THE NEXUS BETWEEN CORPORATE GOVERNANCE AND FOREIGN DIRECT INVESTMENT: COMPARATIVE STUDY OF KENYA AND SOUTH AFRICA

BY

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DECLARATION

This Research Project is my original work and has not been presented for a degree in any other university.

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I confirm that the work presented in this research project was carried out by the candidate under my supervision

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ABSTRACT

A weak corporate governance system has adverse effects on foreign direct investment trends. Losses on the stock market for both domestic and international investors has been caused by corporate governance malpractices. When this state of affairs is coupled with a hostile business environment, the investors are deterred.

The study set out to identify the corporate governance framework in Kenya and South Africa. It was also carried out to explore the extent to which corporate governance influences FDI decisions and compare the corporate governance development about FDI in the two countries.

The sample for the study was Kenya and South Africa as they are both very high recipients and both subscribe to the Commonwealth Codes of corporate governance practice. The Researcher collected data from library sources, reports, international codes, and national statutes, casual interviews with local experts, newspapers and internet sources. Descriptive statistics in forms of indices and bar charts were utilized to describe the trend of the result.

The result shows that Kenya has a bulkier corporate governance framework than South Africa, but South Africa has a sturdier framework and better enforcement. It further demonstrated that a robust corporate governance system has a positive effect on FDI and adverse changes in FDI affect corporate governance. The implications of the outcome were discussed and recommendations proffered. Also, corruption seems to plague both countries and hurts foreign direct investment especially in the case of South Africa.
One of the major recommendations is that both countries ensure that corruption is aptly dealt with. It is also suggested that the national governments unite with stakeholders during the drafting of legislation to ensure an inclusive legal regime.

It is the expectation of the researcher that the findings of the study will be of relevance to Kenyan policy makers, government agencies dealing with both FDI and corporate governance, the academic body of International Relations, Business Management, and potential international investors.
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To my parents: Sampson and Grace and my siblings. In your individual ways, you have been my candle, my strength, and my joy. Thank you all for encouraging me.
DEDICATION

I dedicate this thesis to my parents: Mr. & Mrs. Kimani, my siblings: Anne, Cyrus, and Mwangi for being my fountain of strength and inspiration. To my best friends Martin Githua and Catherine Macharia, thank you for being my soundboards and to every person who struggles with bridging the gap to achieve the standard because of any shortcoming, physical or otherwise.
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KENYAN LEGISLATION

Companies Act No. 17 of 2015

Insolvency Act No. 18 of 2015

Business Registration Services Act, 2015

Capital Markets Act, Cap 485 A, Laws of Kenya

State Corporations Act, Cap 446, Laws of Kenya

Public Procurement and Disposal Act, 2005

Proceeds of Crime & Anti-money Laundering Act, 2009

Ethics & Anti-Corruption Committee Act

Leadership and Integrity Act

SOUTH AFRICAN LEGISLATION

Companies Act No. 71 of 2008

Security Services Act, 36 of 2004

Public Finance Management Act, 1 of 1999

Broad-Based Black Economic Empowerment Act, No. 53 of 2003

Protected Disclosures Act, Act 26 of 2000

Promotion of Access to Information Act, No.2 of 2000
Financial Intelligence Act, No 38 of 2001

Promotion of Administration of Justice Act, No.3 of 2000

Prevention and Combating of Corrupt Activities Act, No. 12 of 2004
LIST OF CODES AND PRINCIPLES

OECD Principles of Corporate Governance (1999 and 2004)

King Code on Corporate Governance (I-IV)

LIST OF ABBREVIATIONS

ACECA – Anti-Corruption and Economic Crimes Act

CEO - Chief Executive Officer

CMA – Capital Markets Authority

FDI – Foreign Direct Investment

GMM – General Moment Methods

JSE – Johannesburg Securities Exchange

JV- Joint Venture

OECD - Organisation for Economic Cooperation and Development

REITs – Real Estate Investment Trusts
CHAPTER 1

1.1 BACKGROUND INFORMATION

A solid corporate governance ground wall is imperative for a growing market economy. It has to include the essential and transparent facets of financial and corporate operations, checks, and balances in compliance with the laws of the country and international standards as well. The laws enacted must be enforceable in a timely and consistent manner. It is important that the laws employ clarity and consistency in areas of orderly entry and exit of firms, property and asset protection of investors and transparency of the legal system. The establishment of effective corporate governance is vital to a transitional economy because its success is crucial for both the growth of a healthy corporate sector and sustenance of a healthy market economy (Foo & Witkowska, 2011).

According to a Report prepared by Africa Corporate Governance Network (2016) in conjunction with the Institute of Directors, Kenya ranked among the top 5 improved countries on Corporate Governance. The ranking shows that corporate governance has undergone gradual evolution. This growth can be attributed to the economic development and on wider policy improvements in each country. The development, according to the report, is primarily dependent on the political structure, economic development, and legal framework.

Of spectral consideration is the one key indicator of the robustness of a country’s financial system is the performance in the capital market. As of 1st July 2016, stock market investors made losses to the tune of Kshs.55 Bn due to corporate governance malpractice. It is such abuses to corporate governance that have raised questions about
strength and reliability of the corporate governance framework (Nairobi Stock Exchange Website, Viewed October 11th, 2016).

There are substantial information and research done on factors affecting Foreign Direct Investment (FDI). Strategy demands that a “PESTEL” and a “BPEST” analysis is done before the firm makes an investment decision.

The “PESTEL” analysis, usually collapsed into “PEST,” is an acronym for Political, Economic, Social, Technological Environmental and Legal factors is considered a sub-set of SWOT (Strengths, Weaknesses, Opportunities and Threats) analysis. The term has usefully been extended to add the business dimension explicitly. It has been extended to ensure that suppliers, competitors, and shareholders are included as well as matters adequately covered by Economics (Cole 1997). The collapse of the Environmental and Legal factors are considered under the political factors because legalities such as legislation and policies are products of political offices.

A “BPEST” analysis refers to the assessment of the external environment of the organization. It stands for Business, Political, Economic, Social and Technological analysis. It enables senior management planners to bring together a comprehensive view of the external environment, which embraces the interest of separate functions and departments across the organization (Cole, 1997). The BPEST analysis appears to be a qualitative evaluation.

This research sought to transcend the “BPEST” and “SWOT” analyses and focus on the organs within the company as the primary units of analysis, advancing to the selected states vis-à-vis the global perspective as the other level of analysis of corporate
governance and its relation to Foreign Direct Investment to ensure sustainable economic development.

The United Nation's Sustainable Development Goals for Africa suggest the need for African economies to attract a substantial amount of Foreign Direct Investments (FDI) to stimulate growth by investing in essential development infrastructures. African countries lag behind their peers regarding infrastructure. The lag is perceptible for low and middle-income countries in Sub-Saharan Africa about other low and middle-income countries. Being predominantly agricultural economies, it would mean that these African Countries need to work at enlarging their economy if they want to fulfill Sustainable Development Goal 8 of attaining a GDP growth of 8% (Foster & Briceno-Garmendia, 2010).

One of the major requirements for development is the ability to attract foreign direct investment that can assist in building growth infrastructural facilities capable of enhancing sustainable development. FDI involves the mobilization of investment funds from foreign investors into the host economy. It may be in the form of transfer of ownership from domestic to foreign investors, or in the form of expansion in productive capacity and capital formation in a country. Consequently, it might also have implications for ownership, since domestic investors may have to concede governance of enterprises to foreigners. FDI provides an opportunity for investors to diversify their portfolio thereby optimizing the balance between risk and return.

Investors are however skeptical of opaque corporate governance structures both at the firm and macro levels because of the attendant risks to their investments in an environment of weak legal system and poor human rights accounts. Recent events indicate that some these economies have realized the significance of good governance
systems and the requirement to signal transparency and accountability both at the firm and country levels and have embarked on significant corporate governance reforms (Adelepo, 2002).

There is limited literature as to whether Corporate Governance does indeed affect the decision to invest. It is imperative, therefore, that we establish the bidirectional effect of Corporate Governance and Foreign Direct Investment.

1.2 STATEMENT OF THE PROBLEM

A weak corporate governance system negatively influences foreign direct investments. Corporate Governance malpractices have led to losses on the stock market to both domestic and foreign investors. A weak corporate governance system, coupled with a hostile business environment repulses investors. The environment of corporate governance in a state affects the ease or lack thereof of attracting investors. The study through an analysis of the corporate governance framework for Kenya and South Africa will assess the sturdiness for corporate governance and how it affects FDI.

1.3 OBJECTIVES

The following objectives guided the study:

1. To identify the corporate governance framework in Kenya and South Africa.

2. To explore the extent to which corporate governance influences FDI decisions.
3. To compare the development of corporate governance vis-à-vis FDI in Kenya and South Africa

1.4 RESEARCH QUESTIONS

The research questions guiding the study included:

1. What is the corporate governance framework in Kenya and South Africa?
2. What is the extent of the influence of corporate governance on FDI behavior?
3. Are there similarities and differences in corporate governance development vis-à-vis FDI in Kenya and South Africa?

1.5 SIGNIFICANCE OF THE STUDY

Foreign Direct Investment into South Africa and Kenya has tended to be more diverse with a growing emphasis on the less-capital intensive services and manufacturing sectors. They have been at the top attracting Foreign Direct Investment projects.

While appreciating that other factors may affect what attracts Foreign Direct Investment to a country, this study focused on the cause and effect of corporate governance on Foreign Direct Investment in Kenya and South Africa.

This study was unique in some ways. Firstly, while there is a preponderance of cross-country panel methods based studies examining the determinants of Foreign Direct Investment in developing economies, there were not many country-specific studies that have examined this issue. Secondly, while other studies had focused on more traditional determinants of Foreign Direct Investment into developing economies, the study took a
more pragmatic look at the issues relevant to economic growth and development in Kenya and South Africa by addressing the governance issues through a robust composite measure of corporate governance.

1.6 SCOPE OF THE STUDY

The study focused on two major variables, corporate governance and foreign direct investment with a comparative analysis of the two variables limited to a cross-country analysis of Kenya and South Africa.

Because the two variables were both wide in their respect, the study shall focus on the Corporate governance framework limited to corporations in both countries and inflows and stock as the variables under consideration in the FDI concept and by extension, the establishment of Multinational Corporations in each state.

1.7 DEFINITION OF TERMS

Accountability; clarifying governance roles and responsibilities and supporting voluntary efforts to ensure the alignment of managerial and shareholder interests as monitored by a board of directors with some independent members.

Bourse: a market organized with the aim of purchasing and sale of securities, commodities, stock options as well as other investments. It is commonly known as a stock exchange.
**Corporation:** A firm that is recognized as having a legal existence when it meets certain legal requirements, and regarded as an entity separate and distinct from its owners. Shareholders who share in profits and losses of the firm own the corporations.

*Direct investment* reflects the aim of acquiring a lasting interest by a local entity of one economy (direct investor) in a venture that is resident in another economy (the direct investment enterprise).

*Direct investor* may be an incorporated or unincorporated private or public enterprise, an individual or a group of related individuals, a government, or a group of related incorporated and unincorporated undertakings which have a direct investment enterprise, which operates in a country that is not the country of residence of the director.

*Direct investment enterprise:* an incorporated or unincorporated initiative in which a foreign investor has ownership of 10% or more of ordinary shares or voting control of an integrated enterprise or the equivalent of a stand-alone enterprise. Direct investment enterprises include subsidiaries, associates or branches.

*Fairness:* protecting shareholder rights and ensuring the enforceability of contracts with resource providers.

*Lasting interest:* the existence of a long-standing relationship between direct investors and the direct investment enterprise with a significant degree of influence on the administration of the latter. Direct investment involves both the initial bargain establishing the relationship between the financier and the enterprise and all subsequent capital negotiations between them and among affiliated enterprises, both incorporated and unincorporated.
Responsibility: ensuring corporate compliance with other laws and regulations that reflect society’s values, including a broad sensitivity to the objectives of the society in which corporations operate.

Subsidiary: an incorporated venture in which an investor controls directly or indirectly, using another subsidiary, more than 50% of the voting power of shareholders.

Transparency: requiring timely disclosure of adequate information on corporate financial performance.

1.8 ORGANISATION OF THE STUDY

Chapter one has highlighted the background of the study, the problem statement, the purpose of the study flowing to the objectives and research questions, significance and scope of the study have also formed the discussion, summed up by definition of terms.

Chapter two focuses on literature review and discuss the concepts of Foreign Direct Investment and Corporate Governance as well as the theoretical underpinnings of the study.

Chapter three deals with the methodology the study will employ. It shall cover the research design, population and sampling design, data collection method, data analysis method and the ethical issues.

Chapter four shall be a presentation of the data and an analysis of the findings.

Chapter five shall summarize the key findings and discuss the results and finally offer recommendations.
CHAPTER 2

2.1 INTRODUCTION

This chapter shall consider the review of the literature and theoretical underpinnings for this study. It shall look at the concept of Foreign Direct Investment and Corporate Governance. Under each concept, this chapter shall illuminate the reasons for investment and factors that affect FDI. It shall also consider what good corporate governance is. In conclusion, it shall map out the nexus between the two concepts.

2.1 LITERATURE REVIEW

2.2.1 Foreign Direct Investment

There is a vast literature on foreign trade and investment dating as far back as the Smithian era (1776). While the mercantile system propagated hoarding and a close economy, Adam Smith was a proponent of free trade and open market system with the “famous” ‘invisible hand.' The neo-classicalists equally hold the views that free trade and investment enhance the accumulation of capital stock. Views have been expressed about the limitations to financing opportunities especially in the face of capital rationing and increasing the cost of capital (Jenkins and Thomas, 2002).

a) Definition of Foreign Direct Investment

FDI has been defined as the investment undertaken by an entity resident of one economy in an enterprise resident in a different economy. The investment is made with the intention of obtaining and sustaining a lasting interest in the enterprise and also to
exercise a major level of influence in its management (Awan, Ahmed, Shahid & Hassan, 2014). Froot (1993) defines it as the acquisition by a firm in one country of control over business activity in a second country. Acquisition of control may or may not be associated with a change in the location of manufacture, but it is necessarily allied to a change in which firm controls production in that location.

b) **Why firms invest abroad**

Substantial increases in domestic market share rarely come without some geographic expansion, first of sales and service operations, later of production facilities. However, it is the original success that drives the expansion, both through lower costs associated with the learning curve and through increased access to and thus lower cost of financial capital.

The over-arching motive why firms engage in FDI is to advance their competitive position. Increasing competitive advantage has become particularly important in the current hyper-competitive global environment. A firm’s competitive position is largely advanced by various motives shown via three main activities according to Dunning (1993) (Luiz & Charlambous, 2009). This division finds a basis in the presumed interest of the investors and how they seek to take advantage of any economy to create a return on their investments. In other words, whatever foreign investors aim to get out of the economy affects what they put in.

The aim suggests that the types of investments behave differently and that, when aggregated, some of the effects of independent variables may be muddled or concealed.
(Samford & Gomez, 2014). Reasons for investment essentially elucidate the types of FDI and include:

i. **Resource seeking**

‘Resource-seeking’ investment is made to maximize the presence of primary goods in the recipient country that is not being extracted by domestic ventures. Such investors pursue reliable stocks of materials that are either not available or not present in their country of origin. Typically this includes extraction of oil and gas and the mining of metallic and non-metallic minerals (Samford & Gomez, 2014). Resource-seeking investment is characteristically relatively immobile and location-bound because it frequently involves the construction of the infrastructure necessary for the extraction of primary goods (Samford & Gomez, 2014; Demirham & Mascra, 2008).

ii. **Market seeking**

Also called horizontal FDI because it often embraces replication of business structures and production facilities in their host countries, targets mostly local and regional markets (Demiharm & Mascra, 2008). The aim of ‘market-seeking’ foreign investment is to either provide non-tradable goods and services to consumers in the target country or to avoid cost-raising barriers to trade by establishing local production of tradable goods. For tradable goods, this means establishing the capacity to produce and sell competitively within the domestic market of the target country, whether by avoiding a trade barrier or simply located within the target market. For non-tradable goods and services (banking, telecommunications and so forth), the intention is to compete with local providers for domestic clients. This type of investment tends to produce goods and services sold within
the target country, rather than exported and hence tariff jumping or export-substituting is viewed as a variant of this type. Samford & Gomez (2014) argue that market-seeking investment is particularly affected by government policy, both investment incentives and trade barriers, on the other hand, it is encouraged by obstacles to entering local markets such as tariffs and transport costs (Demiharm & Mascra, 2008).

iii. Efficiency-seeking

‘Efficiency-seeking’ investment takes place when in the presence of economies of scale as well as scope, the firm can reap from the common governance of geographically dispersed activities in the presence of economies of scale and scope. (Demirhan & Mascra, 2008). Investments in middle-income and developing countries are made with the intent to lower costs of production and marketing by taking advantage of differentials in the costs of inputs and relies on relative openness of cross-border markets. This type of investment often is based on vertically integrated supply chains, where a single portion of the production process is outsourced to take advantage of lower labor costs. Efficiency-seeking foreign investment is most common in high-value-added manufacturing with low transport costs (e.g. textiles, electronics, computers, machinery). (Samford & Gomez, 2014).

c) Factors Affecting Foreign Direct Investment in a country

Identification of determinant factors of FDI is a complex problem which depends on several characteristics specific to each country, sectors, and companies. The host country determinant factors are grouped into three categories: a policy framework for the FDI, economic conditions and business facilitations. To design appropriate economic policies
to attract FDI, one must find out what motivates the investors to seek other markets (Batric & Skuflic, 2006).

The number, range, and complexity of the factors that influence FDI have several implications for governments in their analysis of ways to modify and improve their general and sectoral restrictions. The effectiveness of FDI restrictions is country and time dependent. A set of restrictions that is appropriate for one country may not be suitable for another country. A set of restrictions that was appropriate at one time (and under other conditions) may not be appropriate at another time (and under other conditions) (Conklin & Lecraw, 1997)

The following studies have recently examined the determinants of FDI into Africa using cross-sectional, and panel data approaches, Morisset (2000) and Asiedu (2002, 2004). Morisset (2000), used a panel data approach for 29 African countries to examine the main determinant of FDI and found that good government policy, growth in GDP and trade openness have a significant positive relationship with FDI. He also argued that political instability and volatile financial environment are not helpful to FDI although they did not come up as significant in the regression. He further suggested that a conducive business environment with appropriate incentives and promotion are crucial requirement to attracting FDI. These conditions apply to every economy including the developing economies of Africa.

Asiedu (2002) compared the determinants of FDI in African to other developing economies in the world. She concluded that Africa shared a lot in common regarding the determinants of FDI but observed that some factors seem distinctively unique to the Region. The uniqueness is the backdrop of the fact that while certain factors generate a
significant effect on FDI, the magnitude or effect of such factors is different in the case of Africa. For example, she observed that although the region offers a high return on investment, this has not been sufficiently instrumental in increasing the flow of FDI to Africa because this seemingly high return is somewhat neutralized by the risky business environment in the region. She also noted that Africa does not seem to enjoy locational advantage compared to other developing economies despite the deposit of a substantial number of world natural resources. She suggested that the level of trade openness in the region is lower compared to other developing economic regions and that while infrastructural facilities attract FDI in other regions, its impact on the flow of FDI into Africa is minimal. She put this to the presence of an abundance of natural resources which depends on less on the existing infrastructures.

Dupasquier and Osakwe (2005) studied the performance, promotion, and prospects of FDI in Africa. This descriptive paper identified various factors which include: political and macroeconomic instability, low growth, weak infrastructure, poor governance, inhospitable regulatory environments, and ill-conceived investment promotion strategies, as causes of low FDI into Africa. The paper suggested that conscientious efforts are needed at a national, regional and international level to promote the African market and signal improvement in political stability and transparency in the conduct of the affairs of corporate firms as well as the national governments. Mutenyo (2008) examined the impact of FDI on economic growth in 32 Sub-Saharan African countries using cross-sectional data in a dynamic panel model with General Moment Methods (GMM) estimator. The study found a consistent, stable and significant positive relationship between FDI and economic growth. Inflation was found to be a deterrent to investment
and growth while trade openness and human capital came out inconsistent and insignificant in explaining the relationship between FDI and growth in these countries.

Local legislation and regulation were also viewed as key environmental factors to consider before investing. In particular the presence of a stable and predictable central bank as being essential to interpreting economic stability in a country, and the effect of local tax and profit repatriation legislation. A reliable, fair and transparent judicial system was also seen as a necessity especially in cases where foreign companies required recourse of action to obtain outstanding payments from customers or in cases where service breaches occurred with local vendors (Luiz & Charlambous, 2009).

The Kenya legal system was seen as lacking modern approaches to regulating commercial transactions in as much as foreign investors in Kenya are treated much the same as domestic investors. There has also been seen to be a problem with the government’s policy on Value Added Tax (VAT) administration and delays in reimbursements of excess payments. The tax regime is seen as posing many limitations of foreign investments through high taxes and complex tax system. There are inconsistencies in the policy framework in place thereby limiting foreign direct investment inflows; the policy makers in harmony with regulatory bodies in the industry need to come together to eliminate the inconsistencies, this will enable many willing investors in the industry to fear not to commit their funds (Njoroge & Oketch, 2011).

2.2.2 Corporate Governance

Corporate Governance refers to the set of rule-based processes of laws, policies, and accountability that governs the relationship between the investor (stockholder of a
company) and the investee (management) (Foo & Witkowska, 2011). Gutierrez-Urtiaga (2004) defines corporate governance as the set of institutions that determines how the residual claims are distributed between those who have participated in the generation of profits.

According to Arun & Turner (2009) for Organisation for Economic Co-operation and Development (OECD) economies, corporate governance is the system of practices for controls and management of business corporations. Corporate governance practices as a system make specific how the rights and responsibilities of stakeholders are distributed. They shape rules and procedures for the decision process and provide an outline for the determination of the objectives of a company. Shleifer and Vishny (1996) contend that corporate governance is the form in which stakeholders make sure they obtain a return on their investment.

Arun & Turner (2009) however attempt to reconcile all the previous concepts, which they regard as mutually exclusive. In their view, therefore, corporate governance is the available system of institutions or mechanisms that induce incentives in listed business firms, so as to distribute benefits between stakeholders, restricting discretion on such distribution. The authors focus on institutions and mechanisms that are structured to solve conflicts of interests, and if this process is successful, the risk faced by investors and creditors of the firm will be lower.

Corporate governance is founded on the traditional realization for the privileges allowed to companies under incorporation. It is often based upon two sets of arguments about how these devices serve the public good. The first argument is that incorporation is a public concession by the state in return for benefits, and the second is that there is a valid
contract which entitles a company to exist as a private entity and so should, in a liberal democracy, be defended by the law.

The main assumption is often labeled the ‘concession’ view because it regards the company as an existence granted by the state as a benefit to its members which in return has to be justified by the performance of public welfare functions such as the creation of wealth. The state is therefore entitled to intervene to define and ensure compliance with corporate objectives. However, this argument has been increasingly undermined by the proliferation of companies and other forms of wealth-creating organizations (Warren, 2000).

a) **Good Corporate Governance**

As with states, governance is crucial to the success of individual profit-making enterprises. An analysis of businesses that have sustained success over long periods reveals boards that have governed the affairs of the firm meritoriously. Likewise, with ventures that have performed poorly, it is a rather commonplace to track the problems to boards that have not addressed the issues confronting their businesses efficiently (Colley, 2003).

Some would argue there is no such thing as “good” corporate governance only that the structure of corporate governance has to fit the economy or variety of capitalism it operates within. However, regarding FDI, Adeoye (2009) believes there is a “good” form of corporate governance, which is more likely to attract foreign investors. It is, however difficult to deduce what factors make “good” corporate governance. Suggestions come from the many definitions of corporate governance, for example, the World Bank Report,
1999 definition denotes corporate governance as the procedures and rules that explicitly and implicitly provide the incentive framework for corporations to attract financial and human capital, avoid corruption and perform efficiently” (Adeoye, 1999).

According to Ngirande & Shungu (2014), there is a challenge in the ideal measure of corporate governance because there is no universally accepted measure thereof (Calabrese, Costa, Menichini, Rosati, & Sanfelice, 2013). Yakasai (2001) argued that the structure of the board could be an ideal measure of corporate governance. However, (Chiorazzo et al., 2008) has used control and corporate ownership as the measure of corporate governance, but limited to big and non-financial corporations. Ramano et al. (2012) argue that corporate governance should use any variable, with a direct impact on firm performance. After evaluating this concept using board structure, Boone, Casares Field Karpoffa and Raheja (2007) opine that good corporate governance practices appear to enhance bank performance since it affects the reputation of the bank in the overall market.

In comparison to emerging economies, corporate governance has taken a stronger foothold in developed countries. Good corporate governance has many benefits to the organization, with the importance of finding the difference between the levels of organizational management. At the firm level, well-governed corporations tend to have better and cheaper access to investments and tend to surpass their poorly governed peers over the long-term. Companies that insist on the highest standards of governance reduce many of the risks inherent to an investment in a company. In a similar view, good corporate governance can lessen the risk of financial crisis, which can have devastating social and economic costs. Additionally, it can lead to a better relationship with all
stakeholders and thus improve labor relations as well as the climate for refining social aspects such as environmental protection (Ngirande & Shungu, 2014).

In an attempt to identify the yardstick for good corporate governance, Ngirande & Shungu (2014) argue that the directors are the key attribute of good corporate governance mechanism. They are also regarded as the officers of the company under company law. The Board structure could be used as a proxy for measuring corporate governance practices in firms since directors are the ones who control the company. Board Structure refers to how the organization is structured regarding the board of directors (Ngirande & Shungu, 2014).

The board’s powers are derived from the shareholders whom they represent and are articulated in the corporation’s governing documents. While the Board is empowered to administer and manage the affairs of the company, the shareholders ultimately control the affairs of the corporation because they elect and can replace the board of directors. The Shareholders also have a right to approve significant transactions of decisions, such as mergers, the sale of assets, or dissolution of the company (Colley, 2003). Establishing effective corporate governance is of particular importance for transition countries because its success is crucial not only for the growth of a healthy corporate sector but also for sustaining a healthy market economy (Mekki, 2015).
2.2.3 Mapping out the Corporate Governance- Foreign Direct Investment Nexus

Given that most emerging countries are characterized by severe information asymmetry and uncertainties, financial indicators of potential domestic investors tend to be incomplete or even misleading. While studies find that investors use corporate governance practices to gauge the quality of firms in uncertain local markets, whether the same is true in cross-national investment is left relatively unexplored. Luo & Chung (2009) examine the variety of Joint Venture (JV) partners of foreign companies to determine the effect of corporate governance practices on foreign investment in developing economies. Forming JVs with local enterprises is an attractive entry mode for foreign companies because of the prospects of enlisting strategic assets from local partners, to obtain indigenous knowledge, and to gain a starter into local social networks.

Luo & Chung (2009) consider three possible devices through which corporate governance practices affect how foreign corporations choose local associates. The first suggestion is enshrined by agency theory, which assumes that there exists a set of the most dynamic management parameters. Foreign investors would use these parameters to choose local partners in a bid to reduce monitoring costs. The other contrivance is that foreign firms are anxious to adapt to host-country practices because such institutional consonance can enhance performance in the local contexts. The comparative corporate governance research suggests that different national corporate governance systems might be equally effective because of their affinity with the local institutions. Studies in international business also suggest the importance of local adaptation. Foreign investors, therefore, may select partners featuring the local model. The similarity between these two
mechanisms is that they both treat corporate governance systems as primarily functional tools for profit maximization and assurance of returns, though they differ about what are the best tools.

Miringu & Mworia (2011) argue that institutional investors rely on the excellence of corporate governance systems in decision making, and place a financial premium (a cost) where systems are frail. An effective system that promotes corporate governance contributes positively to the development of both national capital markets and the promotion of foreign direct investment. Thus, the significance of corporate governance is now widely recognized both for national development, and as part of the international financial architecture.

Based on the study conducted by Kim (2010) overall, the results show the specific relationship between the FDI flows or FDI inward performance and the corporate governance or transparency level of hosting countries. The number of analyst index of hosting countries positively affects the FDI inflows, implying that the overall corporate transparency of hosting countries drives foreign investments to host countries. Also, the number of analyst and the anti-director rights level of hosting countries increase the FDI inward performance of foreign firm’s investment in the hosting countries. The results support the related literature that the good overall corporate transparency of hosting countries, measured by the number of analysts, facilitates the foreign direct investment inflows. The results also extend the related literature in that the good corporate governance or transparency, especially the number of analyst and the anti-director rights level, of hosting countries leads to the increase in the performance of foreign firm’s investment in the hosting countries (Kim, 2010).
Institutional investors own large portions of equity in many corporations across the world, and the key responsibility of institutional investors in corporate governance cannot be underestimated. With the internalization of cross-border portfolios and the financial crises that have occurred in many parts of the world, it is perhaps not surprising that institutional investors increasingly look more carefully at the corporate governance of companies. The Cadbury Committee (1992) viewed institutional investors as having a particular responsibility to try to ensure that its recommendations were adopted by companies in which they have invested comply with the Code. The institutional investors’ potential to exert significant influence on companies has clear implications for corporate governance, especially regarding the standards of corporate governance and issues concerned with enforcement (Mallin, 2004).

Ananchotikul (2006) breaks the conventional assertion and concludes from his study of companies in Thailand that foreign investment does not contribute to improving governance of recipient firms in developing countries all the time. His evidence suggests that foreign industrial investors have a negative effect on corporate governance of local firms. The adverse effect is so far-reaching that it includes industry, state- enterprises and family businesses. This paper's contribution discovers that firms owned by investors from countries with weak corporate governance frameworks have worse management than their peers in the host country. The implication is that bad governance practices are easy to transfer, while good governance may attract a premium in a country with relatively weak governance institutions.

As a researcher, I was alive to the debate of the nexus between the two variables. I was met with little evidence of the nexus, which is formed another motivator for this thesis.
The evidence by Kim (2010) suggests that policy framework does indeed affect FDI. Specifically, corporate governance is seen to affect FDI as well. However, this is not a defined factor. The absence of a well-articulated nexus could be attributed to the fact that the jury is still out on what is universally accepted as good corporate governance.

The postulation that foreign investment is a mechanism for change or improvement in corporate governance has been challenged by Ananchotikul (2006) whose findings suggest that foreign industrial investors favor weak corporate governance as it allows for the exploitation of minority shareholders.

I am convinced that there exists a bi-directional relationship between the two variables. A robust corporate governance has a positive effect on FDI. The extent to which this effect is seen is contingent on the type of FDI. On the other hand, FDI also has an effect on the corporate governance of firms (Mallin, 2004). The extent of such influence lies in the ownership of the firm in the host countries. The influence is only at firm level. However, at the state level, the effect is also to the extent of the relations between the host states and the investing countries.

2.2.4 Theoretical Framework

a) Rational Choice Theory

The rational choice theory argues human behavior, and social life, in general, can be explained regarding rational choices of individuals. Social interaction, including political exchanges, is considered to be a type of interaction where people will cooperate with
each other if the expected gains offset the expected costs arising from the interaction (Sato, 2013).

Ogu (2013) highlighting Becker (1976) documented that “the rational choice theory was initially popularized by a 1992 Nobel Memorial Prize Laureate in Economics Science, Gary Becker, who was one of the principals in employing a wider application of the rational actor”. Elster (1989) identified the essence of rational choice theory when he held that “when faced with multiple courses of action, people typically do what they believe is expected to have the best overall result.” The ‘rationality’ elucidated by the rational choice theory espouses a more specific and narrower definition, which simply means that “individual acts as if balancing costs against benefits to arrive at an action that maximizes personal advantage.” (Friedman, 1953).

The theory assumes individual as actors, always behave like rational beings, self-calculating. Self- interested and self- maximizing. These individuals according to the assumptions choose their actions based on preferences as well as the opportunities or constraints faced by the individual; this means that individuals do the best they can, given their circumstances as they see them. It is also a further assumption that structures and norms that dictate the course of action are simply special cases of rational choice theory. The actions of the individual are concerned entirely with his welfare. People act in ways that would benefit them more; every person is most likely to assume courses of actions that they identify to be the best possible option that would be to their advantage (Ogu, 2013).

Individuals run corporations. Decisions made by the organizations are engineered by individuals on the Board of Directors. Thus the decision to invest according to this theory
is based on an individual’s choice. Similarly, the government is comprised of individuals who choose to have a robust corporate governance system or not.

b) **Stakeholder Theory**

Stakeholder theory was rooted in the management discipline in 1970 and gradually developed by Edward Freeman. Freeman (1984) defines stakeholder theory as “any group or individual who can affect or is affected by the achievement of the organization’s objectives.” The stakeholder theory takes a different approach from agency theory in which managers serve the stakeholders primarily, proponents of the stakeholder theory suggest that managers in organizations have to serve a network of relationships which includes suppliers, business partners, and employees (Freeman, Harrison, Wicks & De Colle, 2010).

This theory takes account of a wider group of constituents rather than focusing on shareholders. Corporates have stakeholders, who are groups and people who benefit from or are affected by and whose rights are sullied or respected by corporate actions. The stakeholder's concept is a generalization of the concept of shareholders who themselves have some special right on the firm (Freeman *et. al.*, 2010).

Freeman *et. al.* (2010) distinguishes between “narrow definition” of stakeholders which includes those groups which are crucial to the survival and accomplishment of the corporation. The “comprehensive definition” includes any group or individual who can affect or is affected by the corporation.
The stakes of each are give-and-take since each can affect the other regarding harms and benefits as well as rights and duties. The aspects included in the narrow definition are necessary for the survival and success of the firm. The stakeholder theory doesn’t give primacy to one stakeholder group over another, though there will surely be one group that will benefit at the expense of others (Freeman, 1987).

*Figure 1: The stakeholder Model (Donaldson and Preston, 1995)*

A concern of focusing on shareholders is that the conservation or enhancements of shareholder value are overriding. Whereas when a broader stakeholder group such as employees, suppliers, providers of credit, customers, the government as well as the local community is taken into account, the main shareholder value becomes less self-evident (Abdulla & Valentine, 2009).
Nonetheless, many companies do strive to maximize shareholder value while at the same time trying to take into account the interest of the wider stakeholder group. One rationale for effectively privileging shareholders over other stakeholders is that they are recipients of the residual free cash flow. This means that the shareholders have a vested interest in trying to ensure that resources are used to maximum effect which in turn should be to the benefit of the society as a whole (Yusuff & Alhaji, 2012).

Maximization of the welfare of stockholders is subject to moral or social limits, either because such maximization points to the greatest good or because of property rights (Mallin, 2004).

This theory aptly captures the duty owed to other stakeholders other than shareholders by a corporation. In this argument, multinational corporations, while foreign still have to consider the other stakeholders to the firm in the host countries. Likewise, the domestic companies have to consider the foreign investor as a stakeholder.

The theory primarily deals with the normative prescription of moral and social duty to the stakeholders. The prescription is seen in duties of directors as they manage the affairs of the corporation. The said duties are grounded in common law and guide Commonwealth countries, where they have not been codified.

c) **The Eclectic Paradigm**

The eclectic theory propounded by Professor Dunning is an amalgam of three different philosophies of direct foreign investments (O-L-I):
1) “O” from Ownership advantages:

Ownership advantages refer to intangible assets, which are, at minimum exclusive possesses of the company for a while and may be transferred to the multinational corporations at low costs, leading to cost reduction or higher incomes.

Thereby, for a company to successfully enter a foreign market, it must possess certain characteristics that would crow over operating costs on an international market. Dunning (1973, 1980, 1988) argues that these advantages are the property proficiencies or the specific benefits of the company. The firm has a domination over its specific gains and using them abroad leads to greater marginal profitability or lesser marginal cost than other entrants. (Dunning, 1973, 1980, 1988).

2) “L” from Location:

When the first advantage is achieved, it must be more tactical for the company that owns them to use them itself as opposed to selling them or renting them to foreign firms.

Location advantages of different countries are imperative in determining which country will host the activities of the multinational corporations.

The specific advantages of each country can be divided into three categories:

a) The economic convenience consisting of quantitative and qualitative production factors, transport costs, market size, telecommunications, etc.

b) Political advantages: collective and specific government policies that affect FDI flows

c) Social benefits: includes the distance between the home and host countries, cultural diversity, attitude towards foreigners.
3) "I" from Internalisation:

Suppose the first two conditions have been met, it must be lucrative for the company to use these advantages, in collaboration with at least some dynamics outside the country of origin (Dunning, 1973, 1980, 1988).

This third characteristic of the eclectic paradigm OLI offers a framework for evaluating different ways in which the corporation will exploit its influences from the sale of goods and services to several agreements that might be executed between the companies.

As cross-border market internalization benefits are higher the more, the firm will want to participate in foreign manufacture rather than offering this right under license, franchise.

Eclectic paradigm OLI shows that OLI factors are different from company to company and are contingent on context and mirror the economic, political, social characteristics of the host country. Therefore, the goals and strategies of the firms, the scale, and pattern of manufacture will depend on the challenges and prospects offered by a variety of countries.

The study uses this approach to explain why South Africa is attracting more FDI than Kenya as well as why Kenya’s FDI is growing despite its shortcomings contrasted by South Africa’s decline in Foreign Direct Investment in the recent past.

Similarly, the study shall analyze the trends in line with this theory to verify the extent of its validity in the two countries.
2.3 CHAPTER SUMMARY

This chapter has comprehensively reviewed the literature that sought to inform the research questions and theoretical underpinnings that guided this study. It looked at the concepts of Foreign Direct Investment and Corporate Governance. Under the concept of FDI, this chapter has illuminated the reasons for investment and factors that affect FDI. These reasons include: resource seeking, market-seeking and efficiency seeking motives.

It also considers what good corporate governance is. However, because there is no universally acceptable definition of good corporate governance, the dissocance between the two concepts is seen.

In conclusion, the chapter mapped out the nexus between the two concepts. The Rational Choice Theory primarily guided the study and supplemented by Stakeholder theory and Dunning’s Eclectic Paradigm. The decision to buttress the study on the Rational Choice was informed by the philosophy that actors in the international scene ultimately make choices which we use to study their behavior.
CHAPTER 3

3.1 INTRODUCTION

This chapter presents the methodology and methods employed in the study. It contains a description of the research design, the population and sampling design, the data collection and analysis of the study and finally, the ethical issues encountered during the research process.

3.2 RESEARCH DESIGN

According to Kothari (2004), the formidable problem that follows the task of defining the research problem is the preparation of the design of the research project, popularly known as the research design. To effectively map out the nexus between Corporate Governance and FDI, the study will use comparative strategy and causal-comparative research design. This method is used where the cause and effect relationship being studied doesn’t allow for experimental manipulation (Mugenda & Mugenda, 2003).

Vaus (2006) opines that cross-national research is valuable as it forces researchers to take account of cross-national dissimilarities and inconsistencies that could never be uncovered in a single-nation research.

The thesis employs a mixed method under general methodology to allow for a better assessment of the objectives of the study. The mixed method is used because it aptly captures the complementarity approach which is different methods that are integrated
rather than used in parallel or sequentially, as when researchers repeatedly shift from one to the other.

The study employs the quantitative method because the nature of reality is stable, external and independent of the observer. It assumes a neutral empirical relation to a social phenomenon with a research aim of testing hypothesis and generalizing. The criteria the study shall use for judging the research shall be validity, reliability, and objectivity. The characteristics that shall be focused on in qualitative research is nature of the reality is diverse and holistic.

The qualitative aspect shall, in the beginning, employ unstructured, open-ended, theory developing research while developing concepts that are rich in meaning as strategies. The criteria for judging the research shall be credibility, transferability, dependability and authenticity. It shall then be structured to ensure conformance with the research questions.

3.3 POPULATION & SAMPLING DESIGN

Population has been defined as a complete set of individuals, cases or objects with some common observable characteristics. A particular population has some characteristics that differentiate it from other populations (Mugenda & Mugenda, 2003). The population of this study is Commonwealth countries in Africa that subscribe to the Commonwealth Principle Based model of corporate governance and are recipients of Foreign Direct Investment.
The sampling design to be employed is purposive under non-probability sampling. Mugenda & Mugenda (2003) provides that purposive sampling is a sampling technique that allows a researcher to use cases that have the essential information on the objectives of his/her study. Cases are therefore handpicked because they are informative or possess the characteristics desired.

According to Mugenda and Mugenda (2003), a subdivision of a specific population is called a sample.

The samples chosen for this study is Kenya and South Africa because they are both countries that use the Commonwealth principle based model of corporate governance and have both been significant recipients of FDI in Sub-Saharan Africa. The similarity of their legal systems also contributed to their choice of the sample in this study.

### 3.4 DATA COLLECTION

Data denotes all the information a researcher gathers for her study that has been obtained from a situation or activity (Chandran, 2004). Secondary data refers to the information a researcher obtains from research articles, books, casual interviews, etc. (Mugenda & Mugenda, 2003)

The study employed secondary sources of data as a source. They include information from library sources, reports, national statutes, casual interviews with colleagues and local experts, newspapers, and internet sources.
Secondary data is readily available from already existing sources, and as such, there are no specific collection methods (Shipman, 1997).

The data was collected through analysis of historical records and analysis of documents.

3.5 DATA ANALYSIS

In quantitative analysis, the study shall employ descriptive statistics. Mugenda & Mugenda (2003) posit that the first step in data analysis is to describe or recapitulate the data using descriptive statistics. The aim of descriptive statistics is to enable the researcher to meaningfully describe a distribution of scores using a few indices. Each indicator used has a resolve and is based on the variable used in the study. The study has used bar charts and indices in its descriptive statistics.

Use of qualitative method allows the researcher to explain cases more deeply and exhaustively (Mugenda & Mugenda, 2003).

The study has employed the following steps in its qualitative data analysis:

3.5.1 Organization

Mugenda and Mugenda (2003) propose that due to the plethora of data derived, there is a need for the researcher to read and familiarize with it.

This study was organized through intensive reading and note taking at each point of collection.
3.5.2 Creating categories, themes, and patterns

This process requires familiarity with the data. The researcher must be able to detect various categories in the data (Mugenda & Mugenda, 2003). This is the first step that constructs the relationship among these constructs.

Thematic identification and categorization characterized the study.

3.5.3 Analyzing and interpreting information

A researcher closely evaluates the usefulness of information in answering the research questions. The researcher then evaluates and analyses the data to determine the adequacy of information and the credibility, usefulness, consistency and validation of research questions (Mugenda & Mugenda, 2003).

The study has objectively analyzed the data to validate the research questions.

3.6 ETHICAL CONSIDERATIONS

There were some ethical considerations that the researcher took into account. This accountability is because, in every research, there are issues that the researcher must consider to make his work authentic, acceptable and verifiable. The two major ethical concerns that the researcher paid particular attention to include:

3.6.1 Research Plagiarism and Fraud

Plagiarism refers to situations where researchers refer to people’s works as theirs without acknowledging the author. In the same vein stealing ideas from other scholars constitutes
acts of plagiarism. Plagiarism is a crime punishable by law. More so, it erodes the integrity of the entire work developed by the researcher (Piper & Simons, 2008). The above issues guided the researcher and ensured they were fully complied with to make the current analysis focused and ethical.

3.6.2 Reliability and Validity

The Researcher has attempted to maximize the validity of the secondary data collected. For reliability and Validity to occur in the data, the data collection techniques must produce information that is not only germane to the research hypotheses but also accurate. Therefore reliability and validity are dealings of this relevance and correctness. Reliability is a measure of the degree to which a research instrument yields consistent results or data after repeated trials (Mugenda & Mugenda, 2003). On the other hand, validity is the accuracy and meaningfulness of inferences, which are based on the research results (Kothari, 2004). In other words, validity is the point up to which results obtained from the scrutiny of the data represent the case under study. Validity, therefore, has to do with how precise the data obtained in the study represents the variables of the study. If such data is a true representation of the variables, then inferences based on the same will be accurate and meaningful. (Mugenda & Mugenda, 2003).

3.7 LIMITATIONS AND DELIMITATIONS OF THE STUDY

Secondary Research does not follow a structured procedure. The absence of structure leaves the possibility of straying from the research questions during analysis of the data. To curb this, the researcher developed a structure and a statement of purpose.
Because the data may lack standards of accuracy by their secondary nature, the researcher talked to local experts to corroborate the data.

3.8 CHAPTER SUMMARY

This chapter has discussed the methodology and methods employed in the study. It contained a description of the research design, the population and sampling design, the data collection and analysis of the study which discussed organization, categories and analysis and interpretation of the information and finally, the ethical issues encountered during the research process.
CHAPTER 4

4.1 INTRODUCTION

This Chapter shall identify the corporate governance framework in Kenya and South Africa and present how the corporate governance framework affects Foreign Direct Investments and compare the development of Corporate Governance about Foreign Investment in Kenya and South Africa.

A robust corporate governance framework builds confidence in investors and creates a conducive business environment. This has the effect of attracting investment into the countries. This chapter shall analyze the robustness and effectiveness of corporate governance framework for Kenya and South Africa and compare this against the theories of the study.

In consideration of the corporate governance framework, this study shall limit its assessment to select acts of Parliament of general application. It shall not consider sectoral laws and laws of other bodies corporate other than Companies and State Corporations.

4.2 CORPORATE GOVERNANCE FRAMEWORK IN KENYA AND SOUTH AFRICA

The World Bank Report 1999 defined corporate as the procedures and rules that explicitly and implicitly provide the incentive structure for companies to attract monetary and human capital, perform efficiently and avoid corruption (Adeoye, 2009). There is a
variation of how corporations order their affairs, despite the structure of ownership being evident even within a single jurisdiction.

Corporations whether family firms, the dominant form of economic organization, or state enterprises, operate within boundaries set by law, regulations, by their owners and funders and by the expectations of those they serve (Iskander & Chamlou, 2000)

Institutional Investors rely on the caliber of corporate governance regimes in making decisions and place a premium on weak systems. A system that promotes corporate governance contributes positively to the development of both national capital markets as well as foreign direct investments. The implication of corporate governance is now widely recognized for both national development and as part of international financial architecture (Mallin, 2006).

The definitions of Corporate Governance from both public and private perspectives provide an infrastructure for corporate governance. The infrastructure reflects an interplay between internal incentives, which define the relationship between the key players in the corporation and external forces, notably the market, regulatory, policy and legal and together govern firm performance and behavior (Iskander & Chamlou, 2000).

Kenya and South Africa have both explicit and implicit legal framework that governs functioning of companies. This study shall consider specific Acts that affect foreign Investment. It shall also consider Acts and Provisions within various legislation focusing on Investment that directly or indirectly affect corporate governance of a company. Focusing on the notion that corporate governance is about ensuring that the business is run well and that investors receive a fair return and giving overall direction to
management and ensuring accountability of shareholders. It does not look at management of the company which concerns itself with day to day running of business.

4.2.1 International Corporate Governance Framework

a) Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance

The OECD Principles of Corporate Governance first published in 1999 and later revised in 2004 represent the international foundation of corporate governance. The main principles include ensuring the basis for a strong corporate governance framework, the rights of shareholders and the key ownership functions, disclosure and transparency and the responsibilities of the board, the role of stakeholders in corporate governance, and the equitable treatment of shareholders.

In ensuring the basis for effective corporate governance framework, transparency and efficient markets are paramount. The framework should also be consistent with the rule of law and clearly articulate responsibilities among various supervisory, regulatory and enforcement authorities. Formed with the view to impact economic performance, the legal and regulatory requirements should be transparent and enforceable.

The second principle focuses on protection of shareholder rights and includes rights to secure methods of ownership registration, transfer shares, obtain information regarding the corporation regularly and on a timely basis, participate in general meetings, elect and remove board members and share in profits. Shareholders should also have the right to take part in decisions regarding fundamental corporate changes. Furthermore, markets for
corporate control should be allowed to function in an efficient and transparent manner. Rules and procedures regulating the acquisition of corporate control in the capital markets, the extraordinary transactions such as mergers and sales of considerable corporate assets, should be clearly articulated and disclosed so that investors understand their rights and recourse. Further still, anti-takeover devices should not be used to shield management and the board from accountability. There should be the facilitation of exercise of rights by all members of the company, inclusive of institutional investors. There should be full disclosure of overall corporate governance and policies regarding voting about their investments by institutional investors. This disclosure should also include the procedures that are in place for deciding on conflicts of interests that could affect their exercise of key ownership rights of their investments.

Corporate governance framework according the third principle should ensure that their shareholders are all treated equitably. This includes minority and foreign shareholders. Further insisting on the normativity of shareholders having an opportunity to obtain effective redress for violation of their rights. Further, insider trading and abusive self-dealing should be prohibited.

The fourth principle recognizes the rights of stakeholders recognized by law or through mutual agreements and encourage dynamic co-operation between companies and stakeholders in wealth creation, jobs, and the sustainability of monetarily sound enterprises. Stakeholder rights are established by law or through mutual agreements, and they are to be respected. Where protected by law, stakeholders should have the opportunity to obtain effective redress for said violation. The corporate governance framework should be accompanied by an effective, efficient insolvency framework.
Disclosure and transparency should be timely and accurate regarding the corporation. Disclosure should include material information on financial and operating results of the company, the company objectives, major share ownership and voting rights and issues regarding employees and other stakeholders.

The sixth principle provides for strategic guidance of the company, effective monitoring of administration by the board and its responsibility to the company and the shareholders. It further provides for duties of directors towards the corporations as acting in good faith, on an informed basis, with due diligence and care and in the best interest of the company and the shareholders. The board should employ high ethical standards and take into account shareholders’ interests.

**4.2.2 Corporate Governance Framework in Kenya**

The legal framework and governance Standards in Kenya are limited to the following Acts:

- a) Companies Act, No. 17 of 2015
- b) Co-operative Societies Act (Cap. 490)
- c) Sacco Societies Act (Cap 490 B)
- d) Societies Act (Cap.108)
- e) Trustee Act (Cap.167)
- f) Non-Governmental Organisations Coordination Act (Cap 134)
- g) State Corporations Act (Cap 446)
h) Insolvency Act, No. 18 of 2015

i) Capital Markets Act (Cap 485A)


The Scope of this study shall, however, be limited to analysis of the Companies Act, State Corporations Act, and Capital Markets Act and their subsidiary legislation, The Mwongozo Code of Governance for State Corporations. The choice of these acts is premised on the corresponding variables of FDI of inflows and stock. Inflows may be in the form Multinational Corporations while stocks are in the form of purchase of shares on the securities exchange.

a) **Companies Act, No. 17 of 2015**

The Companies Act, No. 17 of 2015, colloquially known as the new Companies Act has seen a change of how companies are governed. The New Companies Act among other things takes cognizance of the role that technology plays in the society and attempts to ease business transactions through digitization of procedures. It also introduces legal and commercial concepts that were previously not permitted or governed by the 1948 Companies Act. Fines and penalties have also been revised upwards to reflect prevailing economic conditions as well as the severity of offenses.

The Act essentially states that its objects are to expedite commerce, industry, and other socio-economic undertakings. The statute provides for enabling one or more natural
persons to incorporate entities that are a going concern, with or without limited liability, and to predict the regulation of those bodies in the public interest, and particularly in the interests of their members and creditors. ¹

b) **The State Corporations Act (Cap 446, Laws of Kenya)**

The Act established the powers by the President to establish State Corporations. Priding itself as an Act that is meant to make provision for the establishment of state corporations and controlling them by an order made by the President.²

It is imperative that it is clarified, that while a State Corporation is a body corporate, it is not a company as elucidated by Section 2 of the Act.

State Corporations have established Boards by the Act. Part III outlines the Compositions of the Boards, Removal of members of the Board³ and Meetings and Procedures of these Boards⁴. Other Aspects of Corporate Governance that the Act provides for include keeping of books of accounts⁵, accountability of the Board ⁶, and the Restriction to loan members of the Board money⁷.

c) **The Capital Markets Act (Cap 485 A)**

The Act came into effect in 1989 establishes a capital markets authority tasked with promoting and facilitating the development of an orderly and fail and efficient capital market in Kenya.

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¹ Section 2 Companies Act  
² Section 3, State Corporations Act  
³ Section 7  
⁴ Section 8  
⁵ Section 14  
⁶ Section 15  
⁷ Section 17
The Authority, established under Section 5 of the Act is empowered under Section 11 which states its principal objectives, and make rules\(^8\) as may be required for the purpose of ensuring orderly and fair trading in capital market instruments and protection of investors and particularly listing of securities on a bourse\(^9\); disclosures about securities transactions by brokers and dealers; persons who acquire or dispose of securities and a securities exchange;\(^{10}\) Proper maintenance of books, records, accounts and audits by all persons approved or licensed by the authority\(^{11}\); the operation of any other bodies corporate or persons dealing with capital markets instruments\(^{12}\);

Within the ambit of the Capital Markets Authority Act, there have been established various subsidiary legislation, codes, and guidelines that further its objectives.

\(i)\) \textit{Capital Markets (Futures Exchanges) (Licensing Requirements) Regulations, 2013}

These regulations were set up to guide licensing of a futures exchange. A futures exchange has been defined as a securities exchange whose license has been approved to list futures contracts by the Authority as provided under the Act or approved for such purposes and by the Regulations\(^{13}\). The Board is mandated to establish an investor protection fund to satisfy claims of clients against future brokers. Within the ambit of Regulation 32, a futures exchange is mandated to adhere to corporate governance norms. Over and above that, its duties shall be in line with corporate governance norms as under Regulation 33.

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\(^8\) Section 12, Cap 485 A  
\(^9\) Ibid. (a)  
\(^10\) Ibid. (b)  
\(^11\) Ibid. (c)  
\(^12\) Ibid. (d)  
\(^13\) Regulation 2, Cap 485 A(Futures exchange) (Licensing Requirements) Regulations, 2013
ii) **Capital Markets (Real Estates Investment Trusts) (Collective Investments) Regulations, 2013**

Provides for governance of REITS, and further prescribes for employment of corporate governance. Part XXIX provides that the trustees of REITs and REIT managers as market intermediaries with such qualifications as shall be necessary.

iii) **Capital Markets (Conduct of Business) (Market Intermediaries) Regulations, 2011**

These regulations provide for regulation of the business of market intermediaries. Reg 25 provides that a market go-between shall take reasonable steps to discern if any of its patrons are insiders and keep records that assist it in monitoring insider trade.

Regulation 30 provides for proper accounts for client’s funds and prohibition of withdrawal of said funds for purposes other than making payments upon instruction by the client, purchasing, margining, guaranteeing, securing, transferring, adjusting or settling disputes dealing in securities effected by the intermediary on the written instructions of the client, or making any other payment required by law. Regulation 30 sets out requirements in respect of accounting records and maintain an audit trail as under Regulation 34.

iv) **Capital Markets (Asset Backed Securities) Regulations, 2007**

These regulations as prescribed by Regulation 2 shall apply to all offers of asset-backed securities to the public or a section thereof or a section thereof in Kenya including issues by state corporations and other public bodies.
Asset-backed securities refer to securities that are issued as part of the securitization transaction in which assets are transferred to a third party that issues the securities and that are primarily serviced on both returns of investment and return on investment by cash flow from said assets.

v) **Capital Markets (Corporate Governance) (Market Intermediaries) Regulations, 2011**

The regulations establish corporate governance practices required of market intermediaries. Market intermediaries shall have a Board\(^\text{14}\) with duly qualified members\(^\text{15}\) and maintain a register of the members of the Board\(^\text{16}\). It further provides for the code of conduct and provides room for the adoption of the model code in the schedule to the regulations. It goes further to prescribe for a board charter and hold the board to accountability and responsibility. The intermediaries’ prescribed meetings, remuneration, and committees\(^\text{17}\) are duly prescribed by the Regulations. Regulation 14 provides that the intermediaries shall establish a framework providing for strategic purpose of the intermediary and availability of information and documentation promptly.

vi) **Capital Markets (Registered Venture Capital Companies) Regulations, 2013**

The regulations have been established to govern registered Venture capital companies and provide a framework within which they can function. A venture capital means a company incorporated under the Companies Act with the primary objective of providing substantial risk capital to small and medium-sized businesses in Kenya through equity, quasi-equity investments or other instruments which can either be converted into equity

\(^{14}\text{Regulation 3}\)
\(^{15}\text{Regulation 4}\)
\(^{16}\text{Regulation 5}\)
\(^{17}\text{Regulations 8-13}\)
or not as well as the managerial or technical expertise to such business entities. A registered Venture capital company refers to a venture capital registered as such by the Authority. 18

vii) Capital Markets (Securities) (Public Offers, Listing & Disclosure) Regulations, 2002

The regulations provide for particulars related to issuing Public Offers. They outline the eligibility, disclosure and general requirements for public offers. One is said to offer to the public as prescribed under Regulation 5 when said offer is made to the public, whether selected as members or debenture holders of a body corporate or as clients of the person making the offer, or in any other manner is to be regarded as made to the public.

viii) Capital Markets (Foreign Investors) Regulations, 2002 as read together with the Capital Markets (Foreign Investors) (Amendment) Regulations, 2015

These regulations are meant to govern investor relations in the country. They define a foreign investor as anyone who is not a local investor19. Regulation 3(1) was amended to remove the cap on ownership of shares in a listed company to 75% by foreign investors. The Cabinet Minister, however, may prescribe a maximum shareholding by the foreign investor.

Regulation 6(1) was amended to provide that a listed company shall immediately report to the securities exchange once the per centum of ordinary shares held by foreign investors reaches the prescribed foreign shareholding under regulation 3(2).

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18 Regulation 2
19 Regulation 2
Regulation 10 of the principal Regulations was amended by incorporating the above changes.

ix) **The Code of Corporate Governance Practices for Issuers of Securities to the Public**

This Code replaces the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002. The Code outlines the principles and specific guidance on structures and processes, which companies should adopt in making good corporate governance a critical part of their business dealings and culture.

The Code promotes the embracing of standards that are an extra mile past the minimum prescribed by law. The Code has embraced the “Apply or Explain” approach and moved away from the “Comply or Explain.” The former approach is principle-Based as opposed to rule-based and recognizes that an acceptable explanation for any non-compliance will be satisfactory in certain circumstances. The approach therefore requires boards to fully disclose any failure to comply with the Code to germane stakeholders including the Capital Markets Authority with a well-founded commitment to move towards full acquiescence.

However, the Code contains obligatory provisions which are the minimum qualities that issuers must execute, and these are reproduced in the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002. Where this Code imposes mandatory provisions, it is stated that companies shall comply with the particular requirement.
Issuers of restricted offers of securities to erudite, institutional or professional investors are exempted from stringent compliance with the obligatory provisions and may adopt them as a matter of best practice.

Chapter Four of the code outlines relations with stakeholders. Its commentary reads

“Effective management of interested parties will positively impact the company’s achievement of its strategy and long-term growth. Stakeholders are considered to be any group who can affect, or be impacted by the Company, its decision, and its reputation. They include shareholders, customers, suppliers, employees, creditors, regulators, lenders, media, auditors and potential investors. The corporate governance framework should recognize the rights of stakeholders and encourage active co-operation between companies and stakeholders in creating wealth, and sustainability of financially sound enterprises.”

4.2.3 Corporate Governance in South Africa

The main sources of corporate governance in South Africa are the King Reports on Corporate Governance (which forms the basis of the debate on corporate governance in South Africa), Acts of Parliament, particularly the Companies Act (71 of 2008), common law with rich and extensive case law pertaining to corporate governance and the rigorous JSE Listings Requirements (Moloi, 2008).

The research dwells much on the King Reports, Companies Act, and JSE Listing Requirements with brief references to other selected Acts that positively impact on corporate governance.
a) **The King Code on Corporate Governance**

i) **King Report**

The first King Report was influential in raising awareness of what constitutes good governance, in both private and public sectors. It offered to companies a coherent and disciplined governance framework relevant to local circumstances and offered guidelines.

The governance framework proposed by the King Report offered the much needed practical guidance to South African private and public institutions in that it was designed specifically to suit local circumstances. The main aim of the King Report was to encourage the highest standard of corporate governance in South Africa by recommending standards of conduct for directors and emphasizing the need for responsible corporate conduct (Malin, 2006).

The report led to comprehensive revision of listing requirements and revisions to the South African Companies Act (Armstrong, Segal & Davis, 2006)

ii) **King II Report**

The King II also focuses on the central role of the board in ensuring good corporate governance and identifies seven fundamental characteristics of good corporate governance namely discipline, transparency, independence, accountability, responsibility, fairness and social responsibility. Given the challenges of applying the guidelines across the South African economy, the King II was appurtenant to all companies listed on the JSE Limited, financial and insurance entities, banks, public sector firms falling under the Public Finance Management Act (No. 1 of 1999) and the Local Government: Municipal Finance Management Act (No. 56 of 2003), including any state department acting in
terms of the Constitution or legislation. The main reason for the —selective application was to target companies and institutions that fall within a controlled and more readily regulated environment in which the corporate governance standards could be more easily identified and measured (Malin, 2006).

iii) **King III Report**

In September 2009, the King Committee on Corporate Governance released the King III Code of Governance Principles and the King III Report on Governance for South Africa. The King III replaced the King II as from March 2010 and unlike its predecessors, applies to all bodies regardless of their nature, size or form of incorporation or establishment. In a change of approach, the King III moves from a —comply or explain approach to a principles-based —apply or explain approach. The apply or explain approach means that all entities are expected by way of explanation to make a positive avowal about how the principles have or have not been applied. A board may, therefore, determine that applying a recommended practice is not automatically in the best interests of the corporation and apply a different practice only if it explains the practice adopted and its reasons for doing so. This altitude of the disclosure will allow stakeholders to give their comments on and challenge the board to improve the governance level within an organization. Also, companies should not necessarily feel an obligation to comply with all aspects of the King Report (PricewaterhouseCoopers 2002)

The framework recommended by the King III is principles-based and acknowledges that there is no —one size fits all solution. The principles are drafted on the basis that, if they are adhered to, any entity would have practiced good governance. Entities are thus
encouraged to tailor the principles of the Code as appropriate to the size, nature, and complexity of their organization. The wiggle room to tailor the principles is viewed as a major positive development for South African companies as it escapes some of the pitfalls seen in the United States where a —one size fits all approach was initially adopted (PricewaterhouseCoopers, 2009).

The King III has also broadened the scope of corporate governance in South Africa with its core philosophy revolving around effective leadership, sustainability and corporate citizenship. Leaders are mandated to define strategy, provide direction and establish the ethics and values that will influence and guide practices and behavior about sustainability performance. The King III further highlights, amongst others, the need to improve communications between the board and its stakeholders, matters to do with executive pay, emphasis on non-executive director’s effectiveness, integrated reporting, governance within smaller companies and corporate social responsibility (CGF Research Institute 2009).

It is also important to note that the King III takes an integrated approach to corporate governance which —recognizes that stakeholders such as the community in which the company operates, its customers, employees and suppliers, need to be developed when developing the strategy of the company (Hamann 2009). The Code thus argues in favor of balance in corporate governance between allowing directors to run the company in the way they considered best for the stakeholders while providing stakeholders with some protection against a board that ignores its responsibilities and is not held properly accountable (Mallele, 1995).
iv) **King IV**

It is clear that King IV purposes to create a balance between conformance and performance. The Code is further intrepid in its relentless effort to fortify corporate governance as an all-inclusive set of arrangements that involves itself with ethical leadership, attitude, mindset, and behavior. This echoes international developments in the conduct risk stage and also seeks to address and prevent recent examples of corporate failure. The boldness of the Code is manifest in the clear focus on transparency and besieged disclosures in all areas, especially in the introduction of more extensive executive remuneration disclosure than ever seen before. While we believe that this problem still warrants debate in the South African context, we recognize that the propositions are in line with global developments and possibly more relevant than ever before in a country where the revenue differential remains higher than desired.

King IV applies a principle-and-outcomes based approach departs from a tick-box approach. The King III principles have been merged into 16 principles, each aimed at the attainment of one or more very distinct governance results. The focus seen in King IV is to ensure that the application of the principles achieves explicitly identified outcomes, including good performance, ethical culture, effective control, and legitimacy. Each principle is supported by a limited number of recommended practices and requires specific disclosures (KPMG 2017).

b) **The Companies Act No. 71 of 2008**

The purpose of the act is to provide for incorporation, registration organization, and management of companies, capitalization of profit companies and their respective
shareholders or members and directors. It is also meant to provide for equitable and efficient amalgamations, mergers and takeovers of companies to provide for efficient rescue of financially distressed companies as well as provide appropriate legal redress for investors and third parties on companies.

It also purposed to establish a company’s tribunal to facilitate alternative dispute resolution and to review decisions of the commission. It will additionally set up the financial reporting standards council to advice on requirements for financial record keeping and reporting by companies, to establish Companies and Intellectual Property Commission and a Takeover regulation panel to administer the requirements of the act on companies.

c) **Securities Services Act, 36 of 2004**

In an effort to fight insider trading and enhance corporate governance in South Africa's capital markets, the South African government passed the Securities Services Act in 2004 and established the Insider Trading Directorate within the Financial Services Board (which supervises the non-banking financial services industry) to monitor and enforce the law (Malin, 2005).

The Security Services Act makes it a criminal offense for anyone to make use of —inside information to buy or sell any securities or financial instruments in a company on a regulated stock market[^20].

For the first time in South African legislation, the Act protracted beyond criminal sanction to embrace civil remedies. Under the civil provision, a person will be compelled

[^20]: Section 73 - Securities Service act, No. 36 of 2004
to surrender his gains and may also be penalized up to three times the amount of any profit so earned.  

A person prosecuted under the criminal provision may be fined up to R50,000,000 and imprisoned up to ten years. The introduction of a civil offence is considered noteworthy because, previously, prosecutors were only able to proceed under the criminal provision of the Companies Act and due to the fact that crimes require a higher standard of proof, few charges were filed in courts with virtually no successful prosecution under the penal provision (Mallin, 2006).

d) **Public Finance Management Act, 1 of 1999**

The Act came into force on 1st April 2000 to give effect to the governance of public entities classified as national business enterprises, provincial government entities, national public entities and provincial public entities.  

The Public Finance Management Act (PFMA) introduced much more comprehensive standard for reporting and accountability by embracing an approach to financial management in public sector institutions that requires performance in service delivery, and economic and efficient deployment of state assets and resources (Langtry, 2005). In the public sector, the PFMA, which incorporates certain aspects of the King II, plays a major role in regulating good corporate governance practices (PricewaterhouseCooper, 2002). The PFMA aims to secure transparency, culpability, and sound management of the income, expenditure, assets and liabilities of the organizations to which the Act applies (Section 2 of PFMA No. 1 of 1999). An official of a department or trading entity or

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21 Section 77- Securities Service Act No. 36 of 2004  
22 Section 48, PFMA
constitutional institution to whom a power or duty is imposed regarding the Act commits an act of financial misconduct if the officer willfully or negligently fails to exercise such power or perform such duty (Section 81-85). To further enhance compliance, section 86 of the Act also provides for criminal liability of accounting officers and authorities who willfully or grossly negligently failed to comply with certain provisions of the Act.

To complement the Act, a government policy protocol that laid down comprehensive guidelines for good corporate governance in public sector institutions was produced. The protocol set standards of conduct and good governance the government expected its public institutions and officials to comply with (Malin, 2006). Further to the Public Finance Management Act, the South African government also introduced the Municipal Finance Management Act 56 of 2003 which imposes extensive governance obligations on officials and executives associated with municipal financial administration (Section 2). This is a clear signal from policy-makers that corporate governance has been identified as a matter of national significance and not just for the private institutions.

e) **Broad-Based Black Economic Empowerment Act 53 of 2003**

Black Economic Empowerment has been a major policy thrust of the democratic government in South Africa since 1994 in trying to redress the effects of apartheid and to encourage effective participation in the economy by previously disadvantaged people. Some statutory measures and various self-regulatory sectoral accords, such as those reached in the mining and finance sectors have been designed to address historical socio-economic imbalances. It has, however, been generally accepted that so far the measures have not been as successful in ensuring broad-based participation of black people in the economy as desired (Havenga, 2005).
The Broad-Based Black Economic Empowerment Act was thus passed to set up a legal framework for the promotion of black economic empowerment so that black people have sufficient influence over the strategic direction and core management of businesses (Southall, 2004). The Act seeks to—promote the attainment of the constitutional right to equality, increase broad-based and effective contribution of black people in the economy and encourage a higher growth rate, better employment, and more equitable income distribution; and create a national program on broad-based black economic empowerment so as to promote the fiscal unity of the nation, safeguard the common market, and promote equal opportunity and equal access to government services (see Preamble and Section 2). It provides for, among other things, issuance of Codes of good practice (Section 9) and transformation charters (Section 12). The Codes of good practice provide detailed regulations and guidelines on black economic empowerment as well as a framework for measuring progress made on the implementation of the black economic empowerment measures.

Some commentators argue that, in pure governance terms, some of the steps taken to bring about black economic empowerment might present challenges for corporate governance in that—the process of building a capitalist class on the basis of artificial financing structures can, all too readily, lead to business ventures with shareholding structures that transgress the principles of good governance (Armstrong et al., 2005). The matter is further complicated by the fact that South Africa already does not have sufficient skilled and competent directors, a situation which might be worsened if the pool of directors is limited to only black entrepreneurs whose supply may not match the demand. There is, therefore, need for careful management of priorities so as to balance
best business practice and this type of affirmative action which has many strategic merits. This can only be achievable if cautious decisions and strategies are made by policy-makers and everybody else to ensure that the commendable) efforts made towards the empowering of the previously disadvantaged people do not frustrate the drive for good corporate governance (ibid).

f) **The JSE (Johannesburg Securities Exchange) Listing Requirements**

The JSE Listing Requirements sets out the purpose and guiding principles of the JSE. While the body is mandated to monitor and approve the listing of company shares and debts and enforce trading rules, it does not have the power to process any cases where legislation has been contravened. It, however, can impose censures and penalties to an applicant issuer that violates the listing requirements.

The Listings provide for general powers of the JSE under section 1.1; section 1.6 deals with suspension of securities while annual revision of the list is under section 1.19. Section 1.20 outlines censure and penalties, Section 1.25 provides for the power of the JSE to require information and finally, the publication is covered under section 1.27.

The new JSE Listings Requirements came into effect on 1 September 2003, with the exclusion of certain transitional requirements, which became effective on 1 January 2004. These new stipulations take precedence over any other legal dispensations and apply equally to companies listed on the JSE (Section 3.84).

The JSE Listings Requirements have been amended to align them with international best practice further, thereby aiming to enhance the status of JSE listings and increase investor assurance in the South African equities market (Valet et al., 2004).
A major effect, however, has been a growing appreciation in these companies of the high standards of governance required to operate with credibility in international markets, the desire of these companies to associate themselves with markets with stronger corporate governance reputations and the consequent introduction of those higher standards into their operations in South Africa (Carmody, 2002).

An analysis of the corporate governance framework reveals some things regarding both jurisdictions.

The Kenyan corporate governance framework is voluminous and spread out over many statutes. It, however, provides for foreign investments as both Multinational Corporations as well as investors in the capital markets. While the plethora of legislation shows the need and willingness to protect investors, it may have contraindications. The Companies Act itself is bulky with over 1000 sections and dedicates part XXXVIII to foreign companies.

It provides for the entry of foreign companies as well as exit. The procedure for registration of a foreign company is long, and this may discourage foreign companies to register in Kenya. At the time of the study, the companies’ registry was still in the process of phasing out the registration documents under the old system.

Before the publication of The Finance Act of 2016, the Companies Act provided that a foreign company shall not be registered if it failed to have a 30% shareholding allocated to locals. While this was an attempt at promoting the locals, it had a negative response
and would have seen Kenya lose a lot of foreign investors. By Section 85 of the finance act, Section 975 (2) (b) providing for the threshold was deleted.

The Act also codifies the duties of the directors, which were previously under the common law under Division 3 of Part IX.$^{23}$

The South African Corporate Governance framework is not as bulky, it, however, seems to have been there a while longer than the Kenyan corporate governance framework.

In its development, South Africa’s framework assumed local fashion. This is evidenced by the Black Economic Empowerment Act that sought to bridge the gap and fill the holes brought on by apartheid. The effect of this act is that more stakeholders are appreciated and thus mandatory for consideration by firms.

The South African framework has seen growth from the King Reports to the Companies Act. The contents of all these prescriptive laws show that South Africa has attained self-actualization. Possibly because of the gap filled by the Black Economic Empowerment Act, but the level of growth seen in King IV is indicative of substantial economic growth. The main reasons given for moving are not a result of any discontentment at prevailing governance structures in South Africa, but rather the desire to lure investors in an arguably, more stable currency environment and to obtain cheaper funding (Armstrong et al., 2005). This is an indication of a mature economy as opposed to the Kenyan one which until 2015 was governed by acts enacted by colonialists.

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$^{23}$ Companies Act No. 17 of 2015
From an ontological view, both jurisdictions satisfy the stakeholder theory. The theory, based on moral and social derivatives, provides that other groups other than shareholders are considered about a firm.

The JSE Listing Requirements provide for equality of treatment for all holders of securities. There is no distinction between domestic and foreign shareholders.

The Companies Act of 2008 has provided for the director’s duties and recourse for creditors and jilted shareholders. As does the Kenyan Companies Act which provides for derivative actions, the more defined procedure for creditors and a codified prescription of how directors will deal with the other stakeholders of the firm. Creditors are also given more rights under the Act.

The Broad-Based Black Economic Empowerment Act provides for consideration of other stakeholders and even goes further to mandate corporate social responsibility. The Codes published under the Act dictate relations of the firms whether “black-owned” or “White-owned” companies with other stakeholders and by Notice 112 of 2007, companies are assessed. This assessment is purposed to encourage empowerment of the black community.

The South African Jurisdiction has captured this through the Broad-Based Black Economic Empowerment Act, 2003 which promotes equality. It, however, favors domestic development. This is a codified investment in the domestic economy that goes to show that South Africa’s economy is strong enough to stand with little foreign investment.
4.2.4 The Extent of Influence of corporate governance on FDI Behavior

The OECD report in 1998 noted that government interventions are most effective when consistently and expeditiously enforced and should focus on fairness, transparency, accountability and responsibility. These external incentives in the form of regulatory structures, voluntary standards, and competitive market forces, while not under the direct control of the owners, exert discipline on the performance of owners and managers from outside. However corporate governance affects the performance of all corporations whether private, publicly held or state owned- determining their agility, efficiency and ultimate profitability (Iskander & Chamlou, 2000).

Adeoye (1999) argues that it is difficult to deduce what factors make “good” corporate governance. Suggestions come from the many definitions of corporate governance.

This portion of the study employs the World Bank doing business indicators as proxies of business regulations. It also assesses whether business regulatory reforms enhance economic growth.

There are four key goals to World Bank Doing Business regulatory indicators. First, they aim to encourage reforms through country benchmarking. They then try to inform the design of reforms by highlighting what needs to be changed. Third, the dataset enriches international initiatives on development effectiveness. Fourth, the dataset tries to inform theory by producing new indicators that quantify various aspects of regulation, facilitating tests of existing theories, and contributing to the empirical foundation for new theoretical work on the relation between regulation and development (Haidar, 2012).
According to the World Bank Ease of Doing Business Report, 2017, Kenya is ranked 92 up from its 2016 position of 113. South Africa, on the other hand, was at position 72 in 2016 and dropped two positions to 74 in 2017.

*Figure 2: World Bank Doing Business Rank*

Source: World Bank, 2017

Most reforms were reflected in broader programs of investment climate reform aimed at improving economic competitiveness, as in Colombia, Kenya, and Liberia. In structuring their reform programs for the business milieu, governments use numerous data sources and indicators. And, reformers react to many stakeholders and interest groups, all of whom bring important concerns to the debate. World Bank Group dialogue with administrations on the investment climate is designed to encourage the critical use of the data, improve judgment, avoid a tapered focus on improving rankings, and encourage broad-based reforms that enhance the investment climate (Haidar, 2012).
In protecting minority investors, South Africa is ranked higher than Kenya in both 2016 and 2017 at 18 and 22 and 112 and 87 respectively. It can, however, be noted that the change in rank, is very significant for Kenya than for South Africa.

In focusing on select indices that culminate in the rank regarding protection of minority investors, South Africa is seen to score relatively high.

*Figure 3: Ease of doing business World Bank indices, 2017*

![Bar chart showing indices of protection and governance](chart.png)

Source: World Bank Group, 2017

*Figure 2* represents the scores of each country on the respective index in 2017 according to the World Bank Doing Business 2017 Report (Viewed 26/3/2017). On the strength of minority investor protection index (0-10), Kenya scored 5.3 against South Africa’s 7.0. The same dismal performance is seen the extent of shareholder governance index (0-10) where Kenya scored four against South Africa with 6. On the Extent of conflict of interest regulation index (0-10), South Africa scored eight while Kenya scored 6.7. The
Extent of disclosure index assumes the same trajectory with South Africa scoring higher than Kenya at 8.0 compared to 6.0. However, on the corporate transparency index (0-9), both countries scored a dismal 4.0.

Despite little movement in the Doing Business rank, 2017, South Africa appears to have a better governance framework that caters to the various aspects of business regulation and hence a better corporate governance framework.

An analysis of the data reveals that South Africa remains higher than Kenya on the Doing Business Rank. South Africa maintains this higher rank for both years.

In an analysis of the data through the stakeholder theory lens, we find that South Africa has a higher consideration for other stakeholders as opposed to Kenya which is seen to be performing dismally. The strength of the normativity of the theory is pronounced in South Africa’s indices results which prove the strength of the stakeholder theory in South Africa’s business environment.

4.2.5 Behavior of FDI in response to Corporate Governance

Equity markets continuously place and monitor an objective value on corporations and by extension on their management. The day-to–day performance of a company’s shares on a stock exchange is a clear reminder to managers and owners of the company’s alleged viability and value (Iskander & Chamlou, 2000).
<table>
<thead>
<tr>
<th>Region</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>South Africa</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FDI Inflows (in Millions of dollars)</td>
<td>8,300</td>
<td>5,771</td>
<td>1,437</td>
</tr>
<tr>
<td>FDI Stock</td>
<td>153,123</td>
<td>138,906</td>
<td>124,940</td>
</tr>
<tr>
<td>% of GDP</td>
<td>41.5</td>
<td>39.7</td>
<td>39.9</td>
</tr>
<tr>
<td><strong>Kenya</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FDI Inflows (in Millions of dollars)</td>
<td>3,390</td>
<td>4,441</td>
<td>5,878</td>
</tr>
<tr>
<td>FDI Stock</td>
<td>514</td>
<td>1,051</td>
<td>1,437</td>
</tr>
<tr>
<td>% of GDP</td>
<td>6.2</td>
<td>7.3</td>
<td>9.6</td>
</tr>
</tbody>
</table>

Source: UNCTAD website, Accessed 18th March 2017

*Table 1* shows a comparative representation of inflows of FDI and FDI stock trend between South Africa and Kenya, with South Africa having a considerably larger amount of inflow of FDI and FDI stock inflows between 2013 and 2015.

However, Kenya has been experiencing an increase in FDI inflows with an increase of $923 Million between 2013 and 2015. It also experienced a growth of $2,488 Million between the period 2013-2015, in FDI stock.
South Africa appears to have experienced a downward trajectory with changes in FDI dropping by $6,863 Million between 2013-2015. The FDI stock suffered the same fate with a decline of $28,183 Million.

In analyzing the FDI changes in Kenya vis-à-vis the corporate governance structure, it is noteworthy that the increase in FDI was preceded by changes in the framework. The CMA, the country’s capital market regulatory body, is in the process of developing the necessary operational and regulatory framework for the establishment of derivatives and futures exchange in Kenya. The body published the Capital Markets (Demutualisation of the Nairobi Securities Exchange Limited) Regulations 2012 with a June 2013 deadline. While the demutualisation occurred on 27th June 2014, the gazettement of the Regulations could have sparked investor confidence (Press Release, 1/7/2014). Demutualisation process, which is meant to make the securities exchange more reliable and attractive, is currently stuck as the regulator and market players quibble over market access fees, the setting up of a derivatives exchange and adulterating the stake held by stockbrokers at the NSE (Okoth,2014).

In 2014, the Kenyan government further published the Mwongozo Code of Corporate Governance specifically tailored for State Corporations and mandated State corporations to hold governance audits every two years. This could also have contributed to the confidence in investors. The Code would ultimately seek to cure the ailing political leadership and commitment to ensuring competent Boards of states through a transparent appointment process.
Also, with the assent to the Companies Act in 2015, it saw changes in incorporation of companies and codified duties of directors, with the aim of easing business transactions in Kenya. This conveniently saw an increase in FDI for the year 2015.

On the other hand, South Africa has not seen changes in the corporate governance framework between the periods of 2013-2015. This is not to say that the corporate governance framework is weak. On the contrary based on the ease of Doing Business Index, South Africa has a very studious corporate governance framework.

Therefore, it’s decline in FDI inflows and the stock could be attributed to other factors external of corporate governance.

The Rational Choice theory would attempt to explain this scenario through choice. Despite the existence of factors that would make it lucrative to invest in South Africa, foreign investors decide against it. This could be based on consequences of investing in South Africa especially where the investor would not make any profits. For the rational actors, in this case, the foreign investors, pulling out or reducing investments in South Africa could have the overall best outcome, for the investor.

Similarly, the choice to increase investments in Kenya may be brought about by a further assumption that the foreign investors are simply doing it for their welfare.

While it is argued that structure and norms influence this choice, it would appear that this suffices to justify an increase in FDI in Kenya as well.

**4.2.6 Comparison of Corporate Governance Development**

The business environment can exert a strong influence on the governance of firms, chiefly by providing a framework of rules and market incentives. In the analysis of
corporate governance development in the promotion of foreign direct investment, we shall look at strengthening standards and regulatory regimes, increasing judicial capacity for enforcement and strengthening anti-corruption standards.

Stronger corporate governance increases access to capital by making investments less risky and more attractive. This process helps to broaden and deepen financial markets. In turn, well developed financial markets strengthen market discipline for good corporate governance.

a) **Strengthening accounting and auditing standards**

In a contribution to high standards of corporate governance, public governance must be effective, transparent and accountable. On both sides of the accounting, the spectrum is adoption and implementation.

The Second King Report makes some recommendations about accounting and auditing issues highlighting the role of the audit committee. It called for disclosure by companies audit firms rendering consulting services for examination for any potential conflict of interest. It further calls for competent audit processes using an amalgamation of the external audit with an operational internal audit function and further dictates that the chairperson of the audit committee be an independent non-executive director, not the chairperson of the board and that its members should have experience in financial matters (Armstrong, Segal & Davis, 2006).

The Mwongozo Charter prescribes that the onus of financial reporting falls on the Board and that it should adhere to the set financial and accounting standards.
The Companies Act similarly specifies this duty to the Board of Directors, for corporations that are not state owned. The act goes further to provide for offenses relating to company accounts and financial records. It also mandates the auditing of a company’s financial statements providing that members have a right to require an audit of the company’s financial statement.

b) **Framework for entry, operation, and exit**

Both countries have introduced legal and institutional frameworks for entry, operation, and exit.

Company and securities laws, including laws on the scope of fiduciary duties and general business legislation on creating, incorporating and managing companies are intended to restrain managerial opportunism and protect all participants in the corporation. Absence or deficiency of these laws renders enterprises lacking many incentives that prevent managers from deviating from economic goals.

It is also important to improve creditor’s rights through insolvency or takeover rules and proceedings and tender offer rules that provide for efficient reorganization, restructuring or liquidation (exit). Without appropriate and transparent procedures there is no balancing of the rights of creditors and debtors.

In Kenya, the business reforms of 2015 which include the enactment of the Companies Act 2015 which updated corporate law framework to be in line with the global best practices. The Insolvency Act 2015 provided better regulation of business rescue and insolvency procedures. The Business Registration Services Act 2015 established an independent single source business registration body.
In South Africa, the policy framework is largely laissez-faire regarding entry of foreign investors because no official approval is required except in select sectors such as banking. Foreign Investors are subject to the same laws and regulations as domestic investors. The Policy interventions affecting corporate behavior and performance are largely concerned with domestic redistributive aims and don’t discriminate between domestic and foreign investors.

c) **Increasing Judicial Capacity for Enforcement**

Often compounding the weakness in the legal and regulatory environment is an ineffective judicial system. There chronic delays because of archaic procedures, inadequate infrastructure, undertrained judges and poor case flow management (Iskander & Chamlou, 2000).

According to Armstrong, Segal, and Davis (2006), the main source of concern from an international investor’s perspective is that, has been the length of time that it has taken to investigate and prosecute cases of malfeasance. This hasn’t been caused by an unwillingness on the part of the authority but by the sheer capacity constraints facing an economy that’s in transition and at the same time attempting to meet all its international obligations and establish itself as a market of integrity.

Weak enforcement of rules and regulations has been a perennial concern for investors in emerging markets. Probably the main reason for the negative perception is not so much a general lack of enforcement, but erratic enforcement. In some areas, it is of a high standard, but in others, it is almost absent. This inconsistency might be exacerbated by the fragmented nature of South Africa’s regulatory system and the propensity of regulatory arbitrage that has resulted. The high cost that effective regulation would entail
places an immense burden on South Africa’s democratic government (Iskander & Chamlou, 2000).

The same fate befalls Kenya, albeit with a slower pace of case closure and conflict resolve. However, with the Judicial Reformations launched in 2016, investor confidence may increase as cases will no longer take as long. With the Mediation Rules of 2016, adjudication over matters can go through alternative dispute resolution and come to a close within the mandated 60 days or go through the traditional litigation process (Judiciary Reform Framework, 2016).

d) **Strengthening anti-corruption standards**

Weak corporate governance is often rooted in abuse of political power. Senior public officials may pursue personal gain by giving special privileges to companies run by their nominees or relatives. Such practices reduce the need to acquire operating efficiency.

*Table 2: Corruption Perception Index Scores, 2013 – 2015*

<table>
<thead>
<tr>
<th>Country</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Africa</td>
<td>42</td>
<td>44</td>
<td>44</td>
</tr>
<tr>
<td>Kenya</td>
<td>25</td>
<td>25</td>
<td>27</td>
</tr>
</tbody>
</table>

Source: Transparency International Website, Accessed 24th March 2017

In 2003, the Anti-Corruption and Economic Crimes Act, No 3 of 2003(ACECA) and the Public Officer Ethics Act, No 4 of 2003 (POEA) were enacted. Later, the Public Procurement and Disposal Act was promulgated in 2005, the Proceeds of Crime and Anti-money Laundering Act in 2009, and the Ethics and Anticorruption Commission Act
(EACCA) and Leadership and Integrity Act after promulgation of the Constitution of Kenya 2010 and latest on the list is the Anti-Corruption and Economic Crimes Act. It is astounding the number of legislations in place to curtail corruption, and yet, corruption remains perhaps the greatest challenge to Kenya’s social, economic development. The Anti-Corruption and Economic Crimes Act was anticipated to be the substantive anti-corruption statute and sought to apply the United Nations Convention Against Corruption. The anti-corruption legal system is however shared across several sections of legislation in substantial quantities except for the Ethics and Anticorruption Commission Act. This situation makes the anticorruption legal environment too intricate for the public, enforcement agencies and legal practitioners.

However, there is need to improve the Anti-Corruption and Economic Crimes Act to facilitate it to adapt to the Constitution, include other relevant provisions relating to corporate liability and other best practices, as well as to amalgamate the Laws relating to the Anti-Corruption schema. Currently, Anti-corruption laws come across as inept. The Ethics and Anti-Corruption Commission only sets up the institutional framework, leaving the legal regime to be determined by separate legislation such as the Leadership and Integrity Act, the Anti-Corruption and Economic Crimes Act as well as the Public Officer Ethics Act just to mention a few. The consolidation here may mean the enactment of a new comprehensive and coordinated legal framework.

The Anti-Corruption and Economic Crimes Act levied liability only on natural persons and was deficient of the element of corporate liability which is a vital part of enforcement of anti-corruption in other jurisdictions. The absence of an effective anti-corruption law regarding corporate criminal liability has created compliance problems for both domestic
and international organizations operating in Kenya, given the potential for corruption in transactions in the private and public sector.

Significantly, the anti-corruption law should create civil liability of entities for the bribery of public servants. Under the current law only individuals can be prosecuted for corruption. A new anti-corruption law, therefore, should foist judicial and administrative sanctions on commercial entities that engage in corruption while doing business in Kenya, and this should apply to both Kenyan and non-Kenyan officials.

The South African Government has introduced and encouraged various pieces of key legislation such as the Protected Disclosures Act, Promotion of Access to Information Act, Financial Intelligence Centre Act, Promotion of Administrative Justice Act and the Prevention and Combating of Corrupt Activities Act. The enactment of the Public Finance Management Act includes the obligation for departments to do risk assessments and develop fraud deterrence plans as part of implementation of the whole supply chain management system.

Despite the number of anti-corruption initiatives that Government has embarked upon in the past decade, various challenges remain. While progress is also being made in local government in so far as legislative requirements and structures are concerned, local government is still deficient of a visible and coherent anti-corruption strategy. In the case of public entities, some degree of fragmentation in governance arrangements exists. The government is keen to develop a comprehensive governance strategy for the whole of the public sector, thus ensuring internal coherence and standards.
4.2.7 Moving from crisis response to international cooperation and convergence

Both countries predominantly subscribe to the UK/Commonwealth Principles based model which is based on common law, rooted in legislation and extended by case-law. Contrastingly with the American Model, codes of corporate governance principle or good practice determine board responsibilities, as opposed to the rule of law. Companies are required to report that they have followed the governance principles laid down in the codes or explain why they have not i.e. the ‘comply or explain’ approach.

Self - regulation is the underlying theme. Compliance is voluntary with the sanctions being the exposure of corporate governance failings to the market and ultimately delisting from the stock exchange. The role of the regulators is to ensure that investors and potential investors have accurate information on which to base their judgments. All codes for listed companies call for independent non-executive or outside directors, audit, remuneration and nomination committees and high levels of transparency and accountability. The codes require a separation between the chairman and Chief Executive Officer (CEO).

Corporate governance practices in the world are definitely converging. This has been brought on by various factors:
i) There is a striking similarity between Corporate governance codes of good practice around the world given the way they have been influenced by each other. All emphasize the importance of independence, transparency, and accountability.

ii) Securities regulations and international accounting standards are both leading towards convergence.

iii) Globalization of companies is obviously a force for convergence. Firms that have a global strategic outlook, with production, service provision, added value chain, markets and customers worldwide calling on international sources of finance, whose shares are held around the world, are moving towards common effective, transparent and accountable governance practices. Unfortunately, the composition of the boards of the parent companies of such groups seldom reflects such globalization being still dominated by nationals of the country of incorporation.

iv) Raising capital on overseas stock exchange clearly encourages convergence as listing companies are required to conform to the listing rules of that market. Although the governance requirements of stock exchanges differ in detail, they are moving towards internationally accepted norms through IOSCO. This trend was accelerated by cross-border mergers of stock exchanges.

v) International institutional investors e.g. Calpers, explicitly demand various corporate governance practices if they are to invest in a specific country or company. Institutional investors with a global portfolio have been a significant force for convergence. As developing or transitional countries grow, generate and plow back
their funds, of course, the call for inward investment will wane, along with the sway of the overseas institutions.

4.3 CHAPTER SUMMARY

This Chapter has identified the corporate governance framework in Kenya and South Africa and presented how the corporate governance framework affects Foreign Direct Investments and compare the development of Corporate Governance about Foreign Investment in Kenya and South Africa.

In consideration of Corporate Governance framework, this study has limited its assessment to select Acts of Parliament of general application. It also presented the data on ease of doing business and the various positions of each country.

It further presented data on the extent to which corporate governance affects Foreign Direct Investment.
CHAPTER 5

5.1 INTRODUCTION

This chapter shall outline the summary of key findings, hold discussions on those key findings, highlight the conclusion of the thesis and finally offer recommendations and possible research points.

5.2 SUMMARY OF FINDINGS

5.2.1 Corporate Governance Framework for Kenya and South Africa

Kenya has a substantive framework. The framework provides for entry and exit of foreign companies. It further provides for limited foreign relations on the stock market. The acts considered for analysis in the study include Companies Act (No. 17 of 2015), State Corporations Act (Cap 446), and Capital Markets Act (Cap 485A) and their subsidiary legislation, The Mwongozo Code of Governance for State Corporations of 2014.

The South African framework analyzed include: King Reports (I-IV), The Companies Act (No. 71 of 2008), Security Services Act (No. 36 of 2004), Broad Based Black Economic Empowerment Act (No. 53 of 2003), Public Finance Management Act (No.1 of 1999), the Johannesburg Securities Exchange) Listing Requirements, 2003.

There have been provisions that repelled foreign investors. These include Regulation 3 (1) of the Capital Markets (Foreign Investors) Regulations, 2000 that capped ownership of foreign companies at 75%. This was however later repealed and the ceiling removed.
The Companies Act also faced the same fate with Section 975 (2) (b) which was repealed by Section 85 of the Finance Act, 2016.

South Africa has a robust corporate governance system that has seen growth from 1994 with the King Reports setting the stage for corporate behavior. While the second King Report was not a response to crises which shook the economy, it attempted to fix some of the vices that were left unmentioned in the previous report.

Upon ontological analysis, both jurisdictions have frameworks that cater to other stakeholders of firms. This is evidenced by provision of recourse for creditors and unpaid suppliers or service partners who end up in the creditors’ category. Also, it provides for relations with the government through their respective registration and monitoring bodies.

5.2.2 Extent of Influence of corporate governance on FDI Behavior

In protecting minority investors, South Africa is ranked higher than Kenya in both 2016 and 2017 at 18 and 22 and 112 and 87 respectively. It can, however, be noted that the change in rank, is very significant for Kenya than for South Africa.

In focusing on select indices that culminate in the rank regarding protection of minority investors, South Africa is seen to score relatively high.

On the strength of minority investor protection index (0-10), Kenya scored 5.3 against South Africa’s 7.0. The same dismal performance is seen the extent of shareholder governance index (0-10) where Kenya scored four against South Africa with 6. On the Extent of conflict of interest regulation index (0-10), South Africa scored eight while Kenya scored 6.7. The Extent of disclosure index assumes the same trajectory with South
Africa scoring higher than Kenya at 8.0 compared to 6.0. However, on the corporate transparency index (0-9) both countries scored a dismal 4.0.

In the analysis, South Africa has a higher consideration for other stakeholders as opposed to Kenya which is seen to be performing dismally. The strength of the normativity of the theory is pronounced in South Africa’s indices results which prove the strength of the stakeholder theory in South Africa’s business environment.

5.2.3 Behavior of FDI in response to corporate governance

South Africa is having a considerably larger amount of inflow of FDI and FDI stock inflows between 2013 and 2015.

However, Kenya has been experiencing an increase in FDI inflows with an increase of $923 Million between 2013 and 2015. It also experienced a growth of $2,488 Million between the periods 2013-2015, in FDI stock.

South Africa appears to have experienced a downward trajectory with changes in FDI dropping by $6,863 Million between the years 2013-2015. The FDI stock suffered the same fate with a decline of $28,183 Million.

5.3 DISCUSSIONS OF FINDINGS

The study employed a mixed method to enable it to answer the research questions. By using quantitative data, the researcher was able to compare the FDI growth trends that enabled the researcher to analyze the extent of influence of FDI. The data collected also informed the researcher of the performance of the two countries under the factors
considered. This further informed the researcher on the business environment of both countries.

Qualitative research allows the researcher to uncover that which is usually not looked at. There have been multitudes of studies that have been conducted to explain the decision behind investing in another country. International relations dictates that countries will ultimately have to work together. FDI is a facet of the cooperation in trade under International relations.

This study through both qualitative and quantitative method has been able to show that corporate governance influences decisions to invest in another country. While this effect is not absolute, other factors external to corporate governance may affect the choice to invest as illuminated by the Eclectic Paradigm. Further, we cannot ignore the fact that Kenya is also perceived to be more corrupt than South Africa despite having a multitude of laws to deal with corruption.

The findings for each question appear to be contradicting each other. This however does not disqualify the validity of the data. It would appear that while the data shows that a good business environment attracts more investors to a country, the foreign investor still has other factors to consider. South Africa has a robust corporate governance system and effective enforcement mechanisms under corporate governance as compared to Kenya. However, South Africa’s FDI flows have been decreasing over the years compared to Kenya’s which are increasing, drastically at that. The Eclectic Paradigm best explains South Africa's trend. The investors pulled out when one or more of the advantages ceased to be met. This fits the assumptions of the rational choice theory.
From the findings of the study, we can triangulate the data from various sources. By combining multiple theories, methods, the study overcame the weakness and intrinsic bias that arise from the single method and single-theory studies. It employed theory and methodological triangulation.

Being a secondary data based type of research, the study faced the possibility of straying from the research question because of its unstructured nature. This however, did not affect the result as the researcher prepared a statement of purpose and a structure for the development of the study.

The data may also lack standards of accuracy; this may give erroneous indices and trends. The researcher overcame this by corroboration from multiple sources.

5.4 CONCLUSIONS

After analysis of the data and application of theories, the study makes the following conclusions:

i) While Kenya has a bulkier corporate governance framework than South Africa, the latter’s framework is more sturdy, and enforcement is stronger in South Africa.

ii) A robust corporate governance system has a positive effect on FDI

iii) Negative changes in FDI affect Corporate Governance

iv) The common affliction to both jurisdictions is Corruption.
5.5 RECOMMENDATIONS

The mystery of how to unlock the vast reserves of South African corporate entities and direct them into more productive uses needs to be addressed. When domestic investors signal their disinclination to engage further in the economy, it communicates a negative signal to foreign investors that opportunities are not forthcoming or the business environment itself does not lend itself to grander investment.

It is essential to have enhanced engagement with the private sector to fathom the challenges they face concerning reinvestment and what incentives can be accessible to assist. There are existing incentive structures. However, more can be done to tailor them to aim at specific categories of firms. The emphasis should be more on corporate structured incentives rather than incentives that use financial aspects of a firm as indicators.

Notwithstanding the merits of the corporate governance systems, these should be carefully measured against capacities of countries to absorb such requirements, about other policy priorities which are often social in nature.

Well, functioning state corporations would provide an immense boost to national standards. This however implies a measure of political will that is absent in governments. There is also the assumption that the country has appropriate institutions for credible director training and development and readily available accounting and auditing skills.

The Kenyan Anti-Corruption and Economic Crimes Act imposed liability only on natural persons and deficient in the element of corporate liability which is a vital part of anti-
Corruption enforcement in other jurisdictions. This lack of an effective anti-corruption law regarding corporate criminal liability has created compliance challenges for both domestic and international companies operating in Kenya, given the potential for corruption in private and public sector transactions.

Ominously, the anti-corruption law should establish civil liability of entities for the bribery of public officials. As noted above, under the current law only individuals can be prosecuted for corruption. A new anti-corruption law, therefore, should impose judicial and administrative sanctions on corporate entities that engage in corruption while doing business in Kenya, and this should apply to both Kenyan and non-Kenyan officials.

Ensuring that regulations are enforced and that the country can provide a framework for prosecution of economic offenses that is independent of political interests is difficult. Countries need to identify where corporate governance would contribute to greater economic effectiveness. Then, taking other policy priorities into account, they could make well-considered advances in critical areas.

5.6 SUGGESTION FOR FURTHER RESEARCH

A possible future research point is analyzing the bidirectional relationship of foreign investment and corporate governance at the firm level. It would illuminate further the role of corporate governance in foreign investment decisions and inform students of international relations, multinational corporations and government bodies on what influences decisions to invest in a country about corporate governance.
REFERENCES


