ESTABLISHING CORPORATE GOVERNANCE CODES OF BEST PRACTICE TO BE ADOPTED BY STOCK EXCHANGES ON THE AFRICAN CONTINENT

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1. Financial markets today are created or destroyed by the international institutional investor. These global giants have billions of dollars to invest and a large part of their investments is in the equities of companies listed on stock exchanges. The world of today, from an investment point of view, is flat and has no boundaries. With electronic communication and internet banking, an institution can instantly switch hundreds of millions of dollars from one market to another. It can invest or disinvest with a click on a mouse. It is empirically established that capital flows towards well-governed companies and away from poorly-governed companies.

2. Arthur Levitt, the former chairperson of the US Securities and Exchange Commission, said: *"If a country does not have a reputation for strong corporate governance practices, capital will flow elsewhere. If investors are not confident that the level of disclosure, capital will flow elsewhere. If a country opts for lax accounting and reporting standards, capital will flow elsewhere. All enterprises in that country, regardless of how steadfast a particular company's practices may be, suffer the consequences. Markets must now honour what they perhaps, too often, have failed to recognise. Markets exist by the grace of investors. And it is today's more empowered investors that will determine which companies and which markets will stand the test of time and endure the weight of greater competition. It serves us well to remember that no market has a divine right to investors' capital."*

3. Not only is it apparent from this that it is in a company's best interest to practise quality governance, but it has now been established by international consultants such as McKinsey that those companies that do practise good governance compared with their competitors can raise capital more cheaply and have more sustainable businesses. Consequently, it makes good hard-nosed business sense to practise good governance.

4. Whilst there is this borderless electronic world with essentially universal principles of governance, each country has its own special circumstances such as culture, values, societal norms and way of doing business. Consequently, in 1999, the Commonwealth Association for Corporate Governance, covering some 56 countries in the Commonwealth, published principles to enable each country in the Commonwealth to establish its own corporate governance code, but embracing these universal principles. The OECD did the same in 1999. Last year, the United Nations recorded principles of governance in a code with recommended best practices to assist entities in the UN to act in accordance with those principles.

5. A corporate governance code is a recommendation to companies to adopt certain principles and practices and if they do not, they must set out the principle and/or practice adopted by them and explain why it was in the better interests of the company to do so.

6. The UN committee of six eminent persons, in finalising the code for the UN, had 32 professionals who sourced corporate governance codes and statutes in the world before recommending the UN code. Those principles and practices have

been adapted in the attachments hereto marked “A” and “B” to suit companies listed on African stock exchanges. They are attached as guidelines to enable each country to develop its own corporate governance code consistent with the special circumstances in that country.

7. In establishing a code in a country, one has to remember the following characteristics of good corporate governance. *Corporate discipline*, meaning being committed to the principles of good governance. *Transparency*, being the way the company communicates with its stakeholders about the business of the company. Its *communications* should contain substance over form. *Independence*, which involves the avoidance of conflicts of interest. *Accountability*, which involves the board being accountable to the company and being aware that its duty is owed to the company. Whilst a director is accountable to the company, in the modern inclusive approach to governance he must take account of the legitimate expectations of the stakeholders linked to the company. The board needs to develop the short- and long-term *strategy* of the company. In developing the long-term strategy, the board must take account of *sustainability* issues. A check on these issues will improve the company’s risk management. These issues are to be found in the G3 Guidelines issued by the Global Reporting Initiative. A well-managed company today will be aware of the *triple bottom-line* and the need for the company to act and be seen to be acting responsibly and as a good corporate citizen. The foundation of good governance is intellectual honesty in carrying out the duties of a director, namely good faith, care, skill and diligence.

8. The company should report annually, not only the financials such as the balance sheet and the profit and loss statement, but on how the company has both positively and negatively impacted on the economic life of the community in which it operated during the year under review.

9. In establishing a code of best practice in a country, one would have to be aware of the international principles and practices as set out in attachments “A” and “B”, but identify the special circumstances pertaining to one’s country. For example, there might be a concentration of wealthy families who are large equity holders in a small country or there may be a dearth of executive skills and availability of experienced non-executive directors. It would be futile in a country having these special circumstances to provide a code defining the independent non-executive director in the same terms as the Sarbanes-Oxley Act read together with the revised New York Stock Exchange Rules. Even in America, companies are concerned about finding sufficient independent non-executive directors in compliance with the new definitions.

10. The committee established to draft the code should have an advisor with international experience to ensure that its code accords with international best principles and practices and where it does not, it is explained in a manner that will be acceptable to international investors.

11. Having identified the special circumstances the committee established to create the governance code in a country would have to make sure that its terms of reference are precise and it would be preferable if it has the support of the government of the day. This does not mean that such a code should be enforced

by way of statute, but it does mean that the committee must be representative of the society of the country in question, e.g. government representatives, regulators, big business, small business, organised business such as Chambers of Commerce, the Stock Exchange, the Law Society, the Society of Accountants and a labour union representative. In this way, one obtains buy-in from the bottom up and not top down. The final draft should be available for public comment for at least six weeks.

12. The committee must identify various task teams. There are at least five task teams which need to be established, namely Boards and Directors, Risk Management and Internal Audit, Sustainability Reporting, Accounting and Auditing and Compliance and Enforcement. Further, a competent and available secretariat must be at hand to assist the main committee and the task teams in recording all the work done by the task teams and the committee.

13. Each committee needs to have terms of reference and tasks given to it by the main committee. Each task team needs to have a convenor with the right to co-opt members with suitable experience . These task teams would have to consider current issues, such as the definition of executive, non-executive and independent directors; the need and composition of committees of the board such as auditing, remuneration and nomination; the disclosure of remuneration of directors: whether non-executive directors should participate in share incentive schemes; what are cross-directorships and conflicts of interests; service contracts for non-executive directors; the separation of chairman and chief executive; the chairman to be an independent non-executive director; the

impediments in that country in regard to possible outdated legislation and have impediments to good governance been created by any regulation?

14. The sub-committees would have to apply their minds to international concepts and developments such as the induction of directors, the evaluation of the board, the need for a business judgment rule when it comes to measuring the care and skill of directors and the role and function of a company in the country in question in the context of the global economic village.

15. After the work is done by the task teams, it would be collated and placed at the disposal of the main committee, which would then have to devise a code of best practice, taking into account the special circumstances of the country in question, but at the same time ensuring that at the very least it would be recognised by investors as complying with international qualitative governance principles. Examples of the remits of the above task teams are attached as "C".

16. The governance of a company is a dynamic, it is not a static matter. A country's written corporate governance code does not become the law of the Medes and Persians that altereth not. In fact, it is a code which has to be constantly revisited and revised because the way business is conducted is constantly being revised. Political events and corporate failures also have an impact on the way businesses are run. One needs no better examples than the 9/11 tragedy and the huge corporate scandals such of Enron and WorldCom.

17. In Africa, one would have to take particular care in the development of a code of best practice for any particular country on the continent. This is so because, as a

result of colonisation, countries on the African continent have different legal systems and corporate laws. Principles of Portuguese, French, English and Arabic law differ, the one from the other. The mode of doing business is different.

18. In short, the establishment of a code of best practice in a country is a labour in the best interests of that country. It takes time and effort and there should be willing participants who want to do it in the interests of their country without remuneration. Notwithstanding, having regard to the importance of the international institutional investor, every country today should endeavour to establish its own corporate governance code within the parameters of the principles and practices as set out in attachments “A” and “B”. Adherence to the code should be a listing requirement on an adopt or explain basis.

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