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HARMONIZING BUSINESS LAWS IN AFRICA: OHADA CALLS THE TUNE

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INTRODUCTION

Economic development in sub-Saharan Africa, including West Africa, has challenged development economists and legal scholars for decades. Starting in 1993, sixteen West African countries have taken a revolutionary step. They are addressing the problem themselves, jointly. Each agreed to give up some national sovereignty in order to establish a single, cross-border regime of uniform business laws, immediately applicable as the domestic laws of each country. These are the OHADA (in English, the Organization for Harmonization in Africa of Business Laws) laws, adopted pursuant to the 1993 OHADA treaty.¹

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¹Traité relatif à l'Harmonisation en Afrique du Droit des Affaires, 4 JOURNAL OFFICIEL (JO) OHADA 1 (Nov. 1, 1997), available at <http://www.ohada.com/traite.php?categorie=10> (last visited Jan. 28, 2005). The law promulgated under the treaty and relating to business associations was adopted April 17, 1997, effective January 1, 1998. Companies and "groupements d'intérêt économique" in existence before January 1, 1998, were accorded an additional two years before their constitutional documents had to conform to the OHADA law of corporations and other associations; however, even these businesses were otherwise subject to OHADA laws upon the effective date. See Act Uniforme relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique, art. 908, 2 JO OHADA 1 (Oct. 1, 1997), available at <http://www.ohada.com/textes.php?categorie=457> (last visited Jan. 28, 2005).

The charter members of OHADA are Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comores, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal and Togo; Guinea and Guinea-Bissau joined subsequently; all are francophone except for Cameroon (bilingual English-French), Equatorial Guinea (Spanish) and Guinea-Bissau (Portuguese). See Xavier Forneris, *Harmonising Commercial Law in Africa: the OHADA* (MS on file with author) at 2. There are other unifying organizations in the region. There are, for example,

The OHADA laws' articulated purpose is to facilitate investment in general, and foreign investment in particular.² These laws are adapted to the needs of a developing economy, and modernize the chiefly French-system, century-old business laws previously applicable in the OHADA states. OHADA may materially change the investment climate in West Africa. If successful, it offers a model for development in other parts of the developing world. This article presents the first focused analysis of OHADA's laws and institutions to appear in a United States law review. In addition, it rebuts common criticisms of the system and offers some early prognoses on the likelihood of OHADA's success and on its potential impact.

The OHADA laws retain the strong French flavor of their predecessors.³ As I explain in

two overlapping monetary unions. Joseph Issa-Sayegh, *Quelques Aspects Techniques de l'Intégration Juridique: l'Exemple des Acts Uniformes de l'OHADA*, 1 REV. DR. UNIF. 5, 7 (1999) (discussing the UEMOA (Union Economique et Monétaire Ouest Africaine), which includes seven of the OHADA countries: Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo). See also BORIS MARTOR, NANETTE PILKINGTON, DAVID S. SELLERS & SÉBASTIEN THOUVENOT, *BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS* 295-97 (2002) (hereinafter *BUSLAW*) (discussing ECOWAS (in French, CEDEAO), the Economic Community of West African States, to which Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo, from OHADA belong, as well as Cap Verde, Gambia, Ghana, Liberia, Nigeria and Sierra Leone; a merger with UEMOA, which is more advanced had been contemplated for 2004, but will not occur within that time). There is another major economic organization that includes OHADA countries, the CEMAC (Communauté Economique et Monétaire de l'Afrique Centrale), which includes Cameroon, the Central African Republic, Chad, Congo, Equatorial Guinea and Gabon, all OHADA members. See *BUSLAW*, *supra* at 293. There is also, of course, the African Union itself; its website is at <http://www.africa-union.org>.

²The OHADA drafters' articulated goal for their legislation is increased foreign investment in order to enhance economic development. See, e.g., Jacqueline Lohoues-Oble, *L'Apparition d'un Droit International des Affaires en Afrique*, 3 REV. IND. DR. COM. 543, 544-47 (1999); see also Philippe LeBoulanger, *L'Arbitrage et l'Harmonisation du Droit des Affaires en Afrique*, 3 REV. ARBITRAGE 541, 544 (1999) (describing the founders' efforts to "élaborer un droit régional des affaires unique, moderne, susceptible de favoriser le développement économique" (in English: to prepare a regional system of laws, unique, modern, and susceptible of favoring economic development). See also Martin Kirsch, *Historique de l'Organisation pour l'Harmonisation du Droit des Affaires en Afrique* [sic] (*OHADA*), *REVUE PENANT* 130 (1998) (noting that the author, together with Judge Kéba Mbaye and a third, were the "Directoire" authorized at a conference of heads of state, together with a delegation from France, to launch the OHADA project; the Directoire kept in mind that the economic development sought by the heads of state would occur only if the "insécurité juridique et judiciaire" were corrected).

³See, e.g., MAMADOU KONE, *LE NOUVEAU DROIT COMMERCIAL DES PAYS DE LA ZONE OHADA; COMPARAISONS AVEC LE DROIT FRANÇAIS* 16 (2003) (noting that OHADA is based on the French system). See generally, *infra*, Part II.A (analyzing the OHADA business laws).

Part I, recent economic scholarship has asserted that the French legal system may be less favorable to investment than the common law system. This understanding is consistent with traditional theories in comparative law. Drawing on other studies I show that a French legal system is at worst neutral as compared to the common law system.

Underlying these economists' critique is a principally neo-liberal approach to development that emphasizes liberalizing flows of goods and capital. The OHADA regime, which I describe in Part II, is agnostic on the topic. While each member-state has committed to OHADA as its business law regime, the state's political system remains free to adopt a neo-liberal route to development or to be more actively involved in national economic and social structures.⁴ For its part, the OHADA laws and institutions are committed to enhancing private ordering, to creating a reliable, usable system that responds to the needs of a developing economy, whatever the surrounding political reality. As Part II emphasizes, OHADA's central accomplishment is the growing system of modern, business-related statutes. These are supported by an entire regime: a legislature to adopt a full panoply of business laws, a supranational court that preserves the laws' uniformity by issuing decisions and interpretations applicable throughout the OHADA territory, and a permanent secretariat to perform an executive function compatible with OHADA's parliamentary-style governance.

Parts II and III also address a non-economic criticism of the OHADA regime: that it is neocolonial because it bears the influence of a Northern legal system.⁵ No definitive response is

⁴See, e.g., José Antonio Ocampo, *Development and the Global Order* in RETHINKING DEVELOPMENT ECONOMICS 82 (Ha-Joon Chang, ed., 2003) (offering an alternative to the neo-liberal paradigm).

⁵I heard the most unequivocal assertion of neo-colonialism second-hand. Apparently, a senior official at a major international financial institution has resisted providing funding to OHADA because he considers it neo-colonialist. Interview with KG in Washington, D.C., on December 13, 2004 (discussing funding for OHADA).

possible, of course, but Part II describes how the member-states acceded to the OHADA Treaty through their respective political systems. Moreover, the legal professionals who work within the region and use the OHADA laws similarly indicate an affirmative commitment to OHADA. In the summer of 2004, I conducted interviews with lawyers, judges and academics in the region. These professionals even spoke of their admiration for the elegance and simplicity of the OHADA laws.⁶ As Part II points out, these professionals show that they accept the principle and reality of OHADA when they seek to strengthen both the interface between OHADA and the national judicial regimes, and certain aspects of OHADA's own institutional structure.

What are the long-term effects of the OHADA regime? Because the laws are uniform, because their Northern form is familiar both to foreigners and to the regional bar and bench, and because they are clear and accessible, they reduce transaction costs into the region and among the

⁶I conducted 33 interviews in West Africa. Six were in Dakar, Senegal. In Dakar, the interviewees included four Senegalese (one practitioner, one in-house counsel, one senior bureaucrat in the Ministry of Justice, and the Hon. Kéba Mbaye, who is a former Vice Chair of the International Court of Justice in the Hague, a former justice on Senegal's highest court, and motivating force behind OHADA. The other two interviewees in Dakar were a French tax specialist and an economics officer at the US Consulate. Ten interviews were in Abidjan, Côte d'Ivoire; nine of the interviewees were Ivoirian, and the tenth was a US economics officer at the US embassy. The nine local persons were two practitioners, two in-house counsel, one senior bureaucrat in the Ministry of Justice, three judges (including one from the OHADA CCJA) and one professor. In Cameroon, I interviewed twenty-nine people in three cities: thirteen (one by telephone) in Douala, the commercial capital; six in Buéa, arguably the commercial capital of the anglophone part of Cameroon; and ten in Yaoundé, Cameroon's political capital; Douala and Yaoundé are francophone. All of the interviewees were Cameroonian except for the economics officer at the US Consulate in Douala, who is Nigerian, and one professors and one student I met in Yaoundé, both of whom also are Nigerian. In Douala, I interviewed three judges, five practitioners, two in-house counsel, one senior officer in a US-based bank and the US economics officer. In Buéa, I interviewed one judge, one in-house counsel, and four business people. In Yaoundé, I interviewed four professors (one Nigerian, one from Buéa, one from Yaoundé II, and one from Dschang), two judges, one high-level bureaucrat from the OHADA structure, one practitioner, and two students (one Nigerian, and the other from Buéa).

Most of these professionals had trained in a French-source legal system, but a few had received an essentially common-law education. *Under its constitution, Cameroon is bilingual (French and English) and bi-jural. Available in English at <http://confinder.richmond.edu/Cameroon.htm> (last visited March 1, 2005), and in French at <http://www.camnet.cm/celcom/institut/constitu/consti%7E1.htm> (last visited March 1, 2005). There is an English-language, common-law university in Buéa, Cameroon.

In this article, I have fully identified some of the interviewees but in the main have not done so. Notes are on file with author.

states within the OHADA territory. Because legal professionals in the region respect the quality and integrity of the decisions of OHADA's supranational court, transaction costs may well fall further. Potential investors, both domestic and foreign, have greater assurance that their private arrangements will be respected.

But OHADA may accomplish much more. It may prove to be an invaluable and exportable tool for the South because its uniform business laws presenting a unified face to the commercial power of the North. As Part III emphasizes, the first OHADA laws became effective only in 1998, and we cannot yet be certain of the OHADA regime's impact. However, if it is successful in West Africa, it can be a model within the developing world, especially in other African countries because of their proximity, but also in any region with a civilian legal system. Latin America, for example, could benefit directly, since its legal systems trace their roots back to France.⁷ The early indications are mixed, but offer reason for optimism.

I. THE OHADA LAWS AND DEVELOPMENT

The OHADA regime offers both an example and a laboratory. It illustrates an approach, and although the experience is still young, half-a-dozen years is a beginning. At the time when the OHADA Treaty was signed, most of the signatories already had in place a French-based legal

⁷See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113, 1118 (1998) (discussing the influence of the French legal "family" on Spanish and Portuguese law); George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 697 (1998) (discussing the French influence in the laws of Latin American countries); Richard Azarnia, *Tort Law in France: A Cultural and Comparative Overview*, 13 WIS. INT'L L.J. 471, 472 n.6 (1995) (noting the Napoleonic Code's influence in former French colonies, and in Latin America); Victor Ml. Garita, *Conceptual Basis for a New Arbitral Statute for Costa Rica: A New Approach in Latin America*, 65 TUL. L. REV. 1633, 1642 (1991) (asserting that Spain was the "bridge" between French law and Latin America).

system, albeit not necessarily the most recent version,⁸ and OHADA itself is heavily based on the French legal system.⁹ Can it really be expected to attract foreign investment as its drafters anticipated? More broadly, can it be a pro-development tool?

A. *DEVELOPMENT ECONOMICS AND THE DEVELOPING WORLD: THE RULE OF LAW*

The problem of development is intractable.¹⁰ Since World War II, the best minds in

⁸See, e.g., KONÉ, *supra* note 3 at 10-11. Guinea Bissau was a longtime Portuguese colony, and Equatorial Guinea a Spanish colony. See Bureau of African Affairs, U.S. Dept. of State, *Background Note, Guinea-Bissau*, <http://www.state.gov/r/pa/ei/bgn/5454.htm> (April 2004) (last visited Aug. 3, 2004); CIA, *Equatorial Guinea*, WORLD FACTBOOK (May 11, 2004), available at <http://www.cia.gov/cia/publications/factbook/geos/ek.html> (last visited Aug. 4, 2004). These, in their turn, trace their origins to the French system. See, e.g., La Porta, *et al.*, *supra* note 7 at 1118 (discussing the influence of the French legal “family” on Spanish and Portuguese law).

⁹See KONÉ, *supra* note 3 at 16 (OHADA’s similarity to French law). A legendary reformer of French law has described that law as rigid and inflexible. PHILIPPE MARINI, *LA MODERNISATION DU DROIT DES SOCIÉTÉS* 19-21 (1996) (acknowledging that the trend of French corporate law has been toward greater flexibility). *But see* Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Legal Regime and Business’s Organizational Choice: A Comparison of France and the United States during the Mid-Nineteenth Century* (February 2004), *AM. L. & ECON. REV.* (forthcoming), available at <http://papers.nber.org/papers/w10288.pdf> (downloaded Mar.23, 2004) (arguing that the French legal system’s plethora of business forms actually provided flexibility, and that the flexibility that had developed in the US system by the end of the 20th century was due not to the common law’s graceful evolution, but to statutory changes). Lamoreaux and Rosenthal suggest that the correlation between French law and developing countries’ economic stagnation may indicate that the French system operates differently in developing countries as compared to France. Lamoreaux & Rosenthal, *supra* at 28 (speculating on different effects in developing countries).

¹⁰The definition of development is not easy either. For purposes of this article, I use economic growth as a proxy for development. Because economic growth increases the size of the pie, it is likely to contribute to indicators of development. For example, it is likely to reduce mortality, to increase life expectancy and, generally, to contribute to human capability. For a discussion of a definition of development, consider the assertion of Jeffrey Sachs and his co-authors that development can be measured by analyzing a combination of gross national income (the World Bank’s replacement for gross domestic product), average annual growth in gross domestic product per capita, life expectancy at birth, under-five mortality rate, and the annual growth of the population Jeffrey Sachs, John W. MacArthur, Guido Schmidt-Traub, Margaret Kruk, Chandrika Bahadur, Michael Faye & Gordon McCord, *Ending Africa’s Poverty Trap*, 1 *BROOKINGS PAPERS ON ECONOMIC ACTIVITY* 117, 118 (2004) (selecting certain indicators of development). Amartya Sen speaks in terms of “human capability.” The goal is to achieve a society wherein people can live the life they would plan for themselves, which means that the social structures. Importantly, the question is not whether the individual in fact so functions; rather, the issue is whether he or she has the choice to do so. AMARTYA SEN, *CHOICE, WELFARE AND MEASUREMENT* 30-31 (1982) (discussing capability as the ability to function as the individual wishes); Sen, *Choice*, 30-31 (capability as functioning, as choice). To have capability means “being adequately nourished and being free from avoidable disease,” but it also means “being able to take part in the life of the community and having self-respect.” Government structures should support this effort, but do so by focusing on the individual instead of systems. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 75, 144 (1999). (discussing capability as a kind of freedom and the state’s role in supporting the capabilities of education and

development economics have promoted a neoliberal agenda.¹¹ The result of neoliberalism has been disappointing for sub-Saharan Africa, a geographic area that includes West Africa in general and the OHADA territory in particular. Despite the influence of neoliberal ideology, the region has lost ground compared with other parts of the world.¹² While direct investment to the developing world increased substantially in the last two decades of the twentieth century, the portion of world-wide capital and goods flowing into sub-Saharan Africa has shrunk by almost two-thirds in that period.¹³ The region's experience in trade of goods has been no more satisfactory. In those same last two decades, exports from sub-Saharan Africa actually fell even when measured in nominal dollars. Excluding South Africa, exports of manufactured goods from sub-Saharan Africa did not manage to rise by even ten percent.¹⁴ This double failure is particularly devastating given the evidence that a free flow of both capital and goods correlates

welfare). For others, the right to development focuses on the rights of states, with a strong sense that each state has the right to determine its own meaning of "development." *See, e.g.,* Mohammed Bedjaoui, *The Right to Development* in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 1117 (Mohammed Bedjaoui, ed., 1991) at 1182 (describing the right to development in the context of the right of a state as against other states). As noted in the Introduction, the precise definition of development is not essential to this paper because OHADA focuses on private ordering and is neutral as to how the a national government relates to investors, whether foreign or domestic, in terms of conditions and the like. While no regime can force a national government to respect its obligations under domestic and international law, the OHADA regime—like any other—has to operate with the expectation that it will do so.

¹¹Ha-Joon Chang, *Rethinking Development Economics: An Introduction* in RETHINKING DEVELOPMENT ECONOMICS (Ha-Joon Chang, ed. 2003) at 1, 1-3 (noting that neoliberal development economics has been dominated by calls for "extensive privatization, radical deregulation, total opening-up of goods and capital markets, and tightening of macroeconomic policy").

¹²*See, e.g.,* Sachs *et al.*, *supra* note 10 at 118 (discussing failure of development in sub-Saharan Africa).

¹³Howard Stein, *Rethinking African Development* in RETHINKING DEVELOPMENT ECONOMICS (Ha-Joon Chang, ed. 2003) at 153, 154 (discussing foreign direct investment). Africa-to-Africa foreign private investment, as distinguished from classic North-to-South investment, may be a very important potential source of funds for the OHADA territory. *See* Nicole Itano, *South African Companies Fill a Void*, NY TIMES (Nov. 4, 2003) (describing South African companies' investment within Africa).

¹⁴Stein, *supra* note 13 at 155-56. Meantime, total world trade tripled, and percentage of manufactured goods exported by East Asian and Pacific countries increased from 52% to 78%.

positively with economic development.¹⁵ And even if a developing country rejects the pure neoliberal insistence on a wholly free-flow of capital and goods, and chooses instead to retain some barriers to trade, for example in order to protect an evolving industry, the ability to engage in global trade nevertheless correlates positively with economic growth.¹⁶

Despite (or because of) the neoliberal efforts, the region has suffered from a lack of financial resources. The gap between gross national savings and domestic investment has continued to grow; inevitably gross domestic investment has decreased. In order to support even this reduced level of investment, sub-Saharan Africa has had to resort to government debt to replace the missing private capital inflows, resulting in brutal debt-to-export ratios.¹⁷ In the final two decades of the last century, gross national product fell; in real terms, per-capita gross national product fell almost forty percent.¹⁸ Clearly, the neoliberal efforts have foundered.¹⁹

¹⁵Raghuran G. Rajan & Luigi Zingales, *Great Reversals: The Politics of Economic Development in the Twentieth Century*, 69 J. FIN'L. ECON. 5, 22, 24, 37, 45 (2003) (discussing free flow of goods and capital as a means of reducing interest groups' opposition to financial development).

¹⁶*See, e.g.*, JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 17 (2002) (emphasizing that "rapid" liberalization of trade or capital can leave a developing country vulnerable and, among other consequences, destroy jobs). *See also* Ha-Joon Chang, *Only Protection Can Build Developing Economies; Unfree Global Markets*, LE MONDE DIPLOMATIQUE (Aug. 2003), available at <http://www.globalpolicy.org/globaliz/econ/2003/08freetradehistory.htm> (downloaded Feb. 25, 2005) (asserting that some protectionism is essential to development). Access to markets, however, is important. *See, e.g.*, Sachs, *et al.*, *supra* note 10 at 131 (discussing the correlation between access to a larger market and economic growth).

¹⁷Stein, *supra* note 13 at 157

¹⁸*Id.* at 158 (Per capita GNP fell by 39% from 1980 to 2000)

¹⁹The OHADA drafters' articulated goal for their legislation is increased foreign investment in order to enhance economic development. *See supra* note 2. That goal focuses the discussion here. Nevertheless, a complete analysis should consider whether economic development is itself a proxy for some other value. For example, for Amartya Sen the ultimate goal to enhance human capability, that is, to promote each person's ability to function as the individual wishes. SEN, CHOICE, *supra* note 10 at 30-31; SEN, FREEDOM, *supra* note 10 at 74-75. This concept means not only an increase in per capita income so that the person in fact possesses viable choices (opportunities), but also the freedom – political and social – so that the person can as a practical matter function as he or she wishes. SEN, FREEDOM, *supra* note 10 at 290-91.

The question now is whether a new inflow of foreign investment, presumably configured differently from past transfers, could improve on that reality—or at least play a part in such a change.²⁰ And, if the answer is affirmative, to what extent can a legal regime play a positive role? Perhaps it is indeed true that the focus must be on manufacturing, by analogy to the Asian experience where manufacturing was the engine for development.²¹ This, however, cannot be the only answer: before 2000, the Côte d'Ivoire was sub-Saharan Africa's second most industrialized country, after only South Africa.²² Nevertheless, the Côte d'Ivoire's per capita gross national income fell from US\$ 1,140 in 1980 to US\$ 600 in 2000—and that was before the disastrous civil war that has torn the country since September 19, 2002.²³ The real learning may be that while foreign investment will be essential as a source of funds, equally critical is a fundamental change in the social institutions. Ultimately, the goal is to promote trade, and specifically to increase exports in order to generate additional resources from outside the region.²⁴ In this regard

²⁰See, e.g., Sachs *et al.*, *supra* note 10 at 167 *et seq.* (proposing a comprehensive set of terms for donor-recipient agreements geared to reduce poverty within the nation receiving foreign investment).

²¹*Id.* [Stein, *supra* note 13 at 169. Avoiding reliance on the export of primary goods skirts the risk of immiserizing growth. See also PETER H. LINDERT & CHARLES P. KINDLEBERGER, *INTERNATIONAL ECONOMICS* 81-104 (7th ed. 1982) (discussing “immiserizing growth”).

²²Jean-Paul Azam, Marie-Françoise Calmette, Catherine Loustalan & Christine Maurel, *Domestic Competition and Export Performance of Manufacturing Firms in Côte d'Ivoire* 16 (July 2000), available at <http://www.csae.ox.ac.uk/workingpapers/pdfs/2001-01text.pdf> (downloaded Dec. 1, 2003).

²³2000 World Development Indicators CD-ROM, World Bank (Côte d'Ivoire). For a definition of gross national income, see *infra* note 172. The use of year 2000 is important because it pre-dates the recent, devastating civil unrest in the Côte d'Ivoire, which did not begin in earnest until September 19, 2002. See, e.g., United Nations Mission in Côte d'Ivoire (MINUCI), *Background*, available at <http://www.un.org/Depts/dpko/missions/minuci/background.html> (last visited April 2, 2004) (discussing the civil unrest). See also Human Rights Watch, *Trapped Between Two Wars: Violence Against Civilians in Western Côte d'Ivoire* (August 2003), available at <http://www.hrw.org/reports/2003/cotedivoire0803/> (last visited Mar. 3, 2005) (describing the history and consequences of the civil war in the Côte d'Ivoire).

²⁴See Rajan & Zingales, *supra* note 15 at 5, 22, 24, 36-39 & 45 (asserting that economic development is positively correlated with a free flow of both capital and goods). See also Stein, *supra* note 13 at 170-71 (noting that

formalization of local capital investment, too, may be important in its own right, and not just as a means to the foreign-investment end. The revised institutions can be structured to encourage domestic economic development: once the basic social institutions have proved to be conducive to local commerce, the political, economic and social institutions will be in a position to attract foreign investment.

The Peruvian economist, Hernando de Soto, has estimated that over half the economic output of developing countries is generated from extralegal sectors, and that the poor have unofficial, extralegal interests in over US\$90 trillion of real estate in the developing world.²⁵ The problem is to harness that wealth: in the developed world, as much as seventy percent of credit used in new businesses is generated through loans secured by mortgages.²⁶ The informal economy is significant in the OHADA territory, too;²⁷ a commercial law that integrates the informal economy into the formal one may help put existing capital to work.

If properly designed, the law could have strong pro-development effects by both encouraging capital investment and facilitating trade.²⁸ As the law improves its predictability, it both affects and is affected by behaviors and norms, ideally creating and supporting a pro-

these reform efforts will include a combination of private and governmental efforts). *But see* STIGLITZ, *supra* note 16 at 17 (advising against a developing country's "rapid liberalization" of trade and capital).

²⁵HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 85 (2000) (discussing extralegal sectors); *id.* at 35 (discussing unofficial real estate interests).

²⁶*Id.* at 84.

²⁷For example, in the Côte d'Ivoire. See Jean-Pierre Lachaud, *Le Secteur Informel Urbain et l'Informatisation du Travail en Afrique: Rhétorique et Réalités; Le Cas de la Côte d'Ivoire*, Working Paper #5 (1997), available at <http://ced.u-bordeaux4.fr/> (downloaded Jan. 19, 2004) (describing the Côte d'Ivoire's informal economies and their increasing size).

²⁸Rajan & Zingales, *supra* note 15 at 36-39 (discussing the correlation between economic development and the free flow of goods and capital).

development virtuous cycle.²⁹ I am not asserting that business law by itself can solve all problems.³⁰ However, it can be part of the solution. For example, if law helps create a commercial environment where expectations are meaningful because corruption does not trump overt arrangements, domestic and foreign investment and trade, including exports, become less costly.³¹

B. COMPARATIVE LAW'S CHALLENGE TO OHADA'S FRENCH-CIVILIAN ORIGINS

Even if law can be a tool for development, is OHADA the appropriate flavor of law? For historical reasons, namely that the original treaty members were almost all former French colonies, and that the outliers shared a civilian law heritage, the OHADA laws are clearly and frankly based on French business laws. Both the laws and the structure of OHADA are a work in progress but, before espousing continuing support for those laws in their West African context, and certainly before encouraging their extension to anglophone neighbors and even to new civil law arenas such as Latin America, we must consider their efficacy. Older comparative-law

²⁹The Uniform Commercial Code describes “certainty and predictability [as] underlying modern commercial law.” U.C.C. §1-301 *cmt.* 6 (2002). For a discussion of the relationship between evolving norms and laws, *see generally* Claire M. Dickerson, *Ozymandias As a Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035 (2003) (discussing the feed-back loop between societal norms and governmental statutory, regulatory and judicial actions, in the context of corporate governance).

³⁰There are so many possible impediments to development, including the extent of ethnic divisions within a region. *See* William Easterly & Ross Levine, *Africa's Growth Tragedy: Policies and Ethnic Divisions*, 112 Q.J. ECON. 1203, 1220, 1241 (1997) (arguing that there is an inverse correlation between ethnic divisions and economic development; 4 of the soon 17 members of OHADA are among the 15 most ethnically diverse states from among 66 studied worldwide). While business law broadly defined can address issues of discrimination, obviously, it cannot remove ethnic differences.

Consider also the devastating impact of AIDS in the region. *See, e.g.,* Lori Bollinger, John Stover & Benjamin Zanou, *L'Impact Economique du SIDA en Côte d'Ivoire: Résultats d'un Examen de la Littérature*, (Sept. 1999), available at <http://www.policyproject.com/pubs/SEImpact/ivoirebr.pdf> (last visited Apr. 2, 2004)

³¹*See* Stein, *supra* note 13 at 170-71 (discussing the importance of transparency and trust, among other factors).

literature has suggested that the civil law system, and in particular French laws, do not travel well. If, as the analysis asserts, French law indeed impedes development, OHADA is a doubtful choice for implementing the role of law as a path to development. Fortunately for the OHADA members, modern analysis suggests that the French legal system only correlates negatively with development, but does not impede it.

1. *Law and Finance theory*

The older of comparative law's two flavors of theoretic lens is the law and finance theory. First articulated almost half a century ago,³² this theory has been powerfully restated in the past half-dozen years by a team of economists.³³ According to the law and finance theory, countries having inherited the civil-law system, and in particular the French civil-law system, will tend to be less economically successful than countries having inherited the British, or common-law system.³⁴ The focus here is on the legal system.

The argument that French-based law is inappropriate to a developing economy is

³²FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 54-70 (1960) (discussing the different conceptions of liberty and property inherent in the British versus French legal systems); FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY* (1973). *See also* Thorsten Beck, Asli Demirgüç-Kunt & Ross Levine, *Law, Endowments and Finance*, 70 J. FIN'L ECON. 138-39 (2003) (discussing the law and finance theory).

³³*See* La Porta *et al.*, *Law & Finance*, *supra* note 7. The importance of this perspective is underscored by the wide-ranging interest it has garnered, as evidenced by a discussion in a magazine of relatively general circulation. *See* Nicholas Thompson, *Common Denominator*, 2005-FEB LEGAL AFF. 46 (discussing the Shleifer and Visney's law and finance theory, referring specifically to La Porta *et al.*, *Law & Finance*, *surpa*, and commenting on the French government's attention to the thesis).

³⁴HAYEK, *CONSTITUTION*, *supra* note 32 at 54-70 (discussing the different conceptions of liberty and property inherent in the British versus French legal systems); HAYEK, *LAW, LEGISLATION*, *supra* note 32. *See also* Beck, *et al.*, *Endowments*, *supra* note 32 at 138-39 (discussing the law and finance theory), and La Porta, *et al.*, *Law & Finance*, *supra* note 7 at 1149-50 (concluding that French law is "investor-unfriendly").

grounded in history. The more traditional presentation asserts that the French Napoleonic Code's breathtaking detail was designed to remove all discretion from a judiciary that had been notoriously obstreperous.³⁵ The judges had manifested their anti-free market tendencies notably in the context of real property, where they strove to sustain the aristocrats' feudal rights against the king.³⁶ As much as these anti-market tendencies may have inconvenienced the king, they also thwarted the future revolutionaries' belief in a natural-law right to property.³⁷

The consequence of the Napoleonic response is that the Code empowers the executive over the judiciary and creates an environment more *dirigiste* than free market, arguably resulting in inefficiencies.³⁸ In addition, the business laws of French-legal system countries appear on their face to be less protective of both shareholders' rights as against managers, and creditors'

³⁵John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 109-11 (1996) (discussing the pre-revolutionary French judiciary's alignment with the aristocracy against the monarchy, the post-revolutionary dictatorship's desire to have the executive dominate, and the resultant stripping of legislative and interpretative authority from judges); RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG & EDWARD M. WISE, *COMPARATIVE LAW: CASES-TEXT-MATERIALS* 235-36 n.1 (6th ed. 1998) (discussing abuse by 18th century *parlements* and the resultant suspicion of "judicial legislation", leading to a weakened post-revolutionary judiciary); JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, *THE CIVIL LAW TRADITION: EUROPE LATIN AMERICA AND EAST AISA* 439-40 (1994) (noting the Napoleonic dictatorship's mistrust of judges because of their pre-revolutionary opposition to authority). *See also* JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION; AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 15 (2d ed. 1985) (discussing the pre-Revolutionary judges' corruption).

Note that the Napoleonic Code is neither the summa of codes, nor the last word in French law. The German Code of 1896 was more detailed and yet more comprehensive. *See, e.g.*, SCHLESINGER, *et al.*, *supra*, at 236-38, 248 (describing the detailed and comprehensive nature of the German Code). The modern trend in French law to replace the Code by specific statutory pronouncements. *See, e.g.*, John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1868-70 (1988) (describing decodification through statutes, such as labor law statutes, and the increase in administrative procedures).

³⁶*See* MERRYMAN, INTRODUCTION, *supra* note 35 at 15 (discussing the judges' support of the feudal system).

³⁷*Id.* at 16 (discussing the revolutionaries' belief in natural rights to property).

³⁸Beck *et al.*, *Endowments*, *supra* note 32 at 139; Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 505 (2001) (referring to indications that, as a whole, civil law countries have developed less well than common law countries).

rights as against debtors, than are their common-law analogues.³⁹ This suggests that the French structure is less protective of property rights. Conceivably, even in such a situation a well-developed legal profession could create a space for a protection of property rights specifically through contractual provisions, and for protection against abuse of power by the executive through use of all remedial tools.⁴⁰ While many factors have contributed to France's economic success,⁴¹ one difference between the legal structure of France and that of developing countries with a French-based legal system is that the presence of many more lawyers per capita in France may mean that the legal forms are used more flexibly in France.⁴² I am showing a correlation rather than claiming causation, but whatever protection lawyers can offer would be far less available in developing countries where, among other differences, the lawyer-per-capita ratio is far lower.⁴³ The hypothesis is that developing countries' legal infrastructure, possessing

³⁹See La Porta *et al.*, *Law and Finance*, *supra* note 7 at 1129, 1132, 1138 (comparing rights of shareholders and creditors under the French legal system with those under the common law system).

⁴⁰For example, a remedial tool that helps protect some shareholder rights are preemptive rights, more fully discussed *infra* at notes 121-23. See La Porta *et al.*, *Law & Finance*, *supra* note 7 at 1132 (discussing preemptive rights as a remedial measure for the protection of shareholders). As against the government, a critical effort would be to avoid expropriation without adequate compensation, *i.e.*, corruption.

⁴¹La Porta, *et al.*, *Law & Finance*, *supra* note 7 at 1142 (France's per capita GNP is 91% of the US's). During a 3-decade period from the end of WWII through 1975, French governmental intervention in the economy led to a growth rate greater than that of the US. See JAMES CORBETT, THROUGH FRENCH WINDOWS 301 (1975); Perry E. Wallace, *The Globalization of Corporate Governance: Shareholder Protection, Hostile Takeovers and the Evolving Corporate Environment in France*, 18 CONN. J. INT'L L. 1 (2002) (describing the "Trente Glorieuses").

⁴²See Ray August, *Mythical Kingdom of Lawyers: America Doesn't have 70% of the Earth's Lawyers*, 78 ABA JOURNAL 72-74 (September 1992), available at <http://august1.com/pubs/articles/lawyers.htm> (last visited Aug. 4, 2004) (France has more than 1-1/2 times the number of lawyers per capita as does the US).

⁴³Alain Agboton, *Senegal - Justice, Fiction and Reality*, <http://www.peacelink.it/anb-bia/nr337/e19.html> (downloaded Oct. 15, 2003) (reporting that in 1998, there were in Senegal 270 practicing lawyers, 30 in training; 240 in Dakar where 90% commerce). In July 2004, Senegal's population was approximately 10.9 million people. CIA, *Senegal*, WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/sg.html#People> (last visited Aug. 4, 2004). These figures, suggest 1:39,000 lawyers for Senegal (although the ration may be a bit less high since Senegal's population has increased since 1998). Another study suggests that the ratio in Senegal may

few lawyers to wring maximum protection from it, while maintaining the relatively weak judiciary inherited from the French legal system, simply cannot challenge the executive's interference in the markets.⁴⁴

Another difference between the France's legal system and that of developing countries may be that the latter are adopting France's rhetoric, but not its reality. In France, despite all the talk about Napoleonic transfer of power from the judiciary to the executive, in fact the French judiciary is as strong as it needs to be to do its job. In France, the judiciary does make law, however much it claims only to interpret the codes and statutes.⁴⁵

Ultimately, however, complaining about the inadequacy of the French system as applied in developing countries is relevant to OHADA's choice of French law only if another system is more successful within the developing world. The traditional law and finance argument reports that, unlike the French system, the common-law system evolved not to protect the State from the judiciary, but to protect private property from the State.⁴⁶ To the extent that the state is excluded,

be higher: 2.67 per 10,000, at least in the 1980s. *See* August, *supra* note 42. The same study reports that the Côte d'Ivoire boasted 8.98 lawyers per 10,000 people during the 1980s (long before the current civil war), while the United States sported 28.45 per 10,000, and France a whopping 46.34 per 10,000. *See supra* August. Other rough numbers offered for the United States suggest 37.74 lawyers per 10,000 in 2000. *See* Frederick L. Trilling, *The Strategic Application of Business Methods to the Practice of Law*, 38 WASHBURN L.J. 13, 17 (1998) (projecting the ratio of lawyers to population of the United States to be at 1:265 in 2000). *See also* Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77-83 (1993) (emphasizing how difficult it is to measure the number of lawyers for comparative purposes).

⁴⁴*See* La Porta *et al.*, *Law & Finance*, *supra* note 7 at 1139-40 (arguing that stricter enforcement may be a way of remedying the inherently less investor-friendly aspects of French law).

⁴⁵*See, e.g.*, Merryman, *Deviation*, *supra* note 35 at 116 (asserting that the French legal system has failed when "exported" to developing countries because the recipient communities adopt the weak judiciary, but do not include the *sub rosa* judicial law-making). *See also* André Tunc, *Methodology of the civil Law in France*, 50 TULANE L. REV. 459, 464-66, 470-73 (1976) (discussing French judges' use of prior case law and of academic scholarship to support their decisions modernizing the law, including extending the law of liability to damages and injury caused by inanimate objects).

⁴⁶*See, e.g.*, Mahoney, *supra* note 38 at 508-11 (describing legal history: pro-property for British common

market forces tend to dominate.

The newer flavor of law and finance theory continues this comparative argument, but uses a statistical analysis of certain characteristics of various legal systems. For example, after comparing the French-origin legal system with the common-law regime, and with German and Scandinavian civil-law regimes, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny (“LLSV”) conclude that the French-origin legal systems provide the weakest protection for creditors and shareholders, both by the laws’ terms and by the level of enforcement.⁴⁷ For their analysis, the authors focus exclusively on the laws of business organizations and of bankruptcy-reorganization.⁴⁸ LLSV do concede that investors may be better protected than French laws on their face suggest, since ownership in French-system countries tends to be concentrated. This high ownership-concentration may represent business people’s response to a perceived deficiency in the laws, as the owners can then use the power accorded by their relatively high ownership participation to protect their own interests.⁴⁹ Corporations in West Africa’s developing markets may already benefit from this practical protection: the region’s

law; anti-judiciary for French post-Revolutionary law); *but see* Lamoreaux & Rosenthal, *supra* note 9 at 27 (asserting that corporate law changes in the United States were effected not by the common law’s evolution, but by statute). *See also* La Porta *et al.*, *Law & Finance*, *supra* note 7 at 1129, 1138-39 (common law countries on average offer better protection to shareholders and creditors than do countries whose law is based on French law, although the US is only weakly protective of creditors).

⁴⁷La Porta *et al.*, *Law & Finance*, *supra* note 7 at 1116, 1129-32, 1136-39, 1141 (discussing different regimes’ relative protection of shareholders and creditors, including enforcement).

⁴⁸*Id.* at 1120.

⁴⁹*Id.* at 1148 (referring to a concentration of ownership as potentially an “adaptation”). This suggests that the authors consider ownership concentration to have appeared after the Napoleonic codes restricted judicial authority. That is a reasonable assumption for our purposes, given that the first Napoleonic codes were adopted in 1804, and it was not until 1867 that French corporations could be formed without governmental approval, meaning that corporations became “off-the-rack” organizations, subject to standard terms. *See id.* at 5-6 (noting that French corporations required express governmental approval before 1867).

public markets are few and very small compared to developed countries, and ownership concentrations thus are relatively high.⁵⁰

While these new law and finance authors do conclude that the French system is less protective of investor property than is the common-law system, they hesitate on the brink of claiming a true causal relationship between the French legal system and economic failure, and between the common law and economic success.⁵¹ Common-law countries include the United States, the United Kingdom and Australia, but they also include Zimbabwe. The French-origin countries listed include Indonesia, but also Belgium and France—the latter two being, as the authors expressly note, “very rich countries.”⁵²

There is strong evidence of a correlation between property protection, financial development and growth,⁵³ but it was only the traditional law and finance theorists who maintained that the common-law system, being directly focused on protecting property, is inherently better-suited to supporting capitalist impulses even in developing countries.

⁵⁰See, e.g., *infra* Part II.A.2.b (discussing the limited public ownership of corporations in West Africa).

⁵¹Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1146 (1997) (the authors do find a relationship between legal origin and the “breadth of their capital markets”).

⁵²See La Porta *et al.*, *Law & Finance*, *supra* note 7 at 1151-52 (asserting that the French-civil-law family offers the least protection for investors, resulting in higher concentrations of ownership and less liquid markets, but also noting that France and Belgium “are both very rich countries”). This argument is a neat segue to the next section, since it focuses on the historical influence, but also makes claims about the survival of social institutions. La Porta *et al.* do emphasize the contextual nature of the investor-protections they study, although they do not argue that the differences in the laws are geared to make outcomes identical. *Id.* at 1132. See also Daniel Berkowitz, Katharina Pistor & Jean-François Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 185-86 (2003) (asserting that how legal institutions are transplanted is important, too: involuntary receipt is more negatively correlated with GDP than is the identity of the particular legal family implanted, although French law is negatively correlated with GDP; the worst combination for development is a non-OECD country’s involuntary receipt of French law).

⁵³Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Investor Protection and Corporate Governance*, 58 J. FIN’L ECON. 3, 16 (2000) (referring to earlier studies evidencing the correlation).

Explanation

2. *Comparative s Not Based on the Legal System*

Other recent comparative theories, too, seek to explain the failure of certain countries to develop, but operate by debunking the emphasis on legal systems.

(a) *Open trade and free flow of capital.* In direct response to LLSV, Rajan and Zingales point out that in 1913 and 1929, civil-law countries were no less developed than were common-law countries, and that civil-law countries' relative economic weakness is a post-World War II phenomenon. Part of the reason, according to these authors, is that the civil law is more centralized and thus more easily co-opted. However, the civil law, because of the centralization, also more easily benefits from pro-development initiatives. There may be more volatility in civil-law countries' rate of development than in that of common-law countries, which means that the civilian system tends to suffer more on the downside, but also experience a higher rate of improvement on the upside.⁵⁴

Thus, Rajan and Zingales see the civil law versus common law debate as far more inconclusive than do LLSV. Indeed, Rajan and Zingales assert that a free flow of goods, especially when coupled with a free flow of capital, is far more predictive of economic growth than is the country's legal system.⁵⁵ These factors open the country's economy to global pressures and, therefore, especially when present in tandem, limit private interests' ability to

⁵⁴Rajan & Zingales, *supra* note 15 at 42-45 (discussing relative rates of improvement between investor protection and financial development, and between financial development and economic growth).

⁵⁵This does not necessarily mean that a free flow of goods and capital is in each event the best outcome for a developing economy. *See supra* note 16 (discussing Stiglitz's and Chang's views against full liberalization). The point, here, is that the French system at least is no worse than the common-law system.

control the political system to their own advantage.⁵⁶ In other words, avoiding a French-based legal system will not necessarily have any pro-development benefit, but controlling private interests' ability to control the economic system will pay dividends.

For our purposes, we need not adopt Ragan and Zingales's emphasis that freely flowing trade and capital is essential to economic development. Other economists maintain that a focus on social as well as economic measures is critical to development.⁵⁷ However, both ends of the spectrum anticipate the need for significant additional capital inflows,⁵⁸ and to the extent that the capital inflow requires private ordering for the application of those funds, the local legal regime is implicated. According to Ragan and Zingales, a French-based legal system will at least be no worse than a common-law system.

(b) *Endowment theory.* The endowment theorists maintain that the environment that European settlers encountered, and not the legal systems they brought with them, determines whether a country is successful in the post-colonial period. Again, the choice of legal system is trumped by other factors.

If the Europeans experienced significant disease and mortality, they tended to establish authoritarian, extractive institutions designed purely to derive maximum profits from the

⁵⁶Rajan & Zingales, *supra* note 15 at 36-39, 43 (discussing how global economic pressures resulting from the free flow of goods and capital limit private interests' ability to seize rents from the local economy).

⁵⁷*See, e.g.,* Ocampo, *supra* note 4 at 101 (calling for developing countries to assert broad goals such as "human development," instead of focusing narrowly on purely economic measures).

⁵⁸*See id.* at 100 (emphasizing the "linkages between economic and social development"). *See e.g.,* Sachs *et al.*, *supra* note 10 at 164 (describing the sources of funding for three countries to meet the Millennium Development Goals for three African countries, including identifying the domestic and external funding needs).

colony.⁵⁹ If the Europeans landed in an environment where they did not fall sick, they tended to settle permanently and to establish relatively democratic institutions.⁶⁰ After independence, whatever institutions the European settlers had previously established, democratic or not, became part of the countries' post-colonial endowments.⁶¹ Compare the outcomes in North America, Australia, New Zealand with those in, for example, Cameroon, Côte d'Ivoire and Senegal: settler mortality in the seventeenth through nineteenth centuries was much higher in the latter group, and its current per capita gross domestic product (GDP) is much lower.⁶²

There is, indeed, evidence that institutions survived the transition to independence.⁶³ Post-independence, new leaders willingly stepped into the existing authoritarian, extractive institutions.⁶⁴ This is proof, the endowment theory asserts, that settler mortality is negatively correlated with development.

In the process, the endowment theorists assert that the French legal system may not be

⁵⁹Daron Acemoglu, Simon Johnson, James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (Dec. 2001), Appendix Table A2 including first graph. The authors do not dispute that countries having inherited the French legal system are, on the whole, less economically developed than countries having inherited a common law system. However, the factor of French legal origin does not affect their results. *Id.* At 1388.

⁶⁰*Id.* at 1376 (institutions persist)

⁶¹See also Beck *et al.*, *supra* note 32 at 11-13 (generally agreeing with the conclusions of Acemoglu *et al.*, *supra* note 59).

⁶²The settler mortality figures are based on number of deaths per annum, per "1,000 soldiers, where each death is replaced with a new soldier." Acemoglu *et al.*, *supra* note 59 at 1382. The range is not subtle: whereas the US, which is not the lowest of the group, shows 15 deaths, Senegal showed 164.66, and Côte d'Ivoire, 668. *Id.*, Appendix Table A2 at 1398 (the per capita GDP figures are from 1995).

⁶³See, *id.* at 1736 (discussing, *inter alia*, Mobutu's Zaire). Zaire, renamed the Democratic Republic of Congo ("RDC" in French) is slated to join OHADA shortly. See www.ohada.com.

⁶⁴See Acemoglu *et al.*, *supra* note 59 at 1395 (confirming that extractive, authoritarian institutions, such as the colonial regime in Congo, did survive, but also cautioning that institutions are not the only determinant of future economic success).

separately correlated with lack of development.⁶⁵ Despite the fact that, on average, the common law countries' legal provisions protect investors better than do those of civil law countries, especially French civil law countries,⁶⁶ the endowment theorists maintain that the slow development of countries with the French legal system relative to those with the common law system is merely an artifact of history. The French legal system is correlated with slow development, but does not necessarily cause it.

3. Remedial Steps

What, then, can we learn for the future from this analysis? The law and finance adherents at worst see a suspect correlation between a French legal system and failure of economic development. For their part, even the advocates for free flow of goods and capital, and the endowment theorists have rejected a causal relationship between the French legal system and lack of economic development. However, because proving the negative is impossible, a risk-averse response will let stand the French system, but introduce changes to reduce the impediments to development that the free-flow advocates, and the law and finance theorists have identified.

With a nod to the law and finance theorists, laws designed to support development should introduce into a French-based system flexibility not dependent on the skill of lawyers, and

⁶⁵In the process, the endowment-theory researchers show that the French legal system may not be separately correlated with lack of development. Compare *id.* at 1388 (asserting that French legal origin does not affect their results) with La Porta *et al.*, *Law & Finance*, *supra* note 7 at 1151-52, and Berkowitz *et al.*, *supra* note 52 at 185-86 (acknowledging the correlation of French legal system to lack of development).

⁶⁶La Porta, *Law & Finance*, *supra* note 7 at 1139-40; But there are other apparent anomalies, such as the suggestion that rich countries' laws are less friendly to investors than are the laws of less developed countries. *Id.* at 1139 (especially for creditors).

provisions capable of sheltering commerce from extractive and authoritarian impulses.

Recognizing that the free-flow advocates' critique emphasizes the political nature of decisions to erect barriers, the choice of internal legal system does not influence those decisions. Political realities determine what linkages exist between economic and social development, and these can be implemented whether private ordering is under a French legal system or a common law one. Whatever its form, a transparent and predictable domestic legal system will not impede cross-border free flows more than the political authorities permit.

The prescription that the endowment theory identifies is even harder to discern with confidence because we cannot change the past. However, efforts to reverse the counterproductive norms inherited from the colonial era would be pro-growth. Thus, encouraging longer-term investment would be helpful, as would other measures to reduce the elites' extractive impulses. Adding protection of property, and specifically of investments, would be favorable, too.⁶⁷ Once again, the type of pre-existing legal system does not determine the jurisdiction's ability to develop economically.

II. OHADA LAWS: DESIGN, CONTENT AND STRUCTURE, AND ENFORCEMENT

With these tasks in mind, we turn to OHADA, remembering that the OHADA founders' articulated goal is to facilitate foreign investment for the purpose of enhancing local development.⁶⁸ OHADA laws are based on the French legal system.⁶⁹ The last Part confirmed

⁶⁷See, e.g., Sachs, *et al.*, *supra* note 10 at 164, and Stein, *supra* note 13 at 154-155 (acknowledging the importance of investment to growth).

⁶⁸See *supra* note 6 (referring to President Kéba Mbaye and discussing OHADA's avowed purpose of increasing foreign investment).

that the civil law system in general, and the French legal system in particular, can be compatible with economic development. By analyzing specific provisions of the OHADA laws, we will see that OHADA's member-states have created a system of business laws uniquely designed to enhance regional economic development.

Together, the comparative and development-economics lenses indicate the structures that the OHADA legal regime must seek to provide if it is to enhance economic development. First, OHADA must counter the authoritarian state, the rigid legal system, and the anti-private property, extractive structures.⁷⁰ That is the negative conclusion suggested by the comparative analysis. Second, it must affirmatively provide a structure, in this case a legal structure, that encourages investment, both domestic and foreign. This kind of structure is likely designed to increase exports and lead to economic development. OHADA emphatically does not, however, take a stand on the macroeconomic, political questions concerning, for example, the advisability of the neoliberal vision of free trade as the source of economic growth. The OHADA laws focus only on enhancing the predictability of business transactions, not on macroeconomic, political decisions regarding barriers to goods or capital.

To ascertain whether the OHADA laws are supple rather than rigid, and whether they do encourage investment, we will turn to its uniform act concerning corporations and other business

⁶⁹See, e.g., KONÉ, *supra* note 3 at 16 (noting OHADA's similarity to the French legal system). With respect to the impact of transplanting, and thus the importance of studying a transplant in context, see generally Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 339-40, 346-51 (1996) (discussing transplants); see also Gunter Teubner, *Legal Irritants; Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MODERN L. REV. 11, 14-32 (1998) (suggesting that a reception of law is more as an irritant than a transplant).

⁷⁰See Beck *et al.*, *supra* note 32 (without stipulating how to implement the recommendation, suggesting that a country would improve its chances of developing economically if it were to "reform its approach to property rights, private contracting, and free financial markets").

organizations. This is only one of many,⁷¹ but it is a reasonable stand-in for the others: the way it addresses issues of corporate governance reflects assumptions about investment and, specifically, about what categories of investors are to be encouraged. Within that statute, we will focus on the most formal type of business association, the *société anonyme*, because less formal organizations offer fewer corporate-law points of comparison.⁷² After that analysis, we will turn to concerns about enforcement.

A. OHADA CORPORATE LAW

Our review of the comparative law theories and of development economics indicated that any corrective measure will have to protect private property and encourage capital formation in the context of whatever economic regime the body politic adopts. Private ordering must be as reliable as possible within the shadow of whatever political regime exists. Consider the

⁷¹In addition to Acte Uniforme relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique, adopted April 17, 1997, 2 JO OHADA 1 (October 1, 1997) ("corporate code"), the current OHADA uniform acts are: Acte Uniforme relatif au Droit Commercial Général, adopted April 17, 1997, 1 Journal Officiel (JO) OHADA 1 (October 1, 1997); Acte Uniforme portant Organisation des Sûretés, adopted October 1, 1997 [April 17, 1997], 3 JO OHADA 1 (October 1, 1997 [July 1, 1998]); Acte Uniforme, portant Organisation des Procédures Simplifiées de Recouvrement et des Voies d'Exécution, adopted April 10, 1998, 6 JO OHADA 1 (July [June] 1, 1998); Acte Uniforme, portant Organisation des Procédures Collectives d'Apurement du Passif, adopted April 10, 1998, 7 JO OHADA 1 (July 1, 1998); Acte Uniforme relatif au Droit de l'Arbitrage, adopted March 11, 1999, 8 JO OHADA 2 (May 15, 1999); Acte Uniforme portant Organisation et Harmonisation des Compatibilités des Entreprises, adopted February 22, 2000 [March 24, 2000], 10 JO OHADA 1 (Nov. 20, 2000). *See* <http://www.ohada.com/textes.php?PHPSESSID=f4b08a0fc3b774fad066419a02e2466a> (last visited Jan. 27, 2005). Also extant is Act uniforme relatif aux Contrats de Transport de Marchandises par Route, adopted March 22, 2003, 13 JO OHADA 3 (July 31, 2003). OHADA:TRAITE ET ACTES UNIFORMES COMMENTES ET ANNOTES, Joseph Issa-Sazegh, Paul-Gérard Pougoué / Filiga Michel Sawdogo, ed. (2d ed. 2000) (with 2003 addendum).

⁷²However, the most popular business form varies, as a practical matter, within the region. The Groupement d'Intérêt Economique (GIE), partly for historical reasons, is favored in Senegal. Interviews with QN, Dakar, June 24, 2004; Me. TT, Dakar, June 24, 2004 (notes on file with author). In the Côte d'Ivoire, the most favored form is the Société à Responsabilité Limitée (SARL), and the GIE is limited to agricultural cooperatives as was apparently originally intended. Interviews with TE, DL, QF, Abidjan, June 28, 2004; *see also* Interview with Me. HT, Abidjan, June 28, 2004. The SARL is also the most common form in Cameroon. Interview with Me. BK, Douala, July 5, 2004. This nation-to-nation inconsistency is problematic in the face of OHADA's drive to

investor's non-market risks when investing in a corporation, whether public or private, and whether the investor is foreign or domestic. First, there is the Berle and Means problem, the agency costs that, according to Northern scholars, occur as soon as ownership is separated from management.⁷³ Second, there is the problem of conflicts among shareholders.⁷⁴

OHADA corporate law addresses these issues on two levels. Its conception of corporate social responsibility incorporates the behavior that its community expects of corporations.⁷⁵

Corporate governance, the topic that has received a great deal of attention in recent years both in the United States and in Europe, is essentially the implementation of the applicable principles of

uniformity. *See infra* part II.B.

⁷³ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 6-7 (1932) (discussing the importance of the separation of ownership from management). There is an argument that French corporations are pre-Berle and Means because the French constitution stipulates that the state is to favor the national community over private property, at least to the extent that both shareholders and managers are French. However, as a practical matter, individual managers, even if French, will continue to have incentives to shirk and otherwise steal. *See* Benjamin Mojuyé, *French Corporate Governance in the New Millenium [sic]: Who Watches the Board in Corporate France?*, 6 COLUM. J. EUR. L. 73, 77-78, 110-111 (2000); *see generally*, Dickerson, *Ozymandias*, *supra* note 29 160 n.143 (2003) (same).

⁷⁴For simplicity, the discussion will focus only on the *société anonyme* (SA), which is the classic corporation. However, the OHADA statute offers a series of choices, including the *société à responsabilité limitée* (SARL), which is part of the inspiration for the limited liability companies now authorized by state laws in the United States. *See, e.g.*, Larry E. Ribstein, Susan Pace Hamill, Michael L. Gravelle & Sharon Connaughton, *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 378 (1992) (noting the similarity between limited liability companies and several European and Latin American analogies to the SARL); William Callison, *Venture Capital and Corporate Governance: Evolving the Limited Liability Company to Finance the Entrepreneurial Business*, 26 J. CORP. L. 97, 119 (2000) (mentioning specifically the SARL). I am focusing on the SA because that allows me to discuss the publicly held business forms, but I recognize that non-corporate forms, including the SARL are particularly well-suited to capital formation by indigenous entrepreneurs.

Outside the realm of corporate law, the investor is subject to other non-market risks, including an opposing party's refusal to pay. While OHADA laws cover this issue to some degree, it is not addressed in the uniform act on corporations and other business organizations, but instead, in the act on recovery of debts. *See supra* note 71 (listing the OHADA uniform acts).

⁷⁵*See, e.g.*, Dickerson, *Ozymandias*, *supra* note 29 at 1052-60 (2003) (describing post-scandal reform efforts in the US (post-Enron), the UK (post-Maxwell and post-Marconi), and in France (post-Marseille soccer club and post-Alcatel Alsthorn)).

corporate social responsibility.⁷⁶ Thus, before delving into OHADA's structure of corporate governance, we must consider its conception of corporate social responsibility. Because it provides an uncompromising perspective, the United States provides the point of comparison.

1. *Corporate Social Responsibility*

In the United States, the classic articulation of corporate social responsibility belongs to the Chicago-school, Nobel-winning economist, Milton Friedman. In 1970, he asserted that the corporation's social responsibility is to generate maximum profits legally possible for its shareholders.⁷⁷ To seek to do anything else amounts to taxation of the shareholders by corporate management. Sometimes the effect is taxation of employees through depressed wages, or of consumers through increased prices. Friedman asserts that managers should not spend corporate property to accomplish what they perceive to be a social good. If they persist, they are misapplying assets in order to achieve what the body politic demonstrably refused to do.⁷⁸

Friedman's claim that corporate management must focus on maximizing value for its shareholders is completely consistent with the dominant view in the United States today: it reflects recognition of "shareholder primacy." Students of US corporation law may object that

⁷⁶See Jennifer Cook & Simon Deakin, *Stakeholding and Corporate Governance: Theory and Evidence on Economic Performance* (July 1999) at 2, available at www.dti.gov.uk/cld/ersc1.pdf (last visited mar. 30, 2004).

⁷⁷Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAGAZINE, September 13, 1970 at 32 (Friedman speaks of profits, not shareholder value). Assuming that the securities markets are informationally efficient, value and profit reduce to the same concept. ROBERT CHARLES CLARK, CORPORATE LAW 18 (1986). Another characterization is "shareholder wealth maximization." See, e.g., Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (citing to Milton Friedman and referring to wealth maximization).

⁷⁸Friedman, *supra* note 77 at 33, 121-22, 124.

there are many other schools of thought even in the United States concerning corporate social responsibility, including the Progressives who have espoused a stakeholder concept.⁷⁹ My point is only that, to the extent that these alternative schools stray from the shareholder primacy model, they are normative; as a purely descriptive matter the legal system in the United States is deeply committed to shareholder primacy.⁸⁰ Subject to some management discretion, the corporation is supposed to generate maximum value for shareholders. That is the corporation's social responsibility.⁸¹

The shareholder primacy model certainly can help preserve the property that the owners invest in corporations. It clarifies expectations by articulating that corporations should not perform governmental functions. Of course, there is something circular about describing what corporations should do, and then asserting that anything else is a forbidden, governmental action.

⁷⁹PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995). Some might include the Team Production Model as a variant of progressive corporate law, but it is about board supremacy as arbiter, and does not predict how the directors would arbitrate. David Millon, *New Game Plan or Business As Usual?, A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001 (2000). Thus, the Team Production Model is more about corporate governance than corporate social responsibility.

⁸⁰For example, when the media recently discussed Wal-Mart's apparent abuse of undocumented workers, the criticism was not articulated in terms of the corporation's social responsibility to its stakeholder-employees. Instead, the media focused on the fact that Wal-Mart's violation of immigration laws by hiring undocumented workers facilitated Wal-Mart's further violation of labor and safety laws. That's not a discussion of corporate social responsibility that would assert, for example, a corporation's duty, in its capacity as a corporation, to treat its workers fairly (except, of course, to the extent that Wal-Mart's search for profits even through illegal means would be inconsistent with its responsibility to shareholders). Greg Schneider, *Longtime Price Message Takes Back Seat to Blitz Designed to Mend Reputation*, WASH. POST (Jan. 24, 2004) at E01; available at http://www.washingtonpost.com/ac2/wp-dyn/A43156_2004Jan23?language=printer (downloaded Mar. 4, 2004)

⁸¹In practice, the business judgment rule leaves directors a wide margin of acceptable behaviors, unless the duty of loyalty is at issue, as in the case of hostile takeovers (*Unocal Corp. v. Mesa Petroleum, Co.*, 493 A.2d 946 (Del. S. Ct. 1985)) and, especially, a board decision to sell the company (*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. S. Ct. 1985)). The trends in the United Kingdom may be toward a middle course between the U.S. perspective and the more stakeholder, French version described below. See Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, CORNELL J. INT'L L. ____ (forthcoming 2005) (arguing that the U.K. has moved to a middle ground between the U.S. and the Continent); see also Dickerson, *Ozymandias*, *supra* note 29 at 1055-58 (describing UK efforts at corporate-governance reform during the 1990s).

As distinguished from the concept of shareholder primacy familiar to US lawyers and increasingly to UK lawyers,⁸² France has adopted the concept of “*intérêt social*”, or “corporate interest.” Although a minority view asserts that this “corporate interest” is nothing more than the individual and common interest of the owners, the majority view is expansive. With respect to acts affecting the corporation’s assets, this understanding of “corporate interest” at minimum includes not only the owners, but also the interest of the corporation as a whole, which in its turn includes even third parties that have contracted with the corporation. The expansive understanding of “corporate interest” may require management to consider, in addition to the owners, the interests of employees, creditors, suppliers, clients, and perhaps even the State.⁸³ The majority position has a tone that certainly is far more stakeholder than shareholder primacy.

The concept of “corporate interest” was already deeply embedded in the French corporate law that preceded OHADA in most of the OHADA territory,⁸⁴ and even at this early stage of the OHADA regime’s existence, OHADA appears to have adopted the stakeholder sense of “corporate interest.”⁸⁵ However, OHADA has not yet generated enough jurisprudence to reveal

⁸²See, e.g., Cook & Deakin, *supra* note 76 at 3 (discussing managers’ responsibility to shareholders of UK corporations).

⁸³See KONÉ, *supra* note 3 at 157-58 (discussing the three theories of *intérêt social* under French corporate law). With respect to shareholders’ voting rights, the application of *intérêt social* may be more restrained, with the principle of equality of shares trumping. Even there, however, judges consider both the interest of the other shareholders, and the interest of the corporation as a whole. *Id.* at 158.

⁸⁴See *id.* at 156 (discussing the state of the law in the OHADA territory starting in 1935).

⁸⁵See *id.* at 157-59 (suggesting that the concept of *intérêt social* may have become the “compass” for the corporate operation in France, and that, although this is not yet certain, the OHADA regime may well share that sensibility). See also FRANÇOIS ANOUKAHA, ABDOULLAH CISSE, NDIW DIOUF, JOSETTE NGUEBOU TOUKAM, PAUL-GÉRARD POUGOUE & MOUSSA SAMB, OHADA: SOCIÉTÉS COMMERCIALES ET G.I.E. 269 (2002) (hereinafter SOCCOM) (discussing *intérêt social* in the context of *abus de biens*, and noting the French jurisprudence calling for protection of third parties, as well as the owners and the “*patrimoine*” (“patrimony”) of the corporation).

whether “corporate interest” will ultimately embrace the full panoply of interested parties, including the State. If it does so, the OHADA norm of corporate social responsibility would presumably forbid environmental discrimination,⁸⁶ and might well include affirmative obligations to provide various services to those whom its operations affect. In any event, its umbrella covers employees, many of whom will presumably be members of the local community. Given OHADA’s purpose of promoting foreign investment in order to enhance the region’s economic development, OHADA would be consistent with that goal if it were ultimately to adopt a version of “corporate interest” that balances the perceived needs of potential investors with those of the host region. The flexibility of the concept allows it to adjust its contours so as to be consistent with the region’s evolving political assumptions concerning the best route to economic growth.

The OHADA corporate law’s retention of the norm of “corporate interest” thus is our first indication of the balance that the OHADA legislators sought. Specifically, they opted for a concept responsive to local expectations, but one that already includes some guidelines. A foreign investor might prefer shareholder primacy, depending on applicable factors; however, the local government that includes not only elites that might invest, but also voters who may be employees of the enterprise, might well prefer the stakeholder approach.⁸⁷ The concept of

⁸⁶See, e.g., Edward Patrick Boyle, Note, *It’s Not Easy Bein’ Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 968 (1993) (succinctly describing the phenomenon, in the United States, of environmental discrimination).

⁸⁷The stakeholder norm may also be better suited to the host country’s cultural norms. That is another study, but to the extent that regional norms in Africa support more community-based expectations than does the United States’ more individualistic approach, the “corporate interest” assumption may well better answer local needs for that reason, too. See, e.g., MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 3-5 (1925; translated by Ian Cunnison 1967) (emphasizing the importance of groups in “primitive” societies, specifically relating to “archaic contracts”). But see KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE*

“corporate interest,” the focus on the highest interest of the corporation, may in addition implicitly demand that a dominant shareholder not oppress the minority. In other words, this concept describes an equitable perspective directly applicable to classic corporate governance.⁸⁸

How, then, does OHADA translate its stakeholder understanding of corporate social responsibility into action? How would a corporate-interest conception of corporate social responsibility differ from a shareholder-primacy conception when seeking to protect private property and, more generally, to encourage investment? Depending on local expectations, either formula, can meet them. An indigenously grown conception of corporate social responsibility will, by definition, conform to that society’s norms. Drawing with a broad brush, we can say that the stockholder-primacy theme better suits the United States culture because it is consistent with our admiration for rugged individualism.⁸⁹ When transplanting a system, it is of course much more difficult to determine whether corporate interest or shareholder primacy would be best suited to, for example, the OHADA region.⁹⁰ Anthropologists have disagreed on how to

CHEYENNE WAY, CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 50-51 (1941) (pointing out that modern society, like primitive ones, operates through groups).

⁸⁸Interview with Me. FB, Douala, Cameroon, July 5, 2004 (discussing “intérêt social”).

⁸⁹ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, HABITS OF THE HEART 27-51 (1985) (considering a sociological perspective of individualism); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing the disintegration of community life in the United States).

⁹⁰*See, e.g.,* Watson, Teubner, *supra* note 69 (discussing, respectively, “transplants” and “irritants”). *See also,* Katharina Pistor & Daniel Berkowitz, *Of Legal Transplants, Legal Irritants, and Economic Development*, in CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY (P. K. Cornelius & B. Kogut, ed.) (2003) 347, 348-53, 361-62 (discussing irritants in the context of transplants into the developing world); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 29-35 (2004) (arguing that “translation” is a better metaphor than “transplants” or “irritants”).

understand another culture's legal norms.⁹¹ Nevertheless, I will hazard a fundamental generalization for the purpose of discussion.

A formulation of corporate social responsibility that champions owners above all other constituencies rather than valuing the entire community, may be more instinctive in a Western culture than in an emerging economy still influenced by “primordial attachments” and “quasi-kinship” obligations.⁹² I do not mean to overstate this generalization, either.⁹³ Among other complexities exists not only the reality of different attitudes within the developing world, but also the fact that some Western countries are more community-minded than others.⁹⁴ Although OHADA-region scholars and practitioners well-versed in business law are keenly aware of the corporate interest norm embedded in the OHADA corporate law, they have mixed views regarding “corporate interest.” They do not reject the principle; they only question its relevance.⁹⁵ For example, no one I interviewed said the stakeholder approach was culturally

⁹¹Compare Max Gluckman, *Concepts in the Study of Tribal Law*, in LAW IN CULTURE AND SOCIETY 349-55, 371-73 ((Laura Nader ed. 1969; 1997) (comparing Bohannan's use of local terms unfavorably to his own use of Western analogues, while admiring Bohannan's descriptive skill) with Paul Bohannan, *Ethnography and Comparison in Legal Anthropology*, in LAW IN CULTURE AND SOCIETY 401-18 (Laura Nader ed. 1969; 1997) (complaining of Gluckman's use of Western terms).

⁹²Clifford Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in OLD SOCIETIES AND NEW STATES: THE QUEST FOR MODERNITY IN ASIA AND AFRICA (Clifford Geertz, ed. 1963) at 109, 112.

⁹³For an indication of the complexity, see Keith Hart, *The Social Anthropology of West Africa*, 14 ANN. REV. ANTHROPOL. 243 (1985) (reviewing studies of the region and noting the disjuncture caused by colonialism and independence).

⁹⁴See, e.g., MAUSS, *supra* note 87 at 65 (describing the rise of collectivism in France during the 20th century inter bellum).

⁹⁵See *supra* text accompanying notes 82-88 (discussing “intérêt social” under French law, and considering its status under OHADA law). See also Interview with Me. FB, *supra* note 88 (rejecting relevance of “corporate interest”). However, I also visited a company in Buéa, Cameroon operated in a manner consistent with the highest level of corporate interest. Academics displayed mixed reactions. Compare Interview on June 30, 2004 with Prof. Anne-Marie Assi-Esso, founder of a law school in Abidjan, Côte d'Ivoire, the Ecole Supérieure Internationale de

inappropriate. Instead, for the practical-minded, clarity of terms and predictability of judgment-execution are more urgent issues.⁹⁶ The dispute between the two principles was in effect dismissed by many as luxury in which only developed economies can indulge.

One academic, however, actually embraced the concept of corporate interest, stating explicitly that it can help prevent abuse.⁹⁷ Because the principle of corporate interest is broad enough to conform to many cultures, it will be interesting to see how it evolves in the OHADA region;⁹⁸ as we shall see, the OHADA laws are adopted by a process that includes local input.⁹⁹ At minimum, “corporate interest” is a concept that, in France, has been compatible with economic success,¹⁰⁰ and that should be flexible enough to support many perspectives, not just the classic, neoliberal view. Thus, it is at worst neutral, and may be favorable to economic growth, especially if the political interests do call for linking investment to social as well as

Droit (rejecting “corporate interest” as irrelevant to the business realities in the region) *with* Interview with Vice Rector and Prof. Paul-Gérard Pougoué, Soa, Cameroon, July 9, 2004 (suggesting that the principle of “corporate interest” can serve as a means of avoiding abuse).

⁹⁶Interview with Me. FB *supra* note 88 (rejecting relevance of “corporate interest”); Interview with Prof. Assi-Esso, *supra* note 95 (rejecting “corporate interest” as irrelevant to the business realities in the region).

⁹⁷Interview with Prof. Pougoué, *supra* note 95 (suggesting that the principle of “corporate interest” can serve as a means of avoiding abuse; Prof. Pougoué did not describe the type of abuse that he believed could be attenuated but from the context, he may have been referring to managers’ abuse of corporate power in their dealings with the corporations’ various constituencies).

⁹⁸The principle of “corporate interest” may create additional risks to a fragile judicial environment. Because it is more of a standard than a rule, its application depends on judges’ exercise of discretion. To give judges discretion is to increase the risk of corruption. *See* Interview with Prof. Pougoué, *supra* note 95 (noting that the danger of corporate interest is that it provides discretion to judges).

⁹⁹*See infra* part II.B.1.c (discussing OHADA’s legislative branch, the Council of Ministers).

¹⁰⁰*See* La Porta *et al.*, *Law & Finance*, *supra* note 7 at 1151-52 (describing France as a “very rich countr[y]”).

economic impacts.¹⁰¹

2. *Corporate Governance*

a. Berle & Means: Separation of ownership and management. In addition to standards such as the “corporate interest”, the OHADA corporate statute also imposes many rules that limit management behavior. Many of these rules will be utterly unsurprising to a common-law lawyer: management is not supposed to indulge in conflict transactions, so loans from the corporation are, for example, forbidden.¹⁰² And, importantly in the context of transparency, management is supposed to keep the shareholders informed.¹⁰³ How the concept of corporate interest is implemented reveals whether OHADA is flexible and supports property rights against the state and extractive elites.¹⁰⁴

To be sure, individual implementing provisions may be relatively unfamiliar to the Anglo-American lawyer. Thus we must consider them in the context of the entire uniform act concerning business organizations.

Turning first to management’s obligation to inform the owners, OHADA law requires that any corporation must have a statutory auditor.¹⁰⁵ This is not a trivial protection: it was such an

¹⁰¹See Ocampo, *supra* note 4 at 100-01 (with respect to developing countries, advocating linkages of economic and social development, and identifying “human development” as a goal).

¹⁰²SOCOM, *supra* note 85 at 271 (concerning conflicts of interest generally), and 422 & 430 (noting that managers cannot borrow from the corporation, with very few exceptions).

¹⁰³See generally SOCOM, *supra* note 85 at 79-80, 462-63 (describing the shareholders’ rights to receipt of information from managers). *Id.* at 169 (noting that an S.A. must have a *commissaire aux comptes*).

¹⁰⁴See *supra* Introduction to Part II.

¹⁰⁵The reference, as usual in this discussion, is to an SA. See SOCOM, *supra* note 85 at 449 (noting also that even SARLs must appoint a statutory auditor if they exceed a specified fairly small size in annual sales of 250

auditor who first unmasked Messier's excesses at Vivendi Universal.¹⁰⁶ Twice a year, shareholders may also demand that management reveal any information that could have a significant, negative financial impact.¹⁰⁷

While some of these provisions may seem needlessly formal, they may be particularly important in a developing economy. Especially in the United States, the oft-repeated assertion is that, at least for public corporations, the markets place important constraints on managers.¹⁰⁸ However, in economies that tend not to have widely dispersed share ownership and thus are not susceptible to hostile takeovers for example, some of the developed-country market constraints are not available as a practical matter.¹⁰⁹ This formalism therefore should be reassuring to investors, both domestic and foreign, because it may enhance transparency and predictability in an environment where legal sophistication is relatively hard to come by.

million fr. CFA (164K €) or in number of employees employees (50)).

¹⁰⁶See Dickerson, *Ozymandias*, *supra* note 29 at 1047 (discussing the Vivendi Universal melt-down and the role of the accounting firm, Salustro-Reydel); *Ennuis Judiciaires en Vue pour les Deux Rivaux*, LA TRIBUNE (Oct. 30, 2002), available at [http://www.latribune.fr/Dossiers/vivendi.nsf/\(LookupPrint\)/IDC1256B2E0034D352C1256C62007A99C5?OpenDocument](http://www.latribune.fr/Dossiers/vivendi.nsf/(LookupPrint)/IDC1256B2E0034D352C1256C62007A99C5?OpenDocument) (downloaded Mar. 30, 2004) (identifying Salustro-Reydel as Vivendi's "commissaire aux comptes" (statutory auditor) at the relevant time).

¹⁰⁷See SOCCOM, *supra* note 85 at 449.

¹⁰⁸For a summary of certain market restraints on managers of US public corporations, *see, e.g.*, Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 554-56 (1995).

¹⁰⁹See Ajit Singh, *The New International Financial Architecture, Corporate Governance and Competition in Emerging Markets: Empirical Anomalies and Policy Issues* in RETHINKING DEVELOPMENT ECONOMICS (Ha-Joon Chang, ed. 2003) at 377, 391 (also noting that countries such as France have effectively constrained their managers by means other than hostile takeovers). This last point is particularly interesting given that the OHADA legal regime is heavily based on French law. The limitations on US-style market constraints exist, of course, whenever the markets are less liquid and diversified than in the US. *See, e.g.*, Merritt B. Fox, *Required Disclosure and Corporate Governance* in COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH (Klaus J. Hopt, Kideki Kanda, Mark J. Roe, Eddy Wymeersch & Stefan Prigge eds. 1998) at 701, 716-17 (asserting that public disclosure is a more effective constraint on managers in the US, as opposed to Japan or Germany).

In other ways, the OHADA statute has opted for simplicity rather than any other value. Reformers in France, and for that matter reformers in the United Kingdom and the United States with greater success, have called for “independent” directors, that is, persons who have no substantial relationship with the corporation other than as director.¹¹⁰ The OHADA statute, on the other hand, seems to assume that it may be too difficult to find independent directors and that, in any event, even if a new broom sweeps clean, the old one knows all the corners. There is some justification for OHADA’s agnosticism on the subject of independent directors, as several scholars have persuasively questioned their usefulness in enhancing a firm’s economic performance.¹¹¹ OHADA’s response is both pragmatic and balanced: although OHADA-region directors must be non-conflicted, they need not be “independent.”

Reformers in the North have been very leery of allowing too much power to concentrate in the hands of a single manager or group of managers.¹¹² Nevertheless, again presumably in the interest of simplicity, the OHADA statute does not provide for splitting the board into a

¹¹⁰See, e.g., See Dickerson, *Ozymandias*, *supra* note 59 at 1052-60 (reporting that the UK’s reforms champion non-executive directors, and that the US and French reforms call for increased use of independent directors). See also Lamoreaux & Rosenthal, *supra* note 9 at 28 (noting that developing countries are different, that French law requires contractual sophistication at least concerning organizational forms, and that, consequently, simplicity is better).

¹¹¹See, e.g., Sanjai Baghat & Bernard Black, *The Non-Correlation between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231 (2002) (showing that in the US, independent directors have little effect); see also Julian Franks *et al.*, *Who Disciplines Management in Poorly Performing Companies?*, § 3.4 (Centre for Econ. Pol’y Research, Discussion Paper No. 2949, 2001) (discussing the importance of the endgame in the UK).

¹¹²See, e.g., Deborah Solomon, *SEC to Approve Governance Rules by NYSE, Nasdaq*, WALL ST. J. (Oct. 13, 2003) (reporting that the proposals to be voted on by the SEC require a majority of independent directors, and regular meetings of nonmanagement directors, for all corporations listed on the New York Stock Exchange or Nasdaq). UK: *The Combined Code, Principles of Good Governance and of Best Practice*, § 1(A)(1-3) (2000) (mandating the board to be effective, separate chairman from CEO, and balance between NEDs and executive directors), available at http://www.fsa.gov.uk/pubs/ukla/lr_comcode.pdf (last visited Jan. 30, 2003). France: see Dickerson, *Ozymandias*, *supra* note 29 at 1059 (discussing the two-tier board option in France, and the Viénot 1999 report’s suggestion that, if the Président and Directeur-Général positions are held by the same person, the board clearly articulate the extent of the powers of the “PDG”).

supervisory board and a management board. It does not stipulate separation of the role of the Chairman of the Board from that of the chief executive officer (CEO).¹¹³ It even affirmatively requires that, if there are three or fewer shareholders, a single Administrator-General will serve as Chairman of the Board and CEO, and even as the board itself.¹¹⁴ The purpose for this last provision is to add flexibility to the standard corporate form, the *société anonyme*, in the interest of attracting foreign investment.¹¹⁵

b. Relationships between and among shareholders. With respect to the relationship among shareholders, it is useful to remember that there are public shareholders in the OHADA territory. The regional stock market, located in the Côte d'Ivoire, lists just under forty companies, and had a capitalization of US\$1.3 billion in 2003.¹¹⁶ It is interesting, but probably not surprising, that the stock market is located in a country that has at least a small bourgeoisie. While most listed companies are majority-held by foreign investors, Ivorian shareholdings represent very close to half the capitalization.¹¹⁷ Although the market has not been a major source of capital for new ventures, it has been an important forum where foreign and domestic

¹¹³See SOCCOM, *supra* note 85 at 425-29 (discussing the roles of the Président (Chairman), of the Directeur Général (CEO) and of the Président Directeur Général).

¹¹⁴*See, id.* at 429-31.

¹¹⁵*Id.* at 429. The most used form is the SARL or the GIE, depending on the particular state-member of OHADA. *See also* Interviews with QN, Me. TT, TE, DL, QF, Me. HT and Me. BK, *supra* note 72.

¹¹⁶With this market valuation, the entire market would be around number 450 on Fortune 500. *See* <http://www.fortune.com/fortune/fortune500/company/top500/0,17354,401,00.html> (downloaded Oct 15, 2003). For a description of the Bourse Régionale des Valeurs Mobilières (BRVM), *see* <http://www.mbendi.co.za/exch/25/p0005.htm> (last visited Jan. 22, 2005).

¹¹⁷*See* Kathryn C. Lavelle, *Architecture of Equity Markets: The Abidjan Regional Bourse*, 55 INT'L ORG. 717, 718, 728, 735 (2001) (reporting that non-West Africans "control an overwhelming percentage of the publicly listed firms"; that the Côte d'Ivoire had developed a "small bourgeoisie"; and that "Ivoriens [*sic*] hold 49.4 percent of total market capitalization").

capital can meet. The stock market appears to have been a vehicle through which governments have effected the privatization demanded by international financial institutions.¹¹⁸ Thus, while the stock market may have evolved because of the adherence of international financial institutions to neoliberal norms, it remains a structure that could play an important future role in generating both domestic and foreign capital. OHADA's legislators have taken this into account by providing a statute that applies both to public and to private companies.

The principal standard applicable to relations among shareholders under the OHADA corporate statute is a prohibition against abuse by either the majority or the minority.¹¹⁹ Given that foreigners tend to hold a majority of public companies, but that domestic shareholders already have significant holdings, this balance indicates that the OHADA project seeks to protect owners' investments, whether the investors are foreign or domestic, and whatever the level of their holdings. Thus, OHADA encourages foreign investment while simultaneously sheltering domestic participation in capitalizing businesses.¹²⁰

Along with applicable standards, there are many rules, of course. Two that also reflect the balance the OHADA drafters have sought but that may surprise foreigners are preemptive rights and a double-vote provision.¹²¹ Preemptive rights are still popular in France;¹²² in contrast,

¹¹⁸See, *id.* at 723, 730 (discussing developing countries' use of illiquid stock markets as a way to comply with the IFIs' demands for privatization). The BRVM became truly regional in 1998, when the Senegalese company, Sonatel, was privatized. See, *id.* at 734 (discussing Sonatel).

¹¹⁹See SOCCOM, *supra* note 85 at 77-78, 187 (discussing the principle of equality among shares, and the illegality of abuse, meaning essentially self-serving behavior, not justified by "l'intérêt de la société", by either the majority or the minority).

¹²⁰See *supra* this Part II.A.2.b.

¹²¹See SOCCOM, *supra* note 85 at 464 (preemptive rights) and 77, 460-61 (double vote).

¹²²See Dickerson, *Ozymandias*, *supra* note 29 at 1044-45 (noting that preemptive rights are more common

they have for the most part disappeared from corporate practice in the United States, where they are seen as limiting management's ability to raise capital, especially as shareholdings become more widely dispersed and the mechanics of exercising these rights thus more cumbersome.¹²³ Basically, when preemptive rights exist, they allow shareholders to retain their existing percentage of ownership in the face of a new issuance of shares. If the shareholder now holds twenty percent, it can buy up to twenty percent of the new issue at the issue price. Given that foreign shareholders currently hold a majority position in most public companies and thus control them, the preemptive rights tend to protect the domestic minority shareholders. The drafters must have assumed that companies would succeed in raising needed new capital, whether from the originally targeted sources, or from existing shareholders that exercise their preemptive rights.

The drafters may also have considered that the minority (usually domestic) shareholders should at minimum be allowed to participate even if those shareholders typically do not possess enough capital to stay in for many rounds. Further, the negative aspects of preemptive rights are far less salient where even public companies' shareholdings are not widely distributed. Finally, the drafters doubtless realized that in closely held businesses, the majority holder could well be Ivoirian. Thus, the OHADA states-members adopted a corporate law that offers a reasonable

in France than in the US; indeed, Vivendi Universal had such a provision).

¹²³See, e.g., Lori A. Dawkins, Note, *Shareholders' Preemptive Rights in West Virginia*, 97 W.VA. L. REV. 437, 439041 (1993). The issue is the same today, as evidenced by events toward the end of Jean-Marie Messier's tenure as PDG of Vivendi Universal. He had requested that the shareholders approve a repeal of preemptive rights in order to simplify the company's task of raising capital; the shareholders refused. Richard Verrier, Michael A. Hiltzik, & Sallie Hofmeister, *Messier Faces His Critics at Meeting; Media: Vivendi Universal Shareholders Veto a Stock-Option Plan for Management But OK Firing of Pierre Lescure*, L.A. TIMES (Apr. 25, 2002) at C1, 2002 WL 2471233.

balance between foreign and domestic interests and a reasoned recognition of local realities.

As to the double-voting rights, OHADA corporate law provides that shareholders who have held shares for at least two years in their own names, not in bearer form, can be awarded double voting rights.¹²⁴ As a point of comparison the average U.S. investor holds investments 7.8 years.¹²⁵ Like preemptive rights, double-voting rights are an artifact of French law.¹²⁶ While it is not clear whether this provision benefits foreign investors or domestic ones, its retention serves to encourage early investment and to preserve the status quo.¹²⁷ Thus, in the OHADA region, double voting rights seek to rectify an aspect of pre-OHADA law criticized by the comparative lens:¹²⁸ they support stability and discourage a cut-and-run, extractive approach to investment.¹²⁹

B. OHADA PRAGMATIC REACH: ENFORCEMENT

OHADA law may be balanced and sophisticated, and it may be particularly suited to

¹²⁴See, SOCCOM, *supra* note 85 at 77, 460-61 (discussing double vote, and the 2-year, nominal-holding requirement).

¹²⁵Adam Ritt, *Who Is the American Shareholder? Voice of the American Shareholder*, BETTER INVESTING MAGAZINE, NAIC (January 2004), available at www.better-investingnewsroom.org/voice/Voic-164.htm (last visited Jan. 22, 2005) (reporting Harris Interactive poll results).

¹²⁶See, e.g., L'Association Notariale de Paris 12, *Le Gouvernement d'Entreprise*, available at <http://dessnotaire.free.fr/exposes/legouvernementdentreprise.htm> (last visited Apr. 2, 2004) (referring to French law and plural voting rights).

¹²⁷**Le Gouvernement d'Entreprise*, <http://dessnotaire.free.fr/exposes/legouvernementdentreprise.htm> (downloaded Oct 3, 2003) (suggests that pre-NRE, weighted voting is possible; less clear post-NRE; check L 225-25).

¹²⁸See, *supra* Part I.B (discussing the comparative lens).

¹²⁹There are also provisions to protect bondholders and other creditors. See, SOCCOM, *supra* note 85 at 470-479.

encourage both foreign and domestic investment; however, it will not be effective unless it is enforced. There are two aspects to this problem of enforcement. The threshold assumption of OHADA's founders is that a harmonized, modern system of business laws will enhance the territory's economic development, in part by making the region attractive to foreign investment.¹³⁰ For these purposes "harmonization" is no flimsy concept: the process creates truly uniform business laws throughout the OHADA territory.¹³¹ Even if there is enforceability, a variation from state to state will weaken the nations' ability to define their own norms, and to then impose them on foreign investors. If each member state of OHADA can interpret the laws at the national level, the effort to attract foreign investment can become a race to the bottom. For example, an OHADA member-state could choose to retreat from the balanced treatment described in the prior section and, instead, favor majority shareholders in the hopes of reassuring the foreigners. Because OHADA laws are harmonized (uniform), they do not facilitate or otherwise encourage this kind of divisive behavior.¹³²

From a different, more positive perspective, persons trading among or into OHADA

¹³⁰See, e.g., LeBoulangier, *supra* note 2: "L'objectif du Traité et des institutions qu'il a mises en place est, selon les auteurs, ambitieux: il s'agit, d'une part de promouvoir un droit des affaires moderne et unique, susceptible de mettre un terme à l'insécurité juridique résultant de la vétusté dans de nombreux pays et de la disparité des législations nationales en la matière, d'autre part de lutter contre l'insécurité judiciaire dont la cause essentielle réside dans le manque chronique de moyens des juridictions nationales, en créant un environnement favorable au développement des échanges commerciaux et des investissements." A professor at the Ivoirian University of Cocody's law school, who also was serving as a deputy to the national assembly, commented favorably on that assumption. See Lohoues-Oble, *supra* note 2 at 544 -45.

¹³¹See LeBoulangier, *supra* note 2 at 546-47 (presuming that the term "harmonisation" was used for diplomatic reasons, but emphasizing that the OHADA business laws are truly unified). See also KONÉ, *supra* note 3 at 4-5 (discussing the difference between the European Union's harmonization of laws, and the OHADA regime's unification and uniformity of laws). Of course, uniformity is not a panacea because uniformity in a bad direction is bad. See, e.g., Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 672 (1999) (noting that, perversely, uniformity can accentuate inefficient effects).

¹³²Because OHADA offers business laws but is not a customs union, OHADA does not limit the member-states; ability to establish independent trade policy, for example.

member-states will have lower transaction costs if they need not worry about national variations, thereby encouraging trade.¹³³ The second step is that these uniformly interpreted laws must be enforced. We will look first at the interpretation problem and then briefly at enforcement.

1. *Uniform Interpretation through Supranational Structures*

The simple adoption of uniform laws is a relinquishment of sovereignty contemplated by the OHADA treaty: a law that OHADA adopts is automatically and immediately an internal law of each of OHADA's member-states.¹³⁴ To accept a uniform interpretation and enforcement represents another significant step in the same direction. At this point, it is worth pausing to consider why national elites would have allowed the OHADA project to exist at all. The answer is fraught with speculation, but a legal professional who is from the OHADA territory and who was deeply involved at OHADA's earliest stages indicates that the political leaders in the region really did understand OHADA to be pro-development and had been deeply worried by the economic downturn of the early 1990s.¹³⁵ It may also be that the elites recognized that the OHADA laws' nuanced balancing act protects the elites. Elites may typically be majority

¹³³That, of course, was the logic behind the uniform laws in the United States, and the UN Convention on Contracts for the International Sale of Goods. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18, Annex I, reprinted in 19 I.L.M. These are only business laws relating to private ordering, thus they do not prevent a government from imposing on trade whatever social or economic linkages its political system prefers. *See also supra* note 132 (specifically mentioning the freedom of each OHADA member-states to establish independent trade policies).

¹³⁴*See* OHADA Treaty, Art. 10 (explicitly stating that the uniform acts adopted pursuant to the treaty are directly and mandatorily applicable in the member-states). The CCJA has explicitly ruled that the OHADA Treaty abrogates national laws that contrary to, and even merely identical with, the OHADA laws. *See* KONÉ, *supra* note 3 at 5 (describing two rulings of the CCJA, one in response to a request by the Ivoirian government, and the other as a result of the court's review of an intra-State arbitration). For scholarly recognition that OHADA implicates at least a limited waiver of sovereignty, *see* Forneris, *supra* note 1 at 9-10.

¹³⁵Interview with Pres. Kéba Mbaye, Dakar, June 25, 2004. *See also supra* note 2 & 68 (referring to the articulated goal of OHADA, *viz.*, increasing foreign investment).

holders in domestic investments, but we have seen that they tend to have minority positions when foreign investors are involved.¹³⁶ A neutral law can protect their own holdings in both circumstances.

The other reason why the national elites, including the national governments, accepted the relinquishment of sovereign authority is almost certainly because of the manner in which the OHADA drafters structured the new regime. As we will see, it is the triumph of structure and procedure, deployed in the service of substance. OHADA is not just a system of uniform laws; it is a unified legal system designed to protect and enhance the pro-investment qualities of the OHADA laws. It accomplishes this by erecting an entire legislative and judicial structure that formulates and interprets the OHADA laws, and prepares them for enforcement.

a. CCJA. The OHADA Treaty awards the interpretive function to the “Cour Commune de Justice et d’Arbitrage” (the Common Court of Justice and Arbitration), commonly known as the CCJA. This court is a complete judicial system that is supranational within the OHADA territory and operates parallel to the national systems. The CCJA has two principal roles with respect to the business laws adopted under OHADA: it offers a forum for international arbitration, and it also serves as the court of last resort for judgments rendered and arbitrations instituted within State-members.¹³⁷ Its role as forum for international arbitration remains undeveloped, in part because of significant competition from both governmental¹³⁸ and non-governmental

¹³⁶Lavelle, *supra*, note 117. *See also supra* part II.A.2.b.

¹³⁷*See, e.g.,* LeBoulanger, *supra* note 2 at 551 (concerning the CCJA’s dual roles). *See also infra* note 140 (discussing the extent of, and limitations on, the CCJA’s supranational authority).

¹³⁸Interview with Pres. Dr. François Komoin, Abidjan, June 29, 2004 (referring to the arbitral court of the Côte d’Ivoire, located in Abidjan).

groups.¹³⁹ Its role as final arbiter is its contribution to effective uniformity.

Because the CCJA preserves the uniformity of the OHADA laws through its final say,¹⁴⁰ it truly represents a transfer of indicia of national sovereignty to a supranational authority.¹⁴¹ No matter where the cause of action arises, if the CCJA has jurisdiction over the matter, the Treaty requires the national supreme courts to forward the case to the CCJA located in Abidjan, Côte d'Ivoire.¹⁴² This ensures that any decisions under the OHADA laws will occur outside the existing, often authoritarian and extractive national institutions, a significant concept in development-talk.¹⁴³

This is not to say that the role of the CCJA even as interpreter of OHADA laws is yet

¹³⁹Interview with Mr. SADJO Ousmanou, in Douala, Cameroon, on July 6, 2004 (discussing the arbitral procedures of the Groupement Inter-patronal du Cameroun (GICAM), an association of employers).

¹⁴⁰See LeBoulanger, *supra* note 2 at 551. The CCJA's rule as court of last resort with respect to intra-State arbitrations is as a court of cassation (it cannot modify a lower tribunal's decision, but it can reject it). See Forneris, *supra* note 1 at 3. A limitation on the CCJA's authority is that it cannot impose penal sanctions; that is the role of the individual States. OHADA Treaty, art. 5. See also Issa-Sayegh, *Intégration*, *supra* note 1 (discussing the penal-sanction limitation, and suggesting a reform to wholly remove any penal authority from the CCJA). See also SOCCOM, *supra* note 85 at 232-38 (discussing penal sanctions in the context of corporate law, specifically).

Another way in which the CCJA assists in establishing uniform business laws, is by advising the legislative branch, the Conseil des Ministres. See, e.g., BUSLAW, *supra* note 1 at 13. For a discussion of the Conseil des Ministres, see *infra*, Part II.B.1.c.

¹⁴¹The CCJA has explicitly ruled that the OHADA Treaty abrogates national laws that are contrary to, and even merely identical with, the OHADA laws. See KONÉ, *supra* note 3 at 5 (describing two rulings of the CCJA, one in response to a request by the Ivoirian government, and the other as a result of the court's review of an intra-State arbitration). For scholarly recognition that OHADA implicates at least a limited waiver of sovereignty, see Forneris, *supra* note 1 at 9-10.

¹⁴²See email communication with Me. TT (Aug. 9, 2004; on file with author) (interpreting the jurisdiction of the CCJA to cover questions concerning the application of OHADA laws, instead of all disputes to be decided pursuant to OHADA laws); *but see* email communication from Prof. Joseph Issa-Sayegh (Oct. 9, 2004; on file with author) (stating that the CCJA's jurisdiction includes both interpretation and application of the OHADA uniform acts, but noting the difficulty when more than one legal system is involved in a single cause of action).

¹⁴³For a suggestion that a national judicial system may be coopted, at least in part by political forces, see Amnesty International, *Press Release* (Jan. 26, 2004), available at <http://web.amnesty.org/library/print/FRAAFR310012004> (downloaded Mar. 30, 2004) (describing allegations of human rights abuses that the Côte d'Ivoire has not investigated despite the government's promise in the Jan. 24, 2003 Linas-Marcoussis peace agreement).

fully settled. National supreme courts are jealous of their authority. Justices are concerned that they will not have enough work, or at least not enough interesting work, if all matters relating to commerce pass directly from the national appellate courts to the CCJA, thus by-passing the national supreme courts entirely.¹⁴⁴ If the CCJA does have this overarching role as many who have studied the OHADA Treaty believe, then the CCJA will indeed be able to protect the laws' uniformity. What is factually obvious, however, is that the national supreme courts are in fact not sending all their business-related cases to the CCJA, and the parties apparently often do not insist that their case be removed. The supreme courts' motivation is clear enough; legal professionals within the region confirm that parties are equally reticent due to the perceived cost of removing the final appeal to the CCJA in Abidjan.¹⁴⁵ The fact that the vast majority of appeals to the CCJA come from the Côte d'Ivoire supports that conclusion.¹⁴⁶

Until the OHADA structure finds a way to reassure non-Ivoirians on the expense front, it will be unlikely that the CCJA will play the fullest possible role in support of uniformity. Added to this possible practical impediment to full realization of the CCJA is a problem created by the text. Certain legal professionals suggest that the Treaty gives the CCJA jurisdiction only to hear

¹⁴⁴Interview with Pres Seydou BA, president of the CCJA, in Abidjan on June 29, 2004 (noting that he has good relations with the supreme court of Côte d'Ivoire); Interview with Pres. Kouassi Kouadio, Magistrate, in Abidjan on June 29, 2004 (stating that the Côte d'Ivoire's supreme court perceives itself to be the only one to refer cases to the CCJA).

¹⁴⁵Interview with Me. HT, *supra* note 72 (noting that non-Ivorian supreme courts within the OHADA territory ignore the CCJA); interview with Lord Justice Fonkwe J.F., in Yaoundé, Cameroon, on July 9, 2004 (indicating that, presumably, some supreme courts fail to refer cases to the CCJA for fear of losing the more interesting cases).

¹⁴⁶Interview with Pres Ba, *supra* note 144 (asserting that 90% of CCJA cases come from Ivorian parties; he suspects that if two parties are from the same country other than Côte d'Ivoire, they will take their case to their own supreme court).

questions of interpretation, not all matters having arisen under OHADA laws.¹⁴⁷ If that is the case, the CCJA will still have a significant role to play in maintaining uniformity, but only at a remove. That is, after a national court has adopted a particular interpretation and rendered a decision, the CCJA would finally have its opportunity to review the interpretation—but only if a national government or a party were to call on the CCJA to announce the definitive understanding.

b. ERSUMA. Another structure that OHADA has established is a regional school, the Ecole Régionale Supérieure de la Magistrature, which is designed to educate the legal professionals of the OHADA territory. This institution reinforces norms as it imparts substantive legal knowledge.¹⁴⁸ OHADA even publishes cases and provides legal texts; before the advent of OHADA lawyers and even judges could remain ignorant of the status of entire bodies of law, including the bankruptcy-law regime.¹⁴⁹ The principal criticism of OHADA's education mission is that it does not have the resources to do enough. In anglophone Cameroon, for example, many sitting judges did not know about OHADA until after the first OHADA laws were already in effect. The judges were furious and embarrassed to have learned about OHADA for the first time not from the government or from OHADA, but rather from counsel pleading a case.¹⁵⁰

c. Conseil des Ministres (Council of Ministers). The OHADA structure is a brilliant

¹⁴⁷See Me. TT email, *supra* note 142 (asserting that the CCJA's jurisdiction is limited to interpretation).

¹⁴⁸See generally, BUSLAW, *supra* note 1 at 16-17 (noting that a purpose of the school is to promote the use of the OHADA regime of business laws).

¹⁴⁹See Forneris, *supra* note 1 at 7-8 (reporting that a judge had vaguely remembered a bankruptcy law from twenty years before, but did not know what its current status was).

¹⁵⁰Interview with Mrs. FON ACHU Helen, Magistrate, Douala, Cameroon, July 7, 2004.

coup, both as a conceptual and as a procedural matter. In fairness, however, it is not without moral difficulty. Specifically, anyone who moderates from a purely universalist position will recognize that the OHADA system is aggressively top-down, and that it inserts an aggressively Western/Northern legal system.

The OHADA drafters assert that OHADA enhances pre-OHADA business law by updating texts, some of which were more than a century old, and most of which had not been reviewed post-independence.¹⁵¹ The member-states of OHADA wanted a Western/Northern system, not a customary or traditional one, for the more complex commercial transactions that they wished to facilitate. They believe that foreign investors will be more comfortable with an essentially familiar system; in all likelihood, it would substantially reduce transaction costs.¹⁵²

The OHADA proponents also point out that the decision to adopt the OHADA system has been

¹⁵¹There were exceptions, but among the OHADA member-states, only Senegal, Guinea and Mali attempted a systematic review of business laws between independence and the OHADA Treaty in 1993. *See* KONÉ, *supra* note 3 at 10-11 (noting that the primary corporate law was based on French laws of 1867).

¹⁵²*See supra* note 2 and the introduction to Part II (concerning the drafters' effort to reduce investors' transaction costs). *See also* Undated Interview with Judge Kéba Mbaye, one of three members of the original drafting committee ("Directoire"), <http://www.afrology.com/eco/kebam.html> (last visited Mar. 4, 2005; first read Sept. 22, 2003): "[L]es entrepreneurs m'ont répondu, partout, pratiquement la même chose : 'Nous ne voulons pas investir parce que nous ne connaissons pas quel est le droit qui va régir notre patrimoine. Vous allez dans un pays, vous demandez quel est le droit qui vous permet de créer aujourd'hui une société anonyme, personne ne le sait. Il y a pire. Une fois que nous arrivons à détecter, dans certains pays, quel est le droit applicable pour la création de notre entreprise, pour sa viabilité et, au cas où surviendrait un jour un différend, pour la manière dont ce différend doit être réglé, nous avons toujours des surprises considérables. Le même droit n'est pas applicable d'un pays à un autre, d'un tribunal à un autre. On ne tient pas compte de la jurisprudence. Et, généralement, nous sommes toujours les victimes de cette situation, c'est ce qui explique notre hésitation à continuer à investir.' C'est alors que j'ai utilisé l'expression qui a eu ensuite une certaine fortune : 'en réalité, ce qui empêche les investissements, c'est l'insécurité juridique et judiciaire.' "

Some critical theorists question the existence of "traditional" cultures and of "modernity", pointing out that these concepts are matters of perspective, and suggesting that a better approach to understanding what is necessary to a region's development is to establish a dialogue. *See, e.g.,* Vincent Tucker, *The Myth of Development: A Critique of a Eurocentric Discourse*, in *CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM* (Ronaldo Munck & Denis O'Hearn, eds., 1999) at 1, 8-9, 17-21.

legitimated by democratic procedure.¹⁵³ The national parliaments approved the 1993 treaty, and the national governments still play a consultative role in the creation of new OHADA laws.¹⁵⁴ Admittedly less democratic is the fact that the OHADA legislative body, the Conseil des Ministres (the Council of Ministers), is composed of Justice and Finance Ministers and thus is at least one step removed from the electorate.¹⁵⁵ And the national structures that have adopted the entire system, including the parliaments, manifest varying levels of democratic participation, depending on the particular country.¹⁵⁶

This non-democratic aspect is a weakness of the OHADA structure as confirmed by the desirable factors identified by our review of comparative law. A pro-investment structure must protect property—a mission the OHADA laws and structure appear ready to accomplish—but it must also shelter commercial transactions from local extractive impulses. On the latter issue, the Treaty's delegation of the legislative role to senior officials of the national governments looks like a very pragmatic trade-off: the governments approved a treaty that restricts national sovereignty through legislation, in exchange for some direct governmental control over that

¹⁵³See Berkowitz *et al.*, *supra* note 52 at 188-90 (asserting the importance of voluntary receipt of a legal system, and in particular of adapting that system to the host locale's social and economic environment).

¹⁵⁴OHADA Treaty, arts. 6 & 7 (calling for "concertation avec les gouvernements des Etats parties", and also advice from the CCJA, before the Conseil des Ministres approves a uniform law). Most of the States-members have set up a committee made up of "representatives from their legal and judicial professions, the academia, line ministries and parliament." Forneris, *supra* note 1 at 11.

¹⁵⁵See, e.g., BUSLAW, *supra* note 1 at 8.

¹⁵⁶For 2004, Freedom House ranked three OHADA countries as "free," six as "partly free," and seven as "not free." See Freedom House, *Freedom in the World 2005, Table of Independent Countries, Comparative Measures of Freedom*, available at <http://www.freedomhouse.org/research/freeworld/2005/table2005.pdf> (downloaded Mar. 4, 2005) (listing countries' performance from Dec. 1, 2003 through Nov. 30, 2004; the measures are based on an assessment of "political rights" and "civil liberties"). Senegal was listed as "free," but Cameroon and Côte d'Ivoire were "not free." *Id.*

legislation. More to the point, as a practical matter the cost in lost democracy is not great at least for now. It is true that, if a national government is non-democratic, its ministers necessarily will be so also. In such a situation, the national parliament is either equally undemocratic, or it is supine, or both. I am not being flip here. Without pointing fingers at any particular nation, if a country is considered undemocratic, the undemocratic characteristics of the executive will necessarily affect the national legislature.

d. Permanent Secretariat. In the face of the OHADA structure's undemocratic aspects, the administrators of OHADA, the Permanent Secretariat, have devised a pragmatic unofficial channel for public response. These are the so-called "national commissions." Not established by the Treaty, these commissions have evolved because they are necessary. In the Côte d'Ivoire, for example, the very energetic head of the Ivorian national commission is actively soliciting recommendations for improvements to existing codes.¹⁵⁷ Because the committee consists of legal professionals, they do reflect at least a sliver of informed popular opinion, and contribute to at least some popular buy-in for the OHADA laws.

2. *Enforcement.*

No matter how elegantly it is drafted, a statute is only as effective as its enforcement. We have seen that the OHADA laws' uniformity throughout the territory is protected by the CCJA's authority to interpret. Execution of judgments, on the other hand, inevitably require an interface between the OHADA regime and national judicial system. Once a court has rendered its judgment under OHADA laws, the nation's bailiff has to levy, and quarrels about the execution

¹⁵⁷Interview with Pres. Kouassi Kouadio, Magistrate, *supra* note 144.

of the judgment end up in national courts.¹⁵⁸

Indeed, enforcement is a topic of significant interest to the local legal profession, as demonstrated in the interviews I conducted in the summer of 2004 with practitioners, in-house counsel, judges and professors located in the OHADA territory. The study was preliminary and the information anecdotal, but the interlocutors' focus was, strikingly, on the implementation of the laws.¹⁵⁹ The interviewees had accepted—even embraced—the reality of the OHADA. For example, a common refrain among the francophone legal specialists was to praise the clarity and sophistication of the OHADA laws, but to lament the difficulty of obtaining execution on the judgments.¹⁶⁰ The issue arises at the junction where the parallel legal universe touches the national system, that is, at the point where the judgments rendered by the national courts have gone through their final appeal, whether or not to the CCJA. It can even be difficult to ascertain which national authority is responsible for the execution of judgments under OHADA laws.¹⁶¹

¹⁵⁸See, e.g., Interview with Justice NKO T. Irene NJOYA, Advocate General, South West Court of Appeal, in Buéa, Cameroon, on July 8, 2004.

¹⁵⁹For a general description of the interviewing process, see *supra* note 6. In a subsequent study, I will focus on the interface of OHADA in anglophone regions, including anglophone Cameroon, Ghana and Nigeria. The ease with which the French-based OHADA system is received in anglophone (common law) regions may provide additional information not only about OHADA's probable evolution, but also about the accuracy of the assertions about French-based law being an ineffective and even perhaps destructive transplant. See, e.g., the discussion in Part I.B.

¹⁶⁰However, the clarity of OHADA laws may be enough to make them useful despite execution difficulties. See Interview with Me. QT, Douala, Cameroon, on July 5, 2004 (suggesting that the government controls the prosecutor who controls the police which controls execution of judgments); Interview with Me. BK, *supra* note 72 (emphasizing the importance of effective judgment-execution, but also praising the OHADA laws' clarity).

¹⁶¹Henri Tchantchou, *Le Contentieux de l'Exécution et des Saisies dans le Nouveau Droit OHADA (article 49 AUPSRVE)*, 46 JURIDIS PÉRIODIQUE (Apr.-June 2001), available at http://www.ohada.com/imprimable.php?vu=11&article_biblio=447 (2001) (discussing the difficulty of identifying the local, non-OHADA authority responsible for ordering the execution of judgments in Cameroon, particularly in anglophone Cameroon). In anglophone Cameroon, the writ of *fi fa* (“*fieri facias*”) has been replaced by the new “executory formula” (“*formule exécutoire*”) and stamp. Interview with Justice NKO, *supra* note 158.

It may seem like a colossal waste of effort to spend time and energy discussing a legal system when execution of judgments remains uncertain. On the other hand, it is reassuring that the legal profession is taking OHADA seriously enough to be discussing the niceties of judgment-execution.¹⁶² And judgments are being executed. Further, it is important to appreciate that, with every step taken, the OHADA system becomes more fully woven into the commercial fabric of the region, and thus more difficult to reverse. This in turn means that long-term benefits may still be reaped; it does not mean that no short-term benefits are available.

3. *OHADA's Immediate "Soft" Benefits*

Even when OHADA is not yet providing the "hard" benefit of judgments rendered and executed in a predictable and transparent manner, it is offering a soft but immediate benefit. In Senegal, where the economy is growing at a respectable clip,¹⁶³ indications are that the OHADA laws' consumers are beginning to recognize them as local laws, although foreign companies are resisting this perception.¹⁶⁴ In the Côte d'Ivoire, which is still reeling under the civil strife that started in September 2002, members of the local legal profession seem to view the OHADA laws as a promise of better times.¹⁶⁵ When, once again, commerce will be freely possible, the legal

¹⁶²Sylvain Souop, *Pour Qui Sonne le Glas de l'Exécution Provisoire? A Propos du 2ième Arrêt de la CCJA, 002-2001 du 11 octobre 2001, Affaire Epoux Karnib c/ Société Générale de Banques Côte d'Ivoire (SGBCI), OHADATA D-02-06, also available at http://www.ohada.com/imprimable.php?vu=28&article_biblio=293 (2002) (discussing risks created by provisional execution of judgments before all appeals are completed).*

¹⁶³Averaging at 5% real GDP growth from 1995 to 2003, and estimated at 5.5% in 2003. Central Intelligence Agency, *World Factbook, Senegal, Economy*, available at <http://www.cia.gov/cia/publications/factbook/geos/sg.html#Econ> (last visited October 24, 2004).

¹⁶⁴Interview with Me. TT, *supra* note 72.

¹⁶⁵Interviews with TE, DL & QF, *supra* note 72. The Côte d'Ivoire's estimated real GDP growth is -1.9% for 2003. Central Intelligence Agency, *World Factbook, Senegal, Economy*, available at <http://www.cia.gov/cia/publications/factbook/geos/iv.html#con> (last visited October 24, 2004).

profession will be ready with a relatively clean, transparent judicial system to support commerce.

In Cameroon, the local legal professionals to all evidence experience OHADA somewhere between those two extremes. For example, a well-respected Cameroonian scholar studying the OHADA regime has recognized that published decisions are prerequisites to a predictable and transparent judicial system. Because the francophone region of Cameroon does not publish an official journal of decisions, he has taken on himself to do so.¹⁶⁶ His efforts to promote transparency have gained particular importance as they parallel the anglophone region's pre-existing publication of cases. These moves toward transparency are geared to increase predictability and reduce corruption.

On the other hand, it is clear that for many members of the legal profession in these countries, "good governance" means political governance, not corporate governance.¹⁶⁷ Issues of good corporate governance are to all appearances almost at the level of luxury. One member of the legal profession described political corruption at "500%" in his country, but he also said that OHADA laws relating to creation and management of corporations were vastly clearer than the pre-existing law.¹⁶⁸ It is hard to see the statements as consistent unless we understand the OHADA laws as partly aspirational. Of course some OHADA judgments are executed, and

¹⁶⁶As a point of comparison, Cameroon's estimated real GDP growth for 2003 is 4.2%. Central Intelligence Agency, *World Factbook, Senegal, Economy*, available at <http://www.cia.gov/cia/publications/factbook/geos/cm.html#Econ> (last visited October 24, 2004). Professor Paul-Gérard Pougoué, Vice Rector in charge of teaching and professor in the Legal and Political Science Faculty at the University of Yaoundé II, publishes *Juridis Périodique*. Interview with Prof Pougoué, *supra* note 95.

¹⁶⁷Interview with Me. BK, *supra* note 72.

¹⁶⁸Interview with Me. FB, *supra* note 88.

some legal professionals do focus on corporate governance in the context of OHADA.¹⁶⁹ Thus, OHADA is beginning to enhance transparency and protect property, but at least some of these benefits belong to the future.

III. OHADA'S LONG-TERM IMPACT

A. *IMPACT TO-DATE*

This survey suggests that although OHADA's articulated purpose focuses on foreign investment, its implementation is supportive of domestic investment, as well. On the procedural side OHADA is designed to avoid existing authoritarian structures, while on the substantive side it has established a structure to protect private property and enhance incentives for capital formation. Specifically, the OHADA nations established a legislative and judicial system devoted to business laws, operating parallel to their national analogue. In the late 1990s, OHADA adopted statutes, including a corporate law, conceived to encourage responsible behavior by management and to balance the interests of foreign and domestic investors. The OHADA laws accomplish all this while retaining a simplicity compatible with an evolving legal infrastructure. Thus, the OHADA regime in fact addresses concerns about the utility of civil-law models in developing countries that have been articulated by comparative law and development economics. For example, OHADA's laws and institutions protect property rights in private transactions by many means, including respecting both majority and minority owners and by emphasizing transparency.

The mere fact that OHADA's drafters have consciously or unconsciously tracked those

¹⁶⁹Interview with Prof. Pougoué, *supra* note 95.

theories gleaned from comparative law and development economics still does not prove that the theories are correct. The question is how to measure the OHADA project's success in achieving its goals of enhancing foreign investment, specifically, and economic development generally.

We have already seen anecdotal evidence that members of the legal profession within the OHADA territory are unsure of the laws' long-term future, but nevertheless remain supportive of its efforts.

Part of the measure of success is found in the OHADA system's very existence. The OHADA member-states have accomplished a great deal: sixteen (soon seventeen) countries have together constructed supranational institutions, including a legislature and a court, and have thereby implemented a system of uniform business laws throughout their joint territory. We have seen that legal professionals within the OHADA territory do praise the value of the OHADA regime.¹⁷⁰ Practicing lawyers, judges, academics, business people, and members of the OHADA institutional hierarchy, all of whom live daily with the OHADA laws, expressed their support of and hope for the OHADA system. In particular, they praise the laws' clarity.

Otherwise, though, we have to recognize that any external measure will necessarily reflect far more than just the impact of the OHADA system. In other words, a look at trends in foreign or domestic investment within the region, not to speak of gross national product, cannot alone be an accurate reflection of the OHADA's success because of all the other factors that are relevant.¹⁷¹ However, the enumerated factors are not good: for almost all OHADA countries, per

¹⁷⁰See Interview with BK, *supra* note 72, and QT, *supra* note 160 (praising the OHADA laws' clarity); *see also* Interview with Prof. Assi-Esso, *supra* note 95 (praising OHADA laws' clarity, the rapidity of its procedure including in particular the execution of judgments).

¹⁷¹OHADA's articulated purpose is to increase foreign investment. *See supra* note 2. However, the ultimate goal is not to allow the region to reap the benefits of additional investment. For one view of the applicable

capita gross national product is less than US\$ 700 per year,¹⁷² and only one OHADA country has exceeded two percent gross national product growth in the 1990s. We can also consider changes in Transparency International's Corruption Perception Index (CPI) as a proxy for measuring the protection of private property.¹⁷³ While a rising CPI cannot alone prove whether OHADA has been successful, the CPI during the period since the OHADA laws' adoption is not reassuring: the Côte d'Ivoire index has fallen perceptibly, and Cameroon has inched up, but only from a very low level.¹⁷⁴

To be sure, the first OHADA laws have been effective only since 1998, a very brief experience in comparison with the duration of the institutions challenged by OHADA.¹⁷⁵ Future research will focus on how regional, domestic enterprises are using OHADA, and how foreign

criteria in measuring development, *see supra* note 10 (discussing in particular the views of Jeffrey Sachs and his co-authors, and Amartya Sen).

¹⁷²Only Gabon has exceeded US\$700 per capita GNI in 2002 and 2003 (which it has accomplished handily). *See* The World Bank Group, *World Development Indicators: Data Query*, available at <http://devdata.worldbank.org/data-query/> (downloaded Jan. 30, 2005). "GNI" is "gross national income," the terminology that the World Bank now uses instead of "GDP" ("gross domestic product"). The World Bank defines GNI as follows: "Gross national income (GNI) (formerly gross national product, or GNP) is the sum of gross value added by all resident producers plus any product taxes (less subsidies) that are not included in the valuation of output plus net receipts of income from abroad." The World Bank Group, *Data & Statistics, Methodology, National Accounts: Output and Expenditure*, available at <http://www.worldbank.org/data/working/def7.html> (downloaded Jan 30, 2005).

¹⁷³For a discussion of another, similar proxy, *see* William Easterly & Ross Levine, *Africa's Growth Tragedy: Policies and Ethnic Divisions*, 112 Q.J. ECON. 1203, 1209 (1997) (recommending the use of the "black market exchange rate premium" as a proxy for "trade, exchange rate, and price distortions").

¹⁷⁴The cleanest OHADA state in the 2003 survey was Senegal at 3.2, putting it just about at the half-way mark of perceived corruption among the 133 tested nations. The Côte d'Ivoire's index was 2.7 in the 2002 survey, describing 2001 [pre civil strife]. http://www.transparency.org/pressreleases_archive/2002/2002.08.28.cpi.en.html (downloaded Oct. 9, 2003)

¹⁷⁵*See* BUSLAW, *supra* note 1 at 34. *[Registre du Commerce et du Crédit Mobilier (RCCM) is centralized at the national level, and again at the OHADA level; AU General Commercial, art. 20.]

investors view the new regime.¹⁷⁶ For the moment, however, the strongest positive indicator may be that anglophone countries have begun to enquire about joining.¹⁷⁷ Given the historical friction between the anglophone and francophone former colonies, that is a remarkably promising sign.¹⁷⁸ It is thus worth considering briefly what additional steps OHADA should take in order to consolidate its ability to support economic development.

B. NEXT STEPS

We have seen that legal professionals within the OHADA territory praise in particular the laws' clarity. Practicing lawyers, judges, academics, business people, and members of the OHADA institutional hierarchy, all of whom live daily with the OHADA laws, also expressed

¹⁷⁶Foreign investors in the OHADA territory do not necessarily use the OHADA form. ExxonMobil formed a subsidiary, Esso Exploration and Production Chad Inc. (Esso-Chad), to build a \$3.7 billion underground oil pipeline from Chad, through Cameroon, to the Atlantic. Somini Sengupta, *The Making of an African Petrostate* (Feb. 18, 2004) available at <http://www.nytimes.com/2003/11/04/business/worldbusiness/04fdi.html?pagewanted=print&position=> (last visited Feb. 18, 2004). While I do not know exactly when Esso-Chad was formed, it probably was not much before January 2001. See WORLD OIL (Jan. 2001) (referring to this Esso-Chad and discussing the commencement of an oil pipeline from Chad through Cameroon to the Atlantic coast) available at http://www.findarticles.com/cf_dls/m3159/1_222/70204444/print.jhtml (last visited Apr. 2, 2004). The OHADA corporate law was available since January of 1998. See SOCCOM, *supra* note 85 at 17-18 (The OHADA corporate law (Le Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique) entered into force on January 1, 1998). Because of the suffix "Inc.," Esso-Chad probably is a US company, and certainly is not formed under OHADA. When I sought additional information on Esso-Chad, the public-relations department of ExxonMobil had no information and refused to put me in contact with the legal department. See March 4, 2004 email from Russ A. Roberts, ExxonMobil Upstream Public Affairs.

¹⁷⁷Cameroon, already a member of OHADA is bilingual English-French and has a dual legal system. See *supra* note 6 (Cameroon as bilingual and charter member of OHADA). See also BUSLAW, *supra* note 1 at 22-23 (discussing Cameroon's constitutional mandate of French-English bilingualism). See also United Nations, *Core Document Forming Part of the Reports of States Parties – Cameroon*, HRI/CORE/1/Add. 109, Part II.A (June 19, 2000), available at <http://www.hri.ca/fortherecord2000/documentation/coredocs/hri-core-1-add109.htm> (last visited Apr. 2, 2004) ("French and British colonial rule left Cameroon with a dual legal system, which has elements of the Napoleonic Code and common law. This duality is further complicated by the coexistence of customary and statutory law."). Based on casual conversations with persons interested in West Africa generally and OHADA specifically, Ghana is generally considered most likely to be the first fully anglophone adherent, although negotiations are apparently ongoing with Nigeria as well.

¹⁷⁸OHADA is open to all members of the African Union. OHADA Treaty, art. 53 (the Organization of African Unity, in French, l'Organisation de l'Unité Africaine (OUA), is the predecessor to today's African Union).

two principal complaints. First, the consumers of OHADA laws desire easier access to the court decisions and scholarly analysis of those laws.¹⁷⁹ While a privately run website, www.ohada.com, includes texts of the code and of decisions, and makes scholarly commentary available for a fee, the Internet provides only limited access because of the unreliability of connection in many locales.¹⁸⁰ In order to have a reliable, rapid connection to the Internet in Cameroon, for example, the only viable solution is a satellite hookup, which is relatively expensive.¹⁸¹

If the Internet is not part of the solution available to all, the principal alternative is published documentation; this solution costs money. The OHADA Treaty as amended requires each state-party to contribute to the operations of the institutions.¹⁸² To date, these contributions have been honored in the breach, leaving the OHADA institutions underfunded.¹⁸³ Therefore, they are not in a position to provide the documentation in published form, at least not in

¹⁷⁹These are, respectively, the classic “*jurisprudence*” and “*doctrine*” at the heart of French-system interpretation of codes and statutes. *See, e.g.*, SCHLESINGER, ET AL., *supra* note 35 at 280 (describing “*doctrine*” and “*jurisprudence*,” and underscoring their importance to French judicial decisions). *See also* Merryman, *Deviation*, *supra* note 35 at 116 (asserting that French judges are not purely passive and do make law); Mitchel de S.-O-L’E Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1367-68, 1371-75, 1381 (1995) (asserting the importance of precedent to French judges, while acknowledging that it still may be less so than to common law judges).

¹⁸⁰There also exists an official website for OHADA: www.ohada.org. This will in time contain essential information, including the Journal Officiel; however, much material remains to be uploaded.

¹⁸¹In Douala, Cameroon, for example, both Citibank and GICAM had satellite hook-ups. Interview with Mr. SADJO, *supra* note 139; interview with Mrs. Alice Flora NGASSAM, Douala, Cameroon, on July 7, 2004.

¹⁸²OHADA Treaty, Art. 43 (describing OHADA’s funding as including allocations from the member-states). *See also* Règlement No. 002/2003CM Relatif au Mécanisme de Financement Autonome de l’OHADA, Arts. 3 & 4 (stipulating the allocation as 0.05% of imports from outside OHADA, supplied for consumption within the OHADA territory); *Décision*, Conseil des Ministres, No. 004/2004/CM of March 27, 2004 (stipulating the allocation among the member-states).

¹⁸³Interview with Pres Kouassi Kouadio, *supra* note 144 [Abidjan, CIV, June 29, 2004].

sufficient quantity. A private non-governmental organization raises its own funds to commission and distribute documentation;¹⁸⁴ it has donated literally thousands of copies of the OHADA uniform laws and analyses of those laws. It has also contributed toward the regular publication of OHADA's own *Journal Officiel*. This is the official OHADA document that publishes decisions of the CCJA. Further, the Permanent Secretariat is currently constructing a website on which the *Journal Officiel* will be posted.¹⁸⁵ In other words, much is being done to make laws accessible.

Nevertheless, people who need to know about OHADA do not. That includes potential foreign consumers of the legal system, as well as domestic users. Within the region, the U.S. economic advisers to whom I spoke were aware of the OHADA laws' existence, but the reports they had obtained from U.S. investors were generally unfavorable, to all appearances in part based on whether the U.S. investors had won their latest litigation.¹⁸⁶ The foreign investors and their national representatives must have easy access to current information about OHADA and its evolution.

Local lawyers and business people, including in-house banking lawyers, too, must have complete and current information about OHADA. For this, it is important to continue distributing books and articles. However, it also is critical that ERSUMA, the OHADA school,

¹⁸⁴L'Association pour l'Unification du Droit en Afrique (UNIDA), 7, avenue de Ségur, 75007 Paris, France.

¹⁸⁵Email of Feb. 24, 2005, from OHADA Permanent Secretary Lucien Johnson to the author (noting that the *Journal Officiel* will be posted at www.ohada.org; on file with author).

¹⁸⁶Interview with Ms. Portia E. McCollum, Economics Counselor, Embassy of the United States, Abidjan, CIV, June 29, 2004; telephone conversation July 21, 2004 with Mr. Solomon Oshinaike, economic adviser, U.S. Consulate, Douala, Cameroon (reporting that US investors tend not to know about OHADA).

have the resources to educate more professionals,¹⁸⁷ and that the local academics and bar organize parallel educational opportunities, including regular seminars and workshops. The Permanent Secretariat needs funding so that it can support these initiatives.

The legislative side, too, needs attention. The Council of Ministers, with the Permanent Secretariat's support, has been making good use of the national commissions.¹⁸⁸ Again, too, it is important that the Permanent Secretariat have the resources necessary to enhance and monitor the national commissions. These are critical to the feedback loop between OHADA's legislative process and at least the legal professionals, if not the public at large. In addition, they help the representatives to the Council of Ministers ascertain their national government's position on relevant topics.¹⁸⁹ In other words, they have a singular role in enhancing democratic aspects, and therefore the responsiveness, of the OHADA structure. This is an area that is particularly sensitive, as it touches national sovereignty in a way that is instantly recognizable. We have seen that laws adopted by the Council of Ministers automatically become internal law of OHADA's member-states.¹⁹⁰ The heads of state are, apparently, considering reviewing the existing structure under the treaty.¹⁹¹ In many of these OHADA countries, increasing the national executive's supervisory role over OHADA will not increase democratic input. Thus, it is important to

¹⁸⁷See *supra* Part II.B.1.b (describing ERSUMA).

¹⁸⁸See *supra* Part II.B.1.c & d (discussing the Council of Ministers and, in the context of the Permanent Secretariat's role, the national commissions).

¹⁸⁹Interview with Pres. Kouassi Kouadio, *supra* note 144 (suggesting the importance of OHADA to the national governments).

¹⁹⁰See *supra* note 134 (describing the automatic application of OHADA laws).

¹⁹¹Interview with Pres. Kouassi Kouadio, *supra* note 144 (discussing the risk of intervention by heads of state in the evolution of OHADA, suggesting the importance of OHADA to the national governments).

support and even formalize the national committees, and to leave them under the Council of Ministers' authority, while allocating administrative oversight to a reinforced Permanent Secretariat.

Clearly, one of the most difficult areas to address is OHADA's judicial system. The CCJA is well respected because the judges who sit on that court are sophisticated and, from all I have heard, serve with integrity.¹⁹² As the court continues to publish its own decisions, including detailed reference to the lower courts' decisions from which the appeal arose, the CCJA is automatically increasing transparency. However, local legal professionals are quick to acknowledge that the CCJA's transparency has not eradicated corruption in the national judicial systems.¹⁹³ We have seen that the legal profession complains of a breakdown at the transition between the OHADA regime and the national judicial systems. They report a lack of predictability when the local authorities are called upon to execute a judgment or arbitral award.¹⁹⁴ Since the OHADA Treaty chose not to push the transfer of sovereignty to the point of establishing a separate OHADA method of enforcement, the practical impact of the OHADA laws, at least on the short term, depends on the will of the national governments.

This a difficult problem that even fundamental modifications in the OHADA judicial structure cannot immediately correct. To all evidence, national governments that are already questioning an earlier concession of sovereignty pursuant to the OHADA treaty will not now

¹⁹²Interview with Me. Virgile NGASSAM Njike, in Douala, Cameroon, on July 3, 2004 (reporting that the Cameroonian bar admires the CCJA).

¹⁹³Interview with Dr. François Komoin, *supra* note 138; Interview with FB, *supra* note 88.

¹⁹⁴Interview with Justice NKO, *supra* note 158 (describing difficulties of judgment-execution); Interview with Pres. Kouassi Kouadio, *supra* note 144 (referring to judgment-execution as a mess).

want to cede enforcement power. If a national executive that is itself corrupt, as is the case in part of the territory, is prepared to punish judges who fail to rule as instructed by redeploying them to the least desirable courts in the country, no amount of transparency will, at least in the short run, provide effective shaming.¹⁹⁵

On the other hand, any reform effort has to start somewhere. Thus, ERSUMA's education efforts and the related conferences can hope to have some effect on ethical perspectives. There already is a cadre of professionals within the territory who are trying to behave ethically to have property and contracts recognized and respected; the OHADA regime provides support by the laws' clarity and through contacts to like-minded professionals.¹⁹⁶ This may appear utopian, but it need not be interpreted that way. Change can occur only if pressure is applied everywhere simultaneously, in search of the proper pressure-points.¹⁹⁷

Interestingly, while the local lawyers and business people are perfectly aware of the national governments' negative impact on the application of the OHADA laws, even in countries with more impediments to commerce than in Senegal, these consumers of OHADA laws do not view the OHADA regime as useless. As noted above, even these consumers uniformly expect

¹⁹⁵Interview with Me. QT, *supra* note 160 (referring to "chantage alimentaire," meaning blackmailing by threatening to cut off sustenance—in this case career advancement).

¹⁹⁶The theory of networks and of social influence are critical here. *See generally*, Claire Moore Dickerson, *Corporations As Cities: Targeting Nodes in Overlapping Networks*, 29 J. CORP. L. 533, 544-551 (2004) (describing the power of networks). *See also* Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973); MARK BUCHANAN, *NEXUS: SMALL WORLDS AND THE GROUNDBREAKING SCIENCE OF NETWORKS* (2002); DUNCAN J. WATTS, *SIX DEGREES: THE SCIENCE OF A CONNECTED AGE* (2003).

¹⁹⁷This assertion is consistent with network theory. *See generally* Dickerson, *Overlapping Networks*, (discussing the use of network theory to obtain institutional change, and recognizing the difficulty of identifying the relevant pressure points).

that the OHADA laws would at some point in the future attain their full promise.¹⁹⁸ Whether that proves to be wishful thinking remains to be seen. However, shoring up the existing structures will increase the likelihood of success.

So far, the bulk of the discussion has considered OHADA's promise in the context of local economic development. There is another, related aspect that was hinted at in the Introduction, and that emphasizes the importance of protecting another structure of OHADA: its uniformity within the territory.

Countries in the South clearly are brutally aware of Northern influence. Within this reality, OHADA represents an effort to take back the reins. Measuring how that works on the ground is the next phase of my research, but I remain optimistic that the uniformity may be an effective, stealth weapon that will help empower the South in its discussions with the North. If the region taken as a whole is commercially viable and possesses a single form of business laws, and if the entire region interprets and enforces them uniformly, individual countries will be able to require that foreign-based multinational corporations comply with local law if they are to invest anywhere in the region. The territory could, for example, decide to adopt and apply an expansive definition of "corporate interest," thus mobilizing a tool with which to protect its citizens and its environment.¹⁹⁹ If the other assertions are not utopian, this one may be. However, what is utopian today can be reality tomorrow.

IV. CONCLUSION

¹⁹⁸Interview with Me. QT, *supra* note 160 (noting that, even without an effective means of executing judgments, the OHADA laws and their clarity are a preparation for what is to follow).

¹⁹⁹*See supra* Part II.A.1 (discussing "corporate interest").

The OHADA legal regime is designed to help create a plausible economic climate. It is a mechanism that generates business laws whose clarity is designed to provide guidance and thus predictability even when the supporting gloss of case law and scholarly commentary is hard to obtain. Substantively, the laws are measured and favor neither the powerful nor the weak.

OHADA provides much more than laws, because it also has established fundamental legal institutions. The Council of Ministers promulgates new laws and modifies old ones; its structure automatically includes the perspective of the national governments of member-states. It is developing additional mechanisms to enhance its ability to obtain feedback from the legal professionals and business people who apply the OHADA laws. The Common Court of Justice and Arbitration interprets the OHADA laws in order to preserve those laws' uniformity across the entire OHADA region. This court also sets an example of transparency and skill. With the support of the Permanent Secretariat, the regional school serves to reinforce and enhance all these efforts by providing continuing legal education. In addition to these institutional efforts, legal professionals are developing informal networks that create a community of OHADA adherents, thereby confirming that OHADA is putting down roots.

In the process, OHADA gives lie to the view that French-based legal systems impede development. There may indeed be a correlation between economic failure and such legal systems, but modern economic analysis suggests that there is no causation. Indeed, since the OHADA countries have a civilian heritage, and since their legal professionals are steeped in civilian legal norms, a French-based system may well offer particular efficiencies there.²⁰⁰

²⁰⁰Because Cameroon is bilingual and bijural, the region also is a laboratory experimenting with the extension of the OHADA regime to English-language, common-law regions. That is the object of another study.

It is too early in the process to be dogmatic about OHADA's success. However, the commitment of legal professionals in the area, and the interest expressed by neighboring states speak to the new regime's importance. This process of education is proceeding apace. The OHADA institutions and the legal professionals in the region are working on the transition between the OHADA regime and the national judicial systems, in particular in the area of execution of judgments. As these efforts continue, the businesses and legal professionals in the capital exporting nations need to learn about the OHADA regime's professionalism and promise. This article is one step to that end.