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THE ROLE OF GOOD CORPORATE GOVERNANCE IN PROMOTING DEVELOPING COUNTRIES AS ATTRACTIVE INVESTMENT DESTINATIONS

Mini-thesis submitted in partial fulfilment for the LLM degree, University of the Western Cape

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Declaration

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Key words

Company Directors

Corporate Governance

Developing Nation

Foreign Direct Investment

Investment Destination

Portfolio Investment

Theories of Corporate Government

Abstract

This thesis seeks to unpack the measures and structures that a developing nation can put into place to establish itself as a good investment destination. It discusses the three theories of corporate governance, and how the adoption of the Enlightened Shareholder approach is the ideal theory for developing economies to adopt. It reviews the practices of the Republic of South Africa and the Peoples Republic of China to investigate what developing nations can learn from their legislation.

The purpose of this thesis is to identity strong areas of corporate governance to better assist developing nations in their establishment of their corporate governance measures.

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CHAPTER ONE

INTRODUCTION AND OVERVIEW

1.1 Background

Corporate Governance is theorised to be the way in which a company is directed and controlled.[1] In identifying the definition of corporate governance, the thesis will look into various sources to determine a definition that can best encompass the meaning of corporate governance. For this thesis, the text will focus on the corporate governance practices of South Africa and China. This can be referenced to the different acts these two nations have implemented; firstly, the South African Companies Act 71 of 2008 and then secondly The Company Law of the People's Republic of China (revised in 2013).

Determining corporate governance legislation and practices is not an easy task. According to Kay[2], this analysis will be largely determinant on the ultimate objective of the company. This thinking is in relation to the three major theories that find their application in corporate governance, namely; shareholder, stakeholder and enlightened shareholder theory of investment.[3] Each theory of corporate governance will steer in a different direction the operation and strategic outcome of the company.

When interpreting and understanding the shareholder theory one needs to take this from the point of view of individual private ownership as the foundation of capitalist economic development. The core

[1] Mongalo T 'South Africanizing company law for a modern competitive global economy' (2004) *SALJ* 173

[2] Kay A The Enlightened Shareholder Value Principle and Corporate Governance (2013) 14-15

[3] ibid 14-15

interpretation of the theory is that investments must be operated for the gain of the shareholders.[4] The managers and directorate of the company are to focus company practices on realising and maximising the interest of the shareholders, and this is prioritised before the interest of other parties who may have a claim against or in the company.[5] With this understanding, the shareholder approach only concerns itself with economic prosperity, as this will bring about the greatest realisation in the investment made by the respective shareholder. The reasoning behind the shareholder theory is that the shareholders are the original owners of the company and thus management has a fiduciary duty to act in their best interest. Should the corporation act for any other purpose than maximising profits this would be seen as an opportunity for management to abuse their power and for governments to interfere in the running of the company, which allows for the undermining of the free market society in which businesses thrive.[6]

In contrast to the shareholder theory is the stakeholder theory. Unlike the shareholder theory, the stakeholder theory does not only focus the company administration on the maximisation of company profits for the benefit of shareholders. This theory recognises that there are more parties, which need to be taken into consideration, other than the shareholders. It identifies these other parties by establishing who has an interest in the company and balances the interest of all parties when practicing corporate governance.[7] Companies have a social obligation that they need to see to, as the corporation always affects more parties than the shareholders within a company and this theory seeks to see this

[4] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 247

[5] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 15

[6] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 247

[7] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 15

through.[8] Stakeholders in this theory are not limited to parties that have a vested financial interest in the company but any interest that can be established. These parties have been identified to include the following, but also not limited to: creditors; managers; employees; suppliers and community members who depend on the company's survival.[9] Therefore, this theory seeks to ensure that all these parties are taken into consideration when corporate governance is practiced.

There is also a third theory that needs to be reviewed. It pulls understanding from both the stakeholder and shareholder theory of investment. This has been theorised to be the Enlightened Shareholder Approach.[10] The enlightened shareholder theory tries to find a balance between the financial investment the shareholder has brought into the company and the interest(s) of the stakeholders. The enlightened shareholder approach deems that company governance should not focus extensively on the short-term profit maximisation that would benefit the shareholder, but rather build longer lasting relation-ship by ensuring stakeholder interests are met, as this can bring about a better gain for shareholders — this is viewed as a long-term goal.[11] Therefore, it combines factors of the stakeholder and shareholder theory: the focus on economic growth as per the shareholder theory and the mindfulness of business impact from the stakeholder theory.

[8] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 250

[9] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 23

[10] Kay A 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach '(2007) 590

[11] ibid 590

To sum up all the above, corporate governance concerns itself with the way in which companies are controlled and directed.[12] Therefore, a nation is presented with these three theories of corporate governance however, in this thesis the Enlightened Shareholder Approach will be used as the ideal theory. This is due to its duality approach, benefiting the shareholders and stakeholders.

The impact of corporate governance has its effect in how a nation is viewed when considered as an investment destination. This link will be the focus of this thesis. Investors invest in other nations by means of foreign direct investment and portfolio investment. The former is done by purchasing assets in another nation. The investor will gain control over the form of production but the nation in which the investment is done gains the fiscal contribution/purchase of the wealth of the investor and thus strengthens their economy in relation to the investment made. [13] This also allows for larger financial flows into the production process of the nation. Portfolio investment is however defined as a foreign national simply purchases shares in a foreign nation.[14]

When investors seek out possible investments they have to consider the possible risks, their investments may be exposed to. When investors seek out investments, they have to be wary of a variety of different factors[15] that each may have an important impact in the risk assessment.[16] An area of concern with investors is that they are at an informational disadvantage due to the geographical separation

[12] Mongalo T 'South Africanizing company law for a modern competitive global economy' (2004) *SALJ* 173)

[13] Moosa I *Foreign Direct Investment: Theory Evidence and Practice* (2002) 1-3

[14] Sornarajah M *The International law on Foreign Investment* (2004) 7-9

[15] ibid 65-75

[16] A risk assessment is an assessment that is made of a country when seeking investors want to find possible investment opportunities. Their assessment will then either encourage or deter them from investing. 'Corporate Governance & Risk

between themselves and their investment. When seeking investments, they wish to ensure that the investments made are sound[17] and the effective corporate governance legislation and company practices help alleviate this geographical separation. This alleviation of the geographical barrier amounts to a cost saving for the investors, thus making the investment more attractive,[18] which is the ultimate goal of a developing nation. Further to these factors, there are other factors that investors making use of foreign direct investment needs to consider, namely the countries' prominence to industrial action,[19] its political landscape[20] and the environmental impact[21] of the investment.

1.2 Research question and objectives

The thesis will investigate how a developing nation can set itself up as a good investment destination. In order to address this the thesis will unpack the following:

Management' available at *http://www.garp.org/media/991488/theroleofriskgovernanceineffectiveriskmanagement_tunji_adesida_071312.pdf* (Accessed on 7 December 2019)

[17] Das P 'The role of corporate governance in foreign investments '(2014) *Applied Financial Economics* 187

[18] ibid 189

[19] Niselow T 'Workers have lost R56m in wages as Gold Fields strike nears four weeks '(accessed on 7 December 2019) available at *https://www.fin24.com/Companies/workers-have-lost-r56m-in-wages-as-gold-fields-strike-nears-four-weeks-20181123*

[20]' The aim of the investment drive is to create jobs: Ramaphosa '(accessed on 7 December 2019) available on *http://www.sabcnews.com/sabcnews/the-aim-of-the-investment-drive-is-to-create-jobs-ramaphosa/* and Zhou Q 'China's New Foreign Investment Law: A Backgrounder' (accessed on 8 December 2019) available at *https://www.china-briefing.com/news/china-new-foreign-investment-law-backgrounder/*

[21] 'How to measure the "impact" in impact investing' (accessed on 7 December 2019) available on *https://www.dailymaverick.co.za/article/2019-10-28-how-to-measure-the-impact-in-impact-investing/*

- How the Enlightened Shareholder Approach is the preferred theory of corporate governance, in comparison to the Shareholder and Stakeholder theories
- What legislation is currently in place within the jurisdictions of the Republic of South Africa and the Peoples Republic of China (this includes the economic independent city of Hong Kong). How these address reporting requirements and director conduct
- What defines a foreign investment, with reference to foreign direct investment and portfolio investment? The benefits and any negative side effects these pose to a nation. It will also unpack other factors that investors could possibly take into consideration, namely the prevalence of industrial action, environmental policy constraints and the political readiness of the government to investments.

Answering these questions will allow this thesis to determine if there is a link between good corporate governance establishing a nation a good investment destination.

1.3 Literature Review

The literature used within this thesis will be books, journal articles, internet resources and both national and international legal texts. The texts refer to corporate governance (with reference to the three theories), its development and finally how this affects the want of investors to invest in nations. This thesis will focus on the link between corporate governance and investment within the legal jurisdictions of South Africa and China.

- Corporate governance

For purposes of this thesis, the field of corporate governance will be limited to its development. In order to properly discuss South African corporate governance, one needs to keep cognisance of the fact that South African corporate governance has its origins in the corporate governance practices of

the United Kingdom.[22] Therefore when South African Corporate Governance is discussed there is generally a link to the British regime and this will form part of the development discussion in this field.[23] In comparison, the development of Chinese corporate governance practices has not developed from that of another nation but has been developed to bridge the gap between the Far East and the West.[24] China access to western markets and westerns markets access to China. China on the other hand was socialistic in its economic governance, which was driving away future investors wanting to making investments in a capitalist nature.[25] Cassim F, when discussing corporate governance, advises that when this is done correctly, it is beneficial to the nation as it makes the nation more attractive to investors when considering investment opportunities.[26] However, this cannot be taken blindly as other actors advise that investments do not always benefit the host nation.[27]

Internationally, the Organisation for Economic Co-operation and Development (OECD) principles have been established. The OECD originated from Europe as a common model, which the nations

[22] King M 'Synergies and Interaction between King III and the Companies Act 61 of 2008' (2010) *Acta Juridica* 446

[23] Mongalo T 'South Africanizing company law for a modern competitive global economy' (2004) *SALJ* 93

[24] Yong K, Sui L, Brown E 'Chinese Corporate Governance: History and Institutional Framework' available at *http://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR618.pdf*

[25] Pettman J, Lamjav N *The Evolution of Corporate Governance in China: The effects of ownership on Chinese listed companies* (Unpublished Finance & Strategic Management Masters Thesis, Copenhagen Business School, 2009) 29

[26] Cassim F et al *Contemporary Company Law* (2012) 473

[27] Sornarajah M *The International law on Foreign Investment* (2004) 57 - 59

model their corporate governance practices on. Often reference is made to these principles when corporate governance is discussed.[28]

• Foreign direct investment and portfolio investment

The literature on this field is more focused on the economic sector of investment and goes about listing economic formulas as to how this can be predicted and understood using mathematics.[29] There is however literature that combines the understanding of mathematics and corporate governance and uses this link to see the patter of development and investment, these are however short in number.[30] When one refers to the text by Chaze,[31] there is an unpacking of how development in China has not taken place from the usual foreign direct investment way to that of institution building. This stems on the discussion of the development in this field.

Sornarajah unpacks the difference between portfolio investment and foreign direct investment. Foreign direct investment is considered the more long-term investment option as it requires the investor to take up business in a foreign nation and pursue the business ventures form this location. Technology has allowed business to be set up across the globe and be managed from a central place and thus geographical distances are overcome. Foreign direct investment requires control over the business as the investor managers the investment directly. Portfolio investment however is the investment of securities. This is when an investor invests to find a quick profit within the foreign nation's securities

[28] 'OECD (2015), G20/OECD Principles of Corporate Governance' available *at https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf* (Access on 16 September 2020)

[29] See general discussion by Solnik B *International Investments* (1988)

[30] Das P 'The role of corporate governance in foreign investments' (2014) *Applied Financial Economics* 187 - 201

[31] Chaze A *The Asia Investor: Charting a course through Asia's Emerging Markets* (2010)

exchange. Unlike foreign investment, this does not require control, as securities are easily exchangeable and does not geological restraints like foreign direct investment.[32]

• Developing Nation

An important concept to establish would be to identify what makes a nation suitable to be identified as a developing nation, without this definition the recommendations that will be made in the fifth chapter of the thesis will be out of focus, as they will be made for developing nations. National ranking (least developed, developing and developed) is a mathematical analysis of the nation's economic stance.[33] The World Trade Organisation, however, allows a nation to choose their own standing.[34] South Africa and China has not listed themselves as least developed countries but rather as developing economies. The United Nations has promulgated a set list and it is used as the point of reference when identifying least developed nations.[35]

This study seeks to unpack the link between the practice of good corporate governance and how this causes a nation to be viewed as a good investment destination. In establishing this, the analysis will first be made to establish what makes a nation a good investment destination and how the Chinese and South African corporate governance legislation has assisted each nation in establishing itself as

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[32] Sornarajah M *The International law on Foreign Investment* (2004) 7 - 9

[33] 'Statistical Annex' available at *http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf*

[34] 'Who are the developing countries in the WTO?' available at *https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm*

[35] 'Understanding The WTO: Developing Countries' available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm*

a good investment destination. South Africa and China has been selected based on how these two nations are part of BRICS (Brazil, Russia, India, China and South Africa),[36] a group of emerging economies that are good investment destinations.[37] A further reason is the similarities to their corporate governance rules and regulations as will be unpacked further in this thesis.

1.4 Significance of the study

The importance of this study highlights itself in assisting other developing nations to amend and develop their corporate governance legislation in order to make their nation a more attractive investment destination. With the research done within this thesis, corporate governance will be investigated as to the challenges of ineffective legislation with recommendations given on how to rectify this. The corporate governance structures of China and South Africa will be reviewed to unpack what developing nations can learn from their adoption of corporate governance. These nations have been chosen as they are good examples of developing economies with effective corporate governance legislation.

1.5 Limitation of the Study

The thesis seeks to unpack the corporate governance structures and regulations within South Africa and China to determine if they can be used to make a nation a good investment destination. Corporate governance is a strong factor in the establishment of a nation as a good investment destination it is not however the only factor that investors look into.[38] A limitation of this study will be on the ability of the country to enforce the regulations they have in place. Furthermore, as discussed in chapter four the thesis, discusses how domestic issues can have an impact on the confidence corporate governance

[36] 'The Rise of BRICS FDI and Africa' available at *http://unctad.org/en/PublicationsLibrary/webdiaeia2013d6_en.pdf*

[37] 'Emerging advantage' available at *http://bricsmagazine.com/en/articles/emerging-advantage*

[38] Miles K *The Origins of International Investment Law* (2013) 238

tries to assure. The discussion is around industrial action, political unrest and environmental challenges. These are factors that will have an influence into the quality of the investment destination. Another limitation is that I am unable to interview international investors with their view on what creates good an investment destination to them.

1.6 Research methodology

For this thesis, the research methodology that will be used will be desktop research. The research will be in identifying what good corporate governance legislation is and how the implementation and adoption of this can inspire investor confidence within a nation. The thesis will focus on the legislation of South Africa and China and seek to establish what makes these countries' corporate governance legislation effective in establishing it as good investment destinations. Within the section on Chinese corporate governance, specific focus will be on the legislation and governance within Hong Kong. This research has been chosen, as within developing nations, investment is important for economic development. The main research references will be desktop research, consulting primary and secondary sources.

1.7 Chapter Outline

This mini-thesis will consist of 5 chapters

Chapter 1: Introduction

This chapter served as an introduction to the focus of the mini-thesis. It also provided the problem statement, what will be used to answer the statement, the literature review, the importance of the study and how this can be used to better the understanding of corporate governance.

Chapter 2: Corporate Governance

This chapter will focus on what defines corporate governance and why this is an important legal field. The different corporate governance practices within South Africa and China as well as their unique development will be discussed. The chapter will also identify any special practices within corporate governance of each nation and how other nations, especially developing ones, can learn from it. It will focus the discussion on the requirement of the directorate or senior management as well as the requirement of reporting. Special mention will also be made on legislation should it be different to industry standards.

Chapter 3: Investment Law

This will discuss what forms of investments a developing nation seeks to attract. It will review how the scope and concept of an investment and how it has developed. The discussion will further unpack the sources of investment law and how they impact developing nations. An in-depth discussion will be into the difference and similarities of Foreign Direct Investment and Portfolio Investments. This will yield the preferred method of investment for the developing nation. Further to this, the thesis will review the positive and negative impacts that an investment can bring to a nation and in the case of negative impacts; how it can be avoided, if at all.

Chapter 4: The Linkage between Corporate Governance and Investment

The fourth chapter will unpack the linkages between corporate governance and establishing a nation as a good investment destination. It will also discuss other factors that investors review when seeking investment destinations. Based on the discussion into alternative factors investors review, it will determine if good corporate governance is enough to establish a country as a good investment destination.

Chapter 5: Conclusion and Recommendations

The fifth chapter will conclude the above chapters. It will also make recommendations based on the research done within the above chapters as well as how developing nations can learn from the corporate governance practices of South Africa and China.

CHAPTER TWO

CORPORATE GOVERNANCE

2.1 Background

As the concept of a company has developed over the past few years the power the private sector has within the economies of the world, developing nations included, in many cases surpasses or equates to governmental influence within the economies.[39] Many corporations have even transcended their local national boundaries and are now multinational enterprises that have a footing / impact in more than one nation. Corporations have the power to affect so many citizens of the world that naturally its governance needs to be regulated and scrutinised to ensure that it is run well.[40] Ineffective corporate governance regulation has been under scrupulous review since the recent financial crisis. The lack of good corporate governance has been dubbed as one of the main reasons for the collapse of the Lehman Brothers Corporation, the 7th largest bank in the United States of America and other world leading financial institutions.[41] Post the financial crises, the topic of corporate governance has become a more pivotal issue in company law as a repeat of the recent financial crisis cannot be allowed to occur due to the interlinking of nations' economies; a failure of one can have global effects. The repercussions and after effects are still felt to this day.

This chapter will unpack what corporate governance is and why this is an important practice within company law. To fully grasp this concept, corporate governance will be analysed across the three

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[39] Shah S 'The Rise of Corporations' available at *http://www.globalissues.org/article/234/the-rise-of-corporations* (accessed on 10 Oct 2017)

[40] Rezaee Z *Corporate Governance and Ethics* (2009) 7

[41] Anderson R & Associates 'Risk Management & Corporate Governance' available at *http://www.oecd.org/corporate/ca/corporategovernanceprinciples/42670210.pdf* (accessed on 15 Feb 2016)

theories of practice, namely: shareholder, stakeholder and enlightened shareholder theory. It will assess the need for corporate governance, especially within a developing economy and why there is a need for this aspect of company law to be under constant development for economic growth. It will also examine at the specific laws within the Republic of South Africa (RSA) and the Peoples Republic of China (PRC) in trying to understand the reasoning of these two nations in creating their corporate governance in the manner in which it stands today. It will however not be possible to discuss the nation's entire sphere of corporate governance, so it will be limited to the following: the reporting required by the companies and the duties placed on directors or prominent leaders within the companies.

2.2 What is corporate governance?

This section will unpack and analyses what is Corporate Governance. In establishing this, one can properly determine how this aspect of company law can be of use to developing nations in establishing themselves as attractive investment destinations. Establishing the purpose of the company needs to be understood and more importantly, whom it is focused towards, as this will greatly assist in understanding this concept of law. [42] Due to corporate governance not having a universal definition, it is within the legislative body of each nation to determine its ambit and area of regulation.[43] This is controlled and enacted based on the specific needs of each nation. Loosely defined the term corporate governance is associated with the management and control of the company.[44] This simple definition only covers the surface of corporate governance as within each of the points listed within the definition, there are sub points that all add up to the practice and understanding of corporate governance.

[42] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 14

[43] Mongalo T 'South Africanizing company law for a modern competitive global economy' (2004) *SALJ* 173

[44] Rezaee Z *Corporate Governance and Ethics* (2009) 7

Internationally, the Organisation for Economic Co-operation and Development (OCED) has developed a comprehensive policy that many nations use and build on when they develop their corporate governance. The OCED has released an updated set of principles in 2015 in which it defines corporate governance with the following statement

> Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.[45]

The definition allows for flexibility and adaptation, which is one of the requirements within the field of corporate governance. This as the ever-changing corporate world adapts and its governance must be able to keep up with this.[46]

For the furtherance of the thesis, only listed companies and the regulations imposed on them will be discussed. Listed companies' securities can be purchased by any member of the public via the securities exchange of the nation but in the case of an unlisted company, its securities can only be purchase when the owner of the securities sells them privately.[47] The differentiation between these two types

[45] G20/OECD Principles of Corporate Governance (2015) 9

[46] ibid 10

[47] The owners of these shares need only legal personally; it need not be a human being as companies are allowed to own shares of another company.

of companies and their securities are important, as there are different regulations for each of the two. It is generally more common for the listed companies' securities to be controlled with more stringent rules than the unlisted companies' share control. These differences will be further highlighted when the corporate governance of China and South Africa is discussed.

2.3 Theories of corporate governance

When seeking a definition of this term, one needs to understand the different theories that come into play. The two that has taken centre stage in company law are the shareholder and stakeholder theories. These two theories are seen as the extreme right and left side of corporate governance legislative understanding. Due to this, the enlightened shareholder approach was adapted and brought into company law. These three theories will be unpacked and discussed below.

2.3.1 Shareholder theory

The shareholder theory sees the shareholders as the reason the company is in existence and thus advocates for the company to be run to their benefit.[48] Individual ownership is seen as the foundation of the capitalist economic development and the shareholder(s) are the force that promotes and drives such economic development. The father of this theory is Milton Friedman and he famously stated the

South Africa - Companies Act 71 of 2008 (as amended) S95(1)(h) and Financial Markets Act 19 of 2002

PRC - Company Law of the People's Republic of China (Revised in 2013) Art. 138-145 and Securities Law of the People's Republic of China (2005) Chapter 3

[48] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 243

following as a justification for his theory: 'There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits.'[49] Thus, the core focus of the company should be focused to how the company can maximise the shareholder gains.[50]

The theory developed due to the increasing size in companies. With larger companies being in existence, the concept of ownership could no longer be practically held by management; causing the split between ownership and management.[51] The Shareholder theory advocates for the increasing in wealth as the sole reason for the establishment of the company.[52] Without the express unambiguous contractual claim[53] by stakeholders in a company the directorate cannot act in their interest; the shareholders wealth is the primary concern.[54] Company directors and managers are not however forbidden from considering other parties' interest when making decisions, however this can only be done if the end goal maximises the shareholder value; an example of this would be a company partaking in a charitable event. This decision is allowed under the shareholder theory as it can attract business, which will be for the ultimate gain of the shareholders.

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[49] Ferrero I, Hoffman W, McNulty R 'Must Milton Friedman Embrace Stakeholder Theory' (2014) 119 *Business and Society Review* 39

[50] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 247

[51] ibid 247

[52] Corporate deviance is defined as actions that are taken against company policy. Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 16

[53] Alibi C 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' 2 (2014) 40

[54] Hansmann H, Kraakman R 'The End of History for Corporate Law' (2001) 442.

Within the shareholder theory, there are sub-theories that advocate for its practice. The first is the agency theory. It contends that company directors are the agents of the principals (shareholders) within the company and are thus mandated to act in the furtherance of their interest.[55] According to the Shareholder Theory without this relationship, company management would act in their own interest and not focus all company actions on growing company profits. The theory does however have challenges to its application. The first being that company management does not owe such an agent-principal duty to the shareholders.[56] Either company shares are purchased from shareholders or from the company; this does not infer an implied obligation on part of the company management to the shareholders for them to run the company in the best interest of the shareholders only.[57] Secondly, the managers of the company are not agents of the shareholders; they only have a duty of agency to the company as the company employed them.[58] Thirdly, managers and directors can enter into contracts with third parties that affect the company only.[59] They have no power to attach responsibilities to the shareholder, which further strengthens the argument for a separation. Finally, directors are tasked with the management of the company.[60] This is contradictory to the agent-principal theory as in the theory the agent is governed to act under the control and direction of the principal only.[61] In conclusion, the agency principle adopted for the benefit of the shareholder theory is not a principle

[55] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 248

[56] Saltaji IM 'Corporate Governance And Agency Theory How To Control Agency Costs' (2013) 55-56

[57] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 21

[58] Saltaji IM 'Corporate Governance And Agency Theory How To Control Agency Costs' (2013) 55-56

[59] ibid 55-56

[60] ibid 55-56. Shareholders are however to instruct Directors on actions in the annual general meetings, but these are reserved for these meetings and not a conduct on a daily basis.

[61] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 19-20

that can still be brought into practice, as there is sufficient evidence, as discussed above to discredit its application.

According to Kay A,[62] under the shareholder theory there is also the claim that shareholders have a residual claim against the company should it come under liquidation, as it is the shareholder that has placed his/her funds into the company for it to run. It is argued that it is the shareholders that have the most to lose and thus the company should be run for their interest at hand.[63] This is challenged as when companies are liquidated there are more parties that stand to lose out; workers, creditors, contractual parties. It would be incorrect to advocate that the shareholders are the only parties that stand to lose when a company fails. The above proves that should the directors and management only act in the interest of shareholder value maximisation it would be an erroneous business practice as it negates that there are other parties that also have a stake in the success of the business.

In the above, one can see how the shareholder theory proposes to advance that all company focus should be on the advancement of shareholder value. The shareholders are seen as the parties that supplied the capital that created the business. Essentially the business would not be in existence without the supplied capital and therefore their wealth maximisation is key. However as seen above, there are opposing views to this one-sided thinking of company management. It is contended that such a view is not a well thought out process as it brings about tunnel vision.

[62] ibid 21-23

[63] ibid 21-23

In line with the thesis topic, such a corporate governance measure would be highly welcomed on part of the shareholder in developing nations, as their wealth maximisation would be considered as paramount to the company establishment and daily business. Any investor would therefore see a good investment growth; however, for a developing economy this can have serious negative consequences on part of the people and other stakeholders within the business ventures. Having an economy that does not provide any form of consideration for these stakeholders could lead to a situation where the companies exploit workers for profit maximisation. For theses dangers, unless they are proactively sought to be prevented by the host nation, cannot be prevented with a pure shareholder maximisation economic view. It is therefore not an appropriate theory of application, as developing economies need to look into establishing and strengthening the development of its people alongside economic growth. Reviewing the text, it is my view that the shareholder theory is not the most effective theory of corporate governance to have a developing economy modelled after.

2.3.2 Stakeholder theory

As discussed above, the shareholder theory advocates the company governance must be directed to increase the shareholder value. It became increasingly more important for companies to regard other factors with more importance when governance was discussed and acted upon. This birthed the stakeholder theory, which advocates the company not only focus its business adventures for the benefit of the company shareholder(s) but also to incorporate the interest of other parties that may have vested interest in the company for its ongoing operation / success.[64]

[64] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 250

The theory advances that when a company acts, through its management and directorate; it does so in the name of the company and acts for the company's interests.[65] The actions are on behalf of the shareholder and other parties that have a vested interested in the company. Companies have a social obligation that they need to see to, as the company influences more parties than the shareholders of a company and this theory seeks to give these other stakeholders more thought when corporate decisions are made.[66] Stakeholders in this theory are not limited to parties that have a vested financial interest in the company but any interest that can be established i.e. creditors; managers; employees; suppliers and community members who depend on the company's survival.[67] Therefore when decisions are made, thought needs to be taken of more affected parties than the shareholder wealth maximisation.

One of the main arguments for the change in company governance is the limited liability theory, which states that a company acts within its own name and not in the name of the shareholders. In *Salomon v A Salomon & Co. Ltd* [1987] A.C. 22 the court confirmed that the company is a separate legal entity from its shareholder and in the case when the company is unable to pay its debts, such creditors cannot claim from the shareholders.[68]. The shareholders are protected via limited liability

[65] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 12 *Corporate Governance: An International Review* 250

[66] ibid 250 - 251

[67] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 23

[68] This is however not a definite, see general discussion by Payne J 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' 56 (1997).

in that the company is liable for their actions and not the shareholders of the company.[69] When incorporated into corporate governance it has the following effect: a company can enter into a contract [of any kind] with a third party and such stated third party has a claim only against the company for performance, not its directorate or management. Should the company not be able to pay the debts the creditors cannot claim from the shareholders for this performance; the same would apply to delictual claims made against the company.[70] This theory brought into question the concept of the shareholders' wealth increase to be the sole reason for the company's existence as the shareholders cannot be the only parties whose interest should be taken care of, as they are not the only parties that stand to suffer should the company face a liability. In conjunction with the shareholders, other parties stand to lose in the unfortunate case of the company being liquidated or underperforming. Therefore, these parties' interest should be considered when corporate decisions are made.

The stakeholder theory advocates for more parties' interest to be taken into consideration when implementing company governance structures and measures. Difficulty in this practice is establishing whose interest should be taken into consideration when making these informed decisions. This decision is ultimately left to the directorate to determine, as they will need to establish and balance out all factors when decisions are taken.[71] In determining this they also need to be mindful of time factors, e.g., the decisions will have a particular impact on some parties if taken at a particular time but may not affect the same party should it be taken at a later stage. These interests should then be weighed up against one another and that be used as a determining factor; effectively being a mediator between the different interest. Having all the factors determined the ultimate decision of company directions

[69] This isn't always the case as there are exceptions to this rule, namely: lifting the corporate veil.

[70] Ferrero I, Hoffman W, McNulty R 'Must Milton Friedman Embrace Stakeholder Theory' 119 (2014) 44

[71] Kay A *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 45-46

still lies with the directorate of the company as they are charged with the effective management and direction of the company.[72]

As seen with the shareholder theory, the stakeholder theory too has received criticism to its operation. The first being that the theory is difficult to put into practice. For a company to consider the interest of all its interested parties is extremely troublesome and time consuming and this is an unfair burden placed on the directorate, in conjunction to running of the company.[73] In many cases, these companies have multi-national footing and therefore has accumulated a vast number of stakeholders. Secondly, the shareholders have in certain circumstances, the right to the derivative action against the directorate but a stakeholder does not have this same claim.[74] Should it be granted that stakeholders have a derivative claim against a company then it would place an unreasonably difficult task on the courts to identify each stakeholder, and then weigh them all up against each other to determine the relative validity of their interest.[75] This is a near impossible task companies has an ever growing number of stakeholders at any given time. Thirdly, the theory is based on the principle of fairness. It is argued that when non-shareholders are given preference to shareholders (who have vested financial interest within the company) it involves an unfair transfer of this vested interest. The fairness application does not always interpret into a fair and just decision when the investment or interest of all parties are

[72] ibid 47

[73] ibid 51

[74] ibid 51

[75] ibid 51-52

taken into consideration.[76] Taking all the above into consideration the stakeholder theory that advocates and advances the interest of more interested parties to be considered has its logistic challenges as the task of determining and validating the interest can be highly demanding.

Reviewing the above text, the stakeholder theory seeks to establish a corporate governance structure that not only identifies difference stakeholders within a company but to also have their needs and interest be placed in equal consideration when company ventures and actions are taken. The interest of the shareholder no longer carries greater weight as financial contribution to a company is no longer the primary point of concern. Any party who has a vested interest in the continued operation of the company should be given thought. It is the theory that advocates for company that is aware of its stakeholders and seeks to advocate and increase their interest and not just operate on profit maximisation.

In line with the thesis topic, the stakeholder theory would be of great growth to the communities around the business investments made within the nation. Stakeholders would be given equal consideration to the shareholder and their development and protection would be considered as paramount as shareholder wealth maximisation. This line of corporate governance would however have a deterrence factor in terms of seeking and establishing the nation as a good investment destination. Investors seek investments where their investment can grow the fastest and with the greatest margin in the shortest amount of time. Should a nation not allow this to happen then investors may not want to invest in that nation. It is important to note that the shareholder theory is not opposed to maximising shareholder wealth, but it does not view this as the primary focus of the company. It views it on equal footing to the needs of the other stakeholders the company has. Therefore, in my view the theory may

[76] ibid 51-52

be ideal for community development but would not establish the notion as an attractive investment destination.

2.3.3 Enlightened Shareholder Theory

As seen above, the two theories each advocate for either the shareholder(s) or the stakeholder(s) to be the focus of company administration and governance. This is however a one-sided adaptation to effective corporate governance as should a company strictly follow only one these theories, then there would always be a party that suffers. The above theories do not allow for a more well-rounded and all-inclusive adaptation and application of good corporate governance. Adopting the shareholder theory in corporate governance creates a situation where stakeholders are left in the dark. It enforces that wealth maximisation of the shareholders is the ultimate reason for the business to be in existence. This method of thinking and practice has been argued as one of the causes of the 2008 economic crisis.[77] However on the other side of the scale the stakeholder view, places the shareholder on equal footing to other parties that have an interest in the company. This can have the effect of lowering the investment eagerness by investors to invest in the nation due to them not foreseeing their growth being acted on. It would be disastrous for a developing economy to be synonymous with this line thinking. Having these deterrent factors for each of these theories the enlightened shareholder theory was birthed. It advocates that shareholder investment should be looked after, as the shareholder theory proposes, but this should not be done to the alienation of the interests of company stakeholder interest.[78]

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[77] See general discussion in by Tse T 'Shareholder and stakeholder theory: after the financial crisis' (2011) *Qualitative Research in Financial Markets* 51-63

[78] Letza S, Sun X and Kirkbridge J 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) 243

The enlightened shareholder theory tries to find a balance between the financial investment the shareholder has brought into the company and the interest(s) of the stakeholders.[79] The enlightened shareholder approach deems that company governance should not focus extensively on the short-term profit maximisation that would benefit the shareholder but rather build longer lasting relationship by ensuring stakeholder interests are met, as this can bring about a better gain for shareholders — this is viewed as a long-term goal.[80] It is very important to note that if there is a clash between the shareholders and stakeholders interest, the theory requires the interest of the shareholders to take preference.[81] The theory understands that when its stakeholders see a company in a good light then its financial future can be more prosperous as trust in a company is earned over a long period. Once achieved the company's good name has the ability to create more business opportunities. The theory seeks to ensure that there is longevity in the decisions made by the company.[82] It must however be stressed that this is an extension of the shareholder theory, which means that maximising shareholder wealth is still the main goal of the corporation.[83]

This theory of corporate governance also allows for the practice of corporate social responsibility (CSR). This looks at how the company's actions affect their stakeholders. In doing so, it determines

[79] Cassim F *Contemporary Company Law* (2012) 21

[80] Kay A 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 590

[81] Cassim F *Contemporary Company Law* (2012) 20

[82] Williams R 'Enlightened Shareholder Value in UK Company Law' 35 (2012) 366

[83] Alibi C 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' 2 (2014) 50

the way the company makes financial gain with impact on its social, environmental and finical footprints. CSR is not a legal requirement in many nations, but it has become a common practice.[84] The practice includes within its ambits of human rights and labour law into corporate governance, effectively making the company a more well-rounded corporation. It places a human touch to its dealings.[85] This is increasingly important as the company name and reputation is not as big of a benefactor as it was in the past. Corporations now have another valuation system, which measure their social, environmental and financial footprint within a nation.[86]

The enlightened shareholder theory has a few areas of contention that needs to be clarified. The enlightened shareholder theory is certainly not the shareholder theory that seeks to only increase the profits of the shareholder(s) without regard to other factors, but it does demand that profit increase be a central factor in company decision making. Should a business decision be taken in the interest of stakeholders that has a long-term business benefit to the business but does not allow for immediate shareholder growth maximisation then this decision is still deemed to be taken in line with this theory. The ambit and scope of the enlightened shareholder theory is that the wealth maximisation of the shareholders should be the main objective of the company but there is also a greater focus on the long-term longevity on the company and this is sought by also making sure the company has a CSR

[84] Buhmann K 'Integrating human rights in emerging regulation of Corporate Social Responsibility: the EU case' (2011) 140

[85] ibid 146

[86] See general discussion by Andreozzi L 'When Reputation is not Enough: Justifying Corporate Social Responsibility' in Sacconi L (ed), Blair M (ed), Edward Freeman R (ed), Vercelli a (ed) *Corporate Social Responsibility and Corporate Governance: The Contribution of Economic Theory and Related Disciplines* (2011) 253-271

arm.[87] Actions may be taken for the benefit of stakeholders if they are ultimately aimed at promoting the success of the company in the end.[88] The act need only be taken in good faith by the directorate or senior management — this is measured against the skill, care and diligence of a director in their position.[89] A further discussion on CSR will be unpacked and how each nation addresses this concept. This is a fundamental difference to the shareholder theory as it contemplates the importance of stakeholders and different to the stakeholder theory in that it advocates for profit maximisation as an important aspect in corporate operations.

Reviewing the enlightened shareholder theory for developing economies brings about a more complete economic theory of practice. It brings about this understanding because it incorporates both the nation of development as well as the investor's wealth growth: the reason for the investment. Companies are still required to grow the investor's investment but these needs to be done in connection with taking in account the impact this will have on other stakeholders in the company. The theory even allows the directorate to take decision that have the short-term impact of only benefitting other stakeholders as long as the ultimate or long-term effect is to grow the companies' name; which in effect grows the shareholders' wealth. In a developing economy, this would be the ideal theory of economic growth. It would attract the shareholders to invest in the nation but also it would serve the nation that the investment is made in via the stakeholders the company has. Having discussed all three theories of corporate governance, this thesis will be testing the RSA and PRC systems against all three in the furtherance of this chapter.

[87] Kay A 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 592

[88] Alibi C 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' 2 (2014) 44-47

[89] ibid 48

The next sections will unpack the corporate governance legislation within South Africa and China. Before a comparison is taken between the two nations, the thesis will explain why each nation's corporate governance structure has developed into the legislation it currently stands at. Specific mention and discussion will be taken into which theory of corporate governance each nation has chosen to adopt and why this has taken place. Special discussion will also be taken on one of the practices each nation has adopted and is driving to bring about effective corporate governance whilst still keeping to their general theory of corporate governance. First, the South African Legislation will be discussed followed by the Chinese legislation.

2.4 South African Corporate Governance

In reference to the discussion on the theories of corporate governance, nations have three-forms of economic theories to base their legislation against when acting under the ambit of corporate governance. As will be discussed below, the South African corporate governance regulations has had many developments since its introduction into the country. These developments can be seen in the many forms of sources the nation derives its legislation from and the manner in which they all interlink within one another to determine the legislation applicable to each transaction. Further discussion will be given to the development and current legislation as well as milestones reached.

2.4.1 History of South African Legislation

As South Africa was once a colony of the United Kingdom (UK), it adopted most of its business legal reform from the UK including that of company law legislation.[90] It was with the Companies Act 61 of 1973 (The Old Act) that South Africa moved away from complete reliance on UK company law.

[90] King M 'The synergies and interaction between King III and the Companies Act 61 of 2008' (2010) 446

The legislation introduced into South African company law was however still similar to that of its previous colonial power, but now it also adopted practices the legislature saw effective from other common wealth nations into law.[91] Even with the induction of all these legislative acts into South Africa law, the common law still held ground as an applicable law and many of the practices and principles has also been codified into the later passed legislation.[92] The law of the land at the time included both the common law and the legislation enacted by parliament. The Old Act did not regulate on corporate governance matters. Due to this gap, the regulation on this was on a volunteer basis as per King Code I of 1994.[93] The King Codes are publications made by the Institute of Directors, Southern Africa. It is an organisation that seeks to develop the director profession by setting up rules and recommendations that can assist in ensuring that directors run companies in a better manner.[94]

To have a full grasp of South African legislation, one would need to understand the below and how they operate both in its exclusivity as well as together. South Africa corporate governance is regulated by common law, Companies Act 71 of 2008 (Companies Act),[95] King IV,[96] the Johannesburg Stock Exchange listing requirements and other applicable legislation, based on the type of company that is in question.

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[91] Mongalo T 'South Africanizing Company Law For A Modern Competitive Global Economy' (2004) 93

[92] ibid 94

[93] King M 'The synergies and interaction between King III and the Companies Act 61 of 2008' (2010) 446

[94] About the IoDSA' available at *http://www.iodsa.co.za/?page=About* (accessed on 11 October 2016)

[95] Companies Act 71 of 2008 S5

[96] The King Report on Corporate Governance for South Africa

2.4.2 South African Legislation

The Republic of South Africa (RSA) has four spheres of corporate governance legislation; these are Common Law, Statutory Law, King Code IV and JSE Listing Requirements. Depending on the company, they will be bound to follow one or a few of these legislative requirements. All companies are required to follow the Common Law[97] and the Companies Act.[98] However if a company is listed on the JSE securities exchange it needs to comply with the King Code IV[99] and JSE Listing Requirements (JSE LR)[100] in addition to the Common Law and Companies Act. As this thesis is based on both PI and FDI, all the spheres will be discussed. The focal point will be on actions and requirements of directors (or board of governors)[101] and the reporting requirements of companies.

A quick summary on the four spheres of corporate governance legislation in RSA. Common Law is derived from the legal practices ruled on by courts. This legal president once passed by courts, becomes embodied within South Africa Law. These are not written pieces of law but are established via court decisions. This can include foreign law, on the premise that it is adopted by a court of law.[102] The basis or foundation of South Africa common law is Roman Dutch Law, as was confirmed in the Fishers Development case.[103] The Companies Act was drafted by the South African Parliament and

[97] Wiese T *Corporate Governance in South Africa with International Comparisons* 2 ed (2015) 14

[98] Companies Act 71 of 2008

[99] JSR LR S3.84

[100] JSR LR S1

[101] I have chosen these parties as they have the greatest impact in a company's growth and direction. They also the parties that have prescribed actions in all four spheres of corporate governance.

[102] Wiese T *Corporate Governance in South Africa with International Comparisons* 2 ed (2015) 14

[103] *Fisheries Development Corporation Of SA Ltd v. Jorgensen And Another* 1980 (4) SA 156 (W) 165

was placed in force in 2008. There are other sources of legislation that can be referred to for more specific industries such as the Banking Act 94 of 1990.[104] These acts of parliament allow for a widened area of application when assessing corporate governance as with specified areas of law being passed the development of corporate governance grows faster. The King Code was originally created in 1992, under the guidance of the Institute of Directors of Southern Africa (IDOSA).[105] This was done as the institute recognised that there was a lacking within corporate governance legislation of South Africa.[106] The JSR LR is a set of listing requirements imposed by the JSE on all companies listed on its security exchange.

2.4.2.1 Directors Conduct and Liability

In terms of actions and requirements of directors, all four spheres of legislation/governance have criteria on this subject. The Common Law states that there is a separation between the company and shareholders[107] and due to this, the actions of directors are required to act for the benefit of the company and not the shareholders. The problem with common law development of a legal system is that it is a very long process to enact change or development in a legal system.[108] Court cases only rule on specific matters which means that the common law develops at the rate at which the courts rule on the topic. This can bring about a stagnation in a legal system, as the progress is determined on matters being brought before a court of law. To further develop and hasten the development of corporate governance, in RSA, the Common Law is not the only source of legislation. The fiduciary

[104] Wiese T *Corporate Governance in South Africa with International Comparisons* 2 ed (2015) 25-26

[105] ibid 18

[106] Naidoo R *Corporate Governance, An Essential Guide for South African Companies* 2ed (2009) 29

[107] *Salomon v Salomon and Co Ltd* 1897 AC 22 (HL)

[108] Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC) paragraph 112

duties were further codified in the Companies Act.[109] Directors are tasked with fiduciary duties. These duties require of the directors is to act in good faith and in the best interest of the company. This conduct requires them to avoid conflict of interest, not exceeding the company's powers and furthermore to not conduct the business for personal gain. [110] Directors are required to act with care, skill and diligence;[111] however, this requirement is two-step showing both a subjective and objective leg. The first leg requires the test to be based on the actions of other directors in that directors' position. In this leg it is subjective to conduct and knowledge that can be reasonably expected from this director in question.[112] S78(3)(c)(ii) brings the second leg of the assessment which is subjective. This requirement tests the action against the action against the director in question based on their knowledge.[113] Both the subjective and objective leg needs to be met for the application to be successful. The requirement of the board of directors is to act in the best interest of the company.[114] This requirement is not purely objective, but the directors are required to take the necessary steps to be informed about the consequences of their actions, and they need to subjectively be assured that their actions are in the best interest of the company; this belief needs to be rational. The Act does not however do away with the common law requirements. They now live in coexistence to one another. According to Coetzee and van Tonder,[115] there is a partial codification of the duties imposed on the officers and the Companies Act also brings into law the Business Judgement Rule. This allows directors of companies

[109] S9(a)(b) & S77(2)(a)

[110] *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C)

[111] Companies Act 78 of 2008 S78(3)(c)

[112] ibid S78(3)(c)(i)

[113] ibid S78 (3)(c)(ii)

[114] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and others* 2014 (5) SA 179 (WCC)

[115] Coetzee L and Van Tonder JL (2016) 'Advantages and disadvantages of partial codification of directors' duties in the South African Companies Act 71 of 2008' Vol 41(2) *Journal for Juridical Science* 4

to take calculated risks if the intention behind it and hindsight shows that it was taken in the best interest of the company.[116]

The companies act does make provision for the removal of directors.[117] The removal process does allow for removal by the shareholders, in an ordinary resolution, however the directors being removed are afforded the right to make representations to challenge their removal in the shareholders meeting. These directors are also required to be provided with reasons for their dismissal and not merely notice of the dismissal.[118] This was further ruled in Butler v Van Zyl[119] in which the court ruled a director who is to be removed from office cannot prevent this unless there is a legal basis to do so. It is important to note that although a director has the right to make representations for their removal this may not prevent their dismissal. As there are two methods; removal by the board of directors or the shareholders. When removed by the board of directors, they are required to make the removal decision in the best interest of the company because they owe a fiduciary duty towards the company.[120] When a removal by the shareholders has taken place, this duty is not present and the shareholders can act in whichever manner they see fit, as a property owner.[121] It is important that the different methods

[116] Lee A "Business Judgement Rule: Should South African Corporate Law follow the King Report's recommendation?' (2005) *University of Botswana Law Journal* 52 - 53

[117] Companies Act 71 of 2008 S71(1) and S71(2).

[118] *Pretorius and Another v Timcke and Others* (15479/14) [2015] ZAWCHC 215 (2 June 2015)

[119] *Butler v Van Zyl* [2014] ZASCA 81

[120] Cassim R (2019) 'An analysis of directors' fiduciary duties in the removal of a director from office' *Stellenbosch Law Review* 215 - 221

[121] ibid 214

of removal is made within the ambit of the powers offered to these persons/officers. Should the removal by the board of directors not be done for the benefit of the company then such a removal can be reversed, and the director reinstated.[122]

The King Code IV uses the 'apply and explain'[123] method of application. This method places the onus on companies[124] that all closures and requirements of King Code IV is implemented[125] and companies can then report on matters is determines is beneficial to its stakeholders.[126] A further requirement that the King Code IV places is a standard of conduct on part of the governing body/directorate of an

[122] Cassim R (2019) 'An analysis of directors' fiduciary duties in the removal of a director from office' *Stellenbosch Law Review* 225

[123] King Code IV page 37 - "Explanation should be provided in the form of a narrative account, with reference to practices that demonstrate application of the principle. The explanation should address which recommended or other practices have been implemented, and how these achieve or give effect to the principle

[124] Although the requirement is placed on the company, practically it would be the directorate who would have to enforce and apply the requirement.

[125] Harris R Corporate Governance Law Reform in South Africa (Unpublished LLM thesis, University of Pretoria, 2016) 35

[126] The areas the company deems appropriate and disclose can then be done strategically to allow them to provide pertinent information that stakeholders and shareholders will find informative to make investment decisions

organisation.[127] King Code IV takes it further than the Companies Act[128] in that it requires the conduct to be done with accountability,[129] transparency,[130] and that full and adequate disclosure is kept regarding the meetings taken place.[131] With their independency of key,[132] the governing body/directorate should hold the required skill and knowledge to conduct their duties whilst also being sufficiently diverse.[133] With their conduct, knowledge and actions being open for review[134] the King Code brings more accountability and transparency into the conduct of listed companies and those who choose to comply with it. The JSE LR does not mandate the action of the directorate but places procedural requirements on the appointment and removal of these officers.[135] These requirements are to furnish the JSE with the newly appointed details as well as the details of the removed officer. These requirements are set to ensure that the actions of directors of companies and appointment are conducted under sound governance.

[127] King Code IV - Glossary. It's important to note that governing body in this context refers to the directorate too, as is included from the Glossary.

[128] Companies Act 71 of 2008 S77(2)(a)

[129] King Code IV - Principle 6, Recommended Practice 1

[130] ibid - Principle 6, Recommended Practice 3

[131] ibid - Principle 6, Recommended Practice 5

[132] ibid - Principle 7, Recommended Practice 25 & 28

[133] ibid - Principle 7

[134] ibid - Principle 9

[135] JSE LR S3.59 - S3.62

2.4.2.2 Reporting Requirements

The common law under the RSA legislation does not have requirements for the submission of reports. For requirements on this the Companies Act, King Code IV and JSE LR would need to be sought.

The Companies Act requires companies to submit financial reports on an annual basis; these are subject to independent audits, which allows shareholders to have more insight into the financial viability to the company.[136] These officers are required to ensure accuracy in the publishing of the financial reports, as they can be held liable for any material fall in them.[137] According to the Companies Act these reports needs to show the financial position of the company[138] and the assets & liabilities of the company.[139] This needs to be published annually.[140] These are important requirements for the continuation and stability of a company.

A concept that the King Code IV has continued in its application of corporate governance is that of the Triple Context.[141] Companies are encouraged to integrate their thinking in operations a business to their impact on social, environmental and economic factors.[142] It realises the interdependency between these factors and requires business to be mindful of this interdependency. Using this thinking

[136] The Companies Act 71 of 2008 s30

[137] ibid S77(3)(d)

[138] ibid S29(1)(b)

[139] ibid S29(1)(c)

[140] ibid S30(1)

[141] Kind Code - Glossary (page 18)

[142] King Code IV - Fundamental Concepts (page 24)

the King Code IV, has continued in the principles on integrated reporting as brought forth in King III. The code goes on to specify what is required in the various reports the company needs to report on.[143] The reports required by the King Code IV, is to be used to ensure that value[144] is created for the shareholder and stakeholders. It is also used to make informed decisions and assessments of the organisation's performance for their short, medium and long-term business ventures.[145] It is important to understand that principles refer to the governing body making these decisions and this has been described as the body responsible for the primary accountability of the organisation.[146] Principle 5 goes further to state the exact requirements for the reporting by including that the triple context needs to be added in the business reports submitted.[147]

Further requirements are contained in the JSE LR. Section 8 requires that certain financial information must be contained in the reports the listed companies publish to their shareholders and other required parties. The section also contains the information that needs to be contained in the prospectus and pre-listing statement.[148] To be included in this report is the historical report[149] on the actions taken by the listed company and the impact there of. These are required for, but not limited to, the public sale of securities, or a substantial disposal or acquisition of assets within the financial period. This will be essentially important to shareholders who are separated geographically from their investment, as this report will keep them up to date with regard to transactions that could significantly affect their

[143] King Code IV Principles 4 & 5

[144] ibid Principle 4

[145] ibid Principle 5

[146] ibid - Glossary (page 12)

[147] ibid Principle 5, Recommend Practice 11.

[148] Companies Act 71 of 2008 (as amended) S100

[149] The JSE Limited Listings Requirements (15 October 2017) - 8.1 - 8.2

investment. The JSE from understanding these reports, which is by no means an exhausted list, it is clear the JSE LR wants to ensure that transparency and accountability are principles under which the reporting requirements are kept. With reference to the theories discussed earlier, the discussed requirements are largely for the protection of shareholder and to ensure they are supplied with sufficient details on the company to actively manage their investments. Thus, these reports are in line with the shareholders theory in that shareholder maximisation is the core focus.

2.4.3 South African Corporate Governance Summary

The RSA legal structure around corporate governance has evolved from pure reliance on the UK company law and the common law[150] to the codes and legislation found in practice today.[151] There are three spheres of company governance thinking that a nation needs to consider when its corporate governance rules and procedures are being drafted. For a developing nation, this is critical as they are constantly seeking international investment to grow their economy. Investor confidence is not just an aspiration but also one that is imperative to grow a developing economy.[152] Without the confidence of these international investors, the economies of these developing nations would not be considered a good investment destination. The leaders of a developing nation will need to keep these factors in mind when drafting their corporate governance legislation and procedures. The RSA government and company law drafters had these in mind as they drafted the Companies Act 71 of 2008,[153] the King Code IV and the JSE LR. In considering all; in my view; the RSA government, with specific mention

[150] Wiese T *Corporate Governance in South Africa with International Comparisons* 2 ed (2015) 14

[151] The Companies Act 71 of 2008, King Code IV and the Johannesburg Securities Exchange Listing Requirements

[152] Isukul A, Chizea J 'Corporate Governance Disclosure in Developing Countries: A Comparative Analysis in Nigerian and South African Banks' (2017)

[153] Notebook on the Companies Act, 2008 (Act No. 71 of 2008) pg. 4

to the discussed parts of the sources of corporate governance, has adopted to follow the Enlightened Shareholder approach.

The purpose of the Companies Act's[154] shows the act was developed to create an environment where the investments made by investors are adequately protected and given enough attention. Innovation creation and creating an attractive investment destination were of the key foundations taking into consideration with this Act.[155] These factors can be seen with the Purpose of the Act, as discussed, it does not only focus on the shareholder maximisation but encourages an entrepreneurial spirit within the economy too. Having an economy based on these factors, can grow the nations' investment ratings on both the local and international platform. The reporting required by the Companies Act, further assists the investors in their keeping up with information relating to their investments which when the investors are separated from their investment they cannot do easily. Financial reports are fundamental in understanding and assessing the growth of the company the investors has invested in. The Act requires that there be a large amount of these reports, which enforces transparency into the investment of the company.[156] The Act does not however only focus on performance reporting but also requires that there be Triple Context reporting done which brings about the stakeholder aspect into the operation of this act, combining with the shareholder reporting requirements. The King Code IV also requires that there be reports done and made available to authorised parties. In the release of these report(s), value is created for the investors.[157] The JSE LR also requires reporting to be done. It is important to note that the reporting requirements of the JSE LR is based on creating a transparent and fair sphere for investment on the South African Stock Exchange. Reviewing the test, in my view,

[154] Companies Act 71 of 2008 s7

[155] Notebook on the Companies Act, 2008 (Act No. 71 of 2008) pg. 4

[156] The Companies Act 71 of 2008 s30

[157] King Code IV Principle 4

the requirements discussed above are in line with the enlightened shareholder theory due to the over-arching requirements for shareholder maximisation but in the same manner, the requirements require the stakeholder needs to be kept in mind when the decisions are made.

The other sphere in which the South African Government has drafted on is the requirements for directors and their behaviour. The companies act requires certain conduct from Directors with regard to their duty of care and skill.[158] The requirement is for the directors to act in good faith, in the best interest of the company with the required care, skill and diligence that may be reasonably expected. This requires a two-step process to be used when determining if the directorate of the company has failed to meet the requirements. As stated before this should not be confused with the fiduciary duties owed by the directors to the company.[159] The King Code in line with prescribing conduct of the directorate requires tasks to be done of the directorate that would further ensure transparency with the company and its conduct. The conduct required of the officers are to be done in the best interest of the company. The King Code IV requires that the directorate have sufficient knowledge to carry out their duties effectively. This places a standard on the level of directorate the company can appoint which is unfortunately not a requirement in the Companies Act.[160] The JSE LR in comparison to the directorate only places procedural requirements on these officers as well as disqualifying factors for these officers.[161] Taking the above into consideration it points the requirements for the directorate into the shareholder theory of corporate governance is of good reason. The directorate of the company

[158] Companies Act 71 of 2008 S76(3)

[159] It is interesting to note that the Companies Act 71 of 2008 makes a further reference to prescribed officers but the King Code IV has opted to not make use of this term too.

[160] Companies Act 71 of 2008 S76(3)(c)(ii)

[161] The Companies Act 71 of 2008 also has disqualifying factors for directors in S69

is responsible for the direction and drive of the company. Relaxed rules and requirements at that level of employees can have a disastrous impact on the company and its future.

The South African corporate governance follows the enlightened shareholder approach. This theory is based on the understanding that the profit maximisation of the company is what should be pursued but this should not be done to the exclusion of the stakeholders who have an interest in the company doing well. This is seen in the discussed parts of the corporate governance rules and procedures, which for the majority is steered at ensuring that the shareholder wealth is maximised, the shareholders are kept up to date with important information as well as ensuring that they are informed of important updated to the company, which may affect their investment. This is not however the only procedure that the RSA corporate governance sphere requires. It also requires reporting that is of a stakeholder nature and with the implementation of the triple bottom line it requires also factors to be taken into consideration of an environmental and stakeholder nature. These factors combined strongly suggest that the RSA corporate governance sector is following the enlightened shareholder approach.

2.5 Chinese corporate governance

In the next section on Chinese Corporate Governance, this thesis will unpack and discuss the corporate law procedures and requirements within the People Republic of China (PRC). In discussing it this thesis will as with the RSA section of this chapter unpack the structures the PRC government and private sector (if applicable) has put into place in order to guide and steer the Chinese corporate governance measure to success. The discussion will be an inspection into the rationale, purpose, directorial requirements and reporting required by its companies. These measures will be measures against the theories of corporate governance as was done with the South African section to determine which theory the nation is following.

2.5.1 History of Chinese Corporate Governance

Prior to 1978, the PRC was an economy that was run as a communist state.[162] The concept of privatisation was a foreign idea as it was linked to the western world,[163] a society not embraced by the Chinese people. PRC was a world leading economy before the modern age[164] took into effect, which meant that the nation was set up for a prosperous future should it continue in that leading manner. However due to its decision to embrace a communist form of economic development it slowed in its innovation, in comparison to the western world (with their embrace of the capitalist regime) and lost its footing as this economic giant.[165] Due to its past communist practice the people of PRC was accustomed to this way of business and the concept of capitalism was not easily embraced when the government started implementing it. The concept of capitalist thinking would take more time to become a form of thinking the people would practice and accept.[166] This period was the same time of the first company law legislation being adopted in PRC; The Chinese Company Law. In the PRC, the government had many State-Owned Enterprises (SOE) within the economy and these were not developing at the same rate as capitalist operated companies would be in western nations.[167] The SOE

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[162] Breslin S 'How China Changed the Global Economy and the Global Economy Changed China: Thirty Years of Investment and Trade' available at *https://www2.warwick.ac.uk/fac/soc/pais/people/breslin/research/30years.pdf* (accessed on 03 August 2016) 3

[163] The western world being referred to would be The United States of America, European nations and any other nations that embraced similar economic development and practices.

[164] Wei Y 'An Overview of Corporate Governance in China' (2003) Kluwer International 25-26. The Chinese economy was found in this position prior to the 17th century.

[165] ibid 26

[166] ibid 27

[167] Li L, Laughton T, Hovey M 'A Review of Corporate Governance in China' available at http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan033862.pdf (accessed on 03 August 2016)

management structure is linked to the political party of the nation and company objectives are political in nature[168] and established to fulfil social objectives set by the state.

Chinese corporate governance integration was a long process that involved many years of both legal and physiological review. The Chinese corporate governance structures were based on the SOE[169] and these corporate structures dominated the economic sector of the nation.[170] As discussed above, they were fundamentally flawed and did not assist the nation in developing its economy and holding onto its economic footing it had prior to the 17th century.[171] The Chinese corporate governance structure was therefore developed to give it access to the western world.[172] This development was fundamentally important, as without it the Chinese economy would not have progressed as it has.

In order for the Chinese government to implement the changes to their economy that was needed there needed to be transition period to allow the people and economy to adjust. As the PRC economic stance was based on, SOE there had to be a transition period in which the nation had to move to a capitalist form of economic activity. The first change required was a psychological transformation within the people of the PRC to usher in capitalist economic reform.[173] The second step required a

[168] Chen D *Corporate Governance, Enforcement and Financial Development: The Chinese Experience* (2013) 59

[169] These companies were the majority of business and enterprises that was found in the PRC. It was essentially companies that was run and headed by the state and used by the state for its own purpose.

[170] Chen D *Corporate Governance, Enforcement and Financial Development: The Chinese Experience* (2013) 57

[171] ibid 57

[172] ibid 57

[173] Wei Y 'An Overview of Corporate Governance in China' (2003) *Kluwer International Law* 30

change in the profit distribution[174] from ensuring the prevalence of the government to economic and business growth.[175] This third change was to the management and structure of the SOE's.[176] In the final stage of the Chinese corporate governance reform, the government embarked on legal and economic reform of the economy. It did this in two folds, firstly, more reforms with the SOE's within China and secondly, changes to the structure and governance of the SOE's. SOE's, even though transformed in a significant way, was still stagnate in nature, as felt by the local and central government.[177]

2.5.2 The Companies Law of the People's Republic of China

The Companies Law of the People's Republic of China was adopted in 2006. In its purpose,[178] the legislation sets out that the development of a socialist society is the goal of the legislation; even though the PRC has been and is currently undergoing a development to embrace more capitalism. This is quite interesting as the PRC has not chosen to move away from the socialist economic outlook taking into account there are many articles writing on the collapse of the Union of Soviet Socialist

[174] OECD - China policy dialogue on corporate governance. Corporate governance of listed companies in China. Self-assessment by the China Securities Regulatory Commission available at *http://www.oecd.org/corporate/ca/corporate-governanceprinciples/48444985.pdf* 14

[175] Pettman J, Lamjav N *The Evolution of Corporate Governance in China* (unpublished LLM thesis, Copenhagen Business School, 2009) 31

[176] ibid 33

[177] ibid 35

[178] Company Law of the People's Republic of China (Revised in 2013) No.42 Article 1

Republic based on the economic model was based on socialism;[179] it is important to note that pure capitalism is by no means the best practice for nations.[180] This set of rules are applicable to listed companies[181] and are required to conduct business in a socially acceptable and honourable manner.[182]

The PRC Company Law requires extensive compliance with the submission of financial reports. As seen with the JSE LR, the PRC Company law regulates the conduct of listed and limited liability companies.[183] These companies are required to submit financial reports every 6 months[184] as prescribed by the State Controls[185] and be audited;[186] which required full disclosure submission for the audits.[187] Failure by companies not disclosing the true financial findings places it under the threat of sever and persons/officer who failures to make such disclosures.[188] Shareholders are confirmed upon

[179] Gregory P 'Why Socialism Fails' available at https://www.hoover.org/research/why-socialism-fails; Klein A, Vonyo T 'Why did socialist economies flail?' Available at https://www.kent.ac.uk/economics/documents/research/papers/2017/1708.pdf (accessed on 18 December 2018); Perry M 'Why socialism always fails' available at http://www.aei.org/publication/why-socialism-always-fails/ (accessed on 18 December 2018)

[180] Johnston I 'Capitalism inevitably creates a 'sad' unfair world, physicist says he has proved' available at https://www.independent.co.uk/news/science/capitalism-sad-unfair-world-create-communism-doom-fail-physicist-adrian-bejan-duke-university-a7656246.html (accessed on 18 December 2018)

[181] Company Law of the People's Republic of China (Revised in 2013) No.42 Article 2

[182] *ibid* Article 5

[183] *ibid* Article 2

[184] *ibid* Article 146

[185] *ibid* Article 164

[186] *ibid* Article 165

[187] *ibid* Article 171

[188] *ibid* Article 203

the entitlement of these reports[189] and can have them requested on an ad hoc basis.[190] This is very important as investors are many times separated from their investment by great distances. Having the right to request these reports as a shareholder reduces the distance shareholders have from their investment.

The PRC; as with legislation in RSA; has legislative standards that the directorate have to comply with. Unlike seen within the RSA requirements, the PRC company law places more procedural requirements on the directorate. The conduct requirements are listed more in the PRC Company Ordinances, as will be discussed further in this thesis. The PRC company law requires a minimum amount of directors (this number is determined by the type of company in question)[191] and the structure of the board of director in relation to the chairman of the board.[192] Proxy representation by directors is made prevision for,[193] however the directors are held liable for the proxy decisions.[194] What the PRC Company Law is lacking is conduct-based regulation on part of the directorate. In my view, procedural requirements without an accompanying conduct requirement allows for abuse. These should be drafted with each other in mind. These requirements when met will create the procedural requirements for setting up a board of directors but these officers will not be mandated on how to conduct themselves according to this piece of legislation; an area the PRC Company Law falls short on.

[189] *ibid* Article 98

[190] *ibid* Article 34

[191] *ibid* Article 109

[192] *ibid* Article 110

[193] *ibid* Article 113

[194] *ibid* Article 113

In review of the PRC Company Law, its regulation of companies within the PRC is of a good procedural standard. This is seen in the multiple areas of cover it seeks to enforce good corporate governance. This can be seen form the purpose of the legislation, which steers towards the stakeholder theory as it advocates for a more socialistic operation of the economy. With reference to the theories of corporate governance, this in my view does not clearly follow either of the theories. However, by the meeting of the requirements it will inspire shareholder to have faith in the procedural aspects of the company being applied, this in conjunction to the clear socialistic approach by the legislature,[195] would place this within the ambit of the enlightened shareholder approach. This will grant the stakeholder the greatest benefit, but the statute further encompasses the requirements to have adequate protection for shareholders, as it understands the need of attracting investment. The largest benefit to shareholder (that has been discussed in this thesis) is the stringent reporting required of the company for the benefit of these parties and the rights these shareholders have to company reports and other documents of interest. Therefore, the PRC Company Law is in line with the enlightened shareholders approach.

2.5.3 Hong Kong - Company Ordinance

In the above chapter, the discussion was on the company law legislation that regulates mainland China. Hong Kong is within the PRC but is governed under a separate company law legislation.[196] Within Hong Kong, the Company Ordinance is the legislation that governs company law. It is important to note that if a business has its operation within the Hong Kong region is it required to comply

[195] Company Law of the People's Republic of China (Revised in 2013) No.42 Article 1

[196] 'Hong Kong territory profile' available at https://www.bbc.com/news/world-asia-pacific-16517764 (accessed on 16 November 2019)

with the Company Ordinance. As discussed with the PRC Company Law, the focus within the Company Ordinance will be that of the reporting required, director conduct and other factors that are for the establishment of creating a better investment destination.

The purpose behind the Company Ordinance is to modernise the company law legislation within the region.[197] This purpose foresees to the High Kong region being more modernised and steering the region into the future. In an article written in the China Briefing, it notes how the new PRC Company Ordinance is trying to reach four goals and one of them is to create a better space for corporate governance.[198] With such a goal, it shows the severity of the importance of this ordinance being implemented effectively. In addition to this, it includes now more stringent regulations on the actions of directors of the company as they hold the highest power.[199] This purpose statement will guide the understanding of the rest of the ordinance.

The Company Ordinance requires detailed reporting of financial matters by company's operation within the Hong Kong region. For comparison, the Company Ordinance does not require the same level of reporting the RSA legislation does.[200] The level of reporting requires is high, as the Company

[197] Company Ordinance No. 28 of 212 Purpose Statement

[198] New Companies Ordinance Takes Effect in Hong Kong available at http://www.china-briefing.com/news/2014/03/06/new-companies-ordinance-takes-effect-in-hong-kong.html?hilite=%27corporate%27%2C%27governance%27

[199] Harris R 'Three cheers for Hong Kong's new companies law' available at https://www.scmp.com/business/companies/article/1483691/three-cheers-hong-kongs-new-companies-law

[200] The RSA legislation (as was discussed) requires reporting on social environmental and financial matter.

Ordinance requires record keeping of all company transactions.[201] The transactions are required to be documented[202] and stored in a safe place[203] to ensure transparency in the reporting. The directorate of the company is tasked with ensuring the reporting is completed[204] and done accurately;[205] a summarised version can also be prepared.[206] Once these reports are completed, they need to be made available to before general meetings by sending them to the required stakeholders.[207] The requirement to have these reports submitted and made available is of high importance as failure to do so can result in the directorate being held personally liable.[208] With the preparing of the reporting there needs to be absolute accuracy as ambiguity can cause a misrepresentation. In a scenario where harm is caused by ambiguity in the report, the directors can be held personally liable.[209] Having a view in the reporting requirements of the Company Ordinance it shows that there are stringent requirements for the keeping of company records to ensure that the reports submitted and completed by the Director(s) are

[201] Company Ordinance No. 28 of 2012 S373(1)

[202] ibid S373(2)

[203] ibid S374(1)

[204] ibid S429(1). In addition to these the non-voting members of the of the company needs to be given copies of the same financial statements - Company Ordinance No. 28 of 2012 S435(1).

[205] ibid S380(1). In addition to this, the reports need to specify details of the remuneration of the directors and other financial benefits awarded to them. In addition to this there needs to be made mention of transactions made in the name of the company that a director has material interest in - Company Ordinance No. 28 of 2012 S383(1)

[206] ibid S439(1)

[207] ibid S429(1). In addition to this, the non-voting members of the of the company needs to be given copies of the same financial statements - Company Ordinance No. 28 of 2012 S435(1).

[208] ibid S429(2). The directors of the company also have the option to send these persons (members) the summarised report prepared by the directors instead of the full financial report - Company Ordinance No. 28 of 2012 S441(1)

[209] ibid S448(2)

accurate and show a true reflection of the company's finances. In my view these stringent requirements are in line with the shareholder approach as they place a large amount of detail and requirements on the company and its lead management to ensure that shareholders and possible shareholders are always kept in the details and understanding of the company's financial status.

The Company Ordinance requires a duty of care, skill and diligence of the directors of the company.[210] The requirement is subjective as it requires the test to be conducted to the current knowledge and skills possessed of the director in question.[211] This requirement is also require of shadow directors[212], which give the Company Ordinance a greater area of application.[213] Directors cannot also rely on the companies articles to grant them immunity from liability with regard to their actions should it fall short of legislative requirements.[214] However, this is not set in stone as the Company Ordinance does allow permitted indemnity from liability but these have very specific requirements.[215] To reference the requirements within the Company Ordinance to the PRC Company Law; the PRC Company Law regulates procedural requirements of the governing body (senior management) whereas the Company Ordinance places requirements in the form of conduct of the directorate. In view of the theories of corporate governance, the PRC's regulation on directors can be seen in both the shareholder and stakeholder theory. This is due to the fact that the regulation of the highest officers in the

[210] ibid S465

[211] ibid S465(1) & (2)

[212] A shadow director is someone who is not appointed as a director but who gives directions or instructions that the directors of the company are accustomed to act upon

[213] Company Ordinance No. 28 of 2012 S456(5)

[214] ibid S467

[215] ibid S469

company has a positive impact for both the shareholders whose wealth maximisation will be increased, and the stakeholders of the company has a higher chance of the company meeting the needs of its stakeholders. In light of this, the director's conduct regulated in these two pieces of regulation would fit into the enlightened shareholder view. This is due to the combined benefit for both the shareholder and stakeholder.

The Company Ordinance requires sufficient requirements for the conduct of the companies within the Hong Kong Region. This is key to ensure that there is a healthy environment for creating the optimum investment destination. The purpose of the Company Ordinance as discussed is to modernise the Hong Kong investment and company governance standards. This brings forth a high level of governance, which assist in creating an attractive investment destination in the region. With investors; something being separated by large distances; the requirements of effective report keeping, and publishing is vital for ensuring transparency and understanding in this sector. Coupled with the high level of skill and conduct required of the directorate can create comfort for investors. Having all requirements, it shows that the Company Ordinance has aspects of the stakeholder theory but ultimately the requirements above are more inclined to the shareholder theory when placed together. This as the majority of the requirements are based on the shareholder wealth maximisation. It is important to note that this may not be a true reflection of the company ordinance in its whole, as entire statue was not discussed above but only certain parts. For this reason, the sections discussed above would then fall in line with the shareholder theory, not taking into consideration the rest of the ordinance.

2.5.4 Chinese Corporate Governance Summary

In summary of the PRC Company Law and Company Ordinance, it is important to firstly understand that although there are different regions[216] in which these have application, it does not remove the impact these two-piece of legislation have in creating an attractive investment detonation for the PRC.

The purposes of both pieces of legislation was created with the intention of modernising the requirements and conduct of company law within PRC and Hong Kong. With the ongoing westernisation and history of the PRC, this was needed to bring in into a modern state. The conduct and requirements of the SOE's would not have been sufficient to take the PRC into the future of company law and investment attraction. Coupled with this is their reporting requirements, which place a high level of accuracy and transparency on the reporting required places further power and knowledge in the shareholder and stakeholder in these companies. Having the requirements so similar brings about consistency with regard to both regions within the PRC. Finally, the conduct and duties placed on the directorates of the company are different. The PRC Company law regulates procedural aspects to the establishing and requirements of the directors on how the company should be managed whereas the Company Ordinance places more emphasis on the conduct of these officers; requirements are to conduct their duties with greater understanding and effectiveness.

In summary these two-forms of company law legislation is important, as it is significant in modernising and developing the company law legislation within the PRC and Hong Kong region. Having a good and effective corporate governance measure in place definitely gives investors' confidence in

[216] The PRC Company Law has application within main land China (Company Law of the People's Republic of China (Revised in 2013) No.42 Article 2) whereas the Company Ordinance finds application within the Hong Kong region (Company Ordinance No. 28 of 2012 - Long Title).

choosing their investment destination. In my view with the proper application of these statute and ordinance, the PRC has the framework for good corporate governance practices.

2.6 Comparison of RSA and PRC Corporate Governance

To properly understand the current legislation requirements within the South African and Chinese dispensations, one needs to be mindful of their historical development. With the different reasons for the development, it provides more clarity on the reasons for the reasons each nation legislative chose to adopt the specific rules and requirements.

Both the PRC and RSA requires the submission of reports at the end of the company's financial period. In RSA, the requirements are to have them submitted for auditing by independent auditors. RSA legislation requires that there be a detailed submission of the financial status of the company, which the shareholders of the company should be provided and have access to upon their request.[217] This request and availability is also found in the legislation within the PRC. As with the RSA the PRC also places these requirements on the directors of the company to ensure that, the reports are submitted and done so correctly.[218] Both the nations have a similar standard required of the reports being submitted and both have time periods with regard to, when in relation to the financial year end the reports needs to be submitted. One-step the RSA government has taken further is its Triple Context[219] approach in its financial reporting. This requires that when reporting is done it needs to submit

[217] The Companies Act 71 of 2008 S30

[218] Company Law of the People's Republic of China (Revised in 2013) No.42 Article 203

[219] This was originally introduced in King Code III paragraph 9 and has subsequently been reconfirmed with the update to the King Code in King Code IV, under its fundamental concepts. The importance of this concept comes can be seen in the quote in King Code IV (page 24)

reports relating the triple context. This advances that the role of the business is not just for profit maximisation but also should be operated to be sustainable. This requires that the reporting be done not only on an economic level but also on the environmental and social impact the business has. This is different to the PRC, as it only requires the financial reporting and auditing as most nations do. It is important to note that the PRC requires under the PRC Company Law that the nation's companies build the nation in a socialist manner. In summary, the requirements of the procedural standard for the submission and times of reports are largely the same between the PRC and RSA. The major difference lies in the triple context requirement that the RSA requires of its companies. Therefore, these two states have very similar standards when it comes to the reporting requirements of companies.

With repost to the procedural and consult required of the directorate, the PRC and RSA have sillier standards. Within the RSA, the requirements are various in nature and are received from various sources.[220] Directors are requires to have a duty of care and skill[221] as well as fiduciary duties.[222] Under the King Code IV, the requirements are further expanded to accountability[223], transparency[224] and adequate disclosure.[225]These officers are required to possess the adequate skill to carry out the

[220] Common Law, Companies Act 71 of 2008, King Code IV and JSE LR

[221] Companies Act 71 of 2008 76(3)(c), *Fisheries Development Corporation of SA Ltd v Jorgensen, Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1979 (3) SA 1331 (W)

[222] Cassim MF 'Da Silva v C H Chemicals (Pty) Ltd: fiduciary duties of resigning directors' (2009) 1 - 70

[223] King Code IV - Principle 6, Recommended Practice 1

[224] ibid - Principle 6, Recommended Practice 3

[225] ibid - Principle 6, Recommended Practice 5

duties requires of the office[226]; this is extremely important as it places a requirement for a higher level of skill required of these officers. This is only however subjective as no requirements are places on directors to hold any formal qualification. Further to this the JSE LR places procedural requirements on the officer of the director, not character ones like the other sources of law. In comparison, the PRC places punitive measures on ill conduct of directors or on actions that can lead to harm on part of the company or shareholders. As seen in RSA, the PRC under the Company Ordinance also requires a level of skill and care on part of the office of the director.[227] The PRC takes this a step further as with the RSA and places these requirements on part of shadow directors;[228] the RSA disposition does this with the inclusion of Prescribed Officers[229], which can encompass these parties too. This widens the sphere of whom the sections can be applied to. Both nations have sufficient cover when it comes to the role of regulating the office of the director. This is important in that it provides a good amount of assurance to possible shareholders who invest in the company.

2.7 Conclusion

In conclusion, there are vast similarities between the regulations within the PRC and RSA with regard to the purpose of their corporate governance legislation/measures, the requirements for the submission of reports and the office of the directors. There are some slight differences in the application of these requirements such as the PRC requires that the application of the company legislation is geared towards establishing a socialist type of economy and the RSA is purely based on a capitalist model of corporate governance. The requirements for the submission of reports are identical; apart from

[226] ibid - Principle 7

[227] Company Ordinance No. 28 of 2012 S465

[228] ibid S456(5)

[229] The Companies Act 71 of 2008 S66 & S77

slight variations; with the exclusion of the Triple Context requirement under the RSA. This requires that reporting not only be done on financial bases but also with regard to environmental and social aspects. Noting this difference, the RSA requires a slightly greater ambit of reports to be submitted by the company. The requirements for the office of the directors are equal as they both have stringent procedural and character-based requirements. Therefore, it is safe to conclude that the RSA and PRC have similar if not identical corporate governance requirements in terms of the reporting and director requirements. They do have a different purpose statement behind the different legislation required but this is because of the different past histories of the nation, which the new legislation aims to rectify.

With the discussion of the company law legislation within the PRC and RSA, it establishes what legislative requirements and practices these countries place in their economies to ensure that there is good corporate governance. When investors are seeking investment destinations, countries with adequate and well-run legislation presents itself as a better destination in attracting investments. With the PRC and RSA, both having sound corporate governance measures they are on track to establishing a good investment destination. In the next chapter of this thesis the discussion will be to unpack what an investment is, what sources of investments there are and how these different sources of investments impact on an economy; the people of the nation and the development of the nation in general.

CHAPTER THREE

INVESTMENT LAW

3.1 Background

The previous chapter discussed the theories of corporate governance and how they were established. A comparison was made between the shareholder, stakeholder and enlightened shareholder theories of corporate governance. In understanding and unpacking these theories, the chapter also examined the theories and their effect on the legislation within the Republic of South Africa (RSA) and The Peoples Republic of China (PRC). An analysis of the high-level legislation and practices and preferred corporate governance theory within these nations was conducted. The central question addressed was how these theories impact on the nation's desirability as a good investment destination.

In this chapter, the focus of the discussion will be on the concept of an investment. It will explore how this has developed and why it is encouraged. It will also question whether the medium used to invest changed and why this is the case. An investigation will be sought into establishing the positive and negative impacts that an investment can bring into a nation and in the case of negative impacts; how it can be avoided, if at all. The concept of investment will be examined from an international perspective, as investments are not limited to definitions from a certain nation. Should there however be specific details relating to with RSA or PRC this will be specifically named.

3.2 Historical background into the concept of an investment law

In this historical review of the concept of investment, the focus will be on its development with respect to the key factors that would have affected developing economies and their current stance on it. The historical development of investment law originated from the treatment of foreign persons. Form this the rights were then further developed to cover the right and privileges bestowed on these persons

property. Such persons; further noted as aliens or foreigners; were then given rights over their property and how they can manage it.[230] Within this section, the development of the protection afforded to such aliens/foreigners will be discussed and detailed as to the current standing of Investment Law.

It is important to understand the development of how aliens were treated in foreign lands. Aliens in this context refers to the citizen of a foreign nation that is in any other nation, besides the one they hold citizenship in. In both the RSA and PRC, it can be used as a synonym for foreigner. Aliens were under most legal regimes not offered protection in nations other than their own, it was the Greeks; more specifically in Athens; who started to grant these persons a welcome to the cities.[231] The ideology behind this is that these persons would come into Athens and conduct business there for the betterment of the people of Athens. Using this, these aliens, were not afforded the rights of citizens in business and could now legally enforce contracts and other actions required for the success of a business.[232] This granting of rights to aliens allowed these parties to have business and other financial interest in foreign lands, which started the first investment linked transactions. Under the Law of Nations[233] developed by Emer de Vattel, foreigners were granted these rights to keep their property and afford them the protection citizens hold. It started with the nation once granting access to its

[230] De Vattell E 'Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury' (1970)

[231] Schefer KN *International Investment Law* 2 ed (2016) 4

[232] ibid (2016) 4

[233] De Vattell E 'Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury' (1970)

territory by the foreigner, realizing that it needed to afford protection to such foreigners as it would its own citizens without taking away that the foreigner is a citizen of their home nation.[234]

> The property of an individual does not cease to belong to him on account of his being in a foreign country; it still constitutes a part of the aggregate wealth of his nation (§81). Any power, [175] therefore, which the lord of the territory might claim over the property of a foreigner, would be equally derogatory to the rights of the individual owner, and to those of the nation of which he is a member.[235]

The Law of Nations adopted that the state cannot abdicate the protection of this foreigner based on fact that they are foreigners, the state needs to protect them as they would their own citizens.[236] It further went on to establish that the property rights of the foreigner does not terminate upon entering into the foreign land, the state of the foreign land needs to respect it as it adds to the wealth of such foreigner.[237] Vattell concluded that the foreigner was the property of the home state and a violation to such foreigners was an action against the home state.[238] As international law is not binding on host

[234] Schefer KN *International Investment Law* 2 ed (2016) 5

[235] De Vattell E 'Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury' (1970) S109

[236] Law of Nations, Book 2, Ch. 8, S99

[237] ibid Ch. 8, S109

[238] Schefer KN *International Investment Law* 2 ed (2016) 5

states these rules must be adopted at a national level;[239] however, over time there are international practices that has become common practice in the international community. Therefore, these policies allowed for the growth of the protection of foreigners and their property in a foreign land.

These core concepts were the cornerstones on which Foreign Direct Investment (FDI) was developed. As stated above, international law is not binding on a state. In the further development of these protections', major European nations (prior to the creation of the European Union) and the United States entered into binding treaties amongst themselves to provide this protection[240] in the now, developed world. With the development of the technological and industrial sectors in the 19th century, the growth of foreigners who hold investments in a foreign nation grew. It also drove the growth of companies and corporation who now could hold investments by the finding of shareholders — without personal liability.[241] Through this development, investment law grew to where it stands today.

Developing nations saw the growth that foreign investments can bring into their economies within the 1980's. The view from developing nations was that the funds from the developed nations could be used to develop their economies.[242] These developing economies started to transform their legal systems and practices to grant these new foreign investors protection for their investment with the

[239] See general discussion on 'Treaties as Binding International Obligation' accessed on (13 March 2019) available at *https://www.asil.org/insights/volume/2/issue/4/treaties-binding-international-obligation* and 'Uphold International Law' (access on 13 March 2019) available at *http://www.un.org/en/sections/what-we-do/uphold-international-law/*

[240] Schefer KN *International Investment Law* 2 ed (2016) 7

[241] ibid 6

[242] ibid 10

hope of establishing their economy as a good investment destination.[243] These benefits included, preferential treatment of their foreign investment, tax cuts and subsidies; to name but a few; to place their nation as the most attractive investment destination to these foreigners.[244] Currently as it stands the view on these foreign, investments are and will always be one of a welcoming stance but the developing economies are more wary of the negative impact these can have on their economies;[245] these benefits and negative aspects will be discussed later in this chapter.

In summary, the development of investment law was not a development in the investment law as it stands today but started out as the protection that aliens/foreigners were afforded in a foreign land, outside of their citizenship. These rights were developed and later added to the property of these foreigners in other lands. Legal development led to it being that the property of the foreigner was not to be abdicated upon entrance into another land but to remain with the owner. A violation to this would therefore result in an act against the host nation. As this was globally adopted, the current concept of investment law was established, and foreign investment was given legal rights. Seeing the potential these funds can bring to developing economies, these nations began to actively establish their nation as a good investment destination. With the history discussed, the following section will revert to establish what an investment is and how it can be categorised.

3.3 Foreign Investment

In terms of this thesis Investments will be discussed in two forms, this can be via foreign direct investment (FDI) or the portfolio investments (PI). Each carries its own benefits and risks when an

[243] ibid 10

[244] ibid 10 - 11

[245] ibid 11

investment option is investigated. In this section, the discussion will be based on what defines/differentiates FDI and PI, the benefits of choosing either of these kinds of investments as well as any negative aspects associated with these investments. The sources of these investments will be explored and how these are used to interpret and further develop these investment regulations.

Using the definitions and understandings of these kinds of investments this thesis will unpack what an investment means to a developing nation, what challenges and benefits it brings to its land and what can be done to overcome these challenges. In line with this, what sources can be used to enact legislation and practices that will be of benefit to developing nations and how it's in their best interest to ensure that they are used to afford themselves protection from foreign exploitation.

3.3.1 FDI and Portfolio Investments

Before FDI and PI can be discussed with their differences and similarities compared, there needs to be a definition of investment put into place. The Cambridge Dictionary describes an investment as "the act of putting money, effort, time, etc. into something to make a profit or get an advantage, or the money, effort, time…"[246] Investments are in its nature a method of growing wealth via injecting some form of energy or money into a project for it to grow and produce financial growth. To link it up to FDI and PI the definition can be further narrowed to "…be those in which someone purchases assets in the hope of creating future wealth or generating future income".[247] The definition of an investment has also been noted by the International Centre for the Settlement of Investment Disputes in *Fedax N.V. v Republic of Venezuela*[248] as "The term investments shall comprise every kind of asset

[246] Investments (accessed on 25 March) available on *https://dictionary.cambridge.org/dictionary/english/investment*

[247] Schefer KN *International Investment Law* 2 ed (2016) 69 -70

[248] *Fedax N.V v The Republic of Venezuela (Netherlands v Venezuela)* [1997] ICSID No ARB/96/3

and more particularity though not exclusively…" (It then furthered all that can be covered under the definition of an investment), which further cemented the definition in the international community. The definitions of an investment have over time taken on a more encompassing definition as seen as from the history of this subject to the protection of foreign property in another nation. As seen above, the definition of investments allows for the application of FDI and PI to be added into these categories.

3.3.1.1 Foreign Direct Investment

Foreign Direct Investment (FDI) is one of the methods of securing an investment in a foreign nation. It requires a foreign investor to purchase more than 10% of the shares/ownership in a company located in another nation.[249] According to the World Trade Organisation (WTO), there needs to be an intention to manage[250] in order for FDI to take place. When examined from a global scale, investments have increased many times since its conception.[251] The flow of FDI to Emerging Markets and Developing Economies (EMDE) was on a steady increase until 2013, and these countries were capitalising on the growth it brought.[252] This has however stagnated in recent years as flows in the FDI markets are declining especially to the Sub-Saharan nations,[253] and for this reason, developing economies

[249] Salacuse JW *The Three Laws of International Investment - National, Contractual and International Frameworks for Foreign Capital* (2013) 14

[250] 'Trade and foreign direct investment' (accessed on 26 March 2019) available at *https://www.wto.org/english/news_e/pres96_e/pr057_e.htm*

[251] Gnangnon SK, Roberts M 'Aid for Trade, Foreign Direct Investment and Export Upgrading in Recipient Countries' (2015) 3

[252] ibid 3

[253] Devarajan S 'Global Economic Prospects: The Turning of the Tide?' (2018) 19

need to assert themselves as better investment destinations. This is concerning to the continued growth of developing economies as investments brings in funds into the country that was previously not there. Therefore, it is in the best interest of these nations to establish themselves as a good investment destination to capitalise on the inflows of funds.

FDI is itself a flow of funds across an international border, between the home nation and foreign one with the intention of having that funds flow into an industry for the purposes of control (or some control) in that industry. [254] The 10% used for determining the "ownership" in the company is not a hard and set rule as the International Monetary Fund (IMF) acknowledges that it does not in any right give the owner of the shares a controlling state in the company in the same way as a lesser ownership of 10% may give the owner a controlling interest. Regardless of this, the 10% factor has been adopted as a basis.[255] These investments under FDI can come from any source, be this individuals, corporations and even other nations.[256] Another point to be mindful of is that foreign investment need not only come by means of constructing new facilities/companies but can also be received via a merger or acquisition of an existing facility/company.[257] There the establishment and creation of an FDI can come from a multitude of factors but the requirement of 10% ownership still stands.

[254] Makoni LP 'An Extensive Exploration of Theories of Foreign Direct Investment' (2015) 79

[255] Duce M 'Definitions of Foreign Direct Investment (FDI): a methodological note' (accessed on 27 March 2019) available at *https://www.bis.org/publ/cgfs22bde3.pdf* 3

[256] Salacuse JW *The Three Laws of International Investment - National, Contractual and International Frameworks for Foreign Capital* (2013) 14-18

[257] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 5-6

The ultimate goal of FDI is for the generation of wealth with the injection of funds across national borders. What drives firms to make such an action can be derived by two methods of thinking. The first being horizontal FDI, which speaks to the need of the firm/company to address the needs of their current market at a cheaper cost of business. Companies with this thinking establish business in markets where they can produce the same service/product but at a lesser cost due to lower worker fees; this can be result of weaker currencies and relaxed labour rights.[258] The second reasoning proposed by Alfaro and Chauvin is the vertical FDI, which speaks to the company needing to have a wider range of natural resources for the production of their products.[259] This would be specified to companies that create materials and not ones that offer services. In this application, a company may establish a facility in a nation where there is an abundance of natural resources or easier access to such resources than the home nation.[260] As business develops of a daily basis and the need for expansion exists, these thinking will be the factors that would drive a business to look into FDI.

As seen FDI is a rather simple concept to understand as it roughly requires the purchase of 10% of the shares/ownership of a business in another country. The requirement is based on perceived ownership in this company/venture, which can be a new one or a purchase of an existing business. Therefore, the process of FDI can be easily sought, as it is relatively easy to meet the requirements.

[258] ibid 6

[259] ibid 6

[260] ibid 6

3.3.1.2 Portfolio Investments

Portfolio Investment (PI) is the purchase/ownership of less or equal to 10% of the company by a foreign national/company. The biggest defining factor between FDI and PI is that FDI requires controlling or perceived ownership whereas with PI the owner of the shares should not entitle the owner to overall voting power in the company; further to this meaning FDI require presence in the host nation whereas PI only requires ownership in shares, physical presence is not required.[261] From a user experience, PI is an easier investment option due to the user only needing to acquire less than 10% of shares in a company. The 10% or less amount is important, as this is the barrier used to distinguish between FDI and PI. Should a person/company hold less than the 10% but subsequently acquire more to push it over the 10% threshold it will be considered an FDI investment.[262] As was discussed under the FDI, the source of this investment is of no consequence as seen with the application of FDI whereas PI requires only the purchase of shares. Therefore, to be considered a PI the investor needs to be mindful of having less than a controlling share in the company.

With the inflow of FDI into a nation, PI also brings about funds into the host nation. These financial flows are then used to develop the economies of these nations. FDI flows to emerging and developing economies was on the continued rise, however in the recent years this has dwindled in growth.[263] This is not however the case with PI that has always continued at a solid pace of growth,[264] this is

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[261] Salacuse JW *The Three Laws of International Investment - National, Contractual and International Frameworks for Foreign Capital* (2013) 15

[262] Duce M 'Definitions of Foreign Direct Investment (FDI): a methodological note' (accessed on 27 March 2019) available at *https://www.bis.org/publ/cgfs22bde3.pdf* 3

[263] Devarajan S 'Global Economic Prospects: The Turning of the Tide?' (2018) 19

[264] ibid 141

especially true in the Sub-Saharan region. This speaks to the growth in the PI sphere and the potential it has. Part of the reasons why an investor may choose PI investment over FDI is that PI investments does not require as much effort to have investments grow in. Under FDI, the investor needs to be mindful of the state of the nation, operational costs, legal requirements (which varies per nation and jurisdiction) and cultural environment.[265] This kind of investment is more suited to persons/companies who want to grow wealth but lack the knowledge to be fully involved in an enterprise. For these factors the growth of PI has increased in developing economies, as they are more unstable

In conclusion, both FDI and PI allow for flows into a nation, but they do it under different circumstances. They both will bring funds into the nation, but they will do it at a different scale. FDI sees more funds flow into the nation, as it requires more than 10% of the voting power to be purchased, in comparison, PI requires a maximum amount of 10% voting rights share ownership. For a nation to receive the most amount of funds coming into their land they would need to set up the best possible situation for FDI investments. However, domestic nations need to be careful of what the possible side effects of a high amount of FDI in the local economy could amount to as there are negative consequences related to them. A further discussion will follow later in this chapter as to the negative and positive side effects of investments made in a local economy. In the discussion, it will review the how governments need to address possible local concerns when opening its boarders to international investment.

3.3.2 Sources of investment law

As discussed above, there are FDI and PI forms of investment that a domestic economy can focus on to attract investment into its borders. These forms of investments will be the only ones discussed in

[265] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 7

this thesis. In understanding the investments there also needs to be discussion as to the sources of investment law. This will allow the reader to further understand the limitation these investments have and how a developing nation can structure their corporate governance legislation to adequately establish themselves as a good investment destination. As will be discussed further in this thesis the source of International law is of high importance as some sources takes preference over others. These sources of investment law need to be discussed as they lay the ground for, if disputes arise and either the investor or the host nation would like to seek restitution. Having a platform for these allows international investors the freedom to know that in the face of a dispute, they have recourse.

The primary source of Investment law is International Treaties.[266] Accordingly, the founding document for the operation and governance of treaties is the Vienna Convention on the Law of Treaties.[267] The Vienna Convention described a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[268] Using this definition, it allows for states to create binding agreements between themselves. These can be used for any means as can also include that of investments. When treaties are used as an investment document the parties to the treaties may be the nation themselves, however the obligations laid out in them falls on the investors themselves.[269] This is important to note as this allows for states to create agreements amongst themselves which investors can make use of for protection and broadening investment avenues. Treaties

[266] Schefer KN *International Investment Law* 2 ed (2016) 34

[267] Vienna Convention on the Law of Treaties (1969)

[268] ibid Article 2(1)(a)

[269] Schefer KN *International Investment Law* 2 ed (2016) 34

can come in many forms, namely bilateral treaties (these are treaties created between two nations),[270] sectoral treaties (these treaties would be created over a specific economic industry),[271] regional treaties (these refer to a geographical region of nations [272] and multilateral treaties (these are treaties which a multitude of nations have signed and ratified).[273] As treaties in themselves vary, so can the content contained within them. It is important to note that the content of a treaty is not of importance, as nations would need to either ratify, accept, approve or accede to the treaty before it can be said to be enforced.[274] This allows nations to create treaties with any legal content in them with the same enforceability. When a country signs the treaty, this act is only seen as a means of positively stating its intention to be bound by the agreement. However, in the case of a definitive signature made by a state, the state automatically agrees to be bound by the treaty. After the definitive signature the signature is not automatically bound by it; if nation follows a dualist legal system then it needs to be implemented via legislation before it becomes enforceable.[275] The benefit of a treaty, when ratified, is that it is a binding international agreement and investors can rely on it for recourse, thus strengthening their standing for protecting their investment.[276] Therefore, treaties are a good means in which a host nation can establish itself as a good investment destination with the protection it can offer to possible investors.

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[270] Schefer KN *International Investment Law* 2 ed (2016) 34-35

[271] ibid 37

[272] ibid 38

[273] ibid 39

[274] 'Understanding International Law' (accessed on 26 June 2019) available at *https://treaties.un.org/doc/source/events/2010/Press_kit/fact_sheet_5_english.pdf*

[275] ibid

[276] Vienna Convention on the Law of Treaties (1969) Article 14

When investment protection and rights are examined then one can also refer to customary investment law.[277] These rules and regulations have been accepted over time as the norms in investment law within the international sphere. A commonly accepted one would be the wording used in the Vienna Convention on the Law of Treaties.[278] Although treaties are by nature different in that each treaty will cover a specific area of international law, practice that is agreed upon by the parties, there is rules to the interpretation of treaties that falls under international law. Using this the Vienna Convention of the Law of Treaties, requires that treaties are read and understood in context of its ordinary meaning and not further meaning placed in it.[279] The same interpretation needs to be upheld even if the treating is drafted in more than one language.[280] When arbitrators and tribunals test treaties for interpretation, the common and basic meaning of the words are the test used for understanding the rights and obligations contained in the treaty.[281] In interpreting treaties there are various methods that can be called upon which can broaden or bring greater impact to the foundation of the treaty. The expansion method applies further meaning to the words used in the treaty. This is used when human rights are involved, and courts expand the interpretation as to allow for greater rights protection.[282] Interpretation is also differed in the evolutionary interpretation. This interpretation method is used by courts to give the

[277] Schefer KN *International Investment Law* 2 ed (2016) 40

[278] Vienna Convention on the Law of Treaties (1969)

[279] ibid Article 31 (1)

[280] ibid Article 33

[281] Lo C *Treaty Interpretation Under the Vienna Convention on the Law of Treaties* (2017) 63-64

[282] *Soering v. The United Kingdom* [1989] ECHR No. 14038/88. In this, the court further interpreted the impact of extradition to prevent a possible infringement of the client's rights to freedom of torture or inhuman or degrading treatment or punishment.

treaty a timeless interpretation.[283] This allows for the evolution and growth of a treaty, which may have been drafted many years ago but can be interpreted as if created recently. The emerging consensus interpretation, which allows courts to interpret the treaty and its application under the current global policy views.[284] It is important to know that these interpretations are applied mostly in the area of human rights; however, that does not exclude the interpretation to further legal avenues. Therefore, the interpretation of treaties is generally done on a pure understanding of the words, but this is not cast in stone as courts can place further meaning to them should these amount to greater or further development of the treaties purpose.

Further sources of international law are contracts. These are agreement negotiated between the state and private entities.[285] These are largely used by larger corporations when larger investment scale projects are launched. These can fall under concession contracts,[286] production and sharing agreements,[287] licenses[288] or service contracts[289] to name but a few.[290] These are but a few types of contacts

[283] Dothan D 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (2019) 775

[284] ibid 776

[285] Schefer KN *International Investment Law* 2 ed (2016) 60

[286] These are used by an investor and a host nation in which the investor is allowed to develop natural resource of the invested nation.

[287] In this, the investors would conduct drills or mining in the host nation. The nation would benefit from the shared production, which they can profit from at a later stage.

[288] This is an administrative right to explore or use a resource for a limited time under specified conditions.

[289] The action of a nation producing a service from an investor.

[290] Schefer KN *International Investment Law* 2 ed (2016) 60

that can be created in the international investment law sphere. When these contracts are drawn up, the contract can determine the law and procedure to be used for the determination and governance of it.[291] The laws chosen in the contract must be expressly stated as to avoid confusion, this also requires the parties to specify the jurisdiction they would make use of for disputes.[292] This chosen law would govern all the interpretation, right, performance and other aspects of the law that could apply to the contact and its disputes.[293] This allows for the drafters and parties to the contact to determine in detail the application and jurisdiction that can be applied to investment contracts. This further allows for flexibility and protection when the contract is being carried out. Contracts can also be drawn up faster than treaties, as they would only be between an investor and a state. Thus, allowing for faster creation times. Therefore, contracts can also be a form of international law sources; however, these will not be between nations as previous sources but the parties to the contract.

Before this section can be concluded, there needs to be a discussion on the legislation within the RSA and PRC with specific mention to Investment Law. In RSA, there is the Protection of Investment Act[294] (POI). POI was created to provide protection to investors and their investment within the RSA[295]. The POI provides a definition of investments that covers FDI and PI.[296] Investors are given the legislative guarantee that their services or goods will not be treated less than domestic services or

[291] Principles on Choice of Law in International Commercial Contracts Article 2(1)

[292] ibid Article 3, Article 4

[293] ibid Article 9

[294] Protection of Investments Act 22 of 2015

[295] ibid S5

[296] ibid S2

goods[297] and these foreign entities are given the operation of law to resolve legal disputes.[298] This is coupled with the security offered by the RSA government that the FDI will be afforded the same level of protection local enterprises are offered.[299] Within the PRC, there is the Foreign Investment Law[300], which regulates the treatment of investment in the PRC.[301] With a mandate on the state to open its doors to investments;[302] by creating investment prone legislation; while offering these investments protection as it would domestic enterprises.[303] The FDI is guaranteed equal treatment in relation to local business.[304] These Acts have similar operational requirements and objectives in the conducting and protection of foreign investments within the RSA and PRC.

Therefore, in the discussion of international investment law sources there has been mention of Treaties, Customary Investment Law and Contracts. These are by no means an all-encompassing list of sources of investment law, but they allow emerging states to make the best benefit of international law for the betterment of their economy. With Treaties the developing nation can open up an industry in the economy for easier development, this can allow further development than a single company can. With customary international law, there can be easier interpretation and understanding of investment practices. Finally, when making use of International Contracts, a developing nation can specify

[297] Protection of Investments Act 22 of 2015 S8

[298] ibid S6

[299] ibid S9

[300] Foreign Investment Law of the People's Republic of China

[301] ibid Article 2

[302] ibid Article 3

[303] ibid Article 5

[304] ibid Article 9

and recruit an investor for an individual required task the nation can benefit from. In understanding this and applying it effectively, a developing nation can grow their economy faster and more effectively.

3.4 Impact of investment on the local economy

In the previous discussion, the thesis discussed the background to investment law and the developments that took place to bring it to its current standing. With this in place, it was important to understand what an investment is and what classifies as an investment and this allowed the thesis to further develop into the discussion of investments. The thesis unpacked the concept of an investment through the lens of PI; which was loosely described as share investments and FDI; which required more of an ownership in and control over the investment. When developing economies want to structure their corporate governance in line with making it a better investment destination they can do so via the means of PI or FDI. The discussion further developed into the sources of an investment that was required to determine the manner and methods a country can use for investment attractions. Reading all these into how a nation can better set up themselves a good investment destination it is important to firstly examine the benefits and negative impacts an investment brings into a host nation. Undoubtedly, there are positive aspects to an investment like economic growth and stimulation of the economy; as will be discussed further; this may come at a cost to the nation with regard to its sovereignty and total reliance on international investors for growth and stability in an economic sector. Within the next section, the discussion will be based on the true impact investments have on a nation and knowing this, how can a developing economy gain from the positives but mitigate the negatives.

3.4.1 Benefits of an Investment

As a developing economy, it is important to attract investments into the country as it helps the economy grow, brings new ideas and experience into the country and if used correctly it can stimulate

economic growth.[305] In this section of the thesis, the discussion will be around the benefits FDI and PI brings into the economy of a developing economy. The benefits that developing economies get from foreign investment are that it raises the countries' technological level, assists in creating new jobs via establishing new companies and increases the skill level of workers.[306] Should a host nation take advantage of the benefits of FDI and PI, it has the potential to grow the economy as will be discussed below. For the furtherance of this section, when investments are referred to it is inferred to be FDI and not PI. This is due to FDI allowing for greater influence on an economy than PI.

As mentioned above, investments bring benefits into the host nation. One of the theories that is linked to foreign investment is the principle of Spillover.[307] This refers to when large FDI takes place in a host nation and these have Spillover effect in the developing economies nation. The large-scale enterprise (LSE) brings about new technology, processes and industry knowledge from their home nation because of operating in the developing nation spills over these into the local economy to the small/medium scale enterprises (SME).[308] This would be easier seen in the manufacturing sector of the economy, as unlike the services section, the manufacturing sector would benefit more from an update/upgrade to their manufacturing methods.[309] It is important to note that this is not an automatic process that a developing nation is guaranteed to benefit from. Depending on the acceptance and willingness to adapt of the local economy and SME, the introduction of a LSE in the economy can

[305] Reyes J-D 'Effects of FDI on High-Growth Firms in Developing Countries (2018)

[306] 'Trends and impacts of foreign investment in developing country agriculture: Evidence from case studies' (2013) 16

[307] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 16

[308] ibid 16

[309] Reyes J-D 'Effects of FDI on High-Growth Firms in Developing Countries (2018) 57

also bring about increased competition in the market.[310] It would be up to the SME to determine their adaptation to the larger industry body.

A theory that encourages foreign investment is that of Linkages. This theory is similar to that of Spillover but unlike the former, it creates a business relationship between the LSE and SME. How this takes place is the LSE starts its production in the new economy. In order to meet its demands it requires the resources of SME to supply it with the goods and services it needs for production.[311] Where previously the SME had only each other to cater to, the introduction of a LSE brings about a new and greater customer that can have a huge impact at the micro level.[312] As seen with the theory of Spillover, these impacts are seen on a larger scale with the manufacturing sector however, the service sector can also have a positive impact as services can be contracted between the larger companies and local players.[313] It is important to note that SME's do not always have access to the services that LSE require, as many LSE have policies that many SME's cannot match.[314] The government needs to be mindful of this and ensure there are measures and policies placed into place to ensure SMEs have access to the benefits the LSE can offer. Governments need to ensure that they facilitate the natural linkage between LSE and SME. A forced relationship can harm SME into not naturally developing their own technology and process to be able to compete with other businesses.[315]

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[310] Reyes J-D 'Effects of FDI on High-Growth Firms in Developing Countries (2018) 51

[311] ibid 56

[312] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 16-17

[313] Reyes J-D 'Effects of FDI on High-Growth Firms in Developing Countries (2018) 57

[314] 'Policy Framework for Investment' (accessed on 5 August 2019) available at *https://www.oecd.org/daf/inv/investment-policy/36671400.pdf* 31

[315] Gestrin M 'Investment Promotion and Facilitation' (accessed on 5 August 2019) available at *https://www.oecd.org/daf/inv/investment-policy/40287315.pdf* 43

Therefore, in order for linkages to work in the investment sector there needs to be mutually beneficial agreements in place that can benefit both the LSE and the SME's in the economy. A proper understanding of this and with correct application, a developing nation can have a bigger industry body in the local economy that can support its local needs.

SME's can also benefit from the introduction of LSE into the economy through the theory of Reallocation. This theory is a contentious one as it can be viewed as a negative impact to the business; but when seen through the eyes of longevity, it can save a business. How this theory operates is that when a LSE is introduced into the local economy, there can be a loss of business to the SME, as it will be operating at their current business model. This would ultimately affect the less productive firms as they would close business but it would allow others to redefine their business to the current market and can increase productivity at a domestic level.[316] Although it is a theory and reality that is not a negative consequence for the domestic economy as a whole as the resources will be moved/reallocated from the less productive companies and shifted to the ones who are more aggressive in increasing their productivity.[317] This theory is not a welcomed one by all stakeholders in the domestic market, as it will call on some companies to close, however for the greater good of the economy it is required.

A strong and arguably the most important part of a nation wanting to establish themselves as a good investment destination is for the creation and securing of jobs for its people. When nations seek external investors it is for the benefit of its people and this is most practically seen with the creation of

[316] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 18

[317] Devarajan S 'Global Economic Prospects: The Turning of the Tide?' (2018) 2

new jobs.[318] When the above theories are applied and seen in the developing economy, the impact of the newly established LSE and reallocated SME's created a space where job creation is rife.[319] The biggest player in the establishment of rapid job creation is that of high-growth performance driven companies, as they take advantage of the economic gaps.[320] This creation forces is not however only limited to the LSE's but the SME's can play a large part in job creation.[321]

3.4.2 Negative impact of Investment

As stated above, when developing nations are seeking to establish themselves as a good investment destination, they need to be conscious of the impact this will have on their economy. As simple as this statement may sound the concept of investments brings about challenges into a local economy that a national government needs to be mindful of. These kinds of impacts on the local economy are not always good, as seen above, but they can also derail or stifle local growth as will be discussed further. In this case, it is more linked to FDI than PI investments, as FDI requires more control on the part of the investor and brings about a larger scale of investment into the nation. The negative impact of investments will be unpacked below to determine what impact it can have in the local economy.

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[318] 'Trends and impacts of foreign investment in developing country agriculture: Evidence from case studies' (2013) 16

[319] Reyes J-D 'Effects of FDI on High-Growth Firms in Developing Countries (2018) 52

[320] ibid 54

[321] Gestrin M 'Investment Promotion and Facilitation' (accessed on 5 August 2019) available at *https://www.oecd.org/daf/inv/investment-policy/40287315.pdf* 44

The labour market in the local economy can be highly impacted by the technology transfer, which is a huge drawing factor when a local economy is trying to attract FDI. However as much as the Spill-over theory[322] can assist and develop the local economy the introduction of newer technology can have some diverse negative effects in the local economy. This newer technology is brought into the economy by FDI from the foreign investors' home nation. The newer technology can create a de-pendency on part of the developing economy.[323] How this can influence the local economy is in the reduction in the need for labour. Machines and robotics brought into a developing economy before the natural progression in that economy floods the labour market with technology that can replace the work force, which the same workforce cannot have time to prepare itself for.[324] This can have impacts of retrenchments and job losses as the local workforces are not always skilled up. Another impact in the labour maker is that the local firms do not always have access to the same financial resources of a foreign investor. This impacts in the paying scales as foreign companies can pay workers higher salaries, which most local firms cannot compete. Which further impacts on the ability of local firms to attract highly qualified and skilled staff in the same way foreign ones can.[325] With these impacts in the domestic labour sphere, it creates a difficult position for local companies to attract the best workers that can grow their companies to the level where they can compete.

In conjunction with the decrease in the labour market, there is also an impact with the local economy becoming dependent on the foreign firm. This creates an environment where foreign firms create a

[322] Refer to previous section with the positive aspects to investments.

[323] Moura R, Forte R 'The effects of foreign direct investment on the host country economic growth - theory and empir-ical evidence' (2013) 5

[324] ibid 6

[325] Vissak T, Roolaht T 'The Negative Impact of Foreign Direct Investment on the Estonian Economy' 48 (2005) 47

need in the local market for the goods they require. This brings about a gap in the market which local business can fill by producing more goods as is required by the new businesses brought in by FDI. This creates a mutually beneficial business relationship between the local businesses and the FDI created on.[326] This is seen as the negative impact of linkages. With such dependency on the foreign firm, should they leave the local economy this can have devastating impact on the local field. These are mostly felt in the loss of jobs these foreign firms created while in the local economy.[327] This would be bad for any economy as this level of dependency can cause a need on part of the home nation to keep the investment. In connection with this, when FDI is done at such a scale it can also create different levels of development in the local economy. Foreign firms are created in the local economy for the creation of profit for the investors and this would be specific to an industry or field they work in. When this takes place there can be an imbalance in the domestic market. Certain sectors will develop at a rapid scale where FDI has been brought in and others will develop at the level it has been for that economy. This causes a parallel economy in that these bigger firms constantly develop and improve but the local smaller ones cannot keep up and over time, they can close their doors.[328]

For FDI to properly work in a local economy there needs to be a understanding by the local government that as much as it can bring about good for the economy it can also bring about negative aspects that can impact the autonomy of the local economy.[329] For there to be a proper conversion of FDI into the local economy there needs to be measures in place that can mitigate against the negative

[326]Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 17

[327] Njini F 'Why AngloGold may have to leave home to keep up' (accessed on 3 September 2019) available at *https://www.businesslive.co.za/bd/companies/mining/2019-01-20-anglogold-may-have-to-leave-home-to-keep-up/*

[328] Vissak T, Roolaht T 'The Negative Impact of Foreign Direct Investment on the Estonian Economy' 48 (2005) 46-47

[329] ibid 54

impact of FDI. Failure on part of a local government can create a dependency on these foreign firms, the job sector can take a knock and the development of the economy as a whole can be skewed.

3.5 Conclusion

In conclusion of this chapter on investment, it is important to note that the purpose of this chapter was to identify what an investment is. This ties up to the focus of this thesis which is around establishing and assisting developing economies in creating themselves as a good investment destination. In the previous chapter, the discussion was on the most beneficial corporate governance theory to a developing economy. It was determined that the enlightened shareholder theory is the preferred one. This finding can assist the local economy to how to develop their laws and regulations to attract investments.

This chapter sought to further unpack what an investment is and how this definition is not a definitive one. The discussion was held from the point of a foreign investor, investing into the local economy. The differences and similarities of FDI and PI was unpacked. Although both are a means of bringing funds into the economy, FDI is preferred as it brings about a larger amount of investment into the nations. Consequently, this was the focal point of this chapter in that a foreigner (this can come from any source)[330] often does establish a business in the local economy. In the discussion of FDI, the theories of Spillover[331] and Linkages[332] was unpacked with reference to the possible impact to the local economy.

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[330] Salacuse JW *The Three Laws of International Investment - National, Contractual and International Frameworks for Foreign Capital* (2013) 14-18

[331] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 16

[332] Reyes J-D 'Effects of FDI on High-Growth Firms in Developing Countries (2018) 56

From the establishment and understanding of FDI and PI in its place as investment, it was important to establish what sources investment law/regulation draws its regulation from. As established the primary source of investment law comes from treaties.[333] As treaties are the primary source of investment law, this was discussed in further detail than other forms. However, even though treaties are the primary source there are other sources, which was discussed: Customary International Law and [334] contracts.[335] These were chosen, as they are the easiest applicable and implemented to investment law in a developing economy. Each of these sources has their own variants that are applicable to developing economies. RSA and the PRC also enacted the POI and the Foreign Investment Law, respectively. These were drafted to give further detail and protection to investments made in their economies. They are largely similar in the protection and rights offered to investors. With defined sources of law for investments, it makes it easier for investors to be aware of the rights and duties they have available to them.

Investments into the local economy does not come with only growth and impact but there are downsides to it as well. For this reason, there has been developments in the sector to regulate it. Having it go unchecked can result in the local economy being flooded by investments that they cannot contain. The sources of investment law and the ability of the host nation to tailor it to meet its needs allows the local government to have measures that can be used for its economic protection. The host governments to make sure that investments work for the local economy should use these. With a proper

[333] Schefer KN *International Investment Law* 2 ed (2016) 34

[334] ibid 40

[335] ibid 60

usage and understanding of the limits of investments, the local economy can immensely benefit from investments.

This chapter unpacked what an investment is and how FDI and PI brings about positive gains to a local economy as well as the negative impact of it. When nations want to establish themselves as a good investment destination they need to be mindful of these to ensure that they benefit from the positive impact but also mitigate against the negative impacts as much as possible. With this understanding, the next chapter will focus on other factors that impact on the decisions of an investor to invest in a local economy or not. It will discuss current events and how they can either bring or deter investments.

CHAPTER FOUR

THE LINKAGE BETWEEN CORPORATE GOVERNANCE AND INVESTMENT

4.1 Introduction

As discussed in the previous chapter, the understanding of the concept of an investment is pivotal to seeing the impact of good corporate governance in establishing a nation as a good investment destination. Without the core features of an investment it is difficult to link the two factors together; namely corporate governance and investments. The chapter unpacked which investments are sought after by developing economies as well as the benefits these bring. As with all things, some negative side effects have been discovered by investments in a developing economy and these needs to be kept in mind when developing countries seek them. However, this should not be the core focal point as investments bring many positive concepts to the nation too.

In this section of the thesis investment will be examined at from the perspective of corporate governance to determine if that is the only factor that needs to be worked on by a host nation to attract investments. Alternative factors such a political, environmental and social aspects will be looked at as either a deterrent or attraction to investments. The discussion will summarise the factors that can be built into the economies of developing nations besides good sound corporate governance to establish it as a good investment destination.

4.2 The linkage between the establish of a good investment destination and corporate governance

For an understanding in the business sphere, the investment marker is still under the scorn of the financial crisis of 2008.[336] With this, there is a link between the investors requiring some surety in the investment market. Investors seek markets where they can be assured or reasonably assured that they are investing in businesses that are run effectively and ethically.[337] However this is not seen as the only factor that investors use to determine if an investment is made or not.

It is necessary to distinguish between Portfolio Investment (PI) and Foreign Direct Investment (FDI) at this point. Under PI, the investment needs to be under 10% of the shares in the company.[338] This would mean that the investor is investing in a passive manner as they only provide capital to the company already in existence. These investors would not be able to participate in the running or direction of the company on a large scale. PI is on the rise in developing economies[339] and therefore it should be considered with higher detail when countries look into attracting investments. PI can attract a large amount of investment into a nation as the investors are no longer corporations only, but the general population is becoming investors with the ease of cross border investments.[340] Form the

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[336] Aguilar L 'Looking at Corporate Governance from the Investor's Perspective' (accessed on 25 November 2019) available at *https://corpgov.law.harvard.edu/2014/04/24/looking-at-corporate-governance-from-the-investors-perspective/*

[337] ibid

[338] Salacuse JW *The Three Laws of International Investment - National, Contractual and International Frameworks for Foreign Capital* (2013) 15

[339] Devarajan S 'Global Economic Prospects: The Turning of the Tide? '(2018) 141

[340] Aguilar L 'Looking at Corporate Governance from the Investor's Perspective' (accessed on 25 November 2019) available at *https://corpgov.law.harvard.edu/2014/04/24/looking-at-corporate-governance-from-the-investors-perspective/*

prospective of investors who are not trained on investments there needs to be some form of protection to the persons. In my view, these persons would benefit the most from effective and established corporate governance. This is due to the investor not understanding the markets. Coupled with this the investor can also be separated by large distances to their PI. Sound governance can give them better peace of mind that their investment is taken care of.

When viewed under the sphere of FDI the topic however changed. With the investment by large and medium scale companies into developing economies these companies do it to benefit their business.[341] When FDI is done at this scale, effective corporate governance is not as important a factor as these companies would be subsidiaries to the larger ones who would determine its direction. To these investors other factors are considered when an investment destination is sought. These would be the social, political, environmental and investment ratings.

The linkage between good corporate governance and establishing a nation as a good investment destination is therefore not a clear-cut question. There are other factors to be considered to truly determine if good corporate governance is the key factor to establishing a nation as a good investment destination. Under PI, it can be argued that good corporate governance is attributed to establishing a good investment destination. However, under FDI this is not as clear-cut. For the furtherance of this chapter, the thesis will examine other factors that influence an investment. FDI will be the main investment platform of discussion.

[341] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development '(2017)

4.3 Other factors to consider for investments

When investment destinations are examined from the point of view of an investor, there are other factors besides the corporate governance measures of the company that needs to be considered. Although good corporate governance does play a part in the establishment when a large or medium scale company invests in the local economy by opening up factories or other types of business these will form part of the global entity and be governed by its rules. What these companies seek is to grow their investment.[342] In order to do so there needs to be an understanding of the environment the company is being set up in. There are social, political and environmental factors that will influence the viability of the FDI. The different factors will be discussed below.

4.3.1 Industrial Action

Corporate governance was discussed as a factor that influences on establishing a nation as a good investment destination. In this section, the topic of social unrest will be unpacked as a factor that investors may consider for factoring in good investment destinations. With developing economies being under a lot of pressure by both the needs of the economy, for new investment, and the needs of its citizens, there can occur situation where these two clashes in some form of industrial action. It is interesting to know that industrial action is not limited to developing economies but Europe with its developed economy also faces the threat of industrial action.[343]

[342] ibid 6

[343] 'European strikes and industrial action guide' (accessed on 30 November 2019) available at *https://www.eversheds-sutherland.com/global/en/what/practices/labour-employment-law/industrial-action-strikes-guide.page*

In order to understand the impact this has on an economy and the establishment of a nation as a good investment destination, the concept of industrial action needs to be clarified. Industrial Action[344] can be defined as "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and every reference to 'work 'in this definition includes overtime work, whether it is voluntary or compulsory".[345] The definition is quite encompassing and allows for a great coverage area.

Unions within RSA hold a huge amount of power. Historically, with particular mention to the Apartheid era, the development and growth of trade unions were akin to the development to the freedom movement.[346] Post the Apartheid era, political parties and trade unions, with a shared past, still have a relationship in the development of labour relations in the nation.[347] The development of the Labour Relations Act[348] and Basic Conditions of Employment Act[349] was introduced into South Africa to address the injustices within the Labour Regulation as a result of Apartheid; these were drafted due to the close relationship between the government and labour unions.[350] The close ties between the

[344] In this thesis, the term industrial action and strike will be used interchangeably.

[345] Strike Guideline' (accessed on 1 December 2019) available at *https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Employment-Strike-Guideline.pdf*

[346] Budeli M 'Trade unionism and politics in Africa: the South African experience' 45 (2012) *The Comparative and International Law Journal of Southern Africa* 469 - 474

[347] ibid 475

[348] Act 66 of 1995 (as amended)

[349] Act 75 of 1997 (as amended)

[350] Budeli M 'Trade unionism and politics in Africa: the South African experience' 45 (2012) *The Comparative and International Law Journal of Southern Africa* 475

African National Congress (ANC); the political party at the head of the South African government; and Congress of South African Trade Unions (COSATU) could be seen with the appointment of Jacob Zuma as the presidency candidate. This was done as Jacob Zuma was seen as more pro-labours.[351] This further signifies the power of Unions with the South African Context. South African employees are given the right to strike under the Labour Relations Act[352]

In contract the interconnectivity of the state and trade unions is not seen within the PRC. The right to strike was removed[353] as this was seen as modernising the economy. Although the right to strike was removed, the workers of the PRC were not left without recourse. In terms of labour regulation, workers can form trade unions to voice their concerns to employers.[354] Unlike in RSA, the employees do not have freedom of choice with unions, as all unions in PRC needs to form part of the All-China Federation of Trade Unions (ACFTU).[355] This membership is mandatory as an independent one is considered political sabotage.[356] Workers therefore do not have the freedom to create their own unions should the ACFTU not meet their requirements. This can be seen as the state locking down the rights of collective action.

[351] ibid 476

[352] Labour Relations Act 66 of 1995 S64(1)

[353]‘ Labour relations in China: Some frequently asked questions ’(accessed in 1 December 2019) available at *https://clb.org.hk/content/labour-relations-china-some-frequently-asked-questions*

[354] West S ‘Trade Union Law and Collective Bargaining in China ’(accessed on 2 December 2019) available at *https://www.chinabusinessreview.com/trade-union-law-and-collective-bargaining-in-china/*

[355] ‘Labour relations in China: Some frequently asked questions ’(accessed in 1 December 2019) available at *https://clb.org.hk/content/labour-relations-china-some-frequently-asked-questions*

[356]‘ibid

For an investor the establishment of a place of investment it is important to note the labour market the FDI will be operating in. An area of high strike rates will significantly disrupt the production line of a company, as the workers will be participating in strikes instead of the betterment of the company.

As discussed above, the striking patterns in a nation can have it known in the FDI market as a bad investment destination. With regard to RSA, strikes have cost many companies millions in loss of revenue.[357] The strikes are however not limited to SOE's but impacts private businesses too.[358] With such an impact in the business sector investors would be mindful of investing in locations where there is a high strike culture. Typically, in RSA, strikes that turn violent and damage property[359] is not considered an uncommon thing in these strikes. In the PRC there is a similar strike rate.[360] The common factor and reason for strikes in both the PRC and RSA is the remuneration of workers. It is important to note that both RSA and PRC have mechanisms for collective bargaining. In RSA it is

[357]' Strikes costing South Africa billions' available at *https://businesstech.co.za/news/business/98727/strikes-cost-south-africa-r6-1-billion/#:~:text=South%20Africa%20saw%2088%20strikes,up%20to%2020%20in%202014*. (accessed on 24 September 2020)

[358] Niselow T 'Workers have lost R56m in wages as Gold Fields strike nears four weeks' (accessed on 7 December 2019) available at *https://www.fin24.com/Companies/workers-have-lost-r56m-in-wages-as-gold-fields-strike-nears-four-weeks-20181123*

[359] Singh O 'Durban municipal workers' illegal strike caused R3.5m in damage - premier' (accessed on 7 December 2019) available at *https://www.timeslive.co.za/news/south-africa/2019-05-03-durban-municipal-workers-illegal-strike-caused-r35m-in-damage-premier/*

[360] 'The shifting patterns of labour protests in China present a challenge to the union' (accessed on 7 December 2019) available at *https://clb.org.hk/content/shifting-patterns-labour-protests-china-present-challenge-union*

covered under the Labour Relations Act[361] whereas in the PRC under the Trade Union Law of the People's Republic of China.[362] These seek to establish a mediation and prevent strikes in the work place. Therefore, as strikes can cause harm to the economy and property of businesses the governments of RSA and PRC have tried to mitigate this by setting up a means for collective bargaining to mediate conflict between workers and employers.[363]

4.3.2 Political

As discussed above, other factors can be considered when considering FDI. Strikes as discussed above can cause an impact in the viability of setting up an investment in the nation. Another factor that needs to be discussed is the political environment of the nation. This has an important factor, as the leadership of the nation needs to want the investment in their economy and be willing to make the nations adequately to get the investment.

The government of RSA is a good example of this. From the start of his term, President Cyril Ramaphosa has campaigned to have RSA as a good investment destination.[364] As a developing nation, RSA needs investments to boost its economy. The goal for the investments is to create more jobs in the

[361] Chapter 3 Collective Bargaining S11 - S63

[362] Chapter 2 Trade Union Organizations Article 9 - Article 18

[363] Chapter 2 Trade Union Organizations Chapter 2 and Labour Relations Act 66 of 1995 Chapter 3

[364] 'The aim of the investment drive is to create jobs: Ramaphosa' (accessed on 7 December 2019) available on *http://www.sabcnews.com/sabcnews/the-aim-of-the-investment-drive-is-to-create-jobs-ramaphosa/*

economy.[365] With an unemployment rate of 29.1%, this is desperately needed.[366] To boost the economy with foreign capital, President Cyril Ramaphosa, at the Investment Conference, made positive strides to his R1.2 trillion investment goal within SA.[367] With an extra R363 billion raised this November,[368] the RSA government is on its path to reach the goal of R1.2 trillion. With this FDI, RSA is expected to grow its manufacturing power on the continent.[369] As was discussed in chapter 3, with new FDI in an economy it leads to growth in the labour, technological and other areas in which the nation benefits. The PRC a global investment powerhouse has also pledged to invest in RSA.[370] There are however, challenges that RSA needs to remedy to further cement itself as a good investment

[365] 'The aim of the investment drive is to create jobs: Ramaphosa' (accessed on 7 December 2019) available on *http://www.sabcnews.com/sabcnews/the-aim-of-the-investment-drive-is-to-create-jobs-ramaphosa/*

[366] 'Unemployment rises slightly in third quarter of 2019' (accessed on 2 December 2019) available on *http://www.statssa.gov.za/?p=12689*

[367] Mahlaka R 'Promise Tracker: Business backs Ramaphosa again, moving closer to his trillion-rand-plus investment target' (accessed on 7 December 2019) available on *https://www.dailymaverick.co.za/article/2019-11-06-promise-tracker-business-backs-ramaphosa-again-moving-closer-to-his-trillion-rand-plus-investment-target/*

[368] Khumalo S 'Ramaphosa's conference bags R363bn in new investments' (accessed on 30 November 2019) available at *https://www.fin24.com/Economy/ramaphosas-conference-bags-r363bn-in-new-investments-20191106*

[369] 'The aim of the investment drive is to create jobs: Ramaphosa' (accessed on 7 December 2019) available on *http://www.sabcnews.com/sabcnews/the-aim-of-the-investment-drive-is-to-create-jobs-ramaphosa/*

[370] Fabricius P 'Chinese ambassador spells out the blunt truths about investment in South Africa' (accessed on 7 December 2019) available at *https://www.dailymaverick.co.za/article/2019-10-07-chinese-ambassador-spells-out-the-blunt-truths-about-investment-in-south-africa/*

destination. Some structural and economic reforms need to take place before the nation can guide itself towards being a key investment destination.[371]

Within the PRC, there is a similar drive towards establishing itself as a good investment destination. The PRC has drafted the new Foreign Investment Law[372], which came into effect on 1 January 2020.[373] With this, the PRC is trying to ensure that domestic and foreign investors are treated with equality.[374] It furthermore now covers FDI and PI, which was not the case under the previous legislation.[375] This gap requires the legislation to draft it into the Foreign Investment Law Act. This new legislation is in line with President Xi Jinping‘s promises to open up and grow the Chinese economy to the globe.[376] This will allow the economy to grow and see investments in the country rise. Coming from a state where the nation was largely focused inwards, during its more sever communist times, this is a good step in ensuring the continued growth of the nation. RSA also has legislation enacted for the protection of investors, seen in the Protection of Investment Act 22 of 2015. In a similar

[371] Mahlaka R ‘Promise Tracker: Business backs Ramaphosa again, moving closer to his trillion-rand-plus investment target’ (accessed on 7 December 2019) available on *https://www.dailymaverick.co.za/article/2019-11-06-promise-tracker-business-backs-ramaphosa-again-moving-closer-to-his-trillion-rand-plus-investment-target/*

[372] Foreign Investment Law of the People's Republic of China

[373] Zhou Q ‘China’s New Foreign Investment Law: A Backgrounder’ (accessed on 8 December 2019) available at *https://www.china-briefing.com/news/china-new-foreign-investment-law-backgrounder/*

[374] Foreign Investment Law of the People's Republic of China Chapter 2

[375] Zhou Q ‘How to Read China’s New Law on Foreign Investment’ (accessed on 8 December) available on *https://www.china-briefing.com/news/read-chinas-new-law-foreign-investment/*

[376] Wang O ‘China President Xi Jinping says ‘only when China is good, can the world get better ’amid US trade war’ (accessed on 7 December 2019) available at *https://www.scmp.com/economy/china-economy/article/3033694/chinas-door-will-only-open-wider-xi-jinping-tells-delegates*

manner to the protection offered in the PRC (as discussed in the previous chapter) both pieces of legislation were enacted for the protections of investments.

4.3.4 Environmental

Since the industrial age, humans have been influencing the climate of the earth in a negative way.[377] Although this was at first thought to be a conspiracy theory it has been validated and due to the climate change it has impacted the planet by raising the global temperatures, warming oceans, shrinking ice sheets, rise in sea levels, more devastating storms and ocean acidification to name a few.[378] In a response to this, many nations have started on reducing their carbon footprint to ensure that they are part of the solution not the cause to further climate change.[379] With this drive to leave a greener future for the next generations, there has been a drive in the investment market to do the same. This is known as impact investing which will be discussed below.

As mentioned above, impact investing is a movement in the investment field. As much as fiscal investment growth is important, the investment market is looking at how their investments influences the social and environmental scale.[380] With this trend, investors are seeking destinations where these kinds of investments can be done. Developing countries needs to take advantage of this as social and

[377] 'Climate Change: How Do We Know?' (accessed on 7 December 2019) available at https://climate.nasa.gov/evidence/

[378] ibid

[379] 'The Paris Agreement' (accessed on 7 December 2019) available at *https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement*

[380] 'How to measure the "impact" in impact investing' (accessed on 7 December 2019) available on *https://www.dailymaverick.co.za/article/2019-10-28-how-to-measure-the-impact-in-impact-investing/*

environmental projects, which yield an investment return, would be ideal for investment. An example of this would be renewable energy plants.

RSA has a large amount of unused land that can be used to construct wind and solar energy plants.[381] This makes it an ideal venue for impact investing as FDI can be used to grow these energy plants. With the overall declining cost, the high cost was seen as a previous barrier to this kind of investment.[382] The PRC is facing a large-scale problem with regard to their environment. There is large-scale pollution in the country due to its recent rapid industrialisation[383]. As China is the largest contributor to global pollution,[384] an impact or change by it will make a difference on a global scale. With this gap in the PRC market, it leaves a door open for the creation for FDI investment.

Other factors can and needs to be considered when FDI investment destinations are being looked into. The factors all indicate factors that investors need to be mindful of when looking into establish FDI. These all impact on the viability and the possible ease of business the investor will have in the nation. It is therefore very important for an investor to be mindful of these factors.

[381] Gosling M ' SA could have major advantage with renewable energy, say experts' (accessed on 7 December 2019) available at *https://www.fin24.com/Economy/sa-could-have-major-advantage-with-renewable-energy-20190205*

[382] ibid

[383] 'A review of 20 Years 'Air Pollution Control in Beijing' (accessed on 10 December 2019) available at *https://www.un-environment.org/resources/report/review-20-years-air-pollution-control-beijing*

[384] Gardiner B ' China's Surprising Solutions to Clear Killer Air' (accessed on 7 December 2019) available on *https://www.nationalgeographic.com/news/2017/05/china-air-pollution-solutions-environment-tangshan/*

4.4 Is good corporate governance enough?

Chapter 2 discussed the importance of corporate governance in the establishing of a nation as a good investment destination. However as seen above this is not always the only consideration. When investors seek to establish investment destinations there are other factors that need to be taken into consideration. These factors; industrial action, political environment and environmental factors; all contribute to establishing a nation as a good investment destination. There are other discussion points that could have been used but the above three were selected.

In my view, in as much as corporate governance is an important consideration for establishing an investment destination it is not the sole factor that is used for determining this. Investors also view the viability of their investment as this thesis has reviewed. The other factors can even cause the particular investor to choose not to invest depending on the level of difficulty needed to overcome these hurdles. Therefore, to effectively establish a developing nation as a good investment destination there needs to be wider ambit of questioning than the corporate governance measure put into place by the legislature.

4.5 Conclusion

As discussed in this chapter other factors can be used to determine if a nation is a good investment destination. The previous chapters focused on the development of a good investment destination, what constitutes an investment as well as the negative and positive factors that result from FDI. As was stated in the introduction to this chapter, this was mainly focused on FDI investment and not PI. Although they are equally important investment channels, FDI requires more research on the part of the investor with regard to the factors as discussed above.

FDI can create and bring about a large amount of growth in the economy of a country but before these are established, the investor needs to be confident that the location they are considering investing in will yield a positive return for the investor. By being mindful of the discussion points raise above, I believe that the investor would be able to make a better-informed decision. Although effective corporate governance has been seen as a factor to establishing a country as a good investment destination, this as seen is the not the only factor to be considered. Therefore, investors are required to look further than the legislative requirements to determine their location for their FDI.

As was discussed this chapter unpacked other factors that investors need to take into mind when choosing and investment destination. In the same manner when nations want to establish themselves as a good investment destination these are factors that possible investors will look into. By no means is the political, social unrest and environment the only factors that can influence the decisions. Therefore, in the final chapter of this thesis, the questions to be answered will be based on the theories of corporate governance, taking into consideration the legislation of these nations; is the measures put into place by PRC and RSA enough to establish themselves as a good investment destination. If so, what can other developing nations learn from this and what can be improved on.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The focus of this thesis was establishing whether good corporate governance is a key factor in establishing a nation as a good investment destination. Through the research presented in this thesis, corporate governance was discussed with relation to the requirements within the Republic of South Africa (RSA) and the Peoples Republic of China (PRC). These two nations were chosen as they have a good level of corporate governance legislation. The discussion included an analysis of the theories of corporate governance, the history and current practices of corporate governance legislation in RSA and PRC. It further questioned the definition and classification of investment (Foreign Direct Investments (FDI), Portfolio Investments (PI) and discussed the sources of investments, the negative & positive impacts of investments and other factors that can have an impact on establishing a nation as a good investment destination. With this discussion, the establishment of a good investment destination was questioned and how it can be replicated in other developing economies.

5.2 Conclusion

In the current investment climate, with the need of developing economies to attract investment to further and develop their economies it is becoming increasingly important for these nations to establish themselves as good investment destinations. With the three theories of corporate governance discussed,[385] it is my view, in light of the research, that the Enlightened Shareholder theory[386] would be the ideal theory to base a developing economy's corporate governance on. This is due to the theory

[385] Refer to chapter 2.3 Theories of Corporate Governance

[386] Refer to chapter 2.3.3 Enlightened Shareholder Theory

finding a balance in the requirements of shareholders wanting to grow wealth as well as the needs of the host nation.[387]

The RSA[388] and PRC[389] legislative requirements are well structured to provide sound corporate governance for investment within their borders. They have similar requirements with regard to the purpose behind the reasoning for their development, reporting requirements and director conduct and procedural requirements. With the requirements and structure, investors in these nations would have assurance that the corporates in these nations are well established and the investments are protected with these requirements. Assurance in the corporate governance regime is a factor in establishing confidence in the protection of the investment. As seen with the discussion, this is not an all-exclusive factor that investors consider when seeking an investment destination. Other factors[390] do play a role

[387] Kay A 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 590

[388] Refer to chapter 2.4 South African Corporate Governance

[389] Refer to chapter 2.5 Chinese Corporate Governance

[390] Refer to chapter 4.3 Other Factors to Consider for Investments

in their decision process, namely the impact of industrial action[391], environmental[392] concerns and the political readiness[393] of the nation.

In order to establish if the investment is covered by the corporate governance legislation this thesis had to unpack the concept of an investment. FDI[394] and PI[395] were analysed with respect to the level of investment required to fall into each category. FDI; as it carries a larger capital investment;[396] was chosen as the focal point for the discussion on the legislation governing investments. FDI was discovered to carry more risk when investment destinations were reviewed. However, with the risk it carried for the investor there are substantial benefits for the host nation that comes with the FDI being

[391] 'SA Narrowly Avoids Crippling Strikes In The Public Sector For Now... But At What Cost? '(accessed on 7 December 2019) available at *https://www.huffingtonpost.co.uk/entry/sa-narrowly-avoids-crippling-strikes-in-the-public-sector-for-now-but-at-what-cost_uk_5c7e9bd5e4b06e0d4c24b49f?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFOklUryDbd3QS7NulhDBEonsvb4EFaMtc8oMGpLA7lI-jaAXB6iKwgXn8tL0V_Mp_3aLcnWc19gGA8-B8xHfiBK9fKUQ0NLx_D2vphg0cu3dvmSaak-fveL6Zw9MQZ0Zxjsb01YtWni9dVQ-w8ehIaPyU3az3OtEdFYdZ08paylsf*

[392] 'How to measure the "impact" in impact investing' (accessed on 7 December 2019) available on https://www.dailymaverick.co.za/article/2019-10-28-how-to-measure-the-impact-in-impact-investing/

[393] 'The aim of the investment drive is to create jobs: Ramaphosa' (accessed on 7 December 2019) available on *http://www.sabcnews.com/sabcnews/the-aim-of-the-investment-drive-is-to-create-jobs-ramaphosa/*

[394] Refer to chapter 3.3.1.1 Foreign Direct investment

[395] Refer to chapter 3.3.1.2 Portfolio Investment

[396] Salacuse JW *The Three Laws of International Investment - National, Contractual and International Frameworks for Foreign Capital* (2013) 14

set up in communities. These are a result of the theories of Linkages,[397] Spillover[398] and Reallocation[399], which accounts for growth and benefits into the host nation. There are however, negative impacts that an investment can bring into a host nation[400] and these include creating a dependency on the investment, unequal level of technologies[401] and labour markets shifting away from local enterprises[402] who cannot compete with the finances of those held by the international enterprise. The discussed points show that there is an impact to the host nation as result of FDI that is not linked to pure economic growth. Developing nations consider these when establishing regulations for the sourcing of FDI.

Further to the above, the thesis unpacked other factors that may have an impact on an investor seeking a good investment destination.[403] Notwithstanding the corporate governance structures within the PRC and RSA, there is other factors that investors would look into when seeking good invest-

[397] Reyes J-D 'Effects of FDI on High-Growth Firms in Developing Countries (2018) 56

[398] Alfaro L, Chauvin J 'Foreign Direct Investment, Finance, and Economic Development' (2017) 16

[399] ibid 18

[400] Refer to chapter 3.4.2 Negative Impact of Investment

[401] Moura R, Forte R 'The effects of foreign direct investment on the host country economic growth - theory and empirical evidence' (2013) 5

[402] ibid 6

[403] Refer to chapter 4.3 Other Factors to Consider for Investments

ment destinations. The other factors discussed in Chapter 4, was in relation to the impact of industrial action,[404] environmental protection[405] and political readiness[406] to foreign investment. With this discussed it was determined that these factors do make an impact as investments are now moving to value investments. This requires the investment to have a social, environmental and financial benefit; these investments need to produce value.

Based on the research above, when a nation has sound corporate governance measures, this assist the nation in establishing itself as a good investment destination. The regulations allow the investors to know and understand how their investments will be protected and the rights they have. Good corporate governance is however not an exhaustive list that possible investors seek. Other factors that can play a part in the decision process can be the prevalence of industrial actions, environmental

[404] 'SA Narrowly Avoids Crippling Strikes In The Public Sector For Now... But At What Cost? '(accessed on 7 December 2019) available at *https://www.huffingtonpost.co.uk/entry/sa-narrowly-avoids-crippling-strikes-in-the-public-sector-for-now-but-at-what-cost_uk_5c7e9bd5e4b06e0d4c24b49f?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFOklUryDbd3QS7NulhDBEonsvb4EFaMtc8oMGpLA7lI-jaAXB6iKwgXn8tL0V_Mp_3aLcnWc19gGA8-B8xHfiBK9fKUQ0NLx_D2vphg0cu3dvmSaak-fveL6Zw9MQZ0Zxjsb01YtWni9dVQ-w8ehIaPyU3az3OtEdFYdZ08paylsf*

[405] Wang O 'China President Xi Jinping says 'only when China is good, can the world get better 'amid US trade war' (accessed on 7 December 2019) available at *https://www.scmp.com/economy/china-economy/article/3033694/chinas-door-will-only-open-wider-xi-jinping-tells-delegates*. 'The aim of the investment drive is to create jobs: Ramaphosa' (accessed on 7 December 2019) available on *http://www.sabcnews.com/sabcnews/the-aim-of-the-investment-drive-is-to-create-jobs-ramaphosa/*

[406] 'How to measure the "impact" in impact investing' (accessed on 7 December 2019) available on https://www.dailymaverick.co.za/article/2019-10-28-how-to-measure-the-impact-in-impact-investing/

regulation and the political readiness of the government to investment. All these factors, when viewed concurrently, can assist a nation in establishing itself as a good investment destination.

5.3 Recommendations

Based on the examination of factors establishing a nation as a good investment and the benefits such FDI and PI can bring into the nation the following recommendations are for developing nations seeking to establish their local economies as a good investment destination.

1. When developing nations are seeking a theory of corporate governance to base their economy on, they should do it on the Enlightened Shareholder Theory. This is due to the flexibility this theory offers and the duality of its application.[407] Investors will have the protection and assurance that the legislative purpose will be drafted to enable company management to act for the growth of their investment as well as the benefit of the company stakeholders.
2. Developing nations should have laws and procedures in place for the conduct and anointment of company directors. The directors and governing body are the highest body of management in the company and as such regulating their conduct ultimately allows the company to be operated in an efficient and ethical manner. With adequate regulation to the conduct required of these officers, it can inspire confidence in investors for how the company will be managed. The South African approach to regulating the conduct of directors, as taken from The Companies Act,[408] allows for a

[407] Kay A 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach '(2007) 590

[408] Companies Act 78 of 2008 S78(3)(c)(i) requires the test to be based on the actions of other directors in that directors' position. In this leg it is subjective to conduct and knowledge that can be reasonably expected from this director in question. S78(3)(c)(ii) brings the second leg of the assessment which is subjective. This requirement tests the action against the action against the director in question based on their knowledge. Company Ordinance No. 28 of 2012 S465

good starting point into the conduct testing requirements of Directors. Something lacking quality in both the RSA and PRC is the requirement for directors to hold certain qualifications. This I view is lacking in both nations. Due to the amount of power and decision-making ability these officers hold, there should be a requirement of some formal education for these officers.

3. The reporting requirements of companies should not only focus on the financial conduct. I do agree that financial reporting is important, and this approach was taken in both the legislation and regulations in the RSA and the PRC. In the age of impact investing[409] the requirements of reporting are no longer only based on the financial growth of the company. In RSA, this was done by the creation of the Triple Context[410] reporting requirement. With the requirement of the reporting to be on social, environmental and financial impact by the company. This is a good direction in terms of reporting as it gives value investing a legislative requirement. With the impact, large corporations have on the social and environmental spheres of host nations, this requirement will assist in bringing to attention these kinds of impacts. It is also giving the stakeholders of the company a view into the impact the company is making.

4. Developing economies should capitalise on the funds that can flow into the economies because of FDI. Understanding this is vital to the economy, however at the same time, these nations' needs to be aware of any negative impacts these can have. Economic growth should not rely purely on foreign investment. Developing economies should have internal polices to stimulate growth and use foreign investment as a booster.

5. Developing nations should be mindful of the impact that investment has on their economies Not all impacts of investment is good for the local economy. With FDI, these large-scale corporations

[409] 'How to measure the "impact" in impact investing' (accessed on 7 December 2019) available on https://www.dailymaverick.co.za/article/2019-10-28-how-to-measure-the-impact-in-impact-investing/

[410] King Code IV - Fundamental Concepts (page 24)

can, in some instances, take over the local landscape which effectively drives the local business to operate for the needs of the newly establish company because of FDI.[411] Governments should review the readiness and openness of their border to large-scale investments. There should be measures put into place that not only welcomes these into the economy but also to incorporate this into the local market strategically. The benefit for the investor is financial growth but this should not come at the expense of the host nation. In striking a balance between the needs of the investor and local stakeholder, the investment can be a prosperous thing for everyone.

6. Governments of developing economies should keep in mind that the corporate governance structures of investments are not the only factor that investors consider for choosing an investment destination. Industrial action,[412] political readiness to investments[413] and environmental impacts[414]

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[411] Moura R , Forte R 'The effects of foreign direct investment on the host country economic growth - theory and empirical evidence' (2013) 5

[412] 'SA Narrowly Avoids Crippling Strikes In The Public Sector For Now... But At What Cost? '(accessed on 7 December 2019) available at *https://www.huffingtonpost.co.uk/entry/sa-narrowly-avoids-crippling-strikes-in-the-public-sector-for-now-but-at-what-cost_uk_5c7e9bd5e4b06e0d4c24b49f?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFOklUryDbd3QS7NulhDBEonsvb4EFaMtc8oMGpLA7lI-jaAXB6iKwgXn8tL0V_Mp_3aLcnWc19gGA8-B8xHfiBK9fKUQ0NLx_D2vphg0cu3dvmSaak-fveL6Zw9MQZ0Zxjsb01YtWni9dVQ-w8ehIaPyU3az3OtEdFYdZ08paylsf*

[413] Wang O 'China President Xi Jinping says 'only when China is good, can the world get better 'amid US trade war' (accessed on 7 December 2019) available at *https://www.scmp.com/economy/china-economy/article/3033694/chinas-door-will-only-open-wider-xi-jinping-tells-delegates*. 'The aim of the investment drive is to create jobs: Ramaphosa' (accessed on 7 December 2019) available on *http://www.sabcnews.com/sabcnews/the-aim-of-the-investment-drive-is-to-create-jobs-ramaphosa/*

[414] 'How to measure the "impact" in impact investing' (accessed on 7 December 2019) available on *https://www.dailymaverick.co.za/article/2019-10-28-how-to-measure-the-impact-in-impact-investing/*

are factors also considered by investors. As such, developing nations should; in as far as possible; create measures in place for dispute resolution.[415] This should not just be on face value but should have the power to influence a real difference. Bargaining councils and dispute resolution channels should be open and accessible by all who have concerns. They should also be run independently so that both parties have confidence in the neutrality of the process.

The enlightened shareholder approach is the ideal theory of corporate governance that a developing economy should use when enacting their corporate governance regulations. This theory allows for the growth of the investor's investments along with the positive benefits to stakeholders. However, there are negative aspects to investments and making use of the recommendations; proposed above; a developing nation can better their approach to these factors. They can benefit from the economic growth FDI and PI brings into a nation but also mitigate against the negativity it brings, making use of them all will allow a developing nation to grow their investment whilst also preparing for any negative consequences. Nations should also focus on establishing legislation that tables the conduct of directors, requires detailed reporting and taking into consideration the impact company decisions has on stakeholders, without this, it will not fully give rise to the enlightened shareholder theory. By doing all of these, developing nations can establish themselves as good investment destinations.

[415] These resolutions can arise from the interpretation to the enforcement of regulations. Investors should have comfort in knowing the legal system is week established to handle these disputes.

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