vital feature of a market-based corporate governance system.[193] The latter translates to confidence in the stock market which is a key component in influencing the behaviour of companies and for

[185] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)46
[186] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)46
[187] G20/ Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)5
[188] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' (2005)
[189] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)49
[190] Lessambo F *The International Corporate Governance System: Audit Roles and Board Oversight* (2014)23
[191] Lessambo F *The International Corporate Governance System: Audit Roles and Board Oversight* (2014)13
[192] Lessambo F *The International Corporate Governance System: Audit Roles and Board Oversight* (2014)13
[193] *Organisation for Economic Co-Operation and Development Policy Framework for Investment User's Toolkit* (2011)ch6 available at http://www.oecd.org/investment/toolkit/policyareas/corporategovernance/44931152.pdf (accessed 11 August 2015)

protecting investor rights,[194] especially in the SADC where there is the lack of transparency due to insufficient or ambiguous information. This poor speculation of information hampers the markets ability to function thus increasing the cost of capital and discouraging investment.[195] Segmental disclosure is also allowed and will be appropriate in certain lines of business and among geographical areas. [196]

The principle also recommends that the board should fulfill certain key functions including "aligning key executive and board remuneration with the longer term interests of the company and its shareholders".[197] The comments depict that it is regarded as good practice for boards to develop and disclose a remuneration policy statement covering board members and key executives.[198] The lack of transparency and disclosure in issues of remuneration is the reason why there is a great deal of abuse by directors of companies in Zimbabwe. It has been reported that Magaya of Zimbabwe Electricity Distribution Company was pocketing a monthly salary of over $25,000 plus a bonus of $18,000, which translates into an annual salary of over $500, 000.[199] This is why there is a need to have a corporate governance structure in the region to combat such behaviors by the boards of companies in SADC.

3.3.4.6 The responsibilities of the Board

The board is very important to the running of the company hence there is need to give guidelines so as to ensure the smooth running of operations. The principle on the responsibility of the board in relation with this function states that:

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[194] *Organisation for Economic Co-Operation and Development Policy Framework for Investment User's Toolkit* (2011)ch6 available at *http://www.oecd.org/investment/toolkit/policyareas/corporategovernance/44931152.pdf* (accessed 11 August 2015)

[195] *Organisation for Economic Co-Operation and Development Policy Framework for Investment User's Toolkit* (2011)ch6 available at *http://www.oecd.org/investment/toolkit/policyareas/corporategovernance/44931152.pdf* (accessed 11 August 2015)

[196] Muchilinski P *Multinational Enterprises and the law* 2nd edition (2006)371

[197] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends Pre-publication version for Vol.1* (2009)13

[198] Kirkpatrick G 'The Corporate Governance Lessons from the Financial Crisis' *Financial Market Trends Pre-publication version for Vol.1* (2009)13

[199] New ZBC board chairman embroiled in 'salary gate' available at *http://nehandaradio.com/2014/02/17/new-zbc-board-chairman-embroiled-salarygate/* (accessed on 19 June 2015)

> The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.[200]

The envisaged outcome in terms of the principle is that companies are to be run professionally but subject to effective oversight by the board.[201] This is done so as to prevent self-dealing as well as ensuring that the interests of the company and the shareholders are taken into account by both the board and the management.[202] It encourages the board members to act in good faith towards the company and the shareholders as well as taking their fiduciary duties seriously.[203] Furthermore, the principles look at accounting and financial reporting systems of the company and stresses that there is a need for appropriate systems of control like systems for risk management, financial and operational control, and compliance with the law and relevant standards.[204] The new principle now recommend board training and evaluation as well as the establishment of specialized board committees in areas such as remuneration, audit and risk management.[205] This also show how the 2015 Guidelines seek to address the failures of the 2004 on issues of risk management and remuneration which were among the reasons for the financial crisis.

3.4 Successes of OECD guidelines on Corporate Governance

In the beginning of this chapter it was pointed out that the OECD principles on corporate governance have become a benchmark of best practice in the field of company governance.[206] This is attributed to a number of reasons highlighted below. It is also of great importance in this inquiry into the suitability of these principles to SADC that one should make an analysis into the pros and cons of the OECD principles to ensure that they are a viable platform to the improvement of corporate governance in the region through harmonisation.

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[200] Organisation for Economic Co-operation and Development (2004) 24
[201] Bouchez J 'Principles of Corporate Governance: the OECD Perspective' *European Company Law Journal* Volume 3 Issue 4 (2007)113
[202] Bouchez J 'Principles of Corporate Governance: the OECD Perspective' *European Company Law Journal* Volume 3 Issue 4 (2007)113
[203] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)30
[204] Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2004)33
[205] G20/Organisation for Economic Co-operation and Development Corporate Governance Guidelines (2015)34
[206] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005) 4

3.4.1 The OECD principles are endorsed and used by other international organisations

The influence of the OECD is not only limited to its members but it has also managed to influence other international organisations. One can note the influence of the OECD principles in the International Corporate Governance Network Corporate (ICGN) Global Governance Principles, the World Bank and Financial Service Standards.

3.4.1.1 International Corporate Governance Network Corporate (ICGN) Global Governance Principles

The ICGN originated from the merging of corporate governance initiatives in North America and Europe during the mid-1980s.[207] It currently services a number of investors in the form of companies including: KPMG, Delloite, Pepsi and Universities like Stellenbosch in South Africa and London School of Business.[208] The ICGN currently has a membership of 500 leaders in corporate governance based in over 50 countries.[209] The ICGN's mission is to inspire and promote effective standards of corporate governance to advance efficient markets and economies world-wide.[210] The ICGN achieves these objectives through three main functions. The first of its functions is that of influencing policy by providing a dependable source of practical knowledge from the involved institutions and their experiences on corporate governance issues hence contributing to a robust regulatory framework cultivating circumstances that produce a mutual understanding of interests between market participants.[211] It also ensures the communication between peer institutions through a broad array of activities at international conferences and events, virtual networking and through other mediums. It also informs dialogue amongst corporate governance professionals through the publication of policies and principles, exchange of knowledge and advancement of education world-wide.[212]

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[207] History of ICGN available at *https://www.icgn.org/about-icgn/itemlist/category/61-about-history-of-the-icgn* (accessed 19 June 2015)
[208] ICGN membership available at *https://www.icgn.org/our-members* (accessed 19 June 2015)
[209] International Corporate Governance Network Corporate Global Governance Principles (revised 2015)
[210] About ICGN available at *https://www.icgn.org/about-icgn* (accessed 19 June 2015)
[211] About ICGN available at *https://www.icgn.org/about-icgn* (accessed 19 June 2015)
[212] About ICGN available at *https://www.icgn.org/about-icgn* (accessed 19 June 2015)

The ICGN and the OECD have a lot of things in common in their role of influencing corporate governance reform. In a report released by the ICGN a number of issues on this relationship are highlighted. The ICGN was one of the key players in the creation of the OECD Guidelines.[213] Most of representatives serving on the OECD's Ad Hoc Task Force on Corporate Governance made reference to draft principles under discussion at the ICGN. Thus the ICGN and the OECD have a close relationship.[214]

The ICGN in their reports have praised the OECD principles as a declaration of minimum best practice standards for companies and investors around the world.[215] The ICGN also endorses the OECD Principles as a remarkable convergence on corporate governance common ground among diverse interests, practices and cultures.[216]

3.4.1.2 World Bank

This relationship is clear through the OECD and the World Bank agreement to work together on the enhancement of corporate governance through different initiatives including an annual Global Corporate Governance Forum and Policy Dialogue and Development Round Tables.[217]

The World Bank also assists its member countries in strengthening their corporate governance frameworks. The latter is done through the Reports on the Observance of Standards and Codes (ROSC).[218] The ROSC initiative seeks to assist in the creation of robust corporate governance policies and practices of listed companies in emerging markets.[219] The ROSC reviews the country's legal and regulatory framework as well as the practices and

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[213] Mallin C *Corporate Governance* 4th edition (2013)45
[214] Mallin C *Corporate Governance* 4th edition (2013)45
[215] International Corporate Governance Network Statement on Global Corporate Governance Principles (1999)
[216] Mallin C *Corporate Governance* 4th edition (2013)45
[217] Collier P and Zaman M 'Convergence in European Governance Codes: The Audit Committee Concept'(2005)6
[218]McGee R *Corporate Governance in Transition Economies* (2008)61
[219] Reports on the Observance of Standards and Codes available at *http://go.worldbank.org/O8PRM4SL10* (accessed 19 June 2016)

compliance of its listed firms and assesses the framework and practices relative to an internationally accepted benchmark as per the OECD Principles of Corporate Governance.[220]

The ROSC assessment is divided into four parts: executive summary; capital market overview and institutional framework; principle by principle review and a summary of recommendations highlighting areas for legislative reform, institutional strengthening and voluntary/private initiatives.[221] The assessments are done in such a way that they try to differentiate between compliance with the legal and regulatory framework and actual practices by the companies.[222] This entails that each of the OECD Principles is evaluated according to quantitative and qualitative standards where the countries are categorised as per the degree of compliance.[223] There are 5 categories which determine the compliance of the countries in relation to aspects of OECD guidelines and these look at whether the country observed, largely observed, partially observed, materially did not observed did not observed the different aspects of compliance.[224] This has been done for countries such as Zimbabwe, Zambia, Malawi and South Africa of SADC and has exposed some of these countries' discrepancies to their frameworks as well as their application.[225]

3.4.1.3 Financial Stability Standards

The OECD has also been named as one of the standards of financial stability by the Financial Stability Standards. The standards play the important role of promoting the improvement of financial regulation at an international scale particularly in the Group of 20 countries (G20).[226] The standards of the OECD are widely accepted as benchmarks to ensure the financial well-being of these countries, ensuring compliance with these standards in the member countries of the G20.[227] In terms of the standards the OECD features in the

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[220] McGee R *Corporate Governance in Transition Economies* (2008)61
[221] ROSC Assessments available at *http://www.worldbank.org/ifa/rosc_cgoverview.html* (accessed 19 June 2015)
[222] McGee R *Corporate Governance in Transition Economies* (2008)65
[223] McGee R *Corporate Governance in Transition Economies* (2008)65
[224] ROSC Assessments available at *http://www.worldbank.org/ifa/rosc_cgoverview.html* (accessed 19 June 2015)
[225] ROSC countries available at *http://www.worldbank.org/ifa/rosc_cg.html* (accessed 19 June 2015)
[226] Financial Stability Board available at *http://www.financialstabilityboard.org/about/history/* (accessed 17 July 2015)
[227] Mandanis H et al *Global Bank Regulation: Principles and Policies* (2010)84

compendium standards of the FSB in the section that deals with Institutional and Market Infrastructure as a standard on good corporate governance.[228] There are 12 standards in the categories on Financial Regulation and Supervision, Macroeconomic Policy and Data Transparency as well as the latter on Institutional and Market Infrastructure.[229] Financial Regulation and Supervision and Macroeconomic Policy as a category features: Objectives and Principles of Securities Regulation, Core Principles for Effective Banking Supervision and Insurance Core Principles, Standards, Guidance and Assessment Methodology.[230] Macroeconomic Policy and Data Transparency has the following standards: Code of Good Practices on Fiscal Transparency, Code of Good Practices on Transparency in Monetary and Financial Policies, General Data Dissemination System and Special Data Dissemination Standard.[231] Lastly, Institutional and Market Infrastructure has the following: FATF Recommendations on Combating Money Laundering and the Financing of Terrorism & Proliferation, Insolvency and Creditor Rights Standard, International Financial Reporting Standards as well as the OECD.[232] These standards are internationally recognised and endorsed after thorough stakeholder and public consultation as well as endorsement by organisations such as the International Monetary Fund (IMF) and the World Bank.[233] This is high praise which the OECD receives by being named as one of the standards and speaks to its effectiveness and success.

3.4.2 The applicability of OECD principles on Corporate Governance to Non-members

The guidelines by the OECD have had a far reaching effect in that they have managed to greatly influence the governance system of a lot of countries even to the extent of impacting on non-members. The OECD has organised 30 meetings of the Regional Corporate

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[228] Mandanis H et al *Global Bank Regulation: Principles and Policies* (2010)84
[229] Cheol Jeong Y '2010 Seoul Summit and Future of Financial Supervisory Board (FSB) as the Fourth Pillar' *Korea University Law Review* (2010)24
[230] Cheol Jeong Y '2010 Seoul Summit and Future of Financial Supervisory Board (FSB) as the Fourth Pillar' *Korea University Law Review* (2010)24
[231]Cheol Jeong Y '2010 Seoul Summit and Future of Financial Supervisory Board (FSB) as the Fourth Pillar' *Korea University Law Review* (2010)24
[232] Cheol Jeong Y '2010 Seoul Summit and Future of Financial Supervisory Board (FSB) as the Fourth Pillar' *Korea University Law Review* (2010)24
[233] Financial Stability Board Compendium Standards available at *http://www.financialstabilityboard.org/what-we-do/about-the-compendium-of-standards/key_standards/* (accessed 17 July 2015)

Governance Roundtables in 18 countries.[234] Consultations with non-member partners were first undertaken through meetings of Roundtables held in Asia, Eurasia, Latin America, Russia and Southeast Europe.[235] The work of the Roundtables, carried out under the auspices of the OECD's Centre for Co-operation with Non-Members, is continuing through helping economies to develop policies to implement the recommendations of the White Papers.[236] The Roundtables have generated a wealth of background information and identified aspects of corporate governance that are of particular importance to developing and emerging economies.[237]

This has translated to the strengthening of shareholders' participation in governance issues. This is particularly important in the context of the growing importance of pension funds as shareholders in the Latin American region.[238] This has been done through the protection of basic rights, such the right to secure share ownership, or attending and participation in the general shareholders meeting which includes the right to remove board members and to participate in nominating them.[239] Moreover, there has been great innovation toward better disclosure of the relationship between the company and the external auditor in the Latin America Roundtable.[240] For instance, Brazil, have made a policy for rotation of the audit firm so as to limit the non-audit services the audit firm can provide thus increasing the effective liability of the firm.[241]

In the Asian White paper the protection of stakeholders has been heightened through recommendations that require companies to develop policies and procedures that promote awareness and observance of stakeholders and those governments should also introduce

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[234] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005)5
[235] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005)5
[236] Robinett D etal 'Experiences from the Regional Corporate Governance Roundtables' (2003)10 available at *http://www.oecd.org/daf/ca/corporategovernanceprinciples/23742340.pdf* (accessed 07 August 2015)
[237] Robinett D etal 'Experiences from the Regional Corporate Governance Roundtables' (2003)11 available at *http://www.oecd.org/daf/ca/corporategovernanceprinciples/23742340.pdf* (accessed 07 August 2015)
[238] The Latin American Corporate Governance Roundtable; Building on a Decade of Progress available at *http://www.ifc.org/wps/wcm/connect/1a3d778048a7e4b29e7fdf6060ad5911/101020_Building%2Bon%2Ba%2BDecade%2Bof%2BProgress_Web.pdf?MOD=AJPERES* (accessed on 19 June 2015)
[239] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005)6
[240] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005)21
[241] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005)21

protections against retaliation for employees who report problems and abuses (i.e. "whistleblowers").[242] These are just a few instances of the improvement of how the principles of the OECD have played a significant role in the improvement of corporate governance in non-member states. However, the OECD is not without its problems. It also has a number of criticisms as shall be discussed below.

3.5 The Criticisms of the OECD corporate governance principles

The main criticism laid against the OECD principles on corporate governance relates to issues surrounding the global financial crisis of 2008 but this seems to have been fixed in the revised 2015 Principles .Other criticisms would be with regards to their applicability globally and in family run companies. The discussion below shall shed some light to the above issues so as to assess their applicability as well as the evils that the OECD principles may bring if applied to SADC.

3.5.1 Non Compatibility with Family Business

The OECD principles on corporate governance are based on a common understanding of its member countries.[243] Most of the members have a number of formal institutions which have robust systems to ensure transparency and stakeholder involvement. This raises questions with regards to their compatibility with institutional contexts dominated by informal institutions, for instance family firms-governance.[244] Family firms are a dominant feature in most developing countries including SADC countries and because these are mainly run by families their main objective is that of profit hence the disregard for stakeholder rights as

[242] Recommendation 164 Asian White Paper on Corporate Governance
[243]M Siems and O Alvarez-Macotela 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 26
[244] Siems M and Alvarez-Macotela O 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 26

prescribed by the OECD. In order to achieve this there is a need for organised civil society so as to ensure stakeholder involvement and this cannot be said of most emerging markets.[245]

3.6 The suitability of the OECD Guidelines in SADC Corporate Governance laws

In establishing the suitability of the principles it is important to examine the successes of the OECD which makes it stand out the way it has and these have been outlined above. The OECD is one of the standards of Financial Stability[246] and with the poverty as well as the poor systems in SADC corporate governance there is a need for this stability in the economies of SADC members.

The OECD principles are a remarkable convergence on corporate governance common ground among diverse interests, practices and cultures.[247] This entails that they accommodate all the different types of legal systems in SADC be it the Roman-Dutch system of Botswana, South Africa, Lesotho, Zimbabwe, Namibia and Swaziland the Civil Law system of Angola, Mozambique, Democratic Republic of Congo and Madagascar the Common Law system of Zambia, Tanzania, Malawi and Mauritius [248] and the hybrid system of Seychelles.[249] The OECD principles would be a good fit to ensure that there is representation of the different legal systems. In turn this would bring predictability in the region's corporate governance which will eliminate risk in investing in SADC because of clear and predictable laws.
Moreso, in SADC countries where the cost of legal reform is too expensive to meet their developmental priorities due to lack of adequate resources, the OECD can be used for that very purpose.[250] The use of the OECD principles through the World Bank Reports on the Observance of Standards and Codes (ROSC) also in a way gets countries in a position of

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[245] Siems M and Alvarez-Macotela O'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 26
[246] Key Standard for Sound Financial Systems
available at *http://www.financialstabilityboard.org/what-we-do/about-the-compendium-of-standards/key_standards/* (accessed 20 June 2015)
[247] Mallin C *Corporate Governance* 4th edition (2013)45
[248] Ndulo N 'The Need for the Harmonisation of Trade Laws in SADC', *Cornell Law Faculty Publications* (1996) 196
[249] Syechelles legal system available at *http://www.actoffshore.co/about-seychelles/legal-system* (accessed on 20 June 2015)
[250] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)149

assistance from the bank in the strengthening of the corporate governance hence it also deals with the issues of lack of resources for reform.

Furthermore, by virtue of the fact that the principles are not law this allows for them to be applied without most of the politics that come with treatise and conventions. SADC has a history of defiance of treaties for instance the dissolution of their own tribunal due to countries not following its judgements.[251] There is therefore no guarantee that they would respect their own laws on corporate governance. However, the OECD principles are not binding[252] and they are flexible and would be applied with discretion by the members which would not infringe on their policies. Therefore, the upside of these non-binding laws is that there is a possibility that they can be accepted as they do not infringe on the sovereignty of the membership which has been one of the problems in the region. As mentioned in the first principle the guidelines allows for a mix of regulations, laws, self-regulation and business practices that the companies chose themselves. It can be submitted the despite the possible conflict between government policies and the guidelines it is up to the companies to adopt them if they are not binding and this has been seen in the application of the King Reports of South Africa hence it can also be done in the rest of the region. The OECD also offers the Roundtable option which does not require membership as a prerequisite to the application of the principles hence because of the lack of African involvement in the OECD, SADC can use this avenue to improve their corporate governance laws without obligations tying them to the OECD.

However, there are arguments that are to the contrary with regards to the use of the OECD principles in the harmonisation of SADC corporate governance law. There is an argument that the OECD principles on corporate governance are based on a common understanding of its member countries.[253] In the criticisms of the OECD explained above it is pointed out that this would lead to issues of compatibility with SADC countries as they are mainly run

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[251] Fabricuos P 'Selfish JZ allowed Mugabe to kill SADC Tribunal' available at *http://www.iol.co.za/news/africa/selfish-jz-allowed-mugabe-to-kill-sadc-tribunal-1.1479714#.VYvfOhuqqko* accessed (20 June 2015)

[252] Mallin C *Corporate Governance* 4th edition (2013)45

[253] Siems M and Alvarez-Macotela O 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 26

(2014) 26

through the informal sector.[254] Due to the development gap between the two; the membership of the OECD which is mainly European countries and SACD countries it will be expensive to implement the principles as there will be need for formalisation of some aspects of business in the countries.[255] Furthermore, the fact that these principles are not binding raises the question of political will. One might find that they would be totally ignored because of clashes with policy for instance in Zimbabwe where there is law which state that at least 51 per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans.[256] This will lead to principles on equitable treatment of shareholders being disregarded because they are not in line with their policies.

3.7 Conclusion

The OECD corporate governance principles are applied in over 30 member countries as well as in 5 Roundtables of non- member countries.The principles on corporate governance are said to have become the international yardstick for corporate governance as they have successively formed the basis for a number of reform initiatives, both by governments and the private sector.[257] Though this level of recognition is very commendable there is no African contingent in either the OECD membership or the Roundtables which raises the question of whether these principles are well suited for SADC.

However, though there is no African involvement it cannot be ignored that the OECD offers a viable option to the improvement of corporate governance laws in the SADC region. Through it comes the option of non-member activity as well as assistance from the World Bank in the access of resource to improve corporate governance. It is no wonder why Asia, Latin America, Russia have chosen to use these principles to improve their corporate governance laws.

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[254] Siems M and Alvarez-Macotela O 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 26

[255] Siems M and O Alvarez-Macotela O 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 26

[256] Indigenisation and Economic Empowerment Act 2008

[257] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005) 4

It does come with disadvantages of financial burden in the reform of systems to ensure that applicability is realised to its fullest on certain issues, but this can be done gradually as resources become available. Issues of political will and clash of policy cannot be ignored in its application in countries like Zimbabwe due to indigenisation, but not all countries have this policy and there is an option to apply what countries deem pressing at that point in time and if the country does not see the necessity of certain principles or have already complied there is no need to apply the principles. Harmonisation will play an important role in conjuring political will as well as the sharing of resources in updating out-dated corporate governance laws in SADC countries. It will also bring harmony and uniformity in the corporate governance laws of the region as well as the advantage of accessing updated OECD guidelines if ever they are updated as opposed to updating themselves after a crisis or any other event.

It therefore suffices to say that though there are challenges to the use of the OECD corporate governance principles it is a viable option to take in the improvement and harmonisation of corporate governance laws in SADC. Although the OECD offers a viable option to the harmonisation of corporate governance laws in SADC the philosophy of African solutions has become a catch phrase in the African Union and the next chapter shall discuss the viability of the Organization for the Harmonisation of African Business Law (OHADA) as an African initiative on Business Law harmonisation.

CHAPTER 4

THE ORGANISATION FOR THE HARMONISATION OF BUSINESS LAWS IN AFRICA (OHADA)

4.1 Introduction

The ideology of an African solution to African problems is very important to the African Union.[258] From the previous chapter it is notable that African countries have refrained from involvement in the OECD maybe because of the urge to bring about their own solutions to their problems. In business law the rise of the Organisation for the Harmonisation of Business Laws in Africa (OHADA) as one of the most respected institutions which deal with issues of the harmonisation of business law in Africa is an example of the successes towards the realisation of the ideal of local solutions. The OHADA came about as a result of legal diversity and plurality which was happening after independence of African states from colonialism.[259] Prior to its commencement French colonies' commercial law was regulated by French Civil Code of 1804, the French Commercial Code of 1806 and the law of Commercial Companies of 1807.[260] OHADA through unification makes modern business laws that are transparent, accessible, and predictable in terms of enforcement.[261] OHADA laws are said to be balanced and still manage to be sophisticated and suited to encourage both foreign and domestic investment.[262] OHADA has managed to improve its various Member States' legislation through modern legislation concerning business laws and hence facilitated investments in building towards the economic integration in the West African region.[263]
This chapter will discuss OHADA and its institutions as an example of unification in Africa and also how it can be useful as far as the harmonisation of corporate governance law in the

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[258]George Ayittey in response to the behaviour of the international community in the crisis in Somalia available at *https://www.issafrica.org/iss-today/african-solutions-to-african-problems* (accessed 20 July 2015)
[259] Mouloul A *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2009) 10
[260] Penda J & Tumnde M 'The Roadmap of the Harmonisation of Business Law in Africa' *Rule Of Law Informational Series* (2012)1
[261] Penda J & Tumnde M 'The Roadmap of the Harmonisation of Business Law in Africa' *Rule Of Law Informational Series* (2012)1
[262] Houanye P and Shen S 'Investment Protection in the Framework of the Treaty of Harmonising Business Law in Africa (OHADA)' *Beijing Law ReviewVol.4, No.1* (2013)2
[263] Houanye P and Shen S 'Investment Protection in the Framework of the Treaty of Harmonising Business Law in Africa (OHADA)' *Beijing Law ReviewVol.4, No.1* (2013)2

SADC region is concerned. The chapter will also examine the successes as well as criticisms that can be levelled against OHADA in a bid to establish the plausibility of SADC Member States joining or making use of the OHADA laws dealing with corporate governance.

4.2 OHADA

OHADA is an exclusively business-related legal framework that was created on 17 October 1993 in Port Louis, Mauritius. Initially, the OHADA treaty was adopted among 14 Member States which has grown to17 since 1993. [264] The first signatories were Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal and Togo. Guinea and Guinea Bissau joined later on to make the number 16.[265] The Democratic Republic of Congo joined OHADA on September 13, 2012, thereby becoming the 17th member state.[266] OHADA enacts Uniform Acts that have direct effect and supersede contradictory national laws in matters of business.[267]

4.2.1 Institutional Framework

OHADA has an institutional framework which consists of five components: the Council of Ministers, the Permanent Secretariat, the Common Court of Justice and Arbitration (CCJA), and the Regional Training Centre for Legal Officers (ERSUMA).[268]A further component was later added which is the Conference of Heads of State and Government.[269]

[264] Domoraud-Operi S *etal* 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' *EMPEA Legal & Regulatory Bulletin* (2014)1
[265] Organisation for the Harmonisation of Business Law in Africa Treaty 1997
[266] B Kahombo 'The Accession of the DRC to OHADA: Towards National Prosperity by the Unification of Law?' available at *http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf* (accessed 25 June 2015)
[267] Houanye P and Shen S 'Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA)' *Beijing Law ReviewVol.4, No.1* (2013)2
[268] Mouloul A *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2009) 32
[269] Mouloul A *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2009) 32

4.2.1.1 The Council of Ministers

In terms of Article 27 of the Treaty the Council is composed of the Ministers of Finance and Justice of each member state of the organisation.[270] The Council was structured in this way because it deals with both judicial matters and business issues which fall under the portfolio of the Ministers of Finance.[271] In terms of Article 28 of the Treaty the Council of Ministers has a mandate to meet at least once a year when convened by its President on his own initiative or at the initiative of one third of member states.[272] The Council also makes deliberations which are valid when two-thirds of the member states are represented.[273] The adoption of the Uniform Acts on the other hand is only taken by a unanimous vote of States that are present.[274]

The functions and duties of the Council of Ministers are administrative, regulatory and legislative in nature.[275] According to Article 4 of the Treaty the Council has the powers and competencies to; adopt the budget of the Permanent Secretariat and the CCJA; appoint the Permanent Secretary and Director General of ERSUMA; approve the annual accounts of OHADA; elect the members of the CCJA and make the necessary regulations for the implementation of the Treaty.[276]

However, though it has this vast array of duties its main function is legislative.[277] The Council of Ministers acts as a legislative body and approves the annual program of harmonisation of business law and adopts the Uniform Acts in the place of Parliaments of the members.[278] In relation to their legislative duty the Council of Ministers of OHADA has adopted to date, nine Uniform Acts.[279] It has managed to enact the Uniform Act on the Law of Commercial Companies, the Uniform Act on the General Commercial Law, the Uniform Act on the Security Law, the Uniform Act on Simplified Procedures for Recovery and

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[270]Martor B *Business Law in Africa: OHADA and the Harmonisation Process* (2002)10
[271] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009)32
[272] Gasti J *L'effectivité du droit de l'OHADA* (2006)20
[273] Organisation for the Harmonisation of Business Laws in Africa Treaty 1997
[274] Gasti J *L'effectivité du droit de l'OHADA* (2006)20
[275] Houanye P and Shen S 'Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA)' (2012)2
[276] Organisation for the Harmonisation of Business Laws in Africa Treaty 1997
[277] Gasti J *L'effectivité du droit de l'OHADA* (2006)20
[278] Organisation for the Harmonisation of Business Laws in Africa Treaty 1997
[279] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009) 32

Enforcement, the Uniform Act on Collective Proceedings for the Clearing of Debts, the Uniform Act on the Arbitration Law, the Uniform Act on the Organization and Harmonisation of Accounting of the Enterprises, the Uniform Act on Organising Secured Transactions and Guarantees and the Uniform Act on Contracts of Carriage of Goods by Road.[280]All the Acts mentioned above override any law which deals with their subject and they are superior to the national laws of the member countries.

4.2.1.2 Conference of the Heads of State and Government

The Conference of the Heads of State and Government came about as a result of the revision of the treaty in 2008.[281] The Treaty of Port Louis in 2008 did not provide the Conference of Heads of State so as a result of this there was a need to address this shortcoming through providing a Conference of Heads of State and Government as the supreme institution of OHADA.[282] In relation to Article 27 it is composed of the Heads of State and Government of the Contracting States.[283] The Head of State of the country which is chairing the Council of Ministers at a particular time is the one that chairs the Conference.[284] A meeting by the Heads of State can be convened either at the initiative of the presiding country or at the request of at least one-third of the Member States.[285] A vote will be valid only if at least two-thirds of the Member States are present at the meeting and once that quorum is reached the decisions of the Heads of States are adopted.[286] In Article 27 of the revised treaty the Heads of State has the authority to decide all questions regarding the treaty.[287]

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[280] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009) 34
[281] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009)31
[282] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009)31
[283]Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)169
[284] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)169
[285] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?*' IMF Justice and Development Working Paper Series* (2011)13
[286] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?' *IMF Justice and Development Working Paper Series* (2011)13
[287] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?' IMF Justice and Development Working Paper Series (2011)13

4.2.1.3 Permanent Secretariat

The Permanent secretariat is the executive body in the OHADA institutions.[288] In terms of Article 4 of the Treaty the Secretariat is headed by a Permanent Secretary who is appointed by the Council of Ministers for a four year term which can be renewed once.[289] The Permanent Secretary as an office holder has his duties which are: to propose to the President of the Council of Ministers the agenda of the council meeting; the appointment of its staff; supervision of the ERSUMA, of which he is Chairman of the Board of Directors and to organise the election of members of the CCJA.[290] The Permanent Secretariat as an institution including the Permanent Secretary performs the tasks of: the assessments of the areas of law which need to be unified, proposes them to the Council of Ministers for approval, compiles the annual program of harmonisation, prepare the draft Uniform Acts, coordinates the activities of the various organs of the OHADA and monitors the work of the organisation.[291]

4.2.1.4 Common Court of Justice and Arbitration (CCJA)

The CCJA has two main purposes; it serves as a forum for international arbitration and also as the court of last resort for judgments rendered and arbitral awards issued within Member States.[292] The functions of the CCJA are that of interpretation of OHADA laws as well as that of arbitration.[293] The CCJA has supranational power within the OHADA territory and operates parallel to the national system.[294] The Headquarters of the CCJA are in Abidjan, Côte d'Ivoire and it can convene at any place to solve disputes in the territory of the Member States.[295] The CCJA can be a court of last instance only once the regular appeal proceedings

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[288] Martor B et al *Business Law in Africa: OHADA and the Harmonisation Process* (2002)11
[289] Martor B et al *Business Law in Africa: OHADA and the Harmonisation Process* (2002)11
[290] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009)36
[291] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009)36
[292] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?' IMF Justice and Development Working Paper Series (2011) 13
[293] Houanye P and Shen S 'Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA)' *Beijing Law ReviewVol.4, No.1* (2013)2
[294] Houanye P and Shen S 'Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA)' *Beijing Law ReviewVol.4, No.1* (2013)2
[295] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?' *IMF Justice and Development Working Paper Series* (2011)13

have been exhausted in the domestic courts.[296] This entails that the CCJA replaces the domestic court's jurisdiction and its verdict can be applied in the member country. The decisions of the CCJA are final, cannot be appealed and are directly enforceable.[297]

With regards to the arbitration function of the CCJA the Arbitration Uniform Act is applied in disputes between member states where the contract contains an arbitration clause or if parties agree to use OHADA principles for the proceedings.[298] The CCJA arbitration is also available when one of the parties is domiciled or resident in a contracting state, or when the contract's enforcement is wholly or partially located on the territory of a Member State. [299] However, this is not the case with SADC as Article 33 of the new Protocol on the Tribunal stipulates that the Tribunal will only have jurisdiction over the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.[300]

4.2.1.5 Regional Training Centre for Legal Officers (ERSUMA)

The Regional Training Centre plays an important part in ensuring uniformity in the application of OHADA law by legal professionals such as lawyers, judges, notaries, courts experts, registrars and other legal officers.[301] The Centre provides training on the OHADA laws as well as the law of other regional bodies.[302] The individuals who provide the training are chosen by the Academic Council of the Centre and they are chosen because they are either high-level legal professionals or academics and are hired because of their in-depth knowledge and experience of OHADA law and other regional laws.[303] The training is very important as it allows for the efficient and proper application of OHADA laws as well as teaching the OHADA laws to people in their own countries.[304] The centre is not only tasked

[296] Martor B et al *Business Law in Africa: OHADA and the Harmonisation Process* (2002)10
[297] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?' *IMF Justice and Development Working Paper Series* (2011)12
[298] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?' *IMF Justice and Development Working Paper Series* (2011)12
[299] Beauchard R and Kodo M 'Can OHADA Increase Legal Certainty in Africa?*' IMF Justice and Development Working Paper Series* (2011)13
[300] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe
[301] Gasti J *L'effectivité du droit de l'OHADA* (2006)22
[302] Gasti J *L'effectivité du droit de l'OHADA* (2006)22
[303] Martor B et al *Business Law in Africa: OHADA and the Harmonisation Process* (2002)17
[304] Martor B et al *Business Law in Africa: OHADA and the Harmonisation Process* (2002)17

with the training of legal officers but is also in charge of research in African law in fulfilling the main task of OHADA which is that of harmonisation of law of Business Law in Africa.[305]

4.3 OHADA Corporate Governance

OHADA does not have an Act which deals with corporate governance as a subject but it does deal with some aspects of the subject in the OHADA Uniform Acts Relating To Commercial Companies and Economic interest Group (AUSCGIE). This Acts were enacted in 1997 but were further amended in 2014 so as to beef up the Uniform Acts for Security Interests, Cooperative Companies and General Commercial Law of 2010.[306] It has two hundred new articles as well as four hundred revised provisions.[307]

4.3.1 Oversight over the board Directors

The Acts Relating To Commercial Companies and Economic Interest Group of 2010 contains good governance principles by, among other things prohibiting directors from participating in any vote on their own remuneration. The Uniform Acts for Security Interests, Cooperative Companies and General Commercial Law in terms of Article 278 stated that unless otherwise provided by the Articles of Association or by a meeting of shareholders the manager's remuneration shall be determined by the majority in number and capital of the shareholders.[308] This would still allow the director to take part in the voting which would still give leeway to some kind of manipulation or abuse of power by the director. The AUSCGIE in terms of Article 431 addresses this by changing the position and stating that the remuneration of directors is determined freely by the board of directors and the director shall not apart receive any further benefits with the exception of the fixed annual duty allowance granted to them.[309]

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[305] Mouloul A *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2009)47
[306] Domoraud-Operi S et al 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' *EMPEA Legal & Regulatory Bulletin* (2014)1
[307] Domoraud-Operi S et al 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' *EMPEA Legal & Regulatory Bulletin* (2014)1
[308] Uniform Act Relating To Commercial Companies and Economic interest Group 2010
[309] Ngwa Kelong R 'Executive Remuneration As An Aspect Of Corporate Governance Under OHADA's Corporate System' *Munich Personal Archive Paper No* 4054 (2009) 7

The AUSCIGIE also stipulates the kinds of contracts that require the prior authorisation of the company or its board of directors.[310] The latter keeps the shareholders in control of the direction which the company will take as well as protect their interest against bad decisions by directors which could cause great loss such as in the instance of the 2008 financial crisis. Moreover, it also introduces new offences relating to the management of companies, such as the failure by directors to submit companies' financial statements within a month of their approval by the shareholders.[311] This system is very important in ensuring that there are checks and balances in place on the actions of the directors. The Acts further prescribe either civil or criminal liability if the director associated with irregularities in issues stated above. In view of the above one can argue that the threat of liability keeps directors from involvement in illegal activity which can jeopardize the interest of the company.[312]

4.3.2 Disclosure of Information

The directors are required to report on the financial position and activities of the companies so as to ensure that every decision they made which has an impact on the finances of the company can be made public or questioned if it is to the benefit of the company.[313] AUSCIGIE provides that one or more shareholders holding at least one-fifth of the company's authorised capital may, either individually or as a group, petition the president of the competent court of the registered office of the company to designate one or more experts to make a report on one or more management operations.[314] This also seeks to ensure the dissemination of information about the running of the company to the owners of the company and for them to see if their interests are being represented by the directors.

[310] Domoraud-Operi S et al 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' *EMPEA Legal & Regulatory Bulletin* (2014)3
[311] Domoraud-Operi S et al 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' *EMPEA Legal & Regulatory Bulletin* (2014)3
[312] Ngwa Kelong R 'Executive Remuneration As An Aspect Of Corporate Governance Under OHADA's Corporate System' *Munich Personal Archive Paper No* 4054 (2009) 7
[313] Domoraud-Operi S et al 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' *EMPEA Legal & Regulatory Bulletin* (2014)3
[314] Article 156 Uniform Act Relating To Commercial Companies and Economic interest Group 1997

4.3.3 Shareholders' Rights

Article 53 of AUSCIGIE sets out the rights of shareholders which are : the right to a share of the company's profits whenever they are distributed; the right to the company's net assets when shared following the dissolution of the company or where the company's share capital is reduced; the obligation to share in the company's losses under the conditions laid down for each form of company; the right to participate in and vote on the collective decisions of the shareholders, unless otherwise provided by the Uniform Act for certain classes of share.[315]

The AUSCIGIE also provides for the equal treatment of shareholders through the provisions of Article 711 which states that the auditor is obliged by law to assure the equal treatment of shareholders, as well as the equality of rights of all shares of the same class.[316] This does not mention the protection of minority shareholders meaning that there is no recourse in the event of the infringement of the rights of minority shareholders. Moreso, there has been the introduction of another innovation brought by the act, which is a pre-emptory right which is a seasonal right, exercised only in the event of new issuance of shares.[317] For instance, if a shareholder holds 5 per cent of the shares of a company, in the event of new shares becoming available, he would be allowed to buy up to 5 per cent of the new shares at the issue price.[318] These rights are also safeguarded by the corresponding right of the shareholder to initiate a suit against a director or manager if the harm they suffer is due to an abuse of these rights.[319] The above is very important as it poses the threat of a suit to directors or managers if they disregard the rights of shareholders hence keeping them at bay in terms of their actions in relation to the rights of shareholders.

[315] Uniform Act Relating To Commercial Companies and Economic interest Group 2010
[316] Uniform Act Relating To Commercial Companies and Economic interest Group 1997
[317] Doris L 'Regionalism: Lessons the SADC May Learn from OHADA' *Journal of Contemporary Roman-Dutch Law, Vol. 75* (2012) 256-270
[318] Martor B *Business Law in Africa: OHADA and the Harmonisation Process* (2002)94
[319] Uniform Act Relating To Commercial Companies and Economic interest Group 1997

4.3.4 Appointment of Statutory Auditors

As discussed in the section on the OECD one of the important elements to robust and effective corporate governance is transparency in the day to day running of the business. OHADA in ensuring compliance with the latter has in terms of the Uniform Act enacted provisions that force companies to appoint auditors. Article 702 of AUSCIGIE provides that:

> Public limited companies which do not launch a public issue shall be bound to appoint an auditor and an alternate auditor[320] and Public limited companies which launch a public issue shall be bound to appoint at least two auditors and two alternate auditors.[321]

This is very important as it is not optional and forces companies to be more transparent in the running of the business because they can be exposed by the auditors if there is some sort of foul play or recklessness. The auditors also must be present at all meetings that are held in the company.[322] The appointment of the auditors is done in an ordinary meeting for a period of 6 years.[323] In terms of Article 710 the duty of the auditor is to certify that the summary financial statements are regular and accurate and give a fair image of the result of operations of the past fiscal year.[324] They also certify the financial situation and the estate of the company at the end of the fiscal year.[325] This means that there is consistent dissemination of information of the financial well-being of the company to its shareholders as well as stakeholders.

4.4 OHADA and SADC collaboration in the harmonisation of corporate governance laws

As mentioned above OHADA is one of the most successful African Harmonisation Institutions. SADC on the other hand has not been very successful in achieving this goal and

[320] Uniform Act Relating To Commercial Companies and Economic interest Group 2010
[321] Uniform Act Relating To Commercial Companies and Economic interest Group 2010
[322] Martor B *Business Law in Africa: OHADA and the Harmonisation Process* (2002)101
[323] Martor B *Business Law in Africa: OHADA and the Harmonisation Process* (2002)101
[324] Uniform Act Relating To Commercial Companies and Economic interest Group 1997
[325] Uniform Act Relating To Commercial Companies and Economic interest Group 1997

can learn a number of things from OHADA or even join OHADA. One can say that OHADA could potentially serve as a model for the harmonisation of SADC law.[326]

Article 53 of the Treaty is very important in determining the potential involvement of SADC in OHADA. It states that the Treaty is open to membership of any member State of the OAU that is not a signatory to the Treaty as well as to any non-member State of the OAU invited to accede by agreement of all the States Parties.[327] This in theory would allow for the joining of SADC countries or their ascension to the treaty thereby inheriting the laws of OHADA dealing with corporate governance and every other law which it has drafted. The question would be how to go about this and whether it would succeed. There are a number of questions to be asked in this venture such as are countries going to join as individuals which would cause discord in the circles of trade and add to the spaghetti bowl effect as Bhagwati has termed it.[328] This refers to the situation where countries are party to many agreements hence this undermines the effectiveness of the corporate governance as there may be conflicting provisions from the different agreements.

Moreso, another challenge presented by SADC countries either as a collective or as individuals joining OHADA is that of the applicability of the Uniform Acts. OHADA in terms of Article 10 of the Treaty takes a hard law approach where all their Acts apply directly to the members, so in the event that there is a conflict the Uniform Act is applied.[329] In SADC it is a bit different because they make use of Protocols which are soft law because they do not place legally binding obligations nor do they delegate authority to third parties to interpret and implement the laws.[330] This is usually in form of the court and other institutions however because the SADC tribunal in terms of the new amendment does not have the power to make binding judgments in the case of a breach of the rules by private parties it has no authority in such cases..[331] On other hand OHADA has a fully functional hard law system

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[326] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models* (Unpublished thesis Stellenbosch University 2014)189
[327] Organisation for the Harmonisation of Business Laws in Africa Treaty 1997
[328] Bhagwati J 'US Trade Policy : The Infatuation with FTAs' *World Trade Organisation Discussion Paper Series* (1995)4
[329] Organisation for the Harmonisation of Business Laws in Africa Treaty 1997
[330] Organisation for the Harmonisation of Business Laws in Africa Treaty 1997
[331] Shaffer G and Pollack M 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' *Minnesota Law Review* (2010) 715

with a Court system in terms of the CCJA which play the role of applying, implementing and enforcing the Uniform Acts. In view of the above the joining of OHADA would likely cause problems in the application of hard law in the form of the Uniform Acts in the soft law system of SADC.

However, there can be a way around the above issues through adoption only of parts of OHADA law that deal with corporate governance and using that to create a model law for SADC corporate governance. This would entail that SADC countries would not need to join OHADA but would rather be transplanting the parts of the Act that deal with corporate governance. However, the adoption of OHADA corporate governance law can be made via a process of harmonisation as opposed to the OHADA's unification technique because of the lack of political will within the SADC region. It is possible that if there is unification there would be a lack of compliance by the countries because of the reconstituted Tribunal will not have jurisdiction in private matters. An examination of the successes and the failures of OHADA are also important in establishing the viability of its corporate governance laws in assisting the harmonisation of SADC corporate governance laws. However this approach is not without its flaws as there is the debate of firstly the language, legal system as well as that of the pedigree of OHADA in terms of corporate governance as shall be discussed below in the criticisms and successes of OHADA.

4.5 Successes and criticisms of OHADA

In order for OHADA to be a suitable model for SADC in the harmonisation of its corporate governance one has to consider its challenges and it successes. This would be helpful in considering whether other states, especially those from SADC, can join OHADA.

4.5.1 Criticisms of OHADA

OHADA has made a lot of progress in harmonising laws dealing with other aspects of business law except in corporate governance. However, in terms of corporate governance OHADA is behind and need to improve. There are also issues of lack of diversity, language barriers as well as lack of funding are also weaknesses exhibited by OHADA.

4.5.1.1 Poor Corporate Governance Laws

In comparison to legal systems that have effective corporate governance regimes such as the OECD as well as the King Code III of South Africa, the AUSCIGIE have a number of significant ambiguities that overshadow any of the corporate governance principles which are alluded to in the above section. [332] The first is that OHADA does not deal with the rights of workers and other stakeholders which allows for the abuse of these parties.[333] There is also no clear separation between the roles of chairman of the board of directors and chief executive officer (CEO).[334] In terms of the Act there is a combination of the functions and the roles of the CEO and Chairman of the Board in a portfolio called Administrator General.[335] Second, there is the absence of independent directors to neutralize the powers of the CEOs.[336] Thirdly, the mechanism for disclosure is weak because it relies heavily on the company registries which are inadequate and not available on online platforms, but stored manually.[337] Considering these frailties one cannot say that a country such as South Africa which is in SADC would be keen to apply the OHADA laws on corporate governance.

4.5.1.2 Lack of diversity

The possibility of the amalgamation of SADC and OHADA law in corporate governance is marred with strong criticisms. These criticisms are not new at all and they have been seen in the predicament of Cameroon and Guinea Bissau which are members of OHADA. The first notable obstacle to non-francophone African countries joining OHADA is the perceived

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[332] Kameni E 'The End is Night: Towards an OHADA Code/Guideline on Corporate Governance' available at *http://worldjusticeproject.org/blog/end-night-towards-ohada-codeguideline-corporate-governance* (accessed 15 July 2015)
[333] Gold D *Law and Economics: Toward Social Justice* 1st edition (2009)139
[334] Kameni E 'The End is Night: Towards an OHADA Code/Guideline on Corporate Governance' available at *http://worldjusticeproject.org/blog/end-night-towards-ohada-codeguideline-corporate-governance* (accessed 15 July 2015)
[335] Kameni E 'The End is Night: Towards an OHADA Code/Guideline on Corporate Governance' available at *http://worldjusticeproject.org/blog/end-night-towards-ohada-codeguideline-corporate-governance* (accessed 15 July 2015)
[336] Kameni E 'The End is Night: Towards an OHADA Code/Guideline on Corporate Governance' available at *http://worldjusticeproject.org/blog/end-night-towards-ohada-codeguideline-corporate-governance* (accessed 15 July 2015)
[337] Kameni E 'The End is Night: Towards an OHADA Code/Guideline on Corporate Governance' available at *http://worldjusticeproject.org/blog/end-night-towards-ohada-codeguideline-corporate-governance* (accessed 15 July 2015)

civilian nature of its laws as contained in its Uniform Acts.[338] At the beginning of this paper it is mentioned that within SADC there are different types of legal systems including the Roman-Dutch system of Botswana, South Africa, Lesotho, Zimbabwe, Namibia and Swaziland the Civil Law system of Angola, Mozambique, Democratic Republic of Congo and Madagascar the Common Law system of Zambia, Tanzania, Malawi and Mauritius [339] and the Seychelles' hybrid system.[340] Examples in these differences are in terms of the interpretation of statutes. In civil law the interpretation is from the standpoint of what the intention of the legislature was and in common law the interpretation can be taken from precedent which has been set by judges.[341] OHADA continues to be based largely on the French civilian model thus it will be very difficult to persuade African countries with different legal traditions such as the ones mentioned above to join the organisation.[342] SADC needs something that is dynamic to accommodate and apply to the different systems but OHADA only offers one system meaning that the others are not catered for.

4.5.1.3 Language Barrier

The issue of language has arisen as one of the barriers within OHADA. For instance it was an issue for Ghana and Cameroun which have English as one of the official languages. These countries challenged the fact that French was the working language in OHADA on the grounds of constitutionality because other languages were treated as inferior.[343] In terms of the Amendments to the treaty in 2008 it has added English, Spanish and Portuguese.[344] Although the Uniform Acts have been translated into and published in English, it is widely accepted that the English translations are not always accurate or comprehensible.[345] It is also

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[338] Enonchong N 'The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' *Journal of African Law*(2007) 97
[339] Ndulo N 'The Need for the Harmonisation of Trade Laws in SADC', *Cornell Law Faculty Publications* (1996) 196
[340] See *http://www.actoffshore.co/about-seychelles/legal-system* (accessed on 20 June 2015)
[341] Gasti J *L'effectivité du droit de l'OHADA* (2006)25
[342] Enonchong N 'The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' *Journal of African Law*(2007) 97
[343] Enonchong N 'The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' *Journal of African Law*(2007) 97
[344] Del Duca P *Choosing the Language of Transnational Deals: Practicalities, Policy, and Law Reform* (2010) 102
[345] Enonchong N 'The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' *Journal of African Law* (2007) 97

said to create a strong incentive to conduct business in French as opposed to it conducting business in other languages.[346]

4.5.2 Successes of OHADA

Though OHADA has a number of challenges it has also managed to exhibit a number of good traits like healthy growth as an institution, international endorsement as well as a sense of clarity and uniform application of the law. These are very commendable victories on the part of the organisation which can be influential in harmonisation of SADC corporate governance laws if OHADA is to be used as a blueprint.

4.5.2.1 Legal certainty and uniformity

At the beginning of this paper one of the reasons stated for this research was to address the unpredictable nature of most of the laws in the SADC region because of the failure of the organisation to realise the importance of a regional law on corporate governance. OHADA laws are predictable and because they are followed as well as applied by all the members, investors and individuals know how, as well as which law will be applied. These laws are also accessible to different parties to a dispute as well as legal professionals through the Regional Training Centre for Legal Officers. For instance in a matter where there is the abuse of shareholders' voting rights one can clearly refer to Article 53 of AUSCGIE that sets out the rights of shareholders[347] hence there is no unfair advantage to either parties.

4.5.2.2 International endorsement

The OHADA Acts have not only been praised within West Africa alone as but has been praised in France as well as by the American Bar Association.[348] The OHADA Acts have been praised because their laws are drafted in a modern way, they have minimised the

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[346] Del Duca P *Choosing the Language of Transnational Deals: Practicalities, Policy, and Law Reform* (2010) 103

[347] Uniform Act Relating To Commercial Companies and Economic interest Group 1997

[348] Cisse H *etal The World Bank Legal Review: Legal Innovation and Empowerment for Development* Volume 4 (2013)338

drafting of new business laws within the member states, they are written in plain and easy language as opposed to complex language and they have managed to keep most of their Uniform Acts from political issues which are likely to cause defiance by countries on grounds of political will.[349]

4.5.2.3 Pro- Investment tool

OHADA is a platform that encourages investment both on a local and an international scale. The Uniform Act on Companies provides for a variety of business entities through which commercial activities may be done.[350] The advantage of this is that it allows for any company to be formed in terms of the Act.[351]The provisions on the appointment of auditors also safeguard the right of the shareholders by ensuring transparent running of the company. The latter guarantees and reassures investors of their investments.[352] Similarly pre-emptive rights and double-voting provisions are also reassuring to the shareholders as it affords them the right to buy more shares when new shares are issued.[353]

4.6 Conclusion

The philosophy of African solutions for African problems has been very important to the proponents of the African Renaissance movement.[354] OHADA is an African made Organisation which is making strides to harmonising business law and also encouraging investments in the West African region. It can however be deduced from the discussions above, that it does not offer a viable avenue to the harmonisation of SADC corporate governance laws as it does not provide adequate guidelines on the subject. For instance, OHADA corporate governance laws are sub-par and need to be face lifted themselves so as

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[349] Cisse H *etal The World Bank Legal Review: Legal Innovation and Empowerment for Development* Volume 4 (2013)338

[350] Doris L 'Regionalism: Lessons the SADC May Learn from OHADA' *Journal of Contemporary Roman-Dutch Law, Vol. 75*(2012)256-270

[351] Doris L 'Regionalism: Lessons the SADC May Learn from OHADA' *Journal of Contemporary Roman-Dutch Law, Vol. 7*5 (2012) 256-270

[352] Doris L 'Regionalism: Lessons the SADC May Learn from OHADA' *Journal of Contemporary Roman-Dutch Law, Vol. 7*5 (2012) 256-270

[353] Doris L 'Regionalism: Lessons the SADC May Learn from OHADA' *Journal of Contemporary Roman-Dutch Law, Vol. 75* (2012) 256-270

[354] George Ayittey in response to the behaviour of the international community in the crisis in Somalia available at *https://www.issafrica.org/iss-today/african-solutions-to-african-problems* (accessed 20 July 2015)

to match the current trend of stakeholder oriented laws as well as separation of offices of the CEO and Chaiman of the Board to ensure that there is proper oversight and accountability. One can argue that it is only after the improvement of the OHADA corporate governance framework that it can offer guidance to other regions, including SADC.

Moreso, at the beginning of this paper the issue of finding laws that strike a common ground among the diverse systems of laws in the SADC region was one of the priorities. It suffices to say that the laws of OHADA fail in this regard as they are of a civil nature which may be difficult to apply in hybrid and Roman Dutch legal systems. Language issues though resolved on paper are still an issue because of the kind of incentives they create. SADC is not looking only for a French contingent in terms of investment but rather all types of investment to grow the economy.

In conclusion OHADA is not complete in its approach to the aspect of corporate governance and though there are a number of positives such as the rights of shareholders, including pre-emptive rights that are incentives for shareholders to invest because they can buy more shares if the company succeeds, it is not the best option for the improvement of SADC Corporate governance.[355] However, SADC can learn from the plain use of language in the laws of OHADA as well their ability to conjure up political will because of their deliberate abstinence from issues of sovereign privilege of countries.[356] One of SADCs main problems is lack of political will, maybe because there is no clear line on its operations in relation to sovereign privilege. This can only be speculation, but what needs to be noted is that OHADA through only dealing with issues of business laws is really succeeding in ensuring harmonisation in the field. The next chapter will discuss the European Union which has become the pedigree of regional integration as well as a harmonised system of law.

[355] Kameni E 'The End is Night: Towards an OHADA Code/Guideline on Corporate Governance' available at *http://worldjusticeproject.org/blog/end-night-towards-ohada-codeguideline-corporate-governance* (accessed 15 July 2015)

[356] Cisse H *etal The World Bank Legal Review: Legal Innovation and Empowerment for Development* Volume 4 (2013)338

CHAPTER 5

CORPRATE GOVERNANCE LAWS IN THE EUROPEAN UNION (EU)

5.1 Introduction

The European Union (EU) is probably one of the most advanced regional integration systems with a single market for products and financial services.[357] It also has top notch harmonised laws in a number of fields such as Trade where the concepts of freedom of movement of people, freedom of movement of goods and non-discrimination among others are highly rated and highly encouraged. Nonetheless, corporate governance has for some time been the Achilles heel of this progressive regional organ. Although most of the countries are members and founders of the OECD the financial crisis hit the region very hard due to unforeseen corporate governance vulnerabilities such as excessive risk taking and poor management in some companies.[358] Notwithstanding the problems in the field of European corporate governance as well as their lack of a single corporate governance law or model it has a number of directives on the modernisation of company law and the improvement of corporate governance as well as a green paper on the European Union Corporate Governance framework which has been contentious in the EU.

However, the discussion of this chapter is not concerned with the problems in Europe but rather the lessons that can be learnt by SADC in the quest to attain a harmonised system of corporate governance laws. This chapter will discuss the institutional organisation of the European Union law and their corporate governance laws and policies and lastly what lessons can be learnt by SADC from European corporate governance.

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[357] European regional integration available at *http://ec.europa.eu/internal_market/company/index_en.htm* (accessed 22 June 2015)

[358] Kumar N and Singh J 'Global Financial Crisis: Corporate Governance Failures and Lessons' *Journal of Finance, Accounting and Management* Volume (2013)25

5.2 European Union

The European Union has not always been as big and progressive as it currently is, but it went through a process of evolution and growth to be the formidable organisation that it is. The formation of the EU can be traced to the aftermath of the Second World War. The Union was formed in order to avoid a war between European countries again.[359] Europe had suffered greatly from the war and lost close to 50 million people.[360] In response to the crippling results of the war there was a need to improve the economies of Europe and through initiatives such as the Marshal Plan. This was an aid package of 13 million United States Dollars made by the US to help Western Europe to ensure the lifting of trade barriers in the countries of these countries to improve their economies.[361] In 1958 a number of other initiatives followed, including the Schuuman Plan. This Plan was initiated in a bid to ensure the reconciliation of France and Germany as well as resuscitate the German economy which had suffered greatly during the war.[362] The Messina Conference followed after this and its task was the launching of European integration based on a common market and integration in the sectors of transport and atomic energy.[363] The report from the Messina Conference was the basis for the Conference on the Common Market and Euratom in 1956, and led to the Treaties of Rome which established a European Economic Community (EEC) in 1958.[364]

The European Economic Community was an economic cooperation between six countries, namely Belgium, Germany, France, Italy, Luxembourg and the Netherlands.[365] It was named the European Union after the signing of the Maastricht Treaty in 1993 and to date the European Union has 28 members which are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.[366]

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[359] Eger T ' Introduction' in Eger T et al *Research Handbook on the Economics of European Union Law* (2012)1
[360] Kaczorowska A *European Union Law 3rd edition* (2013) 4
[361] Bomberg E et al *The European Union: How Does it Work?*2nd edition (2008)24
[362] Bomberg E et al *The European Union: How Does it Work?*2nd edition (2008)26
[363] The founding fathers of Europe available at http://europa.eu/about-eu/eu-history/founding-fathers/pdf/paul-henri_spaak_en.pdf (accessed 28 July 2015)
[364] The founding fathers of Europe available at http://europa.eu/about-eu/eu-history/founding-fathers/pdf/paul-henri_spaak_en.pdf (accessed 28 July 2015)
[365] *Kaczorowska A European Union Law 3rd edition* (2013) 4
[366] EU members available at http://europa.eu/about-eu/countries/index_en.htm (accessed 24 July 2015)

Since its inception it has managed to excel in lifting barriers to trade and other aspects and removing of borders as a barrier to the free moment of people. This success can be ascribed to the different institutions of the EU and the discussion below will examine these institutions.

5.2.1 European Union Institutions

The institutions of the European Union are outlined in terms of Article 13 of the European Union Treaty and there are seven institutions namely: the European Commission; the European Parliament; the Council the Court of Justice of the European Union; the European Council; the European Central Bank; and the Court of Auditors.[367] Their task is that of promoting the values of the EU, advancing its objectives, serving the interests of its citizens as well as those of the Member States, ensuring the consistency, effectiveness and continuity of its policies and actions.[368]

5.2.1.1 European Council

The European Council is similar to the Southern Africa Development Community (SADC) Summit as well as the OHADA Conference of Heads of States in that it is a body of the Heads of States of the member countries.[369] The European Council meets twice every six months or if it is convened by the President when the situation requires their input.[370] The European Council mostly takes its decisions by consensus but in certain cases which are outlined in the EU treaties, it decides by unanimity or by qualified majority.[371]

The mandate of the European Council is embodied in Article 15 which states European Councils is tasked with providing the necessary impetus for development and defining the general political directions and priorities of the EU.[372] The European Council also has the

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[367] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[368] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[369] Bishop B *European Union Law for International Business: An Introduction* (2009)4
[370] Dubowski T *Białystok Law Books 2 Constitutional Law Of The European Union* (2011)47
[371] Dubowski T *Białystok Law Books 2 Constitutional Law Of The European Union* (2011)47
[372] Article 15 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)

task of revising main treaties resolving and discussing differences between member states on key issues.[373] Unlike its two counterparts the SADC Summit and the OHADA Conference of Heads of States which have failed to act as per their mandate the Council has greatly succeeded in its mandate integrating countries which were rivals in World War II.[374] SADC has greatly lagged behind which is one of the reasons for this paper as they have poor corporate governance systems as well as very slow progress towards the goals of the Regional Strategic Indicative Plan. [375] OHADA is also in this category as per the discussion in the above chapter which also pointed out the frailties of its system, particularly in corporate governance and funding.

5.2.1.2 Council

The Council is the platform from which national ministers from each EU country meet to discuss and adopt EU law, coordinate member states' economic policies, develop policies, such as the EU's common foreign and security policy, conclude international agreements and adopt the EU budget.[376] It operates in a way which allows national ministers responsible for different policy areas to represent their country and expresses its views in the Council.[377] For instance, the foreign ministers will meet on foreign affairs and the environmental ministers will meet on environmental issues.[378]

The functions of the Council are legislative as well as executive. In terms of its executive mandate it has the duty to draft a preliminary budget which it then forwards to the European Parliament and vice versa.[379] The Council and the Parliament then each in the final round of

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[373] Bishop B *European Union Law for International Business: An Introduction* (2009)6
[374] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)216
[375] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)216
[376] How the European Union works available at *http://eeas.europa.eu/delegations/singapore/documents/more_info/eu_publications/how_the_european_union_works_en.pdf* (accessed 18 August 2015)
[377] McCormick J et al *The European Union: Politics and Policies* 5th edition (2014)ch 6
[378] McCormick J et al *The European Union: Politics and Policies* 5th edition (2014)ch 6
[379] Citi M 'European Union budget politics: Explaining stability and change in spending allocations' *European Union Politics Volume 16 no. 2* (2015) 260-280

conciliation agree on a joint document by the two concerning the budget.[380] It is submitted that the oversight of the European Parliament in working together with the Council is one of the reasons of the success because the same cannot be said for SADC and OHADA which as mentioned above have the Summit and the Conference of Head of States with powers to make laws which are not under any supervision.[381]

5.2.1.3 European Parliament

The European Parliament represents the citizens of the EU similar to the conventional manner in which members of Parliament in countries represent the interests of their people.[382] The European Parliament is the only EU institution that is directly elected. In terms of Article 14 of the Lisbon Treaty the European Parliament has three roles with the main role being a legislative role with the budgetary and political functions being its other roles.[383] The European Parliament acts in collaboration with the Council to create legislation.[384] The two have the task of approving the proposal of a Commission in order for it to become EU law.[385] The European Parliament also has the right to accept, amend as well as reject proposed EU legislation.[386]

The EU Parliament can also ensure the enacting of laws through delegation - a process called the power of secondary indirect legislative initiative.[387] This occurs when Parliament requests the Commission to submit proposals on matters that can be considered for the creation of an act for the Union.[388] It also has a control function in that it has to provide oversight to the Commission as the Parliament is responsible for the Commission and the Parliament can forward a motion of no confidence in the Commission.[389] It can be argued that this ensures

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[380] Citi M 'European Union budget politics: Explaining stability and change in spending allocations' *European Union Politics Volume 16 no. 2* (2015) 260-280
[381] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)216
[382] Archick K 'The European Parliament' *Congressional Research Service* (2014)1
[383] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[384] Archick K 'The European Parliament' *Congressional Research Service* (2014)2
[385] Archick K 'The European Parliament' *Congressional Research Service* (2014)2
[386] Lehmann W ' The European Parliament' in Coen D et al Lobbying the European Union: Institutions, Actors, and Issues (2009)ch 3
[387] Lehmann W ' The European Parliament' in Coen D et al *Lobbying the European Union: Institutions, Actors, and Issues* (2009)ch 3
[388] Dubowski T *Białystok Law Books 2 Constitutional Law Of The European Union* (2011)39
[389] Dubowski T *Białystok Law Books 2 Constitutional Law Of The European Union* (2011)39

interest of the citizens of the Union are respected by the Commission as well as representation of these interest as the parliament cannot act without the input of the people who voted for them - unlike in SADC where there is no oversight of the Summit as well as of the OHADA Conference of Heads of States.

5.2.1.4 European Commission

The European Commission is made up of its President and seven Vice-Presidents who are chosen from the commissioners. The commissioner are chosen from each member state of the EU. The High Representative of the Union for Foreign Affairs and Security Policy is also part of the leadership of the Commission and is more concerned with the foreign policy of the Union.[390] The Commission has three main categories of duties which are the legislative, executive as well as the role of being the guardian of the legislative reform.[391] The legislative function of the Commission is established through the provisions of Article 18 (2) of the Treaty on the European Union which states that the Union may adopt the legislative Acts of the High Representative of EU Foreign Affairs on the basis of a Commission proposal unless the Treaties provide otherwise.[392] This is quite puzzling because on the other hand there is the presence of European Parliament which conventionally would be the one responsible for legislative reform of a country or in this instance the Union.

In relation to the executive function of the European Commission this body has a mandate to supervise, manage and implement the policies of the EU which includes the handling of the finances of the Union.[393] The European Commission's guardianship function over legislative reform can be seen through its powers in terms of the Treaty of the European Union to initiate infringement proceedings against countries or individuals who do not comply with

[390] Article 17(4) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[391] Bouwen P ' The European Commission' in Coen D et al *Lobbying the European Union: Institutions, Actors, and Issues* (2009)ch 2
[392] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[393] Bouwen P ' The European Commission' in Coen D et al *Lobbying the European Union: Institutions, Actors, and Issues* (2009)ch 2

European law.[394] This may be said to be too much responsibility for one institution however it is not the question of this paper.

5.2.1.5 Court of Justice of the European Union (ECJ)

The Court of Justice has a judge from each Member State as well as assistance from nine Advocates-Generals. It also includes the General Court which has at least one judge per Member State.[395] It is tasked with the uniform observance, interpretation and the application of the Union's Treaties.[396] The jurisdiction of the Court of Justice encompasses actions brought by a Member State, an institution or a natural or legal person to give preliminary rulings at the request of courts or tribunals of the Member States on the interpretation of Union law.[397] It also examines the validity of acts adopted by the institutions; and apply the law in other cases provided for in the Treaties.[398]

The Court of Justice, similar to its counterpart the Common Court of Justice and Arbitration in OHADA, applies the supremacy principle which stipulates that if there is a conflict between EU law and national law the law of the Union shall be applied.[399] This does not apply to SADC because the Tribunal deals with disputes between states and not individuals. This means that if an act on corporate governance is enacted any dispute between the state and companies, or companies and third parties, this will not be heard by the Tribunal and hence there is no recourse for breaching the principles of corporate governance. Therefore the Tribunal has to be given powers to hear such disputes because most disputes over irregularities in corporate governance involve legal persons and not states. Without the Tribunal having jurisdiction to adjudicate on these matters it would be futile to improve corporate governance laws that will not be enforced.

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[394] Article 226 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[395] Article 19 (2) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[396] Jordan A *Environmental Policy in the European Union: Actors, Institutions, and Processes* 2nd edition (2005) 68
[397] Jordan A *Environmental Policy in the European Union: Actors, Institutions, and Processes* 2nd edition (2005) 68
[398] Conway G *EU Law* (2015)ch4
[399] Conway G *EU Law* (2015)ch4

5.2.1.6 European Central Bank (ECB)

In relation to most regional integration initiatives the structure that has set the EU apart from other upcoming initiatives is the existence of the European Central Bank which is an independent central bank for the Eurozone.[400] The ECB controls the monetary policy of the Union to ensure price stability and has the exclusive right of issuing the Euro.[401] Furthermore, the European Central Bank may sometimes perform a legislative function because of its input in all proposed Union Acts and all proposals for regulation at national level within the areas falling under monetary policy and other issues falling within its domain.[402]

5.2.1.7 Court of Auditors (ECA)

The Court of Auditors is the independent external audit institution of the European Union.[403] The ECA has one national of each Member State chosen from independent individuals who are required to perform their duties only in the Union's general interest.[404] The ECA checks that the Union's income has been received correctly as well as the legitimacy of the expenditure, and that financial management of the Union has been sound.[405] This cannot be said for SADC and OHADA whose financial integration has not advanced to that extent, but however does not mean that the finances of these cannot be audited and the audit of these organisations can be a lesson that can be learnt from the ECA.

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[400] Article 282 (3) of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[401] Article 282 (5) of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[402] Conway G *EU Law* (2015)ch4
[403] How the European Union works available at *http://eeas.europa.eu/delegations/singapore/documents/more_info/eu_publications/how_the_european_union_works_en.pdf* (accessed 18 August 2015)
[404] Articles 285 and 286 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union , *Official Journal of the European Union Volume 55 C 326* (2012)
[405] How the European Union works available at *http://eeas.europa.eu/delegations/singapore/documents/more_info/eu_publications/how_the_european_union_works_en.pdf* (accessed 18 August 2015)

5.3 The European Union Corporate Governance efforts

As mentioned above corporate governance in Europe has been one of the things which have not progressed as well as many of the other initiatives of the EU. It is shocking how the continent that makes up most of the OECD discussed in chapter 2 cannot create their own corporate governance system. However, there have been a number of initiatives towards harmonised and improved corporate governance in Europe which have been initiated. The initiatives are the following: the Modernisation of company law and improvement of corporate governance, the 2003 European Commission's Action Plan, the European Union Corporate Governance Green Paper which led to the 2012 European Commission's Action Plan and the recent Commission's measures package of 2014.[406]

5.3.1 Modernisation of company law and improvement of corporate governance in Europe

The modernisation of company law and improvement of corporate governance law initiative set out to encourage the improvement of corporate governance through the cooperation of member states in issues of corporate governance.[407] The main objectives were to strengthen shareholders' rights and protection for employees, creditors and the other parties with which companies deal, while adapting company law and corporate governance rules appropriately for different categories of company as well as to foster the efficiency and competitiveness of business, with special attention to some specific cross-border issues.[408] In terms of corporate governance it dealt with four areas which were enhancing corporate governance disclosure,

[406] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)
[407] Communication from the Commission to the Council and the European Parliament on Modernising Company Law and Enhancing Corporate Governance in the European Union- A Plan to Move Forward COM 2003/0284
[408] Communication from the Commission to the Council and the European Parliament on Modernising Company Law and Enhancing Corporate Governance in the European Union- A Plan to Move Forward COM 2003/0284

strengthening shareholders' rights, modernising the board of directors and co-ordinating corporate governance efforts of Member States.[409]

Unfortunately, though the draft had a number of noble initiatives they did not get enough approval from the Union. The Union rejected the idea of a European Union Corporate Governance Code.[410] However, the draft was not totally discarded but the aspects of disclosure of remuneration of directors as well as statements on the payment of the directors were retained.[411] These were adopted as some of the issues up for discussion in the 2003 European Commission's Action Plan.

5.3.2 European Commission's Action Plan 2003

The 2003 Action plan also suggested key improvements to the aspect of corporate governance in the Union.[412] It advocated the use of the 'comply or explain' rule, a model board to facilitate employee participation [413] and a remuneration policy.[414]

5.3.2.1 Comply or explain

The 'comply or explain' rule states that listed companies in a country are to explain their reasons for non-compliance with the corporate governance codes of the country. This has been seen in the King Code II of South Africa.[415] The code states that entities are required to make a statement as to whether or not they apply the principles and then to explain their

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[409] Communication from the Commission to the Council and the European Parliament on Modernising Company Law and Enhancing Corporate Governance in the European Union- A Plan to Move Forward COM 2003/0284

[410] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)

[411] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)

[412] Leyens P 'Corporate Governance in Europe: foundations and perspectives 'in Eger T et al *Research Handbook on the Economics of European Union Law* (2012)183

[413] Leyens P 'Corporate Governance in Europe: foundations and perspectives 'in Eger T et al *Research Handbook on the Economics of European Union Law* (2012)184

[414] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)

[415] The King Code of Corporate Governance for South Africa 2009

practices.[416] The importance of this is that it this could expose a director to liability if the statements of compliance to principles are made but the best practices are not followed and are not explained.[417] This could be what is needed in the SADC laws to ensure that there is compliance as it is stated in chapter 3 that unification would not work in the region. However, South Africa has moved to 'apply or explain' which is not about just mindless compliance but looks at how the codes and principles can be applied with regards to the company. [418] It is more refined than the 'comply or explain' rule and would be a worthy addition to the SADC harmonised law.

5.3.2.2 Employee Participation

The 2003 Action Plan was also a major effort towards the participation of employees of the company. As mentioned in chapter one the stakeholder theory has become the driving force of modern day corporate governance and hence this move was highly commendable in realizing this objective of this theory. This was done through the European Company Statue *Societas Europaea* which added obligatory worker involvement at European level particularly by including participation rights at company board level.[419] This would be a worthy addition to SADC law in ensuring the protection of employees. Recently in a judgment in the case of *Nyamande & ors v Zuva Petroleum* in the Zimbabwe Supreme Court, the court allowed for the dismissal of employees with just a 3 months' notice without giving reasons.[420] This led to mass dismissals and showed that there is a need for reform in the rights of employees and the best platform to do this will be through a harmonised law which includes the participation of the employees in the board to safeguard their interests.

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[416] The King Code of Corporate Governance for South Africa 2009
[417]KPMG 'Corporate Governance& King 3' available at *https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Tax-and-Legal-Publications/Documents/Corporate%20Governance%20and%20King%203.pdf* (accessed 19 August 2016)
[418] A quick guide to corporate governance and King code III available at *http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Corporate-Governance-King-3.pdf* (accessed 2 October 2015)
[419] Societas Europaea 2001/86/ EU Of The European Parliament And Of The Council
[420] *Nyamande & ors v Zuva Petroleum* Judgment No. SC 43/15 Civil Appeal No. SC 281/14

5.3.2.3 Remuneration Policy

The 2003 Action Plan also led to the adoption of the 2004 recommendations on directors' remuneration.[421] The recommendation on directors' remuneration requires that the directors have to disclose their salaries as well as the principles that the company uses to determine this remuneration.[422] In 2010 some of these aspects were clarified in a remuneration directive. A directive is a legislative act that sets out a goal that all EU countries must achieve.[423] However, it is up to the individual countries to decide how.

The above directive states a remuneration policy should aim at aligning the personal objectives of staff members with the long-term interests of the credit institution or investment firm concerned.[424] It states that the assessment of the performance-based components of remuneration should be based on longer-term performance and take into account the outstanding risks associated with the performance.[425]

After the 2003 Action Plan was implemented, the Union sought to move towards a harmonized system of corporate governance though a Green Paper on EU corporate governance.

5.3.3 Green Paper on EU corporate governance 2011

In the year 2011 the Commission conducted research and drafted a new Green Paper on EU corporate governance. It focused on three areas, some of which were an improvement of some of the elements mentioned above. The three areas were: transparency and information

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[421] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)

[422] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)

[423] What is a directive? Available at *http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm* (accessed 19 August 2015)

[424] Article 1(7) Directive 2010/76/EU Of The European Parliament And Of The Council

[425] Article 1(9) Directive 2010/76/EU Of The European Parliament And Of The Council

for shareholders, effective application of the abovementioned 'comply or explain' rule as well as supporting growth and competitiveness.[426]

The green paper pointed out that shareholders lacked engagement with companies and this meant that they could not hold the management to account for its performance.[427] The Green Paper recommended that the board had to appoint an independent expert to provide an impartial opinion on the terms and conditions of related party transactions to the minority shareholders.[428] In terms of the 'comply or explain' the Commission pointed out that there was poor transparency and in order to ensure that there was better compliance there was a need for the better explanation as well as application of the principle.[429] The Green Paper, similar to every other initiative which tried to harmonise corporate governance it was not approved because there were a number of things that failed during public participation. However, one of the important aspects which can be learnt from this paper by the SADC region is that of the balance of minority shareholders rights for instance this would protect foreign investors in countries with nationalistic views which allow for the majority shareholders to be nationals of the countries as mentioned in previous chapters in relation to the Zimbabwe Indigenisation Act. The Green Paper was followed by the 2012 Action Plan.

5.3.4 European Commission's Action Plan 2012

In response to the issues raised in the 2011 Green Paper the 2012 Action Plan was drafted and it dealt with enhancing transparency, engaging shareholders and simplifying cross-border operations of EU companies.[430] However for the purposes of this discussion not all aspects will be discussed but only those which have not been covered above.

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[426] Okoye V *Behavioural Risks in Corporate Governance: Regulatory Intervention as a Risk Management Mechanism* (2015)108
[427] Green Paper on the EU corporate governance framework COM(2011) 164 final
[428] Green Paper on the EU corporate governance framework COM(2011) 164 final
[429] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)
[430] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)

5.3.4.1 Enhancing Transparency

The Action Plan dealt with a number of aspects on the subject of transparency. It pointed out the need for boards to give broader consideration to the entire range of risks faced by their company.[431] So in order for this to be done the Commission suggested that there should be an extension of the reporting requirements to include non-financial parameters in an effort to provide a comprehensive risk profile of the company, enabling more effective design of strategies to address those risks.[432] The Commission argued that such non-financial reporting would encourage companies to adopt a sustainable and long-term strategic approach to their business.[433] African countries including those in SADC are in need of sustainable businesses to improve their economies. There is a lack of foresight in the running of businesses and companies do not survive for a long life span because of risks taken to make quick money due to poverty hence such reporting would be important in addressing this challenge.

5.3.4.2 Shareholder rights

The Commission argued that in dealings where the company contracts with its directors or controlling shareholders and may cause prejudice to the company and its minority shareholders the oversight of the shareholders must be strengthened.[434] This initiative sought to safeguard shareholders' interests from abuse by other shareholders as well as from directors in transaction which involve them. This is a very common thing in Africa including Southern Africa were directors enter into agreements with their own companies and overcharge commodities to make a profit. Hence such a provision would be vital in safeguarding against such behaviour.

[431] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies COM(2012) 740/2
[432] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies COM(2012) 740/2
[433] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies COM(2012) 740/2
[434] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies COM(2012) 740/2

The 2012 Action Plan was followed up by the recent 2014 package which has proposed a number of amendments of the directive on shareholder rights so as to codify the suggestions which were given.

5.3.5 Commission's measures package of 2014

The Commission's package is the latest move by the European Union in trying to beef up their corporate governance framework. It deals with three areas in the directive on shareholders' rights which are remuneration, shareholder engagement and enhancing transparency.

5.3.5.1 Remuneration

The proposal to amend the directive of 2010 states that the general meeting of shareholders will be authorised to vote on the remuneration policy for the managing directors.[435] This is called a "say on pay" policy, whereby shareholders will have the right to vote on a company's remuneration policy in respect of directors.[436] Moreover, the remuneration policy should be submitted to the general meeting for approval every three years.[437] Listed companies must prepare a remuneration report with an overview of the remuneration awarded to each individual managing director.[438] This seeks to curb the problem of the abuse of office by directors who end up paying themselves exorbitant salaries which are not linked- to their performance or the work that they have done for the company similar to the way in which it is being done in Zimbabwe as discussed in the beginning of the paper.

[435] Proposal to amend the Shareholder Rights Directive available at *http://www.stibbe.com/en/news/2014/july/proposal-to-amend-the-shareholder-rights-directive* (accessed 21 July 2015)
[436] Proposal to amend the Shareholder Rights Directive available at *http://www.stibbe.com/en/news/2014/july/proposal-to-amend-the-shareholder-rights-directive* (accessed 21 July 2015)
[437] Geens K et al *The European Company Law Action Plan Revisited: Reassessment of the 2003* (2003)92
[438] Geens K et al *The European Company Law Action Plan Revisited: Reassessment of the 2003* (2003)92

5.3.5.2 Enhancing transparency

In terms of the aspect of transparency the Commission's proposal recommends that there must be rules of disclosure. The Commission states that proxy advisors, asset managers and institutional investors have to be regulated by these disclosure recommendations. [439]
For instance, proxy advisors are required to publicly disclose certain key information related to voting and to their clients and the listed companies concerned on any actual or potential conflict of interest.[440] In terms of institutional investors, they are required to disclose to the public how their equity investment strategy is aligned with the profile and duration of their liabilities and it contributes to the medium to long-term performance of their assets.[441] Asset managers are also required to disclose on a half-yearly basis how their investment strategy and implementation contributes to medium to long-term performance of the assets of the institutional investor.[442]

5.3.5.3 Shareholder Engagement

In relation to shareholder involvement the Commission reiterated the need for involvement of shareholders in related party transactions. The Commission gave a detailed explanation of these types of transaction. As an example it states that transactions with a related party representing more than 5% of their assets or that may have a significant impact on profits or turnover are submitted to a vote by the shareholders in a general meeting.[443] As mentioned above the inclusion of this is very important in curbing prejudice by directors or majority shareholders who offer a service or product.

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[439] Ungerechts R 'The Role of the European Union in Corporate Governance for European Business' retrieved at *http://www.consulegis.com/wp-content/uploads/2014/10/The-Role-of-the-European-Union-in-Corporate-Governance-for-European-Business.pdf* (18 August 2015)
[440] Proposal for amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement COM(2014) 213 final
[441] Proposal for amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement COM(2014) 213 final
[442] Proposal for amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement COM(2014) 213 final
[443] Enriques L 'Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)' *ECGI Working Paper Series in Law* (2014)28

5.4 Criticisms and Successes of the EU corporate governance regime: Lessons to be learnt by SADC

As mentioned above the EU has been against a number of corporate governance harmonisation initiatives. However there are a number of lessons that can be learnt from most of their initiatives. Though it only has proposals and action plans these have managed to speak to present day issues post the 2008 financial crisis.

5.4.1 Criticisms of EU corporate governance

As mentioned above the EU has not managed to harmonise their corporate governance law. The laws are haphazard and countries are left to improve their own laws on corporate governance. SADC needs a concrete model set of laws which deals with the subject in a well-rounded manner. Snippets of laws on remuneration, shareholders rights, transparency among others though very detailed cannot be used for the SADC region as most of the laws are outdated and poorly drafted hence there is a need for a complete review to beef up their corporate governance.

Moreover one can argue the development gap raises questions with regards to the compatibility of EU frameworks with institutional contexts dominated by informal institutions, for instance family firms.[444] As mentioned in the chapter dealing with the OECD that there are a lot of informal business in SADC which will possibly not fall under the scope or even be discussed in the European Frame work simply because these are no longer relevant in EU countries.

5.4.2 Successes of EU corporate governance

The EU corporate governance drafts plans and proposals fill the gaps created by the OECD 2004 Guidelines on Corporate Governance. One would argue that these paved way for the

[444] Siems M and Alvarez-Macotela O 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 26

2015 OECD Guidelines which deal with the issues of remuneration as well as risk which were some of the problems which led to the financial crisis. Moreover though EU corporate governance seems stagnant one can note that there is extensive consultation as well as research on these issues. It has gone through thorough discussion and is dynamic as it keeps moving with the times as well as the issues in the region. This is an attribute that is needed in SADC so as to create robust corporate governance laws or any other laws.

5.5 Conclusion

If one is to examine the corporate governance of the EU it could be said that it leaves a lot to be desired because of the lack of corporation between the members. In view of the issue at hand which is that of the harmonisation of SADC corporate governance law the EU drafts offers snippets of laws that can be used post the financial crisis corporate governance and though these maybe excellent other issues are not covered hence it is not a viable option. However, a lot can still be learnt from the thorough nature of the law-making process as well as the efficiency of the institution of the EU. The next chapter will present conclusions as well as recommendations as to how SADC can harmonise the corporate governance laws.

CHAPTER 6

A HARMONISED SADC CORPORATE GOVERNANCE FRAMEWORK

6.1 Introduction

Throughout this paper an analysis of the OECD, OHADA and the EU corporate governance systems have been provided in the bid towards the harmonisation of SADC corporate governance laws. This chapter will review the conclusions and arguments raised in chapters 2, 3, 4 and 5 so as to recommend models that can be followed in the harmonisation of SADC corporate governance.

6.2 OECD

The OECD principles on corporate governance are the international yardstick for corporate governance as they have successively formed the basis for a number of reform initiatives, both by governments and the private sector.[445] The guidelines have managed to influence key corporate governance policies internationally and also in different countries such as South Africa in the form of the King Code III, the Olivencia Code of Italy and the Peterson report in the USA. However, though Southern Africa and Africa at large are lagging behind in corporate governance there are no OECD members from the continent.

Even though there is no African involvement it cannot be ignored that the OECD offers a viable option to the improvement of corporate governance laws in the SADC region. Through it comes the option of non-member activity as well as assistance from the World Bank in the form of access to resources to improve corporate governance. It is no wonder why Asia, Latin America, Russia have chosen to use these principles to improve their corporate governance laws.[446] SADC is a poor region and the help of the World Bank through the non-member

[445] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: An International Review* (2005) 4
[446] Jesover F and Kirkpatrick G ' The Revised Principles of OECD Corporate Governance and their Relevance to Non-OECD Countries' Corporate Governance: An International Review (2005) 4

system would be very important in the harmonising of the corporate governance laws in the region.

It is also important to note that the OECD offer a harmonised system of corporate governance laws which is neutral to all legal systems. As mentioned at the beginning of the paper SADC has diverse legal systems and through the adoption of the OECD Guidelines there is a neutralisation of all these differences and thus one system which takes into account all of the systems is used. Moreover, it makes sense to adopt the OECD Guidelines because most of the big investors in African companies are from countries in Europe, USA and China and all these are members of the OECD or in the case of China active non-members.[447] Thus predictability will play a great role in boosting investments because there is a law that is common amongst the countries hence there will be no need for the investors to pay experts to research the corporate governance of SADC countries but they will be aware of the system. However, this does not mean that SADC must adopt the OECD Guidelines without considering some of the things that will not apply to SADC countries.

6.3 OHADA

In the spirit of 'Africanising Africa's solutions' OHADA has proven to be a good platform in issues of harmonisation of Business Laws in its members states. It has managed to enact the Uniform Act on the Law of Commercial Companies, the Uniform Act on the General Commercial Law, the Uniform Act on the Security Law, the Uniform Act on Simplified Procedures for Recovery and Enforcement, the Uniform Act on Collective Proceedings for the Clearing of Debts, the Uniform Act on the Arbitration Law, the Uniform Act on the Organization and Harmonisation of Accounting of the Enterprises, the Uniform Act on Organising Secured Transactions and Guarantees and the Uniform Act on Contracts of Carriage of Goods by Road.[448]All of which has direct application in member countries and are superior to the national laws of the member countries on any of these subjects.

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[447] Shumba T *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models*(Unpublished thesis Stellenbosch University 2014)271
[448] Mouloul A *Understanding the Organization for the Harmonisation of Business Laws in Africa (O.H.A.D.A)* (2009) 34

However, in comparison to legal systems that have effective corporate governance regimes such as the OECD as well as the King Code III of South Africa, the AUSCIGIE has a number of significant ambiguities including inadequate protection of shareholder rights, no clear separation between the roles of chairman of the board of directors and CEOs, there is the absence of independent directors to neutralise the powers of the CEOs , the mechanism for disclosure is weak and there is a lack of legal diversity in the OHADA laws hence the laws favour a civil law system. Though there are some successes in other aspects of law that SADC can learn from, OHADA corporate governance laws need a boost in order for it to be an option for the harmonisation of SADC corporate governance.

However in light of the concept of African solutions a lot can be learnt from the South African King Code III which has been lauded around the world. Therefore, one can argue that because the King III has elements of the OECD Guidelines it is a viable option for SADC harmonisation in corporate governance. Though it has not been discussed in detail in this paper one cannot ignore it especially because it is also a country from SADC and what better solution than that of a member state.

6.4 EU

The European Union (EU) is arguably one of the most advanced regional integration systems with a single market for products and financial services.[449] It has harmonised laws in a number of fields, including Trade where the concepts of freedom of movement of people, freedom of movement of goods and non-discrimination among others are highly rated and highly encouraged. Nonetheless, corporate governance has for some time been the Achilles heel of this progressive regional organisation. It is clear from the discussion in chapter five that corporate governance has not been harmonised, However a few aspect thereof have been improved such as the 'say on pay' policy, whereby shareholders will have the right to vote on a company's remuneration policy in respect of directors.[450] There has also been the emergence of the 'comply or explain' principle which also places pressure on the

[449] European regional integration available at http://ec.europa.eu/internal_market/company/index_en.htm (accessed 22 June 2015)
[450] Proposal to amend the Shareholder Rights Directive available at http://www.stibbe.com/en/news/2014/july/proposal-to-amend-the-shareholder-rights-directive (accessed 21 July 2015)

management to explain their reasons for not applying corporate governance principles if they chose not to do so. The EU drafts offers snippets of laws that can be used post the financial crisis corporate governance and though these maybe excellent other issues are not covered hence it is not a viable option. Only the relevant snippets may be included in the harmonised SADC law.

6.5 Recommendations

In view of the discussion above, one of the viable options is that of going the OECD route where SADC can use the non-member system to harmonise corporate governance in SADC. However, one cannot ignore some of the positives from the other systems that have been mentioned above which are also important and should be reflected in the SADC law. Hence the substance of the law must be an amalgamation of the OECD, OHADA, and EU rules as well as the King Code III in order to bring out a balanced law. For instance the King Code III apply or explain principle, the say or pay policy in the EU, the OHADA statutory auditor principle as well as disclosure principle of the OECD may be included in this law.

Since corporate governance law has such an impact an amendment of the Protocol on Finance and Investment[451] to include corporate governance could be a way to harmonise corporate governance in SADC. In order for the amendment of the Protocol to occur any Member State may propose the amendment to the Executive Secretary of SADC for preliminary consideration by Council after all Member States have been notified.[452] The amendment to this Protocol can then be adopted by a decision of three quarters of the Member States of SADC.[453] This protocol is already responsible for some of SADC's corporate governance efforts in the form of corporate governance in the central bank discussed in the second chapter and could be said to be a starting point for SADC corporate governance. [454] This

[451] SADC Protocol on Finance and Investment 2006
[452] Article 36 of the Treaty of The Southern African Development Community 1997
[453] Article 36 of the Treaty of The Southern African Development Community 1997
[454] United Nations Economic Commission for Africa 'Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC' (2009)45

would be a good option which does not include that drafting of a new law but the issue of three quarters majority would be a problem among countries to vote in favour of it.[455]

The second way to harmonise corporate governance in SADC would be through a Protocol on SADC corporate governance. A Protocol is a legally binding document committing the SADC states to the objectives and specific procedures stated within it. A Protocol requires a two thirds of the Member States to ratify or sign the agreement to make it officially valid.[456] However, one has to be mindful of the fact that there will be no enforcement mechanism with the new position regarding the jurisdiction of the Tribunal. In Article 33 of the new Protocol it stipulates that the Tribunal will only have jurisdiction over the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.[457] The problem is that most issues on corporate governance will be between private individuals hence there will be no recourse at that level for the breach of the protocol hence it is very difficult to argue that viability of a Protocol on Corporate Governance without an enforcement mechanism. However, there might be hope if the Protocol on the Tribunal is amended to include such issues but this would be wishful thinking considering the case of *Mike Campell v Zimbabwe*.[458]

The last and most viable option would be an introduction of a Model Law on Corporate Governance which is a soft law and is not binding on member countries. An example of such would be that SADC Model Law on Electronic Transactions and Electronic Commence which was adopted by the SADC Ministers of Telecommunication, Post and ICT to enhance electronic commerce in the region by improving and modernising national laws.[459] This in view of the circumstances would be the best and most viable option in a fragmented system such as SADC. One can note that even the CISG and OECD Guidelines on Corporate governance among others are soft law themselves and have a great following and are

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[455] The SADC Protocol available at *http://www.sadc.int/about-sadc/overview/sa-protocols/* (accessed 21 September 2015)
[456] The SADC Protocol available at *http://www.sadc.int/about-sadc/overview/sa-protocols/* (accessed 21 September 2015)
[457] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe 2008
[458] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe 2008
[459] The SADC Model Law on Electronic Transactions and Electronic Commence available at *http://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf* (accessed 21 September 2015)

succeeding in their fields. Since there is no possibility of the enforcement of a Protocol if it is enacted a Model law would not need enforcement as it is a Soft law but will guide the countries in improving their corporate governance laws.

6.6 Content of the Model Law on SADC Corporate Governance

The SADC harmonised law must take the form of a model law which is based on the content of the OECD with aspects taken from the King Code III the OHADA and EU where the OECD fails or is unclear in its law.

The OECD 2015 Guidelines on corporate governance look to be watertight with the addition of guidelines on institutional investors, remuneration of directors and risk management. It seems quite difficult to argue the presence of loopholes in the guidelines. However, an innovation worth mentioning in the OHADA is the presence of statutory auditors in the companies. This enhances the transparency in the companies in the region in relation to their financial reporting. This could be a worthy inclusion in the SADC Model law. Moreover , the King Code III apply or explain rule is a worthy addition because unlike the comply or explain rule of the new OECD rules it shows that it's not about just mindless compliance but is there to consider how the principles and recommendations can be applied in the context of each company.[460] The King code III has also gained credibility with regards to Small Enterprises (SME) as well as Family business. One of the criticisms which is outlined about the OECD was that it failed to address the need of SMEs. The King code III for example recommends a charter for the board of directors that indicates their responsibilities and duties which has to be performed by small SMEs, including the owner operators.[461] In addition to the above it has provisions on external auditors and company secretaries which can be applied to SME's.[462] Another worthy addition from European law would be the inclusion of aspects from the

[460] A quick guide to corporate governance and King code III available at *http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Corporate-Governance-King-3.pdf* (accessed 2 October 2015)
[461] Le Roux F 'The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises'(Unpublished MBA thesis University of Stellenbosch 2010) 70
[462] Le Roux F 'The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises'(Unpublished MBA thesis University of Stellenbosch 2010) 70

European Company Statue *Societas Europaea* which added obligatory worker involvement at European level particularly by including participation rights at company board level.[463]

6.7 Conclusion

In conclusion though the option for a Model Law has been chosen as the most viable in line with the realities in the SADC region, it should be mentioned that the ideal would have been a Protocol which could be enforced in the event of non-compliance with the law, but due to the position of the Tribunal it is not possible. SADC must learn from the EU and OHADA institutions which have succeeded in the administering of their laws within the member states as well as their discipline and political will to follow their community laws so as to move forward as a region.

[463] Societas Europaea 2001/86/ EU Of The European Parliament And Of The Council

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