Cite as: 44 Colum. J. Transnat'l L. 17 (2005)

Articles

Harmonizing Business Laws in Africa: OHADA Calls the Tune

CLAIRE MOORE DICKERSON*

OHADA (in English, Organization for Harmonization in Africa of Business Laws) is a system of business laws and implementing institutions. Sixteen West African nations adopted this regime in order to increase their attractiveness to foreign investment. Because most of the member states are former French colonies, the OHADA laws are based on the French legal system. Despite certain economists' recent, well-publicized assertions that any French-based legal system is incompatible with development, other studies challenge those claims and in doing so outline characteristics that a pro-development system of business laws should possess. This Article reviews selected provisions from OHADA's corporate law and of OHADA's institutions, revealing that they correspond to those pro-development characteristics. Interviews conducted with legal professionals in Senegal, Côte d'Ivoire, and Cameroon highlight the local perception that the OHADA regime, while still young, offers both technical and aspirational support

* Professor of Law and Arthur L. Dickson Scholar, Rutgers Law School-Newark. LL.M. in Taxation, New York University; J.D., Columbia University; A.B., Wellesley College. Thanks for financial support from the Dean's Fund of Rutgers Law School, the Africa Project at the George Washington University School of Law (with the Alfred P. Sloan Foundation), l'Association pour l'Unification du Droit en Afrique (UNIDA). Thanks for comments received at the GWU/Sloan Conference, and the Brooklyn Law School workshop, and at the annual conferences of LatCrit and Law & Society. Particular recognition to Karima Bennoune, Naomi Cahn, Donna Dennis, James Fanto, Anna Gelpern, Lawrence Mitchell, Jean-Alain Penda, Sabrina Safrin, Joseph Issa-Sayegh, Martha Tumnde, and all the legal professionals in Senegal, Côte d'Ivoire, and Cameroon who shared their time and knowledge. Thanks also to research assistants Brian Krause and Melinda Waterhouse, Rutgers Law School-Newark, 2006.

for business transactions. This Article closes with a rough cut at measuring OHADA's success even in these very early days, and with specific recommendations to strengthen the OHADA institutions.

I. INTRODUCTION

A. *Background*

Economic development in sub-Saharan Africa, including West and Central Africa, has challenged development economists and legal scholars for decades. Starting in 1993, sixteen West and Central African countries have taken a revolutionary step.[1] These countries are jointly addressing the problem themselves. 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.[2]

---

1. As of June 6, 2005, the West African members are Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo, and the Central African members are Central African Republic, Chad, Cameroon, Comores, Congo, Equatorial Guinea, and Gabon. *See infra* note 2 for an explanation of the West/Central nomenclature.

2. Traité 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 [hereinafter OHADA Treaty]. The first law promulgated under the treaty, 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, adopted Apr. 17, 1997, 2 JO OHADA 1 (Oct. 1, 1997), *available at* http://www.ohada.com/textes.php?categorie=457 [hereinafter Corporate Code].
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 French), and Guinea-Bissau (Portuguese). *See* Xavier Forneris, *Harmonising Commercial Law in Africa: the OHADA*, 46 JURIS PÉRIODIQUE 77 (2001), http://www.ohada.com/imprimable.php?vu=10&article_biblio=480 (last visited June 27, 2005). With respect to Equatorial Guinea's languages, see The Central Intelligence Agency (CIA), *Equitorial Guinea,* THE WORLD FACTBOOK, http://www.cia.gov/cia/publications/factbook/geos/ek.html [hereinafter *Equitorial Guinea,* THE WORLD FACTBOOK] (last visited June 6, 2005). There are other unifying organizations in the region. There are, for example, two overlapping monetary unions. *See* Joseph Issa-Sayegh, *Quelques aspects techniques de l'intégration juridique: l'exemple des actes uniformes de l'OHADA*, 1 REVUE DROIT UNIFORME [UNIFORM L. REV.] 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.

The OHADA laws' articulated purpose is to facilitate investment in general, and foreign investment in particular.[3] These laws are adapted to the needs of developing economies 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 and Central 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 U.S. 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.

B. OHADA System

OHADA's laws are exclusively business-related[4] and owe a significant debt to the French-based laws that preceded them in most

---

SELLERS & SÉBASTIEN THOUVENOT, BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS 295–97 (2002) [hereinafter BUSINESS LAW] (discussing the Economic Community of West African States (ECOWAS) (in French, CEDEAO), to which OHADA members Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo 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 of which are OHADA members. *Id.* at 293. There is also, of course, the African Union (AU) itself. The AU, the successor as of 2002 to the Organization of African Unity (OAU), includes all nations on the African continent and has as its articulated goal the continued economic and social integration of the continent; information is available at its website: www.africa-union.org.

3. The OHADA drafters' articulated goal for their legislation is increased foreign investment in order to enhance economic development. *See* Jacqueline Lohoues-Oble, *L'Apparition d'un Droit International des Affaires en Afrique*, 3 REVUE INTERNATIONALE DROIT COMPARÉ 543, 544–47 (1999); *see also* Philippe LeBoulanger, *L'Arbitrage et l'Harmonisation du Droit des Affaires en Afrique*, 3 REVUE ARBITRAGE 541, 544 (1999) (describing the founders' efforts to "élaborer un droit régional des affaires unique, moderne, susceptible de favoriser le développement économique" ("[T]o prepare a regional system of laws that is unique, modern, and susceptible to favoring economic development.")); Martin Kirsch, *Historique de l'Organisation pour l'Harmonisation du Droit des Affaires en Afrique (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); OHADA Treaty, *supra* note 2, pmbl. (explicitly describing as one of its purposes the encouragement of investment).

4. *See* OHADA Treaty, *supra* note 2, arts. 1–2 (stipulating that the OHADA Treaty's purpose is harmonization of business laws, and providing a non-exclusive, illustrative listing of topics that fall within the ambit of business laws). *See generally infra* Part III.

of the OHADA territory.[5] The treaty also provides a supranational mechanism for promulgating new OHADA laws. Because most of the member nations are former French colonies, it is reasonable to assume that the French legal system will continue to influence new OHADA laws, at least to some degree and at least in the near future.[6]

The treaty also creates a single supranational court to ensure that judicial interpretation of the OHADA laws will sustain and will not compromise their uniformity. The court's procedure as a practical matter is similar to the French system; indeed, when the procedure departs significantly from French norms, scholars remark on the fact.[7] Currently, six of the seven justices of the *Cour Commune de Justice et d'Arbitrage* (Common Court of Justice and Arbitration) (CCJA) are from purely Francophone countries, suggesting a predominantly French-influenced judicial experience.[8]

While the French legal system's influence over OHADA is significant, it may be waning. OHADA's member states have a total of four official languages,[9] and the treaty is in the process of amendment to include all these languages as official for OHADA purposes, too. In addition to French, these are, in alphabetical order, English, Portuguese, and Spanish.[10] Language does not necessarily

---

5. *See, e.g.*, MAMADOU KONÉ, 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* notes 18–19 (discussing French origins of OHADA), and Part III.A (analyzing the OHADA business laws).

6. *But see infra* notes 8, 9, 11, 12 (discussing reasons to expect a weakening of French-system influence over future OHADA laws).

7. *See, e.g.*, KONÉ, *supra* note 5, at 6 n.6 (noting that the CCJA is not simply a duplicate of the French Court of Cassation, but is also authorized to decide the case). That the CCJA decides the case is specified in the OHADA Treaty, *supra* note 2, art. 14, para. 5. *Cf.* Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts,* 37 WM. & MARY L. REV. 535, 608 (1996) (discussing the role of the French Court of Cassation as compared to the role of the U.S. Supreme Court; the former typically looks only to see if there has been legal error and, if so, sends the matter back down for a decision instead of "substituting its own verdict for that of the lower court").

8. Purely Francophone countries represented: Senegal (President of the court), Central African Republic, Chad, Gabon, Mali, Niger; predominantly Portuguese speaking: Guinea Bissau. *See also infra* note 18 (discussing the French legal system's familial influence on Spanish and Portuguese law).

9. *See supra* note 2 (discussing languages).

10. An indication that future OHADA laws may be less French-law inspired is the current amendment proposal circulating for the OHADA Treaty itself: article 42, which currently specifies French as the working language, would be modified to also include English, Portuguese, and Spanish. *See* e-mail from Mag. Gaston Kenfack Douajni to Mr. Paul Bayzelon (June 1, 2005) (on file with *Columbia Journal of Transnational Law*). Mag. Kenfack, located in Yaoundé, Cameroon, is the publisher of the *Revue Camerounaise de l'Arbitrage,* and is a long-standing authority on OHADA. *See* Interview with Mag. Kenfack in Yaoundé, Cameroon (July 9, 2004) (discussing OHADA's evolution).

determine the legal regime, but the member states are evidencing a keen interest in welcoming Anglophone African countries and their common-law heritage. Separately, there is increasing evidence of an effort by the OHADA institutions to cherry-pick from various systems when drafting new laws, rather than to follow chiefly the French pattern.[11] Nevertheless, today, the OHADA system displays a powerful French influence.[12]

C. *OHADA's Compatibility With Development*

As I explain in Part II of this Article, 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. By drawing on other studies, I show that the French legal system is at worst neutral as compared to the common-law system. Later, I will describe how the laws of a particular French-based system, OHADA, are particularly well-designed to support economic development.

Underlying these recent economic critiques of French-based systems is a principally neoliberal approach to development that emphasizes liberalizing flows of goods and capital. The OHADA regime, described in Part III of this Article, is agnostic on the topic. While each member state has committed to OHADA as its only business law regime, the state's political system remains free to adopt a neoliberal route to development or to be more actively involved in national economic and social structures.[13] The OHADA laws and institutions are committed to enhancing private ordering, and in

---

11. One of the OHADA laws currently in draft covers contracts and is not aggressively French in spiritual origin. Instead, this draft is expressly based on the International Institute for the Harmonisation of Private Law (UNIDROIT) formula, after taking into account local expressions of need. *See* Marcel Fontaine, *Le Projet d'Acte Uniforme OHADA sur les contrats et les Principes d'UNIDROIT relatifs aux contrats du commerce international*, 2 REVUE DROIT UNIFORME 253 (2004), *available at* http://www.unidroit.org/french/publications/review/articles/2004-2.pdf (discussing the UNIDROIT Principles' influence on the new draft, the comparative origins of the UNIDROIT Principles, and the many interviews conducted within the OHADA territory to determine what provisions would be best adapted to the region).

12. The subtitle of the KONÉ text ("COMPARAISONS AVEC LE DROIT FRANÇAIS" (COMPARISONS WITH FRENCH LAW)) confirms the continuing importance of OHADA's French heritage as the author has written an entire book comparing the law of business organizations under OHADA with French law. *See* KONÉ, *supra* note 5 (setting out the full title).

13. *See, 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 neoliberal paradigm).

particular to creating a reliable, usable system that responds to the needs of a developing economy, whatever the surrounding political reality. As Part III of this Article 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 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.[14]

Parts III and IV of this Article also address a non-economic criticism of the OHADA regime: that it is "neocolonial" because it bears the influence of a Northern legal system.[15] No definitive response is possible, of course, but Part III 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, further suggesting that policy decisions from within the member states are central to the OHADA regime's development. To gain this understanding of realities on the ground, I conducted interviews during the summer of 2004 with lawyers, judges, and academics in the West African states of Senegal and Côte d'Ivoire, and in the Central African state of Cameroon. These professionals even spoke of their admiration for the elegance and simplicity of the OHADA laws.[16] As Part III points

14. *See* OHADA Treaty, *supra* note 2, arts. 5–12, 27–29 (discussing the Uniform Acts and the role of the Conseil des Ministres (Council of Ministers) as legislature); arts. 13–20, 31–39 (describing the CCJA and its interpretative role; art. 40 (authorizing the Secrétariat Permanent (Permanent Secretariat)); *see also infra* Part III.B.1 (describing these three institutions).

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

16. I conducted 33 interviews in West and Central 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 (ICJ) 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 U.S. Consulate. Ten interviews were in Abidjan, Côte d'Ivoire; nine of the interviewees were Ivoirian, and the tenth was a U.S. economics officer at the U.S. 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

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 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 fall even further. Potential investors, both domestic and foreign, have greater assurance because of OHADA 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 present a unified face to the commercial power of the North. As Part IV of this Article emphasizes, because the first OHADA laws became effective only in 1998, we cannot yet be certain of the OHADA regime's impact. However, if the regime is successful in West and Central Africa, it can be a model within the developing world. Other African countries may consider adhesion to the OHADA Treaty in part because of their geographic proximity to the OHADA countries, but any region with a civil-law system (sometimes called the "civilian legal system")[17] could easily adapt

---

the U.S. Consulate in Douala, who is Nigerian, and one professor and one student I met in Yaoundé, both of whom are also Nigerian. In Douala, I interviewed three judges, five practitioners, two in-house counsel, one senior officer in a bank based in the United States, and the U.S. 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). CAMEROON CONST. pt. 1, art. 1, ¶ 3, *available at* http://confinder.richmond.edu/admin/docs/Cameroon.pdf (in English); *available at* http://www.camnet.cm/celcom/institut/constitu/consti%7E1.htm (in French). Cameroon also is bi-jural. *See* Decree n°72 (Aug. 26, 1972), organizing the judiciary system of Cameroon. There is an English-language, common-law university in Buéa, Cameroon.

In this Article, I have fully identified some of the interviewees but have generally not done so because, although these interviewees were generous with their time and knowledge and observed me taking notes during the interviews, they were not aware that my writing based on the interviews would be easily accessible in their home countries. Notes are on file with the *Columbia Journal of Transnational Law*.

17. The term "civil law" is in the typical phrasing in the United States and the United Kingdom for the systems of laws applicable in continental Europe, and for the systems that

the model to its purposes. Latin America, for example, could benefit directly, since its legal systems trace their roots back to France.[18] The early indications are mixed, but provide reason for optimism.

II. THE OHADA LAWS AND DEVELOPMENT

The OHADA regime offers both an example and a laboratory. While the regime is still young, six years of experience offers a basis for analysis. A striking feature of the OHADA territory is that, at the time when the OHADA Treaty was signed, most of the signatories already had in place a French-based legal system, albeit not necessarily the most recent version.[19] Indeed, the French legal

---

trace their roots to continental Europe. However, to legal professionals in the "civil law" tradition, "civil law" (or "droit civil") can mean the body of law derived from Roman law, especially in pre-Napoleonic times. It also can mean the law codified in the "Code civil"; in France, that consists of a subset of laws from the entire legal system, and in particular the "private" law relating to family law, the law of property and of succession, and the law of obligations. *See, e.g.*, BARRY NICHOLAS, FRENCH LAW OF CONTRACT 1–3 (1982) (discussing the use of "civil law"). A WestLaw search finds 65 results for <civilian /2 legal /2 system % military> and 2,690 hits for < "civil law" /2 system % military">. *See also* Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 TUL. EUR. & CIV. L.F. 1, 3 (1994) (noting that a focus on "civil law *stricto sensu*" allows the reviewed author to be "largely unconcerned with commercial and penal codes or codes of civil or penal procedure"). Although this statement is necessarily broad-brush, not included are much of the law concerning employment and business law. For an outline of the French Code civil, see RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG & EDWARD M. WISE, COMPARATIVE LAW: CASES-TEXT-MATERIALS 583–91 (6th ed. 1998). The exclusion of commercial law from the "Code civil" also means that certain relationships that a common-law lawyer would put under the general rubric of "contracts" will not be part of the definition of "civil law" that equates it with "Code civil" because, for example, commercial contracts of sale are under the "Code de commerce." *See* NICHOLAS, *supra* at 26–27 (discussing commercial contracts under French law). For these reasons, the phrase "civilian system" is sometimes used to avoid the confusion with "droit civil"; this Article follows common U.S. practice and uses "civil law" to describe the systems of Continental Europe. *See* SCHLESINGER ET AL., *supra* at 257. For examples of U.S. legal literature using "civil law" and "civilian legal system" interchangeably, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2142 (1998); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1987 (1995). This Article follows the English-language norm and refers to the legal systems of continental Europe and their descendents as "civil law" or "civil-law systems."

18. *See, e.g.*, Rafael La Porta et al., *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 on 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).

19. *See, e.g.*, KONÉ, *supra* note 5, at 10–11. Guinea Bissau was a longtime Portuguese colony, and Equatorial Guinea a Spanish colony. *See* Bureau of African Affairs, U.S. Dept.

system's influence continues within OHADA itself.[20] Given OHADA's heritage and its member states' history, can OHADA really be expected to attract foreign investment as its drafters anticipated? More broadly, can it be a pro-development tool, and if so, what particular concerns should a French-based legal regime address?

A. *Development Economics and the Developing World: The Rule of Law*

The problem of development is intractable.[21] Since World

---

of State, *Background Note: Guinea-Bissau* (Apr. 2004), *available at* http://www.state.gov/r/pa/ei/bgn/5454.htm; *Equatorial Guinea,* THE WORLD FACTBOOK, *supra* note 2. These, in turn, trace their origins to the French system. *See, e.g.*, La Porta et al., *Law and Finance*, *supra* note 18, at 1118 (discussing the influence of the French legal "family" on Spanish and Portuguese law).

20. *See* KONÉ, *supra* note 5, at 16 (describing 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. Lamoureaux & Jean-Laurent Rosenthal, *Legal Regime and Contractual Flexibility: A Comparison of Business's Organizational Choices in France and the United States during the Era of Industrialization*, 7 AM. L. & ECON. REV. 28 (2005) (arguing that the French legal system's plethora of business forms actually provided flexibility, and that the flexibility that had developed in the U.S. system by the end of the twentieth century was due not to the common law's graceful evolution, but to statutory changes). *See also* Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Legal Regime and Business' Organizational Choice: A Comparison of France and the United States during the Mid-Nineteenth Century*, NAT'L BUREAU OF ECON. RES. (NBER) WORKING PAPER 10288 28–29 (Feb. 2004), *available at* http://papers.nber.org/papers/w10288.pdf (suggesting 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.

21. The 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 D. 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 D. Sachs, John W. McArthur, Guido Schmidt-Traub, Margaret Kruk, Chandrika Bahadur, Michael Faye & Gordon McCord, *Ending Africa's Poverty Trap,* 1 BROOKINGS PAPERS ON ECON. 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. 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). 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 by focusing on the individual instead of systems. AMARTYA SEN, DEVELOPMENT AS

War II, the best minds in development economics have promoted a neoliberal agenda in order to address the problem of development.[22] The results of neoliberalism have been disappointing for sub-Saharan Africa, a geographic area that includes West and Central 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.[23] While direct investment to the developing world increased substantially in the last two decades of the twentieth century, the proportion of world-wide capital and goods flowing into sub-Saharan Africa has shrunk by almost two-thirds in that period.[24] The region's experience in trade of goods has been no more satisfactory. During 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.[25] This double failure is particularly devastating given the evidence that a free flow of both capital and goods correlates positively with economic development.[26] And even if a developing country rejects

---

FREEDOM 75, 144 (1999) (discussing capability as a kind of freedom and the state's role in supporting the capabilities of education and 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 1177, 1182 (Mohammed Bedjaoui ed., 1991) (describing the right to development in the context of the right of a state as against other states). As noted in Part I.C, *supra*, the precise definition of development is not essential to this Article because OHADA focuses on private ordering and is neutral as to how 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.

22. Ha-Joon Chang, *Rethinking Development Economics: An Introduction, in* RETHINKING DEVELOPMENT ECONOMICS 1, 1–3 (Ha-Joon Chang ed., 2003) (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").

23. *See, e.g.*, Sachs et al., *supra* note 21, at 118 (discussing the failure of development in sub-Saharan Africa).

24. Howard Stein, *Rethinking African Development, in* RETHINKING DEVELOPMENT ECONOMICS 153, 154 (Ha-Joon Chang ed., 2003) (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*, N.Y. TIMES, Nov. 4, 2003, at W1 (describing South African companies' investment within Africa).

25. Stein, *supra* note 24, at 155–56. Meantime, total world trade tripled, and the percentage of manufactured goods exported by East Asian and Pacific countries increased from 52% to 78%.

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

the pure neoliberal insistence on a wholly free-flow of capital and goods, and chooses instead to retain some barriers to trade, the ability to engage in global trade nevertheless correlates positively with economic growth.[27]

Despite (or perhaps because of) 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.[28] 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.[29] In the final two decades of the twentieth century, gross national product fell; in real terms, per-capita gross national product fell almost forty percent.[30] Clearly, the neoliberal efforts have foundered.[31]

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.[32] 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.[33] This,

---

27. *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 (asserting that some protectionism is essential to development). Access to markets, however, is important. *See* Sachs et al., *supra* note 21, at 131 (discussing the correlation between access to a larger market and economic growth).

28. Stein, *supra* note 24, at 156–57 (noting that "gross domestic investment [has] deteriorated").

29. *Id.* at 157.

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

31. The OHADA drafters' articulated goal for their legislation is increased foreign investment in order to enhance economic development. *See* Lohoues-Oble, *supra* note 3, at 544–47. 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 is to enhance human capability, that is, to promote each person's ability to function as the individual wishes. SEN, CHOICE, *supra* note 21, at 30–31; SEN, FREEDOM, *supra* note 21, 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 freedom—political and social—so that the person can as a practical matter function as he or she wishes. *Id.* at 290–91.

32. *See* Sachs et al., *supra* note 21, at 167 (proposing a comprehensive set of terms for donor-recipient agreements geared to reduce poverty within the nation receiving foreign investment).

33. *See* Stein, *supra* note 24, 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

however, cannot be the only answer: before 2000, Côte d'Ivoire was sub-Saharan Africa's second most industrialized country, after only South Africa.[34] Nevertheless, Côte d'Ivoire's per capita gross national income fell from U.S. $1,140 in 1980 to U.S. $600 in 2000—and that was before the disastrous civil war that has torn the country since September 19, 2002.[35] The real lesson may be that while foreign investment will be essential as a source of funds in sub-Saharan Africa, a fundamental change in social institutions is equally critical. Ultimately, the goal is to promote trade, and specifically to increase exports in order to generate additional resources from outside the region.[36] In this regard, formalization of local capital investment 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 proven 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 U.S. $9.3 trillion of real estate in the developing world.[37] The difficulty 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.[38] The informal

---

"immiserizing growth").

34. Jean-Paul Azam, Marie-Françoise Calmette, Catherine Loustalan & Christine Maurel, *Domestic Competition and Export Performance of Manufacturing Firms in Côte d'Ivoire*, Centre for the Study of African Economies, Working Paper WPS/2001-1 (July 2000), *available at* http://www.csae.ox.ac.uk/workingpapers/pdfs/ 2001-01text.pdf.

35. 2000 World Development Indicators CD-ROM, World Bank (Côte d'Ivoire). For a definition of gross national income, *see infra* note 197. The use of year 2000 is important because it pre-dates the recent, devastating civil unrest in 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 Apr. 2, 2004) (discussing the civil unrest). *See also* Human Rights Watch, *Trapped Between Two Wars: Violence Against Civilians in Western Côte d'Ivoire*, 15 Human Rights Watch Report 14 (Aug. 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 Côte d'Ivoire).

36. *See* Rajan & Zigales, *supra* note 26, 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 24, at 170–71 (noting that these reform efforts will include a combination of private and governmental efforts). *But see* STIGLITZ, *supra* note 27, at 17 (advising against a developing country's "rapid liberalization" of trade and capital).

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

38. *See id.* at 84.

economy is significant in the OHADA territory, too,[39] which underscores OHADA's potential: a commercial law that integrates the region's informal economy into the formal one can help put to work the informal economy's existing capital.

If properly designed, the law could have strong pro-development effects by both encouraging capital investment and facilitating trade.[40] As the law improves its predictability, it both affects and is affected by behaviors and norms, ideally creating and supporting a pro-development virtuous cycle.[41] I am not asserting that business law by itself can solve all problems.[42] 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.[43]

B. Comparative Law's Challenge to OHADA's French Civil-Law 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

---

39. For example, in 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* (Centre d'économie du développement, Université Montesquieu-Bordeaux IV, Working Paper No. 5, 1995), *available at* http://ced.u-bordeaux4.fr/ (describing Côte d'Ivoire's informal economies and their increasing size).

40. Rajan & Zingales, *supra* note 26, at 36–39 (discussing the correlation between economic development and the free flow of goods and capital).

41. The 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 Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035 (2003) [hereinafter Dickerson, *Ozymandias*] (discussing the feedback loop between societal norms and governmental statutory, regulatory, and judicial actions, in the context of corporate governance).

42. There 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, 1219–20 (1997) (arguing that there is an inverse correlation between ethnic divisions and economic development; four of the soon seventeen members of OHADA are among the fifteen most ethnically diverse states from among sixty-six 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.

43. *See* Stein, *supra* note 24, at 170–71 (discussing the importance of transparency and trust, among other factors).

that the outliers shared a civil-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 we should consider their efficacy before espousing continuing support for those laws in their West and Central African context. Certainly, we should do so before encouraging their extension to Anglophone neighbors and even to new civil-law arenas such as Latin America. Older comparative-law literature has suggested that the civil-law system, and in particular French laws, do not transplant smoothly. 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 relevant theoretical lenses is the law and finance theory. First articulated almost half a century ago,[44] this theory has been powerfully restated in the past half-dozen years by a team of economists.[45] According to the law and finance theory, countries that inherited the civil-law system, and in particular the French civil-law system, will tend to be less economically successful than countries that inherited the British, or common-law system.[46] The focus here is on the legal system.

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

---

44. FRIEDRICH 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. ECON. 138–39 (2003) (discussing the law and finance theory).

45. *See generally* La Porta et al., *Law and Finance*, *supra* note 18. 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 LEGAL AFF. 46 (2005) (discussing the Shleifer and Visney law and finance theory, referring specifically to La Porta et al. and commenting on the French government's attention to the thesis).

46. *See* HAYEK, CONSTITUTION, *supra* note 44, at 54–70 (discussing the different conceptions of liberty and property inherent in the British versus French legal systems); *see generally* HAYEK, LAW, *supra* note 44; *see also* Beck et al., *supra* note 44, at 138–39 (discussing the law and finance theory); La Porta et al., *Law and Finance*, *supra* note 18, at 1149–50 (concluding that French law is "investor-unfriendly").

been notoriously activist.[47] 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.[48] 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.[49]

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.[50] In addition, the business laws of French-legal system countries appear on their face to be less protective of both shareholders' rights against managers, and creditors' rights against debtors, than are their common-law analogues.[51] 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.[52]

---

47. John 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); SCHLESINGER ET AL., *supra* note 17, at 235–36 n.1 (discussing abuse by eighteenth 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* SCHLESINGER ET AL., *supra* at 236–38, 248 (describing the detailed and comprehensive nature of the German Code). The modern trend in French law is to replace the Code by specific statutory pronouncements. *See* 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).

48. *See* MERRYMAN, THE CIVIL LAW TRADITION, *supra* note 47, at 15 (discussing the judges' support of the feudal system).

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

50. Beck et al., *supra* note 44, 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).

51. *See* La Porta et al., *Law and Finance*, *supra* note 18, at 1129, 1132, 1138 (comparing rights of shareholders and creditors under the French legal system with those under the common-law system); *see also* Mahoney, *supra* note 50, at 508–11; Beck et al., *supra* note 44, at 138–39.

52. For example, a remedial tool that helps protect some shareholder rights are preemptive rights, more fully discussed *infra* at notes 138–40. *See* La Porta et al., *Law and Finance*, *supra* note 18, at 1132 (discussing preemptive rights as a remedial measure for the

While many factors have contributed to France's economic success,[53] 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.[54] 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.[55] The hypothesis is that developing countries' legal infrastructure, possessing 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.[56]

---

protection of shareholders); *see also* Mahoney, *supra* note 50; Merryman, *The French Deviation*, *supra* note 47, at 109–11 (for a historical account of executive dominance). As against the government, a critical effort would be to avoid expropriation without adequate compensation, i.e. corruption.

53. La Porta, et al., *supra* note 18, at 1142 (France's per capita GNP is 91% of that of the United States); Mahoney, *supra* note 50, at 508–11. During a three-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 United States. *See* JAMES CORBETT, THROUGH FRENCH WINDOWS: AN INTRODUCTION TO FRANCE IN THE NINETIES 301 (1994); 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, 2 (2002) (describing the "Trente Glorieuses").

54. *See* Ray August, *Mythical Kingdom of Lawyers: America Doesn't have 70% of the Earth's Lawyers*, 78 A.B.A. J. 72–74 (1992), *available at* http://august1.com/pubs/articles/lawyers.htm (France has more than one and one-half times the number of lawyers per capita than the United States).

55. Alain Agboton, *Senegal: Justice, Fiction and Reality*, http://www.peacelink.it/anb-bia/nr337/e19.html (last visited Oct. 15, 2003) (reporting that in 1998, there were in Senegal 270 practicing lawyers, 30 in training; about 220 in Dakar where 90% of Senegal's commerce is located). In July 2004, Senegal's population was approximately 10.9 million people. Central Intelligence Agency (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 ratio may be a bit less high since Senegal's population has increased since 1998. Another study suggests that the ratio in Senegal may be higher: 2.67 lawyers per 10,000 people, at least in the 1980s. That study reports that 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* August, *supra* note 54. 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); s*ee 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).

56. *See* La Porta et al., *Law and Finance*, *supra* note 18, at 1139–40 (arguing that stricter enforcement may be a way of remedying the inherently less investor-friendly aspects of French law); *see also* Mahoney, *supra* note 50, at 508–11; Merryman, *The French Deviation*, *supra* note 47, at 109–11 (for a historical account of the desire to have executive dominate).

Another difference between 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.[57]

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.[58] To the extent that the state is excluded, market forces tend to dominate.

A 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.[59] For their analysis, the authors focus exclusively on the laws of business organizations and of bankruptcy-reorganization.[60] 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

57. *See* Merryman, *The French Deviation*, *supra* note 47, 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); s*ee 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).

58. *See* Mahoney, *supra* note 50, at 508–11 (describing legal history as pro-property for British common law but anti-judiciary for French post-Revolutionary law); *but see* Lamoreaux & Rosenthal, *supra* note 20, at 27 (asserting that corporate law changes in the United States were effected not by the common law's evolution, but by statute); s*ee also* La Porta et al., *Law and Finance*, *supra* note 18, 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 United States is only weakly protective of creditors).

59. La Porta et al., *Law and Finance, supra* note 18, at 1116, 1129–32, 1136–39, 1141 (discussing different regimes' relative protection of shareholders and creditors, including enforcement).

60. *Id.* at 1120.

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.[61] Corporations in West and Central Africa's developing markets may already benefit from this practical protection: the region's public markets are few and very small compared to developed countries, and ownership concentrations thus are relatively high.[62]

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.[63] 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."[64]

There is strong evidence of a correlation between property protection, financial development, and growth,[65] but only traditional law and finance theorists have maintained that the common-law

61. *Id.* at 1148 (suggesting that the unusually high ownership concentration in French companies could be an "adaptation to poor legal protection"). This proposition suggests that the authors consider ownership concentration to have appeared after the Napoleonic codes restricted judicial authority. This assumption is reasonable 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.

62. *See infra* Part III.A.2.b (discussing the limited public ownership of corporations in West Africa).

63. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1146 (1997) (finding at least "large systematic differences between countries from different legal origins in the size and breadth of their capital markets").

64. *See* La Porta et al., *Law and Finance*, *supra* note 18, 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 good segue to the next section, since it focuses on the historical influence of legal systems, 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 intended to make outcomes identical. La Porta et al., *Legal Determinants*, *supra* note 63, 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 the identity of the particular legal family implanted, although French law is itself negatively correlated with GDP. The worst combination for development is thus a non-OECD country's involuntary receipt of French law).

65. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Investor Protection and Corporate Governance*, 58 J. FIN'L ECON. 3, 15–16 (2000) (referring to earlier studies evidencing the correlation).

system, being directly focused on protecting property, is inherently better-suited to supporting capitalist impulses even in developing countries.

2. Comparative Theories Not Based on the Legal System

Other recent comparative theories also seek to explain the failure of certain countries to develop, but operate by debunking the emphasis in earlier theories on legal systems. They indirectly challenge LLSV by highlighting non-legal factors that do have an impact on an economy's success or failure, thereby rejecting the assertion that the choice of legal system is determinate of economic outcomes.

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. According to these authors, part of the reason for this weakness is that civil law is more centralized and thus more easily co-opted. However, because of its centralized nature, civil law also more easily benefits from pro-development initiatives. There may thus be more volatility in civil-law countries' rate of development than in that of common-law countries, meaning that the civil-law system tends to suffer more on the downside, but also to experience a higher rate of improvement on the upside.[66]

Rajan and Zingales see the civil-law versus common-law debate as far less conclusive 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 the country's legal system.[67] These factors open the country's economy to global pressures and, especially when present in tandem, limit private interests' ability to control the political system to their

66. Rajan & Zingales, *supra* note 26, at 42–45 (discussing relative rates of improvement between investor protection and financial development, and between financial development and economic growth).

67. This 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 27 (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.

own advantage.[68] 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' proposition 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.[69] However, both ends of the spectrum anticipate the need for significant additional capital inflows,[70] 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 colony.[71] If the Europeans landed in an environment where they did not fall sick, they tended to settle permanently and to establish relatively democratic institutions.[72] After independence, whatever

68. Rajan & Zingales, *supra* note 26, 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).

69. *See, e.g.*, Ocampo, *supra* note 13, at 101 (calling for developing countries to assert broad goals such as "human development" instead of focusing narrowly on purely economic measures).

70. *See id.* at 100 (emphasizing the "linkages between economic and social development"); Sachs et al., *supra* note 21, at 164 (describing the sources of funding used by three African countries seeking to meet the Millennium Development Goals, including identifying the domestic and external funding needs).

71. Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1383–84 (2001). 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, accounting for the factor of French legal origin does not affect the authors' conclusion that mortality rates affect the type of institutions established, which in turn have a strong correlation to economic performance. *Id.* at 1388.

72. *Id.* at 1376.

institutions the European settlers had previously established, democratic or not, became part of the countries' post-colonial endowments.[73] Compare the outcomes in North America, Australia and 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.[74]

There is, indeed, evidence that institutions survived the transition to independence.[75] Post-independence, new leaders willingly stepped into the existing authoritarian, extractive institutions.[76] 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 separately correlated with lack of development.[77] 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,[78] 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 see, at worst, a suspect correlation between a French legal system and a lack of economic development.

---

73. *Id.* (emphasizing that pre-independence institutions persist after independence is achieved); *see also* Beck et al., *supra* note 44 at 140.

74. The settler mortality figures are based on the number of deaths per annum, per "1,000 soldiers, where each death is replaced with a new soldier." Acemoglu et al., *supra* note 71, at 1382. The range is not subtle: whereas the United States, which is not the lowest of the group, shows 15 deaths, Senegal showed 164.66, and Côte d'Ivoire, 668. *Id.* at 1398 (the per capita GDP figures are from 1995).

75. *See id.* at 1376 (discussing, *inter alia*, Mobutu's Zaire). Zaire, renamed the Democratic Republic of Congo (ARDC in French), is slated to join OHADA shortly. *See* Ohada.com, http://www.ohada.com (last visited Sept. 18, 2005).

76. *See* Acemoglu et al., *supra* note 71, 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).

77. *Compare id.* at 1388 (asserting that French legal origin does not affect their results) *with* La Porta et al., *Law and Finance*, *supra* note 18, at 1151–52, *and* Berkowitz et al., *supra* note 64, at 185–86 (acknowledging the correlation between a French legal system and a lack of development).

78. La Porta et al., *Law and Finance*, *supra* note 18, at 1139–40. But there are other apparent anomalies, such as the suggestion that rich countries' laws are less friendly to investors than the laws of less developed countries. *Id.* at 1139 (especially for creditors).

For their part, even advocates for the free flow of goods and capital as well as endowment theorists have rejected an actual causal relationship theory between French legal systems and a lack of economic development.[79] However, because proving the negative is impossible, a risk-averse remedial response to the problem of economic development will allow the French legal system to stand, but nevertheless 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 provisions capable of sheltering commerce from extractive and authoritarian impulses.[80] 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.[81] 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 also be favorable.[82] Once again, the type of pre-existing legal system does not determine the jurisdiction's ability to develop economically.

---

79. *See supra* Part II.B.1 (discussing the law and finance theory); Part II.B.2(a)–(b) (discussing, respectively, the free-flow and endowment theories).

80. *See supra* Part II.B.1 (noting the possibility that developing countries with French-based systems have had difficulty developing in part because they may suffer from a paucity of trained legal professionals as compared with France, which in turn limits the judiciary's ability to protect citizens against a rapacious executive).

81. A government could operate a relatively capitalist or a relatively socialist government using either a civil-law or a common-law system. The legal system will not determine whether the state provides a substantial safety net for its citizens or high labor standards, or how many key industries are nationalized. The first two arguably create barriers to trade, and all create barriers to investment.

82. *See* Sachs et al., *supra* note 21, at 164; Stein, *supra* note 24, at 154–55 (acknowledging the importance of investment to growth).

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

With these tasks in mind, let us turn to OHADA, remembering that the OHADA founders' articulated goal is to facilitate foreign investment for the purpose of enhancing local development.[83] Part II of this Article confirmed 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 that are both French based[84] and 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.[85] That is the negative conclusion suggested by the comparative analysis. Second, it must affirmatively provide a 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

83. *See supra* note 3 (referring to Judge Kéba Mbaye and discussing OHADA's avowed purpose of increasing foreign investment).

84. *See* KONÉ, *supra* note 5, 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* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 14–32 (1998) (suggesting that a reception of law is more as an irritant than a transplant).

85. *See* Beck et al., *supra* note 44 (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.[86] This is only one of many,[87] but it is a reasonable stand-in for the others because the way that 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* (SA), because less formal organizations offer fewer corporate-law points of comparison.[88] After that analysis, we will turn to concerns about enforcement.

A. *OHADA Corporate Law*

The review of the comparative law theories and of development economics in Part II of this Article 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 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

86. Corporate Code, *supra* note 2.

87. In addition to the Corporate Code, the current OHADA uniform acts are: Acte Uniforme relatif au Droit Commercial Général, adopted Apr. 17, 1997, 1 JO OHADA 1 (Oct. 1, 1997); Acte Uniforme portant Organisation des Sûretés, adopted Apr. 17, 1997, 3 JO OHADA 1 (Oct. 1, 1997); Acte Uniforme portant Organisation des Procédures Simplifées de Recouvrement et des Voies d'Exécution, adopted Apr. 10, 1998, 6 JO OHADA 1 (July 1, 1998); Acte Uniforme portant Organisation des Procédures Collectives d'Apurement du Passif, adopted Apr. 10, 1998, 7 JO OHADA 1 (July 1, 1998); Acte Uniforme relatif au Droit de l'Arbitrage, adopted Mar. 11, 1999, 8 JO OHADA 1 (May 15, 1999); Acte Uniforme portant Organisation et Harmonisation des Compatibilités des Entreprises, adopted Feb. 22, 2000, 10 JO OHADA 1 (Nov. 20, 2000); Actes Uniformes, http://www.ohada.com/textes.php (last visited Jan. 27, 2005). Also extant is Acte Uniforme relatif aux Contrats de Transport de Marchandises par Route, adopted Mar. 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, eds., 2d ed. 2000) (with 2003 addendum).

88. However, 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, in Dakar (June 24, 2004); Me. TT, in Dakar (June 24, 2004) (notes on file with the *Columbia Journal of Transnational Law*). In 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, and QF, in Abidjan (June 28, 2004) (notes on file with the *Columbia Journal of Transnational Law*); *see also* Interview with Me. HT, in Abidjan (June 28, 2004). The SARL is also the most common form in Cameroon. Interview with Me. BK, in Douala (July 5, 2004) (notes on files with the *Columbia Journal of Transnational Law*). This nation-to-nation inconsistency is problematic in the face of OHADA's drive to uniformity. *See infra* Part III.B.

ownership is separated from management.[89] Second, there is the problem of conflicts among shareholders.[90]

OHADA corporate law addresses these issues on two levels. Its conception of corporate social responsibility incorporates the behavior that its community expects of corporations.[91] 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 corporate social responsibility.[92] Thus, before delving into OHADA's structure of corporate governance, we must consider its conception of corporate social responsibility. Because of its uncompromising perspective, I have chosen the United States to provide the point of comparison.

1. Corporate Social Responsibility

In the United States, the classic articulation of corporate

89. ADOLF 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, 110–11 (2000); *see generally* Dickerson, *Ozymandias*, *supra* note 41, at 1060 n.143 (2003).

90. For 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 SARL, which is part of the inspiration for the limited liability companies now authorized by state laws in the United States. *See, e.g.*, Robert R. Keatinge, 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); J. William Callison, *Venture Capital and Corporate Governance: Evolving the Limited Liability Company to Finance the Entrepreneurial Business*, 26 J. CORP. L. 97, 120–121 (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 87 (listing the OHADA uniform acts).

91. *See, e.g.*, Dickerson, *Ozymandias*, *supra* note 41, at 1052–60 (describing post-scandal reform efforts in the United States (post-Enron), the United Kingdom (post-Maxwell and post-Marconi), and in France (post-Marseille soccer club and post-Alcatel Alsthorn)).

92. *See* Jennifer Cook & Simon Deakin, *Stakeholding and Corporate Governance: Theory and Evidence on Economic Performance* 2 (ESRC Ctr. for Bus. Research, Univ. of Cambridge, July 1999), *available at* www.dti.gov.uk/cld/esrc1.pdf (last visited Mar. 30, 2004).

social responsibility belongs to the Chicago-school, Nobel-Prize-winning economist, Milton Friedman. In 1970, he asserted that the corporation's social responsibility is to generate maximum profits legally possible for its shareholders.[93] 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.[94]

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 U.S. corporation law may object that 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.[95] 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.[96] Subject to some management discretion, the corporation is supposed to generate maximum value

93. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine), 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. *See generally* 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).

94. Friedman, *supra* note 93, at 33, 121–22, 124.

95. *See generally* PROGRESSIVE 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. *See* 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.

96. For 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 is 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, *Wal-Mart's Damage Control: Longtime Price Message Takes a Back Seat to Blitz Designed to Mend Reputation*, WASH. POST, Jan. 24, 2004, at E01.

for shareholders. That is the corporation's social responsibility.[97]

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.

As distinguished from the concept of shareholder primacy familiar to U.S. lawyers and increasingly to U.K. lawyers,[98] 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.[99] 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.[100] The majority position has a tone that certainly is far more stakeholder

97. In 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. 1985), and, especially, a board decision to sell the company, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 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*, 38 CORNELL INT'L L.J. (forthcoming 2005) (arguing that the United Kingdom has moved to a middle ground between the United States and the Continent); *see also* Dickerson, *Ozymandias*, *supra* note 41, at 1055–58 (describing U.K. efforts at corporate-governance reform during the 1990s).

98. *See* Cook & Deakin, *supra* note 92, at 3 (discussing managers' responsibility to shareholders of U.K. corporations).

99. *See* KONÉ, *supra* note 5, at 157–58 (discussing the three theories of intérêt social under French corporate law); *see also* Le Conseil d'Administration des Sociétés Cotées, Conseil National du Patronat Français & Association Française des Entreprises Privées, Part I.1 (July 1995), *available at* http://www.paris-europlace.net/files/rapport_vienot1_fr.pdf [hereinafter Viénot Report] (last visited June 29, 2005) (discussing the importance of intérêt social to corporate governance in France). *See generally* James A. Fanto, *The Role of Corporate Law in French Corporate Governance*, 31 CORNELL INT'L L.J. 31, 47 (1998) (discussing intérêt social for French corporations and referring to the Viénot Report); Dickerson, *Ozymandias*, *supra* note 41, at 1059–60 (comparing French law's intérêt social to Anglo-Saxon stakeholder concepts).

100. *See* KONÉ, *supra* note 5, at 157–58 (discussing the expansive understanding 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.

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,[101] and even at this early stage of the OHADA regime's existence, OHADA appears to have adopted the stakeholder sense of "corporate interest." However, OHADA has not yet generated enough jurisprudence to reveal whether "corporate interest"[102] 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,[103] and might 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" 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. The local government, however, might prefer the stakeholder approach because it includes not only elites that might invest, but also voters who may be employees of the enterprise.[104] The concept of "corporate interest" could serve the

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

102. *See 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, NDIAW 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).

103. *See* 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).

104. The stakeholder norm may also be better suited to the host country's cultural

local government's purposes because it includes a focus on the highest interest of the corporation, and thus does not allow a dominant shareholder to wrest advantages at the expense of the whole. In the appropriate context, "corporate interest" forbids oppression of the minority; it describes an equitable perspective directly applicable to classic corporate governance.[105]

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 support investment because 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.[106] 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.[107] Anthropologists have disagreed on how to understand another culture's legal norms.[108] Nevertheless, I will hazard a fundamental

---

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* MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES 3–5 (Ian Cunnison trans., W.W. Norton & Company 1967) (1925) (emphasizing the importance of groups in "primitive" societies, specifically relating to "archaic forms of contract"); *but see* K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 50–51 (1941) (pointing out that modern society, like primitive ones, operates through groups).

105. .Interview with AA, in Douala, Cameroon (July 5, 2004) (on file with the *Columbia Journal of Transnational Law*) (discussing "intérêt social").

106. ROBERT 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); *see generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing the disintegration of community life in the United States).

107. *See* Watson, *supra* note 84, at 339–41, 346–351 (discussing "transplants"); Teubner, *supra* note 84, at 14–32 (discussing "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 347, 348–53, 361–62 (Peter K. Cornelius & Bruce Kogut eds., 2003) (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").

108. *Compare* Max Gluckman, *Concepts in the Study of Tribal Law*, *in* LAW IN CULTURE AND SOCIETY 349–55, 371–73 (Laura Nader ed., 1997) (1969) (comparing

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.[109] I do not mean to overstate this generalization.[110] 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.[111] 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.[112] For example, no one I interviewed said the stakeholder approach was culturally inappropriate. Instead, for the practical-minded, clarity of terms and predictability of judgment-execution are more urgent issues.[113] 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.[114]

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., 1997) (1969) (complaining of Gluckman's use of Western terms).

109. Clifford 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 105, 109, 112 (Clifford Geertz ed., 1963).

110. For 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).

111. *See, e.g.*, MAUSS, *supra* note 104, at 65 (describing the rise of collectivism in France during the twentieth century inter bellum).

112. *See supra* text accompanying notes 99–105 (discussing "intérêt social" under French law, and considering its status under OHADA law); *see also* Interview with AA, *supra* note 105 (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 with Anne-Marie Assi-Esso, Professor and Founder, Ecole Supérieure Internationale de Droit, in Abidjan, Côte d'Ivoire (June 30, 2004) (rejecting "corporate interest" as irrelevant to the business realities in the region) *with* Interview with Paul-Gérard Pougoué, Professor and Vice Rector, Université de Yaoundé II, in Yaoundé, Cameroon (July 9, 2004) (suggesting that the principle of "corporate interest" can serve as a means of avoiding abuse).

113. Interview with AA, *supra* note 105 (rejecting relevance of "corporate interest"); Interview with Professor Assi-Esso, *supra* note 112 (rejecting "corporate interest" as irrelevant to the business realities in the region).

114. Interview with Professor Pougoué, *supra* note 112 (suggesting that the principle of "corporate interest" can serve as a means of avoiding abuse; Professor Pougoué did not describe the type of abuse that he believed could be attenuated but from the context, he may

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;[115] as we shall see, the OHADA laws are adopted by a process that includes local input.[116] At minimum, "corporate interest" is a concept that, in France, has been compatible with economic success,[117] 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 economic impacts.[118]

2. Corporate Governance

a. Berle and 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.[119] And, importantly in the context of transparency, management is supposed to keep the shareholders informed.[120] How the concept of corporate interest is implemented reveals whether OHADA is flexible and supports property rights against the state and extractive elites.[121]

Even if the concepts are familiar to an Anglo-American

---

have been referring to managers' abuse of corporate power in their dealings with the corporations' various constituencies).

115. The 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 Professor Pougoué, *supra* note 112 (noting that the danger of corporate interest is that it provides discretion to judges).

116. *See infra* Part III.B.1.c (discussing OHADA's legislative branch, the Council of Ministers).

117. *See* La Porta et al., *Law and Finance*, *supra* note 18, at 1151–52 (describing France as a "very rich countr[y]").

118. *See* Ocampo, *supra* note 13, at 100–01 (with respect to developing countries, advocating linkages of economic and social development, and identifying "human development" as a goal).

119. *See* SOCCOM, *supra* note 102, at 271 (concerning conflicts of interest generally), and 422–423, 430 (noting that managers cannot borrow from the corporation, with very few exceptions).

120. *See* SOCCOM, *supra* note 102, at 79–80, 462–63 (describing the shareholders' rights to receipt of information from managers). *Id.* at 169 (noting that an SA must have a *commissaire aux comptes*).

121. *See supra* Introduction to Part III.

lawyer, their presentation may be less so. For example, OHADA law handles management's obligation to inform the owners in part by obligating corporations to have a statutory auditor.[122] This solution imposes a heavy bureaucracy, but it is effective: it was such an auditor who first unmasked Messier's excesses at Vivendi Universal.[123] Twice a year, shareholders may also demand that management reveal any information that could have a significant, negative financial impact.[124]

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.[125] 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.[126] This formalism 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.

In other ways, the OHADA statute has opted for simplicity

---

122. The reference, as usual in this discussion, is to an SA. *See* SOCCOM, *supra* note 102, 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 million Communauté Financière Africaine francs (CFA Fr.) (164K €) or in number of employees (50)).

123. The Vivendi Universal story was a major French scandal that finally blew up in 2002. It included allegations of spectacular executive malfeasance and failure of board oversight. Jean-Marie Messier, Vivendi Universal's chief executive officer, was a colorful figure who sought to bring specific U.S. business practices to his company. However, it was the French accounting system that brought him down. *See* Dickerson, *Ozymandias, supra* note 41, at 1044–47 (discussing Messier, the Vivendi Universal melt-down, and the role of the accounting firm, Salustro-Reydel); Frédéric Hastings, *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 (identifying Salustro-Reydel as Vivendi's "commissaire aux comptes" (statutory auditor) at the relevant time).

124. *See* SOCCOM, *supra* note 102, at 449.

125. For a summary of certain market restraints on managers of U.S. public corporations, see Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 554–56 (1995).

126. *See* Ajit Singh, *The New International Financial Architecture, Corporate Governance and Competition in Emerging Markets: Empirical Anomalies and Policy Issues*, *in* RETHINKING DEVELOPMENT ECONOMICS 377, 391 (Ha-Joon Chang ed., 2003) (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 U.S.-style market constraints exist, of course, whenever the markets are less liquid and diversified than in the United States. *See, e.g.*, Merritt B. Fox, *Required Disclosure and Corporate Governance*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 701, 716–17 (Klaus J. Hopt et al. eds., 1998) (asserting that public disclosure is a more effective constraint on managers in the United States, as opposed to Japan or Germany).

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—persons who have no substantial relationship with the corporation other than as director.[127] 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.[128] 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 leery of allowing too much power to concentrate in the hands of a single manager or group of managers.[129] Nevertheless, again presumably in the interest of simplicity, the OHADA statute does not provide for splitting the board into a 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).[130] It even permits, if there are three or fewer shareholders, the appointment of a single Administrator-General who will serve as Chairman of the Board and

127. *See* Dickerson, *Ozymandias*, *supra* note 41, at 1052–60 (reporting that the U.K.'s reforms champion non-executive directors, and that the U.S. and French reforms call for increased use of independent directors); *see also* Lamoreaux & Rosenthal, *supra* note 20, 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).

128. *See* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231 (2002) (showing that in the United States, independent directors have little effect); *see also* Julian Franks, Colin Mayer & Luc Renneboog, *Who Disciplines Management in Poorly Performing Companies?*, 10 J. FIN. INTERMEDIATION 209 (2001) (discussing the importance of the endgame in the United Kingdom).

129. *See* Deborah Solomon, *Deals and Deal Makers: SEC to Approve Governance Rules by NYSE, Nasdaq*, WALL ST. J., Oct. 13, 2003, at C5 (reporting that the SEC will vote on proposals that would require companies whose stock is traded on the NYSE or Nasdaq to have a majority of independent directors and regular meetings of nonmanagement directors); Financial Services Authority, The Combined Code: Principles of Good Governance and Code of Best Practice, § 1(A)(1)–(3) (2000), http://www.fsa.gov.uk/pubs/ukla/lr_comcode.pdf (last visited Jan. 30, 2003) (requiring a division of responsibilities between the Chairman and CEO, as well as a balance of executive and non-executive directors); *see also* Dickerson, *Ozymandias*, *supra* note 41, 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 unitary board clearly articulate the extent of the powers of the Président-Directeur Général).

130. *See* SOCCOM, *supra* note 102, at 425–29 (discussing the roles of the Président (Chairman), Directeur Général (CEO), and Président Directeur Général).

CEO, and even as the Board itself.[131] The purpose for this last provision is to add flexibility to the standard corporate form, the SA, in the interest of attracting foreign investment.[132]

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 Côte d'Ivoire, lists just under forty companies, and had a capitalization of U.S. $1.3 billion in 2003.[133] 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.[134] Although the market has not been a major source of capital for new ventures, it has been an important forum where foreign and domestic capital can meet. The stock market appears to have been a vehicle through which governments have effected the privatization demanded by international financial institutions.[135] 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

131. *See id.* at 429–31; *see also* Corporate Code, *supra* note 2, § 494.

132. *Id.* at 429. The most used form is the SARL or the GIE, depending on the particular state-member of OHADA. *See* Interviews with QN, Me. TT, TE, DL, QF, Me. HT, and Me. BK, *supra* note 88.

133. Analyse Sogebourse, BULLETIN HEBDOMADAIRE, n° 261 (Dec. 12, 2003), http://www.afribourse.com/anabourse.html (last visited June 29, 2005) (describing the capitalization in 2003 of the Bourse Régionale des Valeurs Mobilières (BRVM) in Abidjan as U.S. $1.387 billion). Sogebourse (Société de Gestion et d'Intermédiation) is an affiliate of the Groupe Société Générale. *Id.* With this market valuation, the entire market would be around number 450 on Fortune 500. *See* Fortune, http://www.fortune.com/fortune/fortune500/company/top500/0,17354,401,00.html (last visited Oct. 15, 2003). For a description of the Bourse Régionale des Valeurs Mobilières (BRVM), see Afribourse, *La Bourse d'Abidjan,* http://www.afribourse.com (last visited June 29, 2005). Afribourse is a "partner" of Sogebourse. *Id. See also* MBendi Information Services (Pty) Ltd., *Bourse Regionale des Valeurs Mobilieres*, http://www.mbendi.co.za/exch/25/p0005.htm (last visited Jan. 22, 2005).

134. *See* Kathryn C. Lavelle, *Architecture of Equity Markets: The Abidjan Regional Bourse*, 55 INT'L ORG. 717–18, 728, 735 (2001) (reporting that non-West Africans "control an overwhelming percentage of the publicly listed firms" on the Abidjan Bourse; that Côte d'Ivoire had developed a "small bourgeoisie"; and that "Ivoriens [*sic*] hold 49.4 percent of total market capitalization").

135. *See 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. *Id.* at 734.

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.[136] 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.[137]

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.[138] Preemptive rights are still popular in France;[139] in contrast, 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.[140] 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

136. *See* SOCCOM, *supra* note 102, 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).

137. *See supra* Part III.A.2.b.

138. *See* SOCCOM, *supra* note 102, at 464 (preemptive rights) and 77, 460–61 (double vote).

139. *See* Dickerson, *Ozymandias*, *supra* note 41, at 1044–45 (noting that preemptive rights are more common in France than in the United States; indeed, Vivendi Universal had such a provision).

140. *See* Lori A. Dawkins, Note, *Shareholders' Preemptive Rights in West Virginia*, 97 W.VA. L. REV. 437, 439–41 (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.

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 because it is at least plausible that shareholders will in fact exercise the preemptive rights and that, in consequence, preemptive rights are not merely a costly delay. Finally, the drafters doubtless realized that in closely held businesses, the majority holder could well be local, in this case Ivoirian. Thus, the OHADA member states adopted a corporate law that offers a reasonable 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.[141] As a point of comparison, the average U.S. investor holds investments for 7.8 years.[142] Like preemptive rights, double-voting rights are an artifact of French law.[143] 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.[144] Thus, in the OHADA region, double voting rights seek to rectify an aspect of pre-OHADA law criticized by the comparative lens:[145] they support stability and discourage a cut-and-run, extractive approach to investment.[146]

B. OHADA Pragmatic Reach: Enforcement

OHADA law may be balanced and sophisticated, and it may be particularly suited to encourage both foreign and domestic investment; however, it will not be effective unless it is enforced.

---

141. *See* SOCCOM, *supra* note 102, at 77, 460–61 (discussing double vote, and the two-year, nominal-holding requirement).

142. Adam Ritt, *Who Is the American Shareholder? Voice of the American Shareholder*, BETTER INVESTING MAGAZINE, NAIC (Jan. 2004), *available at* http://www.better-investingnewsroom.org/voice/articles/VoicVoic-164.htm (last visited Sept. 19, 2005) (reporting Harris Interactive poll results).

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

144. *See id.* (suggesting that pre-NRE, weighted voting is possible).

145. *See supra* Part II.B (discussing the comparative lens).

146. There are also provisions to protect bondholders and other creditors. *See* SOCCOM, *supra* note 102, at 470–79.

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.[147] For these purposes "harmonization" is no flimsy concept: the process creates truly uniform business laws throughout the OHADA territory.[148] 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.[149]

From a different, more positive perspective, persons trading among or into OHADA member states will have lower transaction costs if they need not worry about national variations, thereby encouraging trade.[150] The second step is that these uniformly

147. *See, e.g.*, LeBoulanger, *supra* note 3, at 544 ("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 3, at 544–45.

148. *See* LeBoulanger, *supra* note 3, 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 5, 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).

149. Because OHADA offers business laws but is not a customs union, OHADA does not limit the member states; they retain the ability to establish independent trade policy, for example. *See* OHADA Treaty, *supra* note 2, arts. 1–2 (describing the treaty's purpose as limited to harmonization of the OHADA member states' business laws, and its implementation as restricted to acts conforming to the treaty's purpose).

150. That, of course, was the logic behind the uniform laws in the United States, and the U.N. 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, 19 I.L.M. 671 (1980). 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* OHADA Treaty, *supra*

interpreted laws must be enforced. Let us 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.[151] 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 very 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.[152] It may also be that the elites recognized that the OHADA laws' nuanced balancing act protects the elites. Elites may typically be majority holders in domestic investments, but we have seen that they tend to have minority positions when foreign investors are involved.[153] 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

---

note 2, arts. 1–2 (specifically mentioning the freedom of each OHADA member state to establish independent trade policies).

151. *See* OHADA Treaty, *supra* note 2, 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 are contrary to, and even merely identical with, the OHADA laws. *See* KONÉ, *supra* note 5, 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 2, at 6.

152. Interview with Pres. Kéba Mbaye, in Dakar (June 25, 2004) (on file with the *Columbia Journal of Transnationla Law*); *see also supra* notes 3, 83 (referring to the articulated goal of OHADA, *viz.*, increasing foreign investment).

153. *See generally* Lavelle, *supra* note 134. *See also supra* Part III.A.2.b.

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*, 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 member states.[154] Its role as forum for international arbitrage remains undeveloped, in part because of significant competition from both governmental[155] and non-governmental groups.[156] 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 on matters concerning the application of OHADA laws,[157] it truly represents a transfer of indicia of national sovereignty to a supranational authority.[158] No matter where the

---

154. *See, e.g.*, LeBoulanger, *supra* note 3, at 551 (concerning the CCJA's dual roles). *See also infra* note 158 (discussing the extent of, and limitations on, the CCJA's supranational authority).

155. Interview with Pres. Dr. François Komoin, in Abidjan (June 29, 2004) (on file with the *Columbia Journal of Transnational Law*) (referring to the arbitral court of Côte d'Ivoire, located in Abidjan).

156. Interview with Mr. Sadjo Ousmanou, in Douala, Cameroon (July 6, 2004) (on file with the *Columbia Journal of Transnational Law*) (discussing the arbitral procedures of the Groupement Inter-patronal du Cameroun (GICAM), an association of employers).

157. OHADA Treaty, *supra* note 2, arts. 13–18 (stipulating that national trial and appellate courts handle litigation concerning the OHADA laws (art. 13); the CCJA hears appeals in cassation from the national courts which removes jurisdiction from the national courts of cassation (arts. 14, 16)). *See* LeBoulanger, *supra* note 3, 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). Forneris, *supra* note 2, at 2. *But see supra* note 7 (noting that the CCJA has more powers than the French Court of Cassation which must return the case to a lower court for a further decision). A limitation on the CCJA's authority is that it cannot impose penal sanctions; that is the role of the individual States. OHADA Treaty, *supra* note 2, art. 5. *See also* Issa-Sayegh, *supra* note 2 (discussing the penal-sanction limitation, and suggesting a reform to wholly remove any penal authority from the CCJA). SOCCOM, *supra* note 102, 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. OHADA Treaty, *supra* note 2, art. 14 (describing, *inter alia*, the CCJA's consultative role). *See also* BUSINESS LAW, *supra* note 2, at 13. For a discussion of the Conseil des Ministres, see *infra*, Part III.B.1.c.

158. The 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 5, at 5 (describing two rulings of the CCJA, one in response to a request by the Ivoirian

cause of action arises, if the CCJA has jurisdiction over the matter, the OHADA Treaty requires the national supreme courts to forward the case to the CCJA located in Abidjan, Côte d'Ivoire.[159] 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.[160]

This is not to say that the role of the CCJA even as an interpreter of OHADA laws is yet fully settled. National supreme courts are protective of their own authority. As OHADA adopts new business laws, the CCJA increases its jurisdiction in the commercial arena.[161] Justices of the national courts are concerned that they will not have enough work, or at least not enough interesting work, if an increasingly broad range of commercial matters passes directly from the national appellate courts to the CCJA, thus skirting the national supreme courts entirely.[162] 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

---

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 2, at 6.

159. *See* e-mail from Me. TT (Aug. 9, 2004) (on file with the *Columbia Journal of Transnational Law*) (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* e-mail from Professor Joseph Issa-Sayegh (Oct. 9, 2004) (on file with the *Columbia Journal of Trannsnational Law*) (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).

160. For a suggestion that a national judicial system may be co-opted, at least in part, by political forces, see Press Release, Amnesty International, *Cote D'Ivoire: one year after Marcoussis, the victims are still waiting for justice* (Jan. 26, 2004), *available at* http://web.amnesty.org/library/Index/ENGAFR310012004?open&of=ENG-CIV (describing allegations of human rights abuses that Côte d'Ivoire has not investigated despite the government's promise in the January 24, 2003 Linas-Marcoussis peace agreement).

161. *See* OHADA Treaty, *supra* note 2, arts. 2, 14 (respectively, stipulating that OHADA's jurisdiction is limited to business laws, and describing the extent of the CCJA's authority within that jurisdiction, including its role as interpreter of the OHADA laws).

162. *See id.*, arts. 15–16 (stipulating that when the CCJA has jurisdiction over a matter, the national supreme court, typically a court of cassation, loses jurisdiction). *See also* Interview with Pres. Seydou Ba, President of the CCJA, in Abidjan, Côte d'Ivoire (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, Côte d'Ivoire (June 29, 2004) (stating that Côte d'Ivoire's supreme court perceives itself to be the only one to refer cases to the CCJA).

Abidjan.[163] The fact that the vast majority of appeals to the CCJA come from Côte d'Ivoire supports that conclusion.[164]

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. Further, the CCJA will have to address the textual arguments that some legal professionals advance in an effort to limit the court's jurisdiction. These legal professionals suggest that the OHADA Treaty gives the CCJA jurisdiction only to hear questions of interpretation, not all matters having arisen under OHADA laws.[165] If that is not the case, the CCJA does possess authority to impose uniformity because substantive matters will be brought to the CCJA. If the CCJA adopts the minority position, 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.[166] This institution reinforces norms as it imparts substantive legal knowledge.[167] 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,

163. Interview with Me. HT, *supra* note 88 (noting that non-Ivorian supreme courts within the OHADA territory ignore the CCJA); Interview with Lord Justice J.F. Fonkwe, in Yaoundé, Cameroon (July 9, 2004) (indicating that, presumably, some supreme courts fail to refer cases to the CCJA for fear of losing the more interesting cases).

164. Interview with Pres. Ba, *supra* note 162 (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).

165. OHADA Treaty, *supra* note 2, art. 14 ("La Cour Commune de Justice et d'Arbitrage assure dans les Etats Parties l'interprétation et l'application commune du présent traité, des règlements pris pour son application et des actes uniformes"; "Saisie par la voie du recours en cassation, la Cour se prononce sur les décisions rendues par les juridictions d'Appel des Etats Parties dans toutes les affaires soulevant des questions relatives à l'application des actes uniformes et des règlements prévus au présent traité à l'exception des décisions appliquant des sanctions pénales."); *see also* e-mail from TT, *supra* note 159 (asserting that the CCJA's jurisdiction is limited to interpretation).

166. OHADA Treaty, *supra* note 2, art. 41 (constituting the ERSUMA).

167. *See* BUSINESS LAW, *supra* note 2, at 16–17 (noting that a purpose of the school is to promote the use of the OHADA regime of business laws).

including the bankruptcy-law regime.[168] 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.[169] 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.[170]

c. *Conseil des Ministres (Council of Ministers)*

The OHADA structure is a brilliant approach, 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.[171] 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.[172] OHADA proponents also point out that

168. *See* Forneris, *supra* note 2, at 5 (reporting that a judge had vaguely remembered a bankruptcy law from twenty years before, but did not know what its current status was).

169. Interview with Helen FonAchu, Magistrate, Court of Appeals, in Douala, Cameroon (July 7, 2004) (reporting on the experience of certain magistrates in Cameroon's Anglophone South West Province).

170. *Id.*

171. There 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 5, at 10–11 (noting that the primary corporate law was based on French laws of 1867).

172. *See generally supra* note 3 and the Introduction to Part III (concerning the drafters' effort to reduce investors' transaction costs); *see also* Interview by François Katendi and Jean-Baptiste Placca with Kéba Mbaye, Honorary Chief Justice of the Supreme Court of Senegal [and one of three members of the original drafting committee] (undated), http://www.afrology.com/eco/kebam.html (last visited Mar. 4, 2005) ("[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

the decision to adopt the OHADA system has been legitimated by democratic procedure.[173] The national parliaments approved the 1993 treaty, and the national governments still play a consultative role in the creation of new OHADA laws.[174] 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.[175] And the national structures that have adopted the entire system, including the national parliaments, manifest varying levels of democratic participation, depending on the particular country.[176]

This non-democratic aspect is a weakness of the OHADA structure as confirmed by the desirable factors identified by the review of comparative law in Part II of this Article. A pro-investment structure must protect property; it must also shelter commercial transactions from local extractive impulses. On the latter issue, the OHADA 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 legislation. More to the point, as a practical matter the OHADA legislature's remove from the electorate

---

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 establishing a dialogue is a better approach to understanding what is necessary to a region's development. *See, e.g.*, Vincent Tucker, *The Myth of Development: A Critique of a Eurocentric Discourse*, *in* CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM 1, 8–9, 17–21 (Ronaldo Munck & Denis O'Hearn eds., 1999).

173. *See* Berkowitz et al., *supra* note 64, 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).

174. OHADA Treaty, *supra* note 2, 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 member states have set up a committee made up of "representatives from their legal and judicial professions, the academia, line ministries, and parliament." Forneris, *supra* note 2, at 7.

175. *See, e.g.*, BUSINESS LAW, *supra* note 2, at 8.

176. For 2005, 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: The Annual Survey of Political Rights & Civil Liberties* (2005), *available at* http://www.freedomhouse.org/research/freeworld/2005/table2005.pdf (listing countries' performance from December 1, 2003 through November 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.*

will not necessarily have significant non-democratic consequences, at least for now. If a national government is non-democratic, its ministers will necessarily also be so. In such a situation, the national parliament is either equally undemocratic, or it is supine, or both.

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 OHADA Treaty, these commissions have evolved because they are necessary.[177] In Côte d'Ivoire, for example, the very energetic head of the Ivoirian national commission is actively soliciting recommendations for improvements to existing codes.[178] 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

177. According to the OHADA Treaty, upon receipt of a draft uniform act prepared under the auspices of the Permanent Secretariat, member states have ninety days to submit their comments to the Permanent Secretariat. OHADA Treaty, *supra* note 2, art. 7. In order to make it possible for a state to respond in a timely fashion, the Conseil des Ministres allowed the formation of national commissions that could work with the Permanent Secretariat in the original drafting, thus allowing the member states' governments to contribute throughout the drafting process. *See* Jacqueline Lohoues-Oble, *Comment to Article 7*, *in* OHADA: TRAITÉ ET ACTES UNIFORMES, COMMENTÉS ET ANNOTÉS 35 (2002) (discussing the role and origin of the national commissions).

178. *See* OHADA Treaty, *supra* note 2, art. 20 (stipulating that decisions of the CCJA are susceptible to execution); *see also* Réglement de procédure de la Cour commune de justice et d'arbitrage, arts. 41, 46, *available at* http://www.ohada.com/traite.php?categorie=682 and http://www.ohada.com/traite.php?categorie=686 (last visited Oct. 28, 2005) (stipulating that the national judicial systems are required to execute CCJA decisions without any review beyond verification of the document's accuracy); Interview with Pres. Kouadio, *supra* note 162.

about the execution of the judgment end up in national courts.[179]

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.[180] For example, a common refrain among the Francophone legal specialists was to praise the clarity and sophistication of the OHADA laws while lamenting the difficulty of obtaining execution on the judgments.[181] 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.[182]

It may seem like a colossal waste of effort to spend time and energy discussing a legal system when the 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.[183] And judgments are being

179. *See, e.g.*, Interview with Justice Nko T. Irene Njoya, Advocate General, South West Court of Appeals, in Buéa, Cameroon (July 8, 2004).

180. For a general description of the interviewing process, see *supra* note 16. 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 II.B.

181. However, the clarity of OHADA laws may be enough to make them useful despite execution difficulties. *See* Interview with Pierre Saha Tazoh, Supreme Courts of Nigeria and Cameroon, in Doula, Cameroon (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 88 (emphasizing the importance of effective judgment-execution but also praising the OHADA laws' clarity).

182. Henri 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 (last visited Oct. 28, 2005) (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 179.

183. Sylvain Souop, *Pour Qui Sonne le Glas de l'Exécution Provisoire? Commentaire de l'arrêt de la CCJA, n 2/2001 du 11 octobre 2001, Affaire Epoux KARNIB c/ Société Générale de Banques Côte d'Ivoire (SGBCI)*, OHADATA D-02-06, *available at* http://www.ohada.com/imprimable.php?vu=28&article_biblio=293 (last visited Oct. 28, 2005) (discussing risks created by provisional execution of judgments before all appeals are

executed.[184] 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 pace,[185] indications are that the OHADA laws' consumers are beginning to recognize them as local laws, although foreign companies are resisting this perception.[186] In 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.[187] When, once again, commerce will be freely possible, the legal profession will be ready with a relatively clean, transparent judicial system to support commerce. In Cameroon, the local legal professionals 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 begun do so himself.[188] 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 designed to increase

completed).

184. *See,* Interview with Professor Pougoué, *supra* note 112 (discussing complexities relating to the execution of judgments without asserting the existence of a bar on execution).

185. Averaging 5% real GDP growth from 1995 to 2003, and estimated at 5.5% in 2003. Central Intelligence Agency (CIA), *Senegal,* THE WORLD FACTBOOK, *available at* http://www.cia.gov/cia/publications/factbook/geos/sg.html#Econ (last visited Oct. 24, 2004). As a point of comparison, Cameroon's estimated real GDP growth for 2003 is 3.2%. Central Intelligence Agency (CIA), *Cameroon,* THE WORLD FACTBOOK, *available at* http://www.cia.gov/cia/publications/factbook/geos/cm.html#Econ (last visited Oct. 24, 2004).

186. Interview with Me. TT, *supra* note 88.

187. *See* Interviews with TE, DL, and QF, *supra* note 88. Côte d'Ivoire's estimated real GDP growth is -1.9% for 2003. Central Intelligence Agency (CIA), *Côte d'Ivoire,* THE WORLD FACTBOOK, *available at* http://www.cia.gov/cia/publications/factbook/geos/iv.html#con (last visited Oct. 24, 2004).

188. 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 Professor Pougoué, *supra* note 112.

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.[189] 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.[190] 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 some legal professionals do focus on corporate governance in the context of OHADA.[191] Thus, OHADA is beginning to enhance transparency and protect property, but at least some of the economic benefits to flow from OHADA's impact belong to the future.

IV. OHADA'S LONG-TERM IMPACT

A. Impact To-Date

This survey of OHADA suggests that although its 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 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

189. Interview with Me. BK, *supra* note 88.
190. Interview with Me. FB, in Douala, Cameroon (July 5, 2004).
191. Interview with Professor Pougoué, *supra* note 112.

minority owners and by emphasizing transparency.[192]

The mere fact that OHADA's drafters have consciously or unconsciously tracked those 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.[193] 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.[194] In particular, they praise the laws' clarity.[195]

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, or at changes in gross national product, cannot alone be an accurate reflection of the OHADA's success because of all the other factors that are relevant.[196] However, the enumerated factors are not positive: for almost all OHADA countries, per capita gross national product is less

192. *See* Part III.A.2.b (discussing the relationship between dominant and minority shareholders).

193. *See* Interview with Me. BK, *supra* note 88; Interview with QT in Douala, Cameroon (July 6, 2004) (praising the OHADA laws' clarity); Interview with Professor Assi-Esso, *supra* note 112 (praising OHADA laws' clarity, and the rapidity of its procedure including in particular the execution of judgments).

194. I chose the specific interviewees because of their familiarity with the OHADA regime; to that extent, it was a biased sample. On the other hand, familiarity could have bred contempt, which is not what the interviewees expressed.

195. *See* Interviews with Me. BK, *supra* note 88; Interview with Professor Assi-Esso, *supra* note 112 (discussing the OHADA system's clarity).

196. OHADA's articulated purpose is to increase foreign investment. *See supra* note 3. However, the ultimate goal is not to allow the region to reap the benefits of additional investment. For one view of the applicable criteria in measuring development, see *supra* note 21 (discussing in particular the views of Jeffrey Sachs and his co-authors, and Amartya Sen).

than U.S. $700 per year,[197] 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.[198] 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: Côte d'Ivoire index has fallen perceptibly, and Cameroon has inched up, but only from a very low level.[199]

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.[200] Future research will focus on how regional domestic enterprises are using OHADA and how foreign investors view the new regime.[201] For the moment,

---

197. Only Gabon has exceeded U.S. $700 per capita GNI in 2002 and 2003 (which it has accomplished handily). *See* The World Bank Group, *World Development Indicators*, *available at* http://devdata.worldbank.org/data-query/ (last visited 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 (last visited Jan. 30, 2005).

198. For 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").

199. The cleanest OHADA state in the 2003 survey was Senegal at 3.2, putting it about at the half-way mark of perceived corruption among the 133 tested nations. Côte d'Ivoire's index was 2.7 in the 2002 survey, describing 2001 (pre-civil strife). Transparency International, Transparency International Corruption Perceptions Index 2002 (Aug. 28, 2002), *available at* http://www.transparency.org/pressreleases_archive/2002/2002.08.28.cpi.en.html.

200. *See* BUSINESS LAW, *supra* note 2, at 34. Registre du Commerce et du Crédit Mobilier (RCCM) is to be centralized at the national level, and again at the OHADA level; AU General Commercial, art. 20.

201. Foreign investors in the OHADA territory do not necessarily make use of OHADA laws. ExxonMobil formed a subsidiary, Esso Exploration and Production Chad, Inc. (Esso-Chad), the major function of which is to oversee the construction of a $3.7 billion underground oil pipeline from Chad, through Cameroon, to the Atlantic coast. *See Companies in the News,* WORLD OIL, Jan. 2001, at 120; Somini Sengupta, *The Making of an African Petrostate*, N.Y. TIMES, Feb. 18, 2004, at A3. While I do not know exactly when Esso-Chad was formed, it probably was not much before January 2001. *See Companies in the News*, *supra* (referring to Esso-Chad and discussing the commencement of an oil pipeline construction project from Chad through Cameroon to the Atlantic coast). The OHADA corporate law has been available since January of 1998. *See supra* note 2 (discussing the OHADA Corporate Code, which entered into force on January 1, 1998). Because of the suffix "Inc.," Esso-Chad probably is a U.S. 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. E-mail from Russ A. Roberts, ExxonMobil Upstream Public

however, the strongest positive indicator may be that Anglophone countries have begun to enquire about joining.[202] Given the historical friction between Anglophone and Francophone former colonies in Africa, that is a remarkably promising sign.[203] 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 clarity of OHADA laws.[204] However, practicing lawyers, judges, academics, business people, and members of the OHADA institutional hierarchy, all of whom live and work daily with these laws, also expressed two principal complaints. First, consumers of OHADA laws desire easier access to court decisions and scholarly analysis of those laws.[205] While a privately run website, www.ohada.com, displays the texts of the code and of decisions and makes scholarly commentary available for a fee, the Internet provides only limited public access because of the unreliability of connection in many locales.[206] In order to obtain a

---

Affairs, to author (Mar. 4, 2004) (on file with the *Columbia Journal of Transnational Law*).

202. Cameroon, already a member of OHADA, is bilingual English-French and has a dual legal system. *See supra* note 16 (discussing Cameroon's bilingual nature and charter member status of OHADA); *see also* BUSINESS LAW, *supra* note 2, at 22–23 (discussing Cameroon's constitutional mandate of French-English bilingualism); Office of the U.N. High Comm'r for Human Rights, *Core Document Forming Part of the Reports of States Parties—Cameroon*, U.N. Doc. HRI/CORE/1/Add. 109 (Apr. 13, 2000) (noting that "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 and Central Africa generally and OHADA specifically, Ghana is generally considered most likely to be the first solely Anglophone adherent, although negotiations are apparently ongoing with Nigeria as well.

203. OHADA is open to all members of the African Union. OHADA Treaty, *supra* note 2, art. 53 (the Organization of African Unity, in French, l'Organisation de l'Unité Africaine (OUA), is the predecessor to today's African Union).

204. *See supra* Part III.B.2; *see also* Interview with Me. BK, *supra* note 88, and with Professor Assi-Esso, *supra* note 112 (discussing the OHADA system's clarity).

205. These 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 17, at 280 (underscoring the importance of multiple sources of law to French judicial viewpoints). *See also* Merryman, *The French Deviation*, *supra* note 47, 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 that precedent is important to French judges, while acknowledging that it still may be less so than to common-law judges).

206. There 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.

reliable, rapid connection to the Internet in Cameroon, for example, the only viable solution is a satellite hook-up, which is relatively expensive.[207]

If the Internet is not a solution for the public at large, the principal alternative is published documentation, although this solution costs money. The OHADA Treaty as amended requires each state-party to contribute to the operations of the institutions.[208] To date, these contributions have been honored in the breach, leaving the OHADA institutions underfunded.[209] Therefore, OHADA institutions are not in a position to provide documentation in published form, at least not in sufficient quantity. However, a private non-governmental organization currently raises its own funds to commission and distribute documentation;[210] it has donated 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.*[211] 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.[212] In other words, much is being done to make laws accessible.

Nevertheless, people who need to know about OHADA often do not. That includes potential foreign consumers of the legal system, as well as domestic users. Within the region, the U.S. economic advisers with 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

207. In Douala, Cameroon, for example, both Citibank and GICAM have satellite hook-ups. Interview with Ousmanou, *supra* note 156; interview with Alice Flora Ngassam, Relationship Manager at Citibank, in Douala, Cameroon (July 7, 2004) (on file with the *Columbia Journal of Transnational Law*).

208. OHADA Treaty, *supra* note 2, art. 43 (describing OHADA's funding as including allocations from the member states). *See also* Relatif au Mécanisme de Financement Autonome de l'OHADA, arts. 3–4, Règlement No. 002/2003CM [Relating to the Autonomous Financing of OHADA] (stipulating that the allocation should be 0.05% of imports from outside OHADA, supplied for consumption within the OHADA territory); Décision, Conseil des Ministres, No. 004/2004/CM of Mar. 27, 2004 (stipulating the allocation among the member states).

209. Interview with Pres. Kouadio, *supra* note 162.

210. L'Association pour l'Unification du Droit en Afrique [Association for the Unification of African Law] (UNIDA), 7, avenue de Ségur, 75007 Paris, France.

211. *See* e-mail from Paul Bayzelon (July 8, 2005) (on file with the Columbia Journal of Transnational Law). For a description of UNIDA, see About OHADA.com and UNIDA, http://www.ohada.com/ohada_et_unida.php (last visited October 28, 2005).

212. E-mail from Lucien Johnson, OHADA Permanent Secretary, to author (Feb. 24, 2005) (on file with the *Columbia Journal of Transnational Law*) (noting that the *Journal Officiel* will be posted at www.ohada.org).

whether the U.S. investors had won their latest lawsuits.[213] Foreign investors and their national representatives must have easy access to current information about OHADA and its evolution before they can have a basis upon which to assess the value of improvements that OHADA is bringing to the region's security. Only then will investors factor the value of OHADA into their cost analysis, and thus only then will the region begin to reap benefit from any advantages that OHADA in fact offers.

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, have the resources to educate more professionals,[214] and that local academics and bar committees organize parallel educational opportunities, including regular seminars and workshops. The Permanent Secretariat needs funding so that it can support these initiatives.

The OHADA regime's legislative arm also needs attention. The Council of Ministers, with the Permanent Secretariat's support, has been making good use of the national commissions.[215] Again, 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.[216] 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.[217] The heads of state are, apparently, considering reviewing the existing structure under the

213. Interview with Portia E. McCollum, Economic Counselor, U.S. Embassy, in Abidjan, Côte d'Ivoire (June 29, 2004) (on file with the *Columbia Journal of Transnational Law*); telephone interview with Solomon Oshinaike, Economic Adviser, U.S. Consulate, in Douala, Cameroon (July 21, 2004) (on file with the *Columbia Journal of Transnational Law*) (reporting that U.S. investors tend not to know about OHADA).

214. *See supra* Part III.B.1.b (describing ERSUMA).

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

216. Interview with Pres. Kouadio, *supra* note 162 (suggesting the importance of OHADA to the national governments).

217. *See supra* note 151 and accompanying text (describing the automatic application of OHADA laws to member states).

treaty.[218] 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 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.[219] As the court continues to publish its own decisions, including detailed references to lower court decisions from which appeals arise, 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.[220] 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.[221] 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 in 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 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, effectively shame such executives into ceding enforcement power.[222]

---

218. Interview with Pres. Kouadio, *supra* note 162 (discussing the risk of intervention by heads of state in the evolution of OHADA, and suggesting the importance of OHADA to the national governments).

219. Interview with Me. Virgile Ngassam Njike, attorney-at-law, in Douala, Cameroon (July 3, 2004) (on file with the *Columbia Journal of Transnational Law*) (reporting that the Cameroonian bar admires the CCJA).

220. Interview with Pres. Dr. Komoin, *supra* note 155; Interview with AA, *supra* note 105.

221. Interview with Justice Nko, *supra* note 179 (describing difficulties of judgment-execution); Interview with Pres. Kouadio, *supra* note 162 (referring to judgment-execution as a mess).

222. Interview with Me. QT, *supra* note 193 (referring to "chantage alimentaire,"

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 in order to have property and contracts recognized and respected. The OHADA regime provides support for this effort through the clarity of its laws and by generating contact between like-minded professionals.[223] This approach 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.[224]

Interestingly, while 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 that the OHADA laws will at some point in the future attain their full promise.[225] Whether that proves to be wishful thinking remains to be seen. However, shoring up existing structures will increase the likelihood of success.

So far, the bulk of this 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, which emphasizes the importance of protecting another aspect 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 OHADA's uniformity may be an effective stealth weapon that will help empower the South in its discussions with the North. If the region

---

meaning blackmailing by threatening to cut off sustenance—in this case, career advancement).

223. The theory of networks and of social influence are critical here. *See generally* Claire Moore Dickerson, *Corporations As Cities: Targeting the 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'Y 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).

224. This assertion is consistent with network theory. *See generally* Dickerson, *Overlapping Networks, supra* note 223 (discussing the use of network theory to obtain institutional change, and recognizing the difficulty of identifying the relevant pressure points).

225. Interview with Me. QT, *supra* note 193 (noting that even without an effective means of executing judgments, the OHADA laws and their clarity are a preparation for what is to follow).

taken as a whole is commercially viable and possesses a single form of business laws, and if the entire region interprets and enforces these laws 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.[226] If the other assertions are not utopian, this one may be. However, what is utopian today can be reality tomorrow.

V. CONCLUSION

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 CCJA interprets 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 belies 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 causal relationship. Indeed, since the OHADA countries have a civil-law heritage, and since their legal professionals are steeped in those legal norms, a French-based system may well offer particular efficiencies

226. *See supra* Part III.A.1 (discussing "corporate interest").

there.[227]

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. The process of education is proceeding apace. OHADA institutions and 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, 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.

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