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Article

Isabelle Deschamps*

Assessing the *Organisation pour l'harmonisation en Afrique du droit des affaires*'s Contributions to Poverty Reduction in Africa: A Grounded Outlook

Abstract: This article inquires into the Organisation pour l'harmonisation du droit des affaires en Afrique (OHADA)'s claims to innovation for its law reform processes and into its ambition to become a precedent for pursuing legal integration among countries elsewhere in Africa and in the world. It seeks to assess whether the OHADA regime effectively contributes to, or has the potential to contribute to, socio-economic development in member states. In making this assessment, the article revisits assumptions about the part that international and Western inspired law should play in development, institutional renovation and law reform in OHADA countries. The article argues that a shift of paradigms should occur in OHADA and international economic law from the foreign investor credo towards a more nuanced empirically informed approach to law making. Legal, policy and economic experts should concentrate more efforts on the needs, practices and realities of businesses in OHADA states, particularly local enterprises the majority of which are micro, small and medium (MSM) and are regulated by both formal and unofficial rules. Focusing on facilitating the operation of local businesses as well as on poverty reduction rather than on making regional economic integration, the dominant goal of business law reform in the OHADA can lead to commercial rules and strategies more successful at fostering sustainable development in member parties.

Bearing this in mind, the article analyses some of the innovations ascribed to the OHADA regime with a view to investigating whether they actually contribute usefully to the operation of businesses and more generally to socio-economic development in member states. The attributes examined concern both the form and the substance of the new law. Part A looks at the alleged increased physical accessibility and logical ordering of member states' business law rules. In order to better appreciate the impact of this claimed novelty, Part B focuses on the OHADA Acts themselves and analyses three of their fundamental characteristics, namely their supranational, transplanted and viral-like nature, the latter two qualifiers being used metaphorically. The article shows that while OHADA-promoted rules and concepts are innovative in a number of respects,

their supranational, transplanted and viral qualities have either little, none or adverse effects on the operation of local MSM businesses in the OHADA region.

Some commentators contend that the adverse effects and poor effectiveness of laws can be linked to a system's legal origins. In particular, law and economics scholars and other academics have asserted that common law is a superior normative framework to civil law for law reform aimed at promoting economic development and the "rule of law". Part C considers this claim and argues that the debate is beside the point since it presupposes a hermetic conception of legal traditions, conceives development as being primarily dependent on foreign investment and does not rest on solid empirical data from OHADA states.

Keywords: law reform, OHADA, micro, small, medium businesses, development, commercial law

***Corresponding author: Isabelle Deschamps,** Institute of Comparative Law, McGill University, 3644 Peel Street, Montreal, QC H3A 1W9, Canada, E-mail: isabelle.deschamps2@mail.mcgill.ca

1 Introduction

In 1993, in the midst of an economic and financial crisis that made the CFA Franc plummet to 50% of its value,[1] 14 mostly West and Central African States[2] created the *Organisation pour l'harmonisation en Afrique du droit des affaires* ("OHADA") with a declared objective to promote economic integration and development through the modernisation and harmonisation of their business laws.[3] To do so, the organisation adopted uniform laws ("*Actes Uniformes*" or the "Acts") and related regulations meant to constitute the primary source of formal business law in member states.

The promotion of the OHADA and its *Actes uniformes* has intensified since its creation, especially since UNIDROIT and the World Bank began supporting

1 "*La délicate évolution du franc CFA*", Jeune Afrique, 13 January 2009, available at: <www.jeuneafrique.com>.

2 Benin, Burkina Faso, Cameroun, Chad, Comoros, Côte d'Ivoire, République Centrafricaine, Republic of Congo, Gabon, Equatorial Guinea, Mali, Niger, Senegal and Togo.

3 *Traité relatif à l'harmonisation du droit des affaires*, 17 October 1993, 4 JO OHADA 1 (1 November 1997), available at: <http://www.ohada.org>, 16 ratifications on 3 April 2001 ["OHADA 1993 Treaty"] as amended by *Traité portant révision du traité relatif à l'harmonisation du droit des affaires en Afrique*, 17 October 2008, available at: <http://www.ohada.org> ["OHADA 2008 Treaty"], jointly, "OHADA Treaty", preamble and s1.

the project in the middle of the last decade, alongside France.[4] The latter helped propel the initiative and remains its strong advocate.[5] Moreover, supporters (lawyers, politicians, consultants, professors) abroad and within member states have been celebrating various claimed novelties instituted by the regime.

This article inquires into the OHADA's claims to innovation for its law reform processes and into its ambition to become a precedent for pursuing legal integration among countries elsewhere in Africa and in the world. In particular, it seeks to assess whether the OHADA regime effectively contributes to, or has the potential to contribute to, socio-economic development in member states. In making this assessment, the article revisits assumptions about the part that international and Western inspired law should play in development, institutional renovation and law reform in OHADA countries. The article argues that a shift of paradigms should occur in OHADA and international economic law from the foreign investor credo towards a more nuanced empirically informed approach to law making. Legal, policy and economic experts should concentrate more efforts on the needs, practices and realities of businesses in OHADA states, particularly local enterprises the majority of which are micro, small and medium (MSM) and are regulated by both formal and unofficial rules.[6] Focusing on facilitating the operation of local businesses as well as on poverty reduction rather than on making regional economic integration, the dominant goal of business law reform in the OHADA can lead to commercial rules and strategies more successful at fostering sustainable development in member parties.[7]

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4 UNIDROIT, *Préparation par UNIDROIT d'un projet d'Acte Uniforme sur le droit des contrats*, available at: <www.unidroit.org/french/legalcooperation/ohada.htm>, accessed 9 June 2013; and M. Fontaine, *L'avant-projet d'Acte uniforme OHADA sur le droit des contrats. Quelques réflexions sur le contexte actuel*, lecture given at the Club OHADA Canada forum on L'arbitre, l'avocat et les entreprises face au droit des affaires de l'OHADA (Montreal, 23 March 2012) [*Forum OHADA*]; The World Bank, *Project – Improved Investment Climate within the Organization for the Harmonization of Business Law in Africa (OHADA)*, 26 June 2012, available at: <www.worldbank.org> (for details of recent support granted by the Bank to the OHADA).

5 "Rencontre entre le ministre chargé de la coopération, M. Henri de Rincourt, et le Secrétaire Permanent de l'OHADA, Me Dorothé Sossa (16 mars 2011)", Ministère des Affaires Étrangère et Européennes-France (16 March 2011), available at: <www.diplomatie.gouv.fr> (for a recent example of France's support to the OHADA).

6 The MSM businesses this article is concerned with include single person businesses to 200 employee ones.

7 D. Rodrik, *The Global Governance of Trade as if Development Really Mattered* (October 2001) United Nations Development Program, available at: Weatherhead Center for International Affairs, available at: <www.wcfia.harvard.edu> (arguing that poverty reduction should be a policy development goal *per se* alongside growth and trade integration).

Bearing this in mind, the article analyses some of the innovations ascribed to the OHADA regime with a view to investigating whether they actually contribute usefully to the operation of businesses and more generally to socio-economic development in member states. The attributes examined concern both the form and the substance of the new law. Part A looks at the alleged increased physical accessibility and logical ordering of member states' business law rules. In order to better appreciate the impact of this claimed novelty, Part B focuses on the OHADA Acts themselves and analyses three of their fundamental characteristics, namely their supranational, transplanted and viral-like nature, the latter two qualifiers being used metaphorically. The article shows that while OHADA-promoted rules and concepts are innovative in a number of respects, their supranational, transplanted and viral qualities have either little, none or adverse effects on the operation of local MSM businesses in the OHADA region.

Some commentators contend that the adverse effects and poor effectiveness of laws[8] can be linked to a system's legal origins. In particular, law and economics scholars[9] and other academics[10] have asserted that common law is a superior normative framework to civil law for law reform aimed at promoting economic development and the "rule of law". Part C considers this claim and argues that the debate is beside the point since it presupposes a hermetic conception of legal traditions, conceives development as being primarily dependent on foreign investment and does not rest on solid empirical data from OHADA states.

A better approach is to examine the Acts' actual effects and uptake by indigenous entrepreneurs and foreign enterprises in member states. The claimed novelties of the OHADA, the fundamental characteristics of its laws and the impact of their legal origins should be assessed by reference not to the benefits that are said to derive, but *in fact do derive*, from OHADA laws for foreign and domestic businesses. Assembling the data necessary to make statistically significant conclusive findings as to the actual effects of these laws would require a massive and diverse sampling. While such an investigation is beyond the scope

8 Although related, the effectiveness and the effect of (new) laws should be distinguished. Effectiveness concerns the extent to which new laws achieve their reform goals (i.e. social change, increased investments, increased business incorporation), whereas the effects of laws concern all predictable and non-predictable actual outcomes: P. Ewick, "Penetration of Law", in D.S.C. (ed.), *Encyclopaedia of Law and Society: American and Global Perspectives* (Thousand Oaks, CA: Sage, 2007), p. 1102.

9 R. La Porta, F. Lopez-de-Silanes and A. Schleifer, *The Economic Consequences of Legal Origins*, 46 Journal of Economic Literature, no. 2 (2008), 285.

10 S.F. Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 30 The Journal of Modern African Studies, no. 4 (2001), 571.

of this study, the research and analysis reported out in this article is informed by specific on-the-ground examples of social and economic realities and business practices in the OHADA region, some of which are drawn from the author's own empirical research. That is, this article seeks to provide a snapshot of some paradigmatic situations involving women MSM entrepreneurs. This research was conducted through interviews with women entrepreneurs, OHADA agents and jurists and observations made in Benin, Cameroon and Côte d'Ivoire in 2010, 2011 and 2012.[11] The data I collected during these interviews suggests that significant gaps persist between officially enacted law and everyday business practices in the OHADA region. It also highlights the limited reach of the Acts on MSM businesses in member states.

To help resolve these difficulties, the OHADA should aim to construct a *sui generis* commercial legal system that would effectively make room for indigenous trading practices and customs, taking account of the interests of local citizens, banks, informal financiers and businesses. The conclusion sets forth an outline of a methodology for law making and law reform in the OHADA region. The author has coined the expression "clinical legal pluralism" to characterise the key features of this methodology. This methodology is both empirical and conceptual. It begins with empirical observation of the informal "law of the streets" that would be identified as the living law under a legal pluralist analysis. The methodology then demands that officials who manage the law reform process give the creators of this informal law an adequate opportunity to state how the legal reform process should address their concerns. The point is that there may be occasions when the formal law can best proceed by deferring to local informal law, rather than creating general rules that are meant to apply to all entrepreneurial activity, whatever its size and scope. The law reform methodology proposed in the conclusion of the article is inspired by several contemporary theoretical approaches, most notably critical legal pluralism, critical development studies, legal pragmatism and transsystemic approaches to comparative legal regulation.

11 Interviews were conducted in Benin (Cotonou, Porto-Novo, Glo Yekon) from 19 June to 5 July 2011, 25 to 29 April, 21 to 28 May and 11 to 18 June 2012; in Cameroon (Douala, Yaoundé, Bangoua, Abonbang, Dschang, Maroua, Maga, Ngaounderé) from 5 to 20 July 2011 and 30 April to 20 May 2012; and in Côte d'Ivoire (Abidjan, Dabou, Debrimo) with 80 women entrepreneurs aged twenties to sixties, operating registered and non-registered local MSMs, mostly in retail and/or wholesale sector; 5 businessmen (aged twenties and forties, operating small local non-registered businesses and large local businesses; in retail sale and information technology); 6 lawyers practicing OHADA law; 12 agents from the OHADA institutions (training and research centre; Permanent Secretariat; and regional court); 3 clerks working for national company registries (RCCM); 2 employees of microcredit institutions; 1 journalist; 1 accountant.

1.1 Innovation through increased access and order of business laws

One of the outcomes of the OHADA initiative that is most widely praised by lawyers, law professors and jurists involved in the reform process and practising OHADA law is the increased physical accessibility and logical ordering of business laws in the region.[12]

Indeed, before the adoption of the Acts, commercial rules were scattered in an array of hard copy texts, many of which dated back to the colonial era, were in scarce supply and often were difficult to find.[13] This made it challenging for judges, lawyers and their clients to know which rules to apply, especially when rules were being repealed by badly disseminated texts.[14] Some believe this uncertainty facilitated attempts to corrupt the independence of the judicial system.[15]

The OHADA sought to respond to the problem of legal unpredictability in different ways. First, it attempted to gather, order and unify "all" formal business laws of its member states into *Actes Uniformes* that would apply automatically in OHADA countries once their regional adoption process is completed. While the OHADA's name and its constitutive texts[16] refer to legal "harmonisation", this term does not accurately reflect the end product, for example the Acts, which are

12 Interviews with: Me Pierre Boubou, July 2011, Douala, Cameroon; Me Kele Kone, May 2012, Abidjan, Côte d'Ivoire; Me Theodore Bomiso, May 2012, Abidjan Côte d'Ivoire; Comments of speakers at *Forum OHADA, supra* note 4; J. Kamga, *L'apport du droit de l'OHADA à l'attractivité des investissements étrangers dans les États Parties*, 5 La Revue des Juristes de Sciences Po (2012), 43, at 45.

13 For example, before 1997, privileges created during colonisation were scattered and disorderly listed in OHADA states' formal laws. The *Acte uniforme portant organisation des sûretés*, 17 April 1997, 3 JO OHADA 1 (1 October 1997), available at: <http://www.ohada.com> [*1997 Act on Secured Transactions*] attempted to order them, limit their scope, remove out-dated ones and established publicity requirements: J. Issa-Sayegh et al., *OHADA, Traité et actes uniformes commentés et annotés* (3rd ed., Paris: JURISCOPE, 2008).

14 Incidents occurred in courts whereby one lawyer pleaded a given statute only to be rebutted by his opponent basing himself on another law, which on its face was equally applicable to the facts of the case. It came to the judge to decide, more or less arbitrarily since no precise information was available, regarding which of the two texts was actually in force: Conversation with Me Alain Fénéon, attorney and arbitrator practising African commercial law, Montreal, 24 March 2012.

15 C. Ayémonna, *Femmes juges du Bénin: visages et contribution à l'évolution du droit* given at the Association Internationale des Femmes Juges, Section béninoise (AIFJ-Bénin) (Cotonou, 28 June 2006), 15 Journal Officiel 659, 659 (judge presiding the Beninese Constitutional Court from 1998 to 2008 and decrying corruption amongst the Beninese judiciary).

16 *1993 OHADA Treaty* and *2008 OHADA Treaty*.

uniform laws.[17] At the time of writing, nine Acts have been enacted on topics ranging from accounting practices to transportation of goods by road. They are bound together in what practitioners commonly call the "code vert" (green code) even though this is not a legal code *per se*.[18] Indeed, the consolidated Acts were not drafted as a single, integrated and cross-referenced whole.[19]

A second significant measure adopted by the OHADA to increase legal predictability and the logical ordering of business laws in member states is section 10 of the *OHADA Treaty*, which provides that the Acts are mandatory in member states notwithstanding any conflicting national laws – whether these laws were enacted prior or after the Acts.[20] This rule gives the Acts a superseding effect on national commercial legislation across the region. Moreover, various provision of the Acts either specifically provide that their respective Act abrogates incompatible national laws or imply this effect *a contrario*.[21]

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17 See: R.A. Macdonald, *Three Metaphors of Norm Migration in International Context*, 34 Brooklyn Journal of International Law (2009), 603 (analysing the meaning, "use and abuse" of the metaphor of harmonisation and highlighting "the rhetoric that underlies appeals to harmonisation in international commercial law reform: unification is bad; harmonisation is good." This may explain in part the reference to "harmonisation" as opposed to "unification" in the OHADA's name and stated objectives); M. Boodman, *The Myth of Harmonization of Laws*, 39 American Journal Comparative Law, no. 4 (1991), 699 (discussing the concepts of harmonisation and legal harmonisation, the effects and of the suitability of using such a legal reform technique in given circumstances).

18 Issa-Sayegh (2008), *supra* note 13.

19 The "code vert" was not initiated nor is funded by the OHADA or its member states but by two private French Associations: UNIDA (a private grouping of businesses operating in Africa and other actors) and Juriscope (a public/private grouping of French law professors and other actors).

20 Section 10 reads: "les Actes Uniformes sont directement applicables et obligatoires dans les États parties, nonobstant toute disposition contraire de droit interne, antérieure ou postérieure".

21 s 336 of the *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution*, 6 JO OHADA 1, 1 June 1998, available at: <www.ohada.org>; 396 of the *Acte uniforme relatif au droit des sociétés coopératives*, 15 December 2010 (entered into force on 16 May 2011), 23 JO OHADA 1, available at: <www.ohada.org>; 919 of *Acte uniforme relatif au droit des sociétés commerciales et du groupement d'intérêt économique*, 17 April 1997, 2 JO OHADA 1, available at: <www.ohada.com>; 257 of the *Acte uniforme portant organisation des procédures collective d'apurement du passif*, 1 July 1998, 7 JO OHADA 1, available at: <www.ohada.com>; 112 of the *Acte uniforme portant organisation et harmonisation des comptabilité d'entreprises*, 10 JO OHADA 1, available at: <www.ohada.org>; 35 of the *Acte uniforme relatif au droit de l'arbitrage*, 11 March 1999, 8 JO OHADA 1, available at: <www.ohada.com>; 4 of the *Acte uniforme portant organisation des sûretés*, 15 December 2010 (entered into force on 16 May 2011), 22 JO OHADA 1, available at: <www.ohada.org> ["2010 Act on Secured Transactions"] Section 227 provides for non-retroactivity of the Act (s 150 of the 1997 Act on Secured Transactions repeals all prior national rules that are contrary to the 1997 Act); and 1 of the *Acte uniforme relatif au droit commercial général*, 15 December 2010 (entered into force on 16 May 2011), 23 JO OHADA at 1 (available at: <www.ohada.com>) ["2010 Act on General Commercial Law"].

Third, to contribute to the unified interpretation of the Acts across the OHADA region and ensure proper application of s10 of the OHADA Treaty, the OHADA instituted a regional court, the Cour Commune de Justice et d'Arbitrage ("**CCJA**")[22] in Abidjan, Côte d'Ivoire and an OHADA law training centre for lawyers, magistrates, accountants and other professionals, the École Régionale Supérieure de la Magistrature (ERSUMA) in Porto Novo, Benin.[23] In 2001, the CCJA delivered an opinion on the interpretation to be given to s10.[24] It advised that s10 of the OHADA Treaty contains, in and of itself, an abrogative rule according to which the Acts automatically repeal incompatible or overlapping national laws save as otherwise specifically provided in the Acts. Thus, according to the Court, an Act's abrogative effect on incompatible or overlapping national laws or provisions derives from s10 of the OHADA Treaty, from the provisions of the Act itself or from both.[25]

Fourth, the OHADA has taken steps to computerise various aspects of the regime. For example, it has begun making the Acts available online.[26] Moreover, the 2010 Act on general commercial law institutes a trade and personal property credit registry (*Registre du commerce et du crédit mobilier* (RCCM)) and provides that the registry's national and regional databases as well as registration applications can be in electronic format.[27] Sections 303 to 305 of the Act allocate

22 Ohada Treaty, s14.

23 Private independent OHADA clubs generally aimed at promoting the regime have also been multiplying in and outside Africa (including two in Canada) over the past decade to whom the OHADA provides limited documentary support: Exchange with Karel Dogué, president of Club OHADA Canada, 16 March 2012.

24 Opinion no.1/2001/EP (*Demande d'avis de la République de Côte d'Ivoire enregistrée au greffe sous le no. 002/2000/EP du 19 octobre 2000*), 30 April 2011, Recueil de jurisprudence CCJA, No. Spécial, January 2003, 74.

25 *Ibid*. See also: *La Société Elf-oil Côte d'Ivoire devenue Total FINAELF v La Société COTRACOM*, Case no. 012/2002, 18 April 2002, Recueil de jurisprudence CCJA, N° spécial, 53 (on the combined application of s10 of the OHADA Treaty and ss 336 and 337 of the *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution*, which results in a wide-ranging abrogation of incompatible national laws relating to this topic).

26 See <www.ohada.org> (OHADA's official website, which reproduces some of the Acts and contains a documentary section still under construction). See also: <www.ohada.com> (UNIDA's comprehensive OHADA law web database).

27 2010 Act on General Commercial Law, ss 79-81; P. Crocq, *Les grandes orientations du projet de réforme de l'Acte uniforme portant organisation des sûretés* 197 Droit et patrimoine (2010) 52 and L.Y. Black, *L'enjeu économique de la réforme de l'Acte uniforme OHADA portant organisation des sûretés: un atout pour faciliter l'accès au crédit* (2007) 197 Droit et patrimoine 46, at 50-51 (describing the difficulties of national commercial registry systems in OHADA states prior to the 2010 Act on General Commercial Law and the measures envisaged by the Act to palliate to them including the computerisation of the regime).

a 2-year delay from the date of the Act's entry into force (for example May 2011) for the computerisation of the registry and application procedures to be completed. At the time of writing, this computerisation remains wishful thinking for lack of financial, material and human resources at the state and regional levels.[28] As a matter of fact, during a field trip in Cameroon in 2012, I visited RCCM offices in the cities of Yaoundé, Maroua and Ngaoundéré and none were computerised.

It could be anticipated that the four measures described above would contribute, at least minimally, to increasing physical access, predictability and logical ordering of business laws in the OHADA region. Moreover, a perusal of the comments posted on Ohada.com[29] by African jurists and law students hints at their authors' pride and enthusiasm towards the OHADA.[30] While the organisation did not explicitly state its intention to generate these sentiments among African jurists, such a feeling can be viewed as a positive actual outcome of the reform and of the (perceived) increased access and ordering of business rules in the region. This may facilitate the acculturation process required to ensure that the new laws are integrated and applied in each state.

However, much remains to be achieved for business laws in West and Central Africa to attain levels of accessibility, predictability and ownership by local jurists and enterprises necessary to effectively contribute to sustainable socio-economic development in the region.

Indeed, the abrogating effect of the Acts on domestic laws – whether resulting from a specific provision in an Act or from the CCJA's interpretation of s10 of the OHADA Treaty – is not in practice recognised by all. Nor is the scope of the abrogating effect understood in a uniform manner across member states. For one thing, the validity of the Acts' abrogative effect under national law has been challenged on various occasions and the CCJA's 2001 interpretation of s10 remains controversial.[31] Moreover, colleagues and students in Benin

28 M.S. Tumnde, borne Njikam, "OHADA as Experienced in Cameroon: Addressing Areas of Particular Concern to Common Law Jurists", in C.M. Dickerson (ed.), *Unified Business Laws for Africa – Common Law Perspectives on OHADA* (2nd ed., London: IEDP, 2012), pp. 90-91 (for an account of the various deficiencies of the commercial registry system in Cameroon).

29 See note 32.

30 Similarly, speakers (professors, students, members of the OHADA Permanent Secretariat, lawyers, etc) at the *Forum OHADA*, *supra* note 4, painted a promising picture of the OHADA while little attention was paid to its failures.

31 P. Diédhiou, *L'article 10 du Traité OHADA: quelle portée abrogatoire et supranationale?* 2 Revue de droit uniforme (UNIDROIT), (2007), 265, at 276-283 (being critical of the CCJA's extensive interpretation of s10); *contra*: J. Issa-Sayegh, *La portée abrogatoire des Actes Uniformes sur le droit interne des parties*, 39-40 Revue burkinabè de droit (2001), 51, at 60-62; *Réflexions et suggestions sur la mise en conformité du droit interne des Etats parties avec les Actes uniformes de l'OHADA et réciproquement*, 850 Penant, (2005) 6 (approving the CCJA's interpretation of s 10).

indicated that the 1807 French *Code de commerce* continues to be taught in certain law schools and used by jurists notwithstanding the incompatibility of various of its provisions with the Acts.[32] The reasons for this are diverse: a preference on the part of jurists and their clients for a law they already know, doubts regarding the validity under states' constitutions of the supranational character of the Acts,[33] national courts being protective of their jurisdiction,[34] debates about whether and to what extent a given Act or some of its rules contradict, supersede or abrogate specific local laws,[35] varying interpretations of the Acts between countries and lack of training of local lawyers, magistrates and professors of OHADA law. Regarding the latter, the CCJA's and the ERSUMA's work and human resources are insufficient to respond to the needs of the OHADA region's population of over 270 million inhabitants.[36] Smaller agglomerations, rural areas and the MSM sector are particularly neglected in this regard.

Indeed, ERSUMA and private firm legal education activities are predominantly aimed at and financially accessible to lawyers, accountants, bankers and institutional representatives in African commercial hubs and foreign countries (mostly France).[37] In Benin, Cameroon and Côte d'Ivoire, OHADA law trainings in remote areas and in small- to medium-size cities are still rare.[38] The Acts also

32 Observations and informal discussions with law students and jurists in Cotonou (Benin), May/June 2010.

33 Tumnde (2012), *supra* note 28, at 83 (on constitutional issues surrounding the applicability of the OHADA law in Cameroon); Diédhiou (2007), *supra* note 31, at 271.

34 For example, draft Acts on intellectual property law and on general contract law were commissioned but the adoption process was interrupted for a number of reasons including national courts' fear of losing jurisdiction to the benefit of the CCJA. For other reasons for which the draft Act on contracts was shelved, see Part C.

35 Incompatibility may concern either the spirit or the letter of the law, or both. It can concern selected provisions only or whole laws. This makes findings of incompatibility often requiring to be litigated. For example, see: *Société ivoirienne d'emballage métallique dite SIEM v Sté ATOU et Banque ivoirienne pour le commerce et l'industrie de la Côte d'Ivoire dite BICICI* Recueil de jurisprudence CCJA, No. Spécial January 2003, 39 (no incompatibility between OHADA law and an Ivoirian procedural provision.)

36 Central Intelligence Agency, *World Fact Book*, available at: <www.cia.gov>, accessed on 9 June 2013.

37 For example, see: OHADA Secrétariat Permanent, "Conditions d'admission et de séjour pour la formation à l'ERSUMA" (1 July 2010), available at: <http://www.ohada.org/formation.html> (indicating that that a 5-day training course costs FCFA 350,000 (EUR 534). Expensive trainings are also organised by private firms and legal professionals).

38 Interview with Me Johnson, RCCM clerk, Ngaoundéré, Cameroon, May 2012 (noting the lack of continuing legal education in his region on OHADA law and indicating he was not aware of the enactment of the 2010 Acts on General Commercial Law and on Secured Transactions). The

remain inaccessible for the majority of MSM local entrepreneurs. Indeed, many of them are women[39] who have low levels of formal education,[40] are not trained to understand formal business law and have little if any resources to pay for lawyers to navigate the Acts on their behalf.

Moreover, online access essentially benefits foreign lawyers, their clients and a minority of local jurists with a reliable Internet connection. Indeed, permanent Internet access is still available to only a few, communications infrastructures remain deficient in the region and power shortages are common.[41] MSM businesses, law students and the general public typically have no access to electronic devices for accessing the laws.

Finally, while the Acts have clarified the law applicable to business-related activities in a number of respects, they also brought about conflicts of laws issues that did not exist prior to the OHADA. Roughly stated, pre-OHADA, the difficulty was to determine whether laws existed that regulated a case and if yes, which rule was in force. Post-OHADA, the question is whether a conflict or an overlap exists between regional and national laws and if yes, whether the former supersede, explicitly repeal (by virtue of a specific OHADA Act disposition) or implicitly abrogate (by virtue of an extensive interpretation of s10 of the OHADA Treaty) national laws. Thus a shift occurred from conflicts needing to be resolved between national business laws only to conflicts between national and transnational laws. If the OHADA's objective is to encourage foreign investment through simplified and clearer business laws, the controversial interpretation of s10 of the OHADA Treaty and the non-uniform application of the abrogative provisions of its Acts continue to make it difficult for foreign investors to transact in the region without the assistance of local experts. This situation undermines, more than promotes, legal certainty.

International Trade Center "ACCESS II program for African businesswomen in international trade" is one of the few examples of commercial law trainings provided in remote areas of OHADA states: ITC <www.intracen.org>; Interview with Me Pierre Boubou, Douala, Cameroon (July 2011, May 2012); Interview with Me Clarisse Motsebo, Yaoundé, Cameroon (May 2012).

39 In Sub-Saharan Africa, 84% of women in the non-agricultural sector are informally employed compared to 63% for men: United Nations Development Fund for Women (UNIFEM), *Progress of the World's Women 2005: Women, Work and Poverty*, (2005), available at: <www.unifem.org>, at 39.

40 Data from 2010 estimate the level of female literacy (e.g. women aged 15 and over able to read and write) to 30.3% in Benin, 46.6% in Côte d'Ivoire and in Cameroon data from 2001 estimate this to 67.8%: Central Intelligence Agency, *World Fact Book – Benin – Cameroon – Côte d'Ivoire*, available at: <www.cia.gov>, accessed on 9 June 2013.

41 "Coupure de l'internet au Bénin: de graves conséquences pour l'économie nationale", La Nouvelle Tribune (16 January 2012), available at: <http://www.lanouvelletribune.info>.

Further implications of the unification of formal business rules in the OHADA region for the operation of businesses are discussed in Part B, which looks at the specific legislative instruments – the *Actes uniformes* – that have been promulgated by the organisation.

1.2 The OHADA *Actes uniformes*: supranational transplants with viral effects

This section analyses potential implications of three essential attributes of the OHADA Acts for economic development. These attributes are (i) their supranational character; (ii) their viral transmission logic and (iii) the transplanted nature. By using the concept of supranationalism and the metaphors of the virus and of the transplant to analyse the mechanism of the OHADA Acts, this article is not implying an *ex ante* or *prima facie* judgement of these characteristics as positive, negative or neutral. Rather, the point is to use these concepts to illustrate and understand how OHADA norms are created and operate.[42] Identifying the qualities and understanding the workings of the Acts will help measure the actual uptake and effect of OHADA, laws as well as assess whether OHADA rules are beneficial, harmful or have no consequence on economic agents in the region.

1.2.1 Supranational rules

The mechanisms set out in the OHADA Treaty for the preparation, adoption and application of the Acts signal their supranational character. Indeed, the institution responsible for coordinating the drafting of the Acts is the OHADA's Permanent Secretariat, the administrative branch of the organisation.[43] It is meant to work in concert with member states but it has the last word on the choice of topics to be legislated, on the selection of teams of drafters and on final approval of draft Acts.[44] Thus, law making in the OHADA remains largely at the regional supranational level. The Acts are adopted by the OHADA's Council of Ministers, a regional institution composed of Justice and Finance

42 Macdonald (2009), *supra* note 17 (analysing the metaphors of the transplant and of viral propagation in international law reform initiatives).

43 OHADA Treaty, s 6.

44 The CCJA must also provide its opinion on the final draft of Acts: OHADA Treaty, s7.

Ministers of member states, most of whom are non-elected.[45] Finally, once formally adopted and published, the Acts are mandatory and apply directly in member states by virtue of ss 9 and 10 of the OHADA Treaty.[46]

From a development perspective, concerns arise with regard to the supranational nature of the Acts and of the institutions that prepare, adopt and interpret them. Indeed, supranationalism in the OHADA implies that member states surrender some of their sovereignty to the organisation. This can contribute to eroding the legitimacy of national laws and institutions in what are already weak states. It can also undermine the poor trust that many African citizens have in their national legal system.[47] As a matter of fact, one of the less officially publicised reasons put forward to justify the establishment of a supranational structure was the need to ensure transparency in the African business legal system and to control undue influence of national elites.[48] If anything, this is an acknowledgement of the weakness of member states' legal structures. Further weakening states' structures through supranationalism may not be the appropriate solution to their democratic deficits.

Moreover, the supranational character of the Acts combined with their superseding or abrogating effect on incompatible domestic laws give the regime a strong positivist nature. To a certain extent, this perpetuates the hierarchical and monopolistic legal system imposed by France during the colonial period.[49] Indeed, from the beginning of the twentieth century to the Second World War,

45 OHADA Treaty, s6; C.M. Dickerson, "Perspectives on the Future", in C.M. Dickerson (ed.), *Unified Business Laws for Africa – Common Law Perspectives on OHADA* (2nd ed., London: IEDP, 2012), at 111.

46 Decisions of the CCJA are also supranational and national courts must submit to them: OHADA Treaty, ss 14 and 20.

47 Tumnde (2012), *supra* note 28, at 86-87 (on legislative, judicial and institutional supranationalism in the OHADA and the difficulties this entails including that it may contribute to making national courts and parliaments "moribund").

48 C.M. Dickerson, *The Future of International Law and Development: Flying under the Radar*, 35 North Carolina Journal of International Law and Commercial Regulation, no. 3 (2010), 563, at 563-564 (claiming that the OHADA responds to corruption and undue influence problems of member states by "flying under the radar", that is, by creating a supranational system that bypasses national structures); *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 Columbia Journal of Transnational Law, no. 1 (2005), 17, at 57 (discussing how the supranational OHADA judicial structure makes it independent from "authoritarian and extractive national institutions"), and at 55 (discussing more publicised possible motivations of heads of states for adopting the supranational structure).

49 See also: D. Acemoglu, S. Johnson and J.A Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 The American Economic Review, no. 5 (2001), 1369 (arguing that most African colonies were structured and governed according to an "extractive" as opposed to "settler" logic, which persisted after independence).

relevant laws[50] of the French metropole applied in a relatively uniform manner across its colonies in the region and little room was left for local commercial laws to cohabitate.[51] A noteworthy distinction between the colonial and OHADA regime, however, is that under the former, legislative authority resulted from a top-down imposition, whereas in the OHADA, similar to the European Union, this authority results from member states' voluntary delegation of their jurisdiction in business law matters. Although this is a significant caveat, given OHADA states' experience with colonial legislation, it is difficult to sustain that the supranational nature of the Acts is an innovation in Africa.[52] More important, in light of colonial experiences, the wisdom to reinstitute regional foreign-inspired supranational laws is questionable. Model laws or legislative guides, for example, might be more appropriate legal reform tools since they encroach less on state sovereignty than supranational laws.

1.2.2 Viral transmission logic

The virus metaphor allows for drawing insightful parallels between the transmission of viruses to organisms (planned or unplanned; self-perpetuating; vertical, horizontal or external spreading) and the propagation of OHADA rules in the legal systems of member states.[53]

Three elements evidence the viral logic of OHADA laws. First, the Acts' supranationalism and abrogating effect on incompatible local laws result in the Acts' vertical (from the top down) penetration into national legal systems.

50 For example, *Code de commerce de 1807* (applicable overseas by the 7 December 1850 Law and decrees adopted between 1850 and 1870); *Loi du 24 juillet 1867 sur les sociétés anonymes et en commandites par actions* (applicable in Africa by a 30 December 1868 decree); *Loi du 7 mars 1925 sur les sociétés à responsabilité limitée* (applicable overseas by virtue of s 43).

51 Joireman (2001), *supra* note 10, at 580-581. The situation was similar in Belgian Congo: Acemoglu (2001), *supra* note 49, at 1375-1376. Indigenous business rules continued to develop during colonisation but in a more covert manner: I. Deschamps, "Commercial Law Reform in Africa: A Means of Socio-Economic Development, But for Whom? Perspective of Women Entrepreneurs in Benin" LLM Thesis, 2011 [unpublished], at 34-35. The situation in British colonies was slightly different due to indirect rule, which made it easier for indigenous and foreign rules to cohabitate.

52 Supranational law is not novel outside of Africa either. This characterised canon law during the Middle Ages in Europe, American states' laws prior to the confederation and multiple laws governing the European Union: J.W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 University of Kansas Law Review (1994), 605, at 622-623.

53 Macdonald (2009), *supra* note 17, at 636.

This penetration is planned for in the OHADA Treaty and the Acts and reveals the regime's ambition to prevail over, rather than cohabitate with, incompatible or overlapping domestic laws.

Second, the OHADA Treaty's extensive definition of "business law" gives the Acts virus-like effects. Similar to the manner in which a virus spreads in the body, the rules of the Acts influence multiple legal orders and diverse areas of the law within national legal systems.[54] Section 2 of the OHADA Treaty defines business law as encompassing arbitration, general commercial law, secured transactions, transportation of goods by road, cooperative societies, insolvency, commercial societies, recovery procedures, labour law, accounting practices, law of sale and any other subject that the Council of Ministers may deem fit to introduce in accordance with appropriate procedure. Thus s 2 confers on the organisation jurisdiction to regulate a wide array of activities, some of which – explicitly listed or implicitly inferred – are not traditionally associated with business law as a discrete field (e.g. judgement recovery procedures, arbitration, labour,[55]consumer contracts,[56] general contracts,[57] penal law[58]). This can be assimilated to the planned horizontal transmission (spreading) of OHADA rules across areas of the law. To present, the OHADA has adopted Acts on all topics listed in s2 except for labour law and the law of sales.

Horizontal spreading of OHADA law is further increased by the fact that the Acts affect domains of the law that are not targeted by the already wide-ranging definition of s2. While laws never operate in bell jars, the broad definition of "business law" brings about unplanned incidental propagation of OHADA law to areas that the regime did not intend to regulate. These include family, land and tax law. For example, in Benin, the interplay between OHADA secured

54 OHADA Treaty, s 2.

55 Work on an Act on labour law was initiated in the past years and is still under way. The strong local nature of labour law renders consensus on a final draft difficult to attain: A. Blackett, *Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa*, 32 Comparative Labor Law Policy Journal, no. 2 (2011), 443.

56 A preliminary draft Act on consumer contracts was prepared in 2005 but has not been adopted at the time of writing: T.M. Bourgoignie and C. Masse, *Projet de loi uniforme sur le contrat de consommation pour les pays de l'OHADA*, Report submitted to the Federal Ministry of Justice (Ottawa, 2005).

57 UNIDROIT, *supra* note 4. See also note 40 and Part C.

58 Examples of OHADA rules creating penal offenses include: ss 1 & 243 of the *Acte uniforme portant organisation des procédures collectives d'apurement du passif*; Part 3 of the *Acte uniforme relatif au droit des sociétés commerciales et du groupement d'intérêt économique*; Part 3 of the *Acte uniforme relatif au droit des sociétés coopératives*; ss 69 & 140 of the 2010 Act on General Commercial Law.

transactions rules aimed at excluding residential property from seizure,[59] family code provisions defining residence and prohibiting polygyny[60] and the extent of polygyny notwithstanding formal prohibition results in a paradox. That is, the residence of a "legally" married woman in a polygynous marriage is protected from seizure while the residences (if different)[61] of "illegally" married women in the same family are not. In this case, the spreading effects of the provisions of the 2010 Act on Secured Transactions can cause unintended harm to the rights of women in polygamous unions.

Third, the viral nature of the regime appears from its ambition to expand its membership and to become *the* legal integration model for Africa and beyond. Indeed, Section 53 of the *OHADA Treaty* provides that membership is open to all African Union States as well as to other countries. Since its creation, three more West and Central African States joined the organisation including the Democratic Republic of Congo whose population nears seventy-four million people.[62] Moreover, in recent years, the OHADA deployed efforts to convince English-speaking West African countries such as Ghana and Nigeria to join the organisation.[63] Outside the African continent, steps have been taken since 1997 for the creation of the Organisation for Harmonisation of Business Law in the Caribbean modelled on and supported by the OHADA.[64] This gives an external

59 2010 Act on Secured Transactions, ss 198-199.

60 *Code des personnes et de la de la République du Bénin – Loi no. 2002–07*, 14 June 2004, available at: Yale Law School <http://www.law.yale.edu/rcw/rcw/jurisdictions/afw/benin/benin_family_code.htm>, ss 14, 15, 74, 123, 131.

61 D.J Falen, *Polygyny and Christian Marriage in Africa: The Case of Benin*, 51 African Studies Review, no. 2 (2008), 51, at 61 (Noting that in modern-day Benin polygynous men "often try to avoid cowife jealousy by housing wives in different places, sometimes in different towns.")

62 Central Intelligence Agency, *World Fact Book – Democratic Republic of Congo*, available at: <www.cia.gov>, accessed on 9 June 2013 (July 2012 estimate). DRC's adhesion to the OHADA was completed in September 2012: Ohada.com, "12 septembre 2012: Un grand jour pour la RDCONGO/Un grand jour pour l'OHADA/Un grand jour pour l'Afrique", 12 September 2012, available at: <www.ohada.com>. The other two countries that joined the OHADA since 1993 are Guinea Bissau (1996) and Guinea Conakry (2000).

63 Ohada.com, "OHADA.com vous informe: Setting up of the Foundation for a Unified Business Law in Africa/New York, USA/December 1, 2010", 2 December 2010, available at: <www.ohada.com>. The question, however, of the compatibility between the common law inherited system of Anglophone African countries and the largely civil law inspired OHADA Acts remains controversial: see Part C.

64 Thirty-six Caribbean States are part of the OHADAC project, some having inherited French or Spanish civil law inherited system, others British or American common law systems: *Organisation for Harmonization of Business Law in the Caribbean*, Brochure, October 2011, available at: <http://www.ohadac.com/ohadac-brochure.html>; "OHADA.com vous informe: Réforme OHADAC: prochaines étapes" 31 May 2011, available at: <www.ohada.com>. See also:

dimension to the viral transmission of OHADA norms: they seek to propagate outside of their host organisms (the current OHADA African states).

There are multiple implications and potential effects of the Acts' viral transmission logic on socio-economic development, poverty reduction and the operation of businesses, particularly local MSMs, in OHADA states. As was alluded to earlier, while viruses are generally viewed as harmful, there are multiple circumstances in which they can actually be beneficial to the organism or environment they affect.[65] Just as it cannot be stated in the abstract that viruses are always bad, only a comprehensive and empirically informed assessment of the OHADA rules' viral propagation effect can help predict and appreciate its real consequences on the operation of businesses on the ground. The paragraphs below discuss potential real outcomes of the Acts' viral character based on my doctrinal and empirical research to present.

The Acts' pretension to prevail over national laws by virtue of their supranational, superseding and/or abrogating effect can have both positive and negative consequences. On one hand, the disparate and out-dated colonial business laws of OHADA states can be assimilated to "parasites" that need to be eradicated by OHADA rules. As such, the Acts can be viewed as a good virus whose injection in the OHADA region helps overcome parasitic laws.

On the other hand though, similar to the supranational character of the Acts, the viral logic of OHADA rules can give the regime an intrusive character that local businesses and citizens may associate with the invasive nature of the colonial legal system. Such a perception will likely hinder acculturation and application of OHADA law and negatively affect the regime's effectiveness.

Second, regarding the Acts' planned horizontal viral transmission, some claim that the Section 2 definition of "business law", which encompasses subjects that are not traditionally viewed as pertaining specifically to the business law domain, gives the OHADA a novel character.[66] The regime is seen as moving across traditional boundaries between civil law, common law and commercial law as well as between private and public law. Moreover, one could argue that the s2 definition is an explicit acknowledgement of the *de facto* interrelation and

<http://ohadac.com/ohadac-and-acp-legal.html> and Ohada.com Newsletter, "F.U.B.L.A participation to a Presentation on OHADA and OHADA law organized by The Benin Embassy in the United States and the Corporate Council on Africa (CCA) on September 26, 2011, Washington, DC, USA." 14 October 2011, available at: <www.ohada.com> (for explicit references to OHADA as a model for OHADAC).

65 For example, by killing harmful bacteria, parasites or other more dangerous viruses: "A Few Good Viruses", Cosmos Online (7 February 2007), available at: <www.cosmosmagazine.com/node/1024>.

66 A. Ngwanza, *La tradition juridique en droit OHADA* given at *Forum OHADA*, *supra* note 4.

mutual influence between business, labour, disputes, crime and other areas of human activity. Taking cognizance of this is important for improving laws in Africa and elsewhere in the world. Indeed, multidisciplinary teams and increased coordination between lawmakers working in the different areas of the law (e.g. human rights, business, environment) can help business laws tackle socio-economic needs in a manner that is more comprehensive and will benefit not only large businesses or a certain elite[67] but a larger part of the economy and of society.[68]

There are however potential harmful effects to the planned and unplanned horizontal transmission of OHADA law operated by the s2 definition. One illustration of these harmful effects appears from the combined application s3 of the 2010 Act on General Commercial Law, which prohibits minors from carrying out acts of commerce, and s69 of the same Act, which provides that fraudulent performance of a formality prescribed by the Act (including those formalities that must be carried by those who carry out acts of commerce) shall be punished under national penal laws. Enforcing these provisions can be problematic in OHADA states in light of the fact that numerous teenagers and children carry out "acts of commerce" for their subsistence.[69] This is a case where the drafters of the Act could have benefited from the insight of sociologists, labour law regulators and criminologists, as well as from more grounded knowledge, for adopting better adapted laws.[70]

With respect to the horizontal unplanned transmission of OHADA norms in national and local legal orders that derives from the extensive definition of s2, an example of potential harmful effect on poverty reduction efforts was given above regarding secured transactions law and women in polygynous marriages. Regarding harm caused by horizontal unplanned transmission on the manner in which the OHADA Acts affect national tax laws and foreign and local

67 M. Stephens, *The Commission on Legal Empowerment of the Poor: An Opportunity missed*, 1 Hague Journal on the Rule of Law (2009), 132, at 134 (claiming that private sector development projects in poor countries still too often continue to be shaped by the interests of the wealthy, the "political elite and the well-connected who dominate the formation of (...) [formal] legal norms and the institutions that regulate them").

68 One example of a normative initiative seeking to integrate human rights concerns in the operation of businesses around the world is the Ruggie Rules: J.H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, draft (16 August 2011), available at: <http://ssrn.com>.

69 I. Deschamps, "Using Local Legal Cultures to Evaluate the OHADA Regime as a Precedent for Business Law Integration in the SADC", draft submitted for publication at the SADC Law Journal (22 April 2013) [on file with author].

70 Blackett (2011), *supra* note 55 (arguing that the OHADA should refrain from further pursuing work on an Act regulating labour relations because of its lack of expertise in this area).

businesses' fiscal conduct also merits empirical investigation. The lack of information on the interactions between OHADA law, fiscal practices and states' ability to collect taxes shows the need for business law jurists, tax experts and economists to collaborate with each other more when drafting commercial and fiscal laws and to be better educated on local fiscal practices in OHADA states.

Finally, viruses, whether their effects are good, bad or neutral, encounter resistance to their spreading and integration into their host. The same can be said of OHADA norms, in respect of which resistance comes from many fronts: member states, international organisations, local businesses and jurists. Whether ill- or well-founded, this resistance can take multiple forms and is not without its impact on both the effectiveness of the legal system. It might, for example, deflect law reform resources to other areas, or it might lead states not simply to abandon a particular reform but also to abandon the attempt to reform business law in any manner whatever. Careful examination of the actual reception (or non-reception) of OHADA norms is necessary in order to assess whether resistance is helpful or counterproductive for businesses and sustainable economic growth in OHADA states.

1.2.3 Transplanted law

For the most part, OHADA rules can metaphorically be equated with legal transplants.[71] The latter have been defined as "the domestic adoption by a state or community of a legal norm taken from elsewhere."[72] They relate to the incorporation of foreign legal institutions in domestic legal systems.[73]

The Acts incorporate a considerable amount of Western, mostly civilian, legal institutions. For example, the 2010 Acts on General Commercial Law and on Secured Transactions, which revise and abrogate the 1997 Acts on General Commercial Law and on Secured Transactions, are solidly anchored in French law. They also incorporate principles from UNCITRAL's Legislative Guide on Secured Transactions, rules from the International Chamber of Commerce, and

71 Macdonald (2009), *supra* note 17 (discussing the implications of "transplantation", "harmonisation" as a legal metaphors in international law reform). *Contra*: H.P. Glenn, *On the Use of Biological Metaphors in Law: The Case of Legal Transplants*, 1 The Journal of Comparative Law (2006), 358 (critical of the transplant metaphor).

72 J.M. Miller, "Transplants, Legal Exports as", in David Scott Clark (ed.), *Encyclopaedia of Law and Society: American and Global Perspectives* (Thousand Oaks, CA: Sage, 2007), p. 1512.

73 J. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process*, 51 American Journal of Comparative Law (2003), 839.

from the law of Luxembourg.[74] Another example concerns the *Acte Uniforme relatif aux contrats de transport de marchandises par route*.[75] The Act's preliminary draft was written by jurists in Canada[76] hired and paid by Justice Canada and drew considerably from North American and European transport law in addition to member states' national legislation.[77] The multiple origins of the rules transplanted in the *Actes uniformes* and of the teams that "performed" the transplants are reflected in the non-uniform style of drafting and structure of the Acts.[78] This absent unity of style and structure contrasts with the regime's ambition to increase accessibility and logical ordering of the Acts. It would be advisable that future Acts be drafted according to a single agreed-upon structure in order to increase internal coherence between the Acts and facilitate their usage.

As suggested by Allan Watson, "borrowing is the most fruitful source of legal change."[79] Moreover, "inter-normative transfers" and the phenomenon of "circulat[ing] legal ideas"[80] have existed at least since the time of the Roman Empire and continue to be widespread in today's globalised world. It would be futile to condemn a rule for the mere reason that it was borrowed or transplanted from a foreign legal culture. What is particular to the OHADA, however, is the extent to which foreign rules were transplanted into the Acts, the origin of these rules and the unidirectional, as opposed to circulating, manner in which they were transplanted.

Various elements explain the extent to which Western and in particular French law has been transferred into OHADA Acts. They include the colonial origins of the formal legal system of member states and the persistence of

74 Crocq (2010), *supra* note 33, at 52.

75 22 March 2003 (entered into force on 1 January 2004), available at: <www.ohada.com>.

76 Canadian (Quebec) professor Nicole Lacasse was the chief expert mandated by Justice Canada to draft the preliminary version of the Act. She was assisted by then-student Serge Kaplan of Ivoirian origin.

77 N. Lacasse and S. Kablan, *Retour sur l'expertise québécoise et canadienne dans l'AUCTMR*, given at *Forum OHADA*, *supra* note 4. Quebec experts also worked on the preliminary draft of an Act on consumer contracts, which draws substantially from the consumer protection laws of the Province of Québec: Bourgoignie, *supra* note 56.

78 For examples and discussion of specific legal transplants in OHADA Acts see: Black (2007), *supra* note 27, at 50; R.A. Macdonald and I. Deschamps, "Planimétrie et topographie en droit des sûretés", in M. Béhar-Touchais, N. Martial-Braz and J.-F. Riffard (eds.), *Les mutations de la norme: Le renouvellement des sources du droit* (Paris: Economica, 2011); Deschamps (2013), *supra* note 69; Deschamps (2011), *supra* note 51.

79 A. Watson, *Aspects of Reception of Law*, 44 American Journal of Comparative Law (1996), 335, 335.

80 Macdonald (2009), *supra* note 17, at 631.

colonial laws in these countries today – this made it natural for the OHADA to draw inspiration from the laws of their old metropoles; the prestige accorded to French law by the generation of jurists that participated in the creation of the OHADA many of whom completed part of their legal education in France[81]; continued strong political and economic ties between France and the organisation's founding member states; the French government's active promotion and substantial funding of the OHADA project[82]; and teams of drafters of the Acts headed by or composed of mostly Western trained experts.[83] Whatever these reasons from is important from a development perspective is whether the inserted transplants have adapted to their environment, and vice versa. Most important is a determination of whether the transplants are effective at promoting the operation of businesses in member states.

To do so, the following paragraphs look at the types of "irritation" that (legal) transplants inevitably cause in host regions and at how local economic agents in the OHADA region may or in fact do react to these irritations.[84] It should be noted that OHADA officials have been making more frequent allusions to the need to integrate African specifics in the Acts and to encourage African

81 For example, judge Keba Mbaye, one of the "pères fondateurs" of the OHADA. Also, during the *Forum OHADA*, *supra* note 4, the OHADA Secretary General, the Director General of the ERSUMA, his consultant and the drafters of the draft Acts on the transport of goods by road and on general contracts highlighted the attachment of jurists in OHADA member states to the civil law tradition. This attachment results in their hesitating to support the incorporation of other foreign legal influences in OHADA laws. See also: Miller (2003), *supra* note 73 (discussing how prestige of the legal transplant influences its application); D. Berkowitz, K. Pistor and J.-F. Richard, *The Transplant Effect*, 51 American Journal of Comparative Law (2003), 163 (arguing that the extent to which people respect the (official) law in the host state influences reception of the transplant).

82 France Diplomatie, *supra* note 5; A. Mouloul, *Comprendre l'Organisation pour l'harmonisation en Afrique du droit des affaires (O.H.A.D.A.)* (2nd ed., December 2008), available at: <http://www.ohada.com>. See also: Y. Dezalay and B.G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002) (discussing the relation between the law exporter's capital for funding the reform and the importer's willingness to adopt it).

83 Deschamps (2011), *supra* note 51, at 74. See: Watson (1996), *supra* note 79 (for four other possible reasons for which lawmakers borrow foreign legal concepts: practical utility, chance, difficulty of clear sight and the need for authority); Miller (2003), *supra* note 73 (for further exploration of the motivations underpinning the use of transplants through a typological analysis of (i) the Cost-Saving Transplant; (ii) the Externally Dictated Transplant; (iii) the Entrepreneurial Transplant; and iv) the Legitimacy-Generating Transplant).

84 Macdonald (2009), *supra* note 17, at 631.

indigenous contributions to the law-making process.[85] However, as discussed below, the Acts contain little evidence of this. Indeed, rather than reflecting a "blend" of domestic and international influences, the Acts and their drafting process consist mainly of an internalisation of foreign laws.

Legal transplants can be "irritating" for a number of reasons. First, the more remote a new legal norm is from the local legal culture meant to receive it, the lower the chance that it will be permanently absorbed in the host system. Thus, a preliminary assessment of the transferability, or potential compatibility between a proposed transplant (rule) and the host (targeted legal order) before proceeding to the "operation", should always be carried out.

The rewriting of the 1997 Acts on General Commercial Law and on Secured Transactions after less than 10 years of existence is indicative of the fact that this assessment was not adequately performed. In light of this failure, isolated efforts were made during the revision process to include provisions in the 2010 Acts that would account for African local realities and practices.[86] The result though is a piecemeal insertion of sections whose adaptability to the realities of those it is meant to target (i.e. the poor; illiterate traders and guarantors; micro-traders) remains to be seen. Indeed, provisions were inserted in the 2010 Act on General Commercial Law creating a new category of traders, the "entreprenants"[87] (micro-traders) and, amongst other things, alleviate their registration costs and formalities. In line with the De Soto thesis, these provisions are meant to help turn "dead" (unidentifiable, unused, unprofitable) capital into "live" registered capital to be transacted upon and taxed by local authorities.[88]

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85 Interview with Dorothé Sossa, OHADA Permanent Secretary, Yaoundé, Cameroon, July 2011. The need to integrate more elements of indigenous legal traditions in OHADA law is not unanimously recognised by the African legal community both inside and outside Africa. For example, during the *Forum OHADA*, *supra* note 4, Burkinabe law professor Sibidi Emmanuel Darankoum saluted the fact that the talk given at the Forum on the OHADA legal tradition focused not on local African customs and traditions but on the civilian characteristics of the rules and their global sources. The intensity with which some African jurists seem protective of the civil legal tradition appears matched only by the intensity of their disregard for indigenous modes and legal cultures, some of which predate colonisation. This disregard seems somewhat paradoxical in light of the fact that the commercial usages and business practices of many enterprises operating in OHADA states, in particular MSMs, are rooted in local, traditional and/or religious legal cultures more than they are in Western ones.

86 Black (2007), *supra* note 27, at 49.

87 Book I, Title II; Book III, Title III.

88 H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000); A. Ghani, *Economic Development, Poverty Reduction, and the Rule of Law – Lessons from East Asia: Successes and Failures*, Commission on Legal Empowerment of the Poor, 2006; UNDP, Commission for Legal Empowerment of the

However, none of the eighty women entrepreneurs I interviewed in Benin, Cameroon and Côte d'Ivoire in June–July 2011 and May–June 2012 had registered as "entreprenant". Similarly, the head clerk of the RCCM in Yaoundé, a city of close to two million inhabitants,[89] indicated during an interview in May 2012 that no one had filed an application to be registered as "entreprenant" at his office.[90] Moreover, statistics on the size of the informal non-agricultural economy in Sub-Saharan Africa hint at the fact that micro-traders continue to operate in the region without formally registering their businesses.[91] This is notwithstanding ss 62 and 69 of the 2010 Act on General Commercial Law, which make it mandatory for traders and micro-traders to register or declare their business to the RCCM, failing which they shall be punished under national penal laws.

This situation suggests that the De Soto thesis is not necessarily transferable to OHADA states, or at least that lawmakers should perform more comprehensive preliminary empirical assessment of local business needs and realities before designing new rules. Beyond the widely known reasons for which micro and small enterprises operate unofficially in many Third World countries (e.g. expensive or perceived to be expensive registration fees; complicated or perceived to be complicated formalities; lengthy processes; corruption of state agents; etc.), some are less publicised. For example, Angèle, a seller of electric products in Dantokpa market in Cotonou explained that she did not want to register her business for fear of paying taxes on goods she does not sell.[92] She explained that her clients – electricians – often ask for blank receipts when they purchase equipment at her stall. This is in order to fill out the bill themselves and claim the inflated amount back from their own clients. Angèle indicated that this is a widespread practice in the market and she has no choice but to agree to her clients' requests otherwise they will shop elsewhere. If Angèle registered her business, inflated numbers on the value of her assets may be used by fiscal

Poor, available at: <www.undp.org> (making recommendations for strengthening formal business, property and land rights regimes in line with the De Soto thesis).

89 Central Intelligence Agency, *World Fact Book – Cameroon* (2009 Estimate), available at: <www.cia.gov>, accessed 9 June 2013.

90 Interview with Jean Okono, head clerk RCCM, Yaoundé, Cameroon, May 2012; Interview with Me Johnson, head clerk RCCM, Ngaoundéré, Cameroon, May 2012 (indicating not even being aware of the existence of this new category of "entreprenants" who could register at his registry.

91 The average percentage of Sub-Saharan states' informal economy as measured against "official" gross domestic product is 38.4% and the size of informal non-agricultural employment represents 72% of all non-agricultural employment: A. Buehn, F. Schneider, C.E. Montenegro, *Shadow Economies All over the World – New Estimates for 162 Countries from 1999 to 2007*, World Bank Policy Research Working Paper 5356 (July 2010), available at: <http://elibrary.worldbank.org/>; UNIFEM (2005), *supra* note 39.

92 Interview with Angèle (pseudonym), May 2012, Cotonou, Bénin.

authorities to calculate her commercial taxes, hence her refusal to formalise her business. Lawmakers need to be better aware of realities such as those of Angèle for laws to be effective and adapted their host region.

The second type of irritation that transplants may cause concerns the consent, or rather the absence thereof, of the host community to receive and integrate transplanted rules into its legal system. Legal transplants reflect the arrangements and practices of the foreign cultures they originate from and are transposed into indigenous legal cultures without seeking and/or necessarily reflecting the consent of individuals and groups in the receiving region. Absent consent, the legal transplant amounts to an illegitimate imposition of rules and foreign cultural modes. One could suggest that the willingness of the receiving countries' jurists involved in the reform activities to incorporate the transplants constitutes sufficient consent. This, however, can only be true to the extent that these jurists' consent effectively and adequately reflects that of their society as a whole. The consent of legal elites by itself is insufficient.[93]

The OHADA Treaty sets out a procedure to ensure that states' views are taken into account during the Acts' elaboration process. Under s7 of the OHADA Treaty, the OHADA Secretariat must send the draft of proposed *Actes uniformes* to the government of each member state. States then have 3 months to send their written observations back to the Secretariat. In practice, written observations are prepared by national commissions – if and where they exist – who study and react to draft Acts.[94] These observations and the draft Acts are then sent to the CCJA for review. The difficulty with this process is that more often than not states' and national commissions' observations do not reflect wide-scale opinion or consensus but only the views of national legal and political elites.

A third irritant that can adversely affect a legal transplant's integration into a legal system is the perception in the host community that the transplant is hostile. This is particularly the case in OHADA states where the heavy colonial heritage of French legal and administrative institutions in African collective

93 This applies to Africa as it does elsewhere in the world. For example, Article 9 of the Uniform Commercial Code is predominantly the product of and reflects the views of the American Law Institute, which regroups a certain legal elite in the United States. For details on the Article 9 Review process, see: <http://www.ali.org>. I am grateful to Prof. Catherine Walsh for sharing her views on this point.

94 Tumnde (2012), *supra* note 28, at 59-60 and 110-126 (on the development, workings and contributions of national commissions); Interview with Clarisse Motsebo, legal researcher, OHADA Permanent Secretariat, Yaoundé, June 2012 (indicating that few OHADA states have functioning national commissions (for example, Cameroon and Benin). Most often, commissions are composed only one or two jurists).

psyche may cause some economic agents to hesitate to submit to rules perceived as imposed by hostile powers.

Fourth, where transplants are "externally dictated",[95] or foreign funded as is the case with the Acts whose drafting has been funded by Canada,[96] France,[97] the European Union and the World Bank,[98] their chances of long-term success are prone to be less certain and predictable. This is because "to the extent that a transplant is dependent on the foreign pressures or incentives that led to its adoption, the continued implementation of the imported rule may depend on the continued existence of the foreign pressures or incentives."[99] This is problematic in the OHADA given the considerable funding (among other incentives) it receives from Western countries and international organisations. As a matter of fact, in 2011, when the EU delayed the disbursement of a portion of its promised funding for the ERSUMA, the survival of the ERSUMA itself seemed to be at risk.[100]

Finally, foreign transfers of rules carry with them cultural transplants[101] that require that measures be put in place in the host community to ensure proper acculturation to the new law. (This will also be needed in the case of indigenously rooted new laws that seek to induce social change rather than reflect it.) Measures to help legal acculturation include avoiding fictions, new words and excessive formalities since these exacerbate the foreign character of the transplant.[102] In the OHADA region, considerable resources are needed for legal and economic agents to be acculturated and educated to the new laws. The select and expensive ERSUMA and private firm trainings (both of which often foreign subsidised) on OHADA law and the scarce trainings provided in rural areas such as the ones funded by the International Trade Center[103] are insufficient to palliate to the legal education needs of local businesses.

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95 Miller (2003), *supra* note 73.

96 See note 83.

97 See note 5.

98 For example, the World Bank funded the revision of the 1997 Acts on General Commercial Law and on Secured Transactions.

99 Miller (2003), *supra* note 73, at 1516.

100 Observations made at the ERSUMA, Porto-Novo, Benin, June 2011.

101 R. Lippens, "Symbols in Law", in D. Scott Clark (ed.), *Encyclopaedia of Law and Society: American and Global Perspectives* (Thousand Oaks, CA: Sage, 2007), p. 1450 (legal transplants carry new legal symbols into the state or community where they are implemented. These symbols can be found in the text of the new rules (expressions, terms, etc.), in the new procedures enacted (lawyer and judge dress codes, etc.) and in new institutions created).

102 R.A. Macdonald, *Article 9 Norm Entrepreneurship*, 43 Canadian Business Law Journal (2006), 240, at 241-242, 256, 266-271.

103 International Trade Center, *supra* note 38.

Given that the Acts – whether revised, as originally enacted or recently promulgated – remain overwhelmingly inspired from foreign laws and poorly adapted to domestic usages and given their supranational, abrogative and viral-like nature, there is reason to hypothesise that OHADA law is currently ineffective at promoting the operation of local businesses in member states.

To test this hypothesis further, Part C explores arguments by law and economics scholars according to whom legal origins are partly responsible for legal systems' ability or not to achieve economic development goals. From the time when the OHADA project first emerged to the present, significant discussion surrounding the making, transferability and merits of the Acts has focused on the regime's (initial) civil law anchorage and on the opportuneness of integrating concepts and institutions from the common law tradition. The paragraphs below look at the circumstances giving rise to the debate between civil law and common law and at some of the arguments put forward by its stakeholders. It finds that these arguments offer little insight into the real consequences of the Acts' supranational, viral and transplanted nature on socio-economic development in the region. This is because, amongst other things, they do not rely on strong empirical data on OHADA states and they ignore the influence and potential contributions of the plural legal cultures operating in these states.

1.3 Common law versus civil law: a distracting theoretical debate

The origins and character of business law in and across OHADA states are probably as diverse as their ethnic groupings and languages. They date from long before the first commercial relations with Europeans. Broad timeline-based categorisations can nonetheless be made. Prior to European contact in the fifteenth century, business law in West and Central Africa developed at the tribal and kingdom levels as well as being influenced by Arabic and Islamic commerce.[104] Slave and other trade with Europeans followed by colonisation led to OHADA states inheriting predominantly civil law systems during colonial times. Successive colonisations resulted in some OHADA states inheriting rules and institutions from multiple European legal systems notably, German,

104 Deschamps (2011), *supra* note 51, at 30-33.

Spanish, British, Belgian, Portuguese and French.[105] The last-mentioned was and remains dominant in the region. The 1960s saw many African colonies regain independence from European metropoles as pan-African political movements expanded and pleaded for re-appropriation of Africa by Africans. This brought about the creation of a number of regional trade, security and monetary integration organisations on the continent.[106]

At the same time, public international law principles such as *pacta sunt servanda*, the practicality of retaining the only political structure known by Africans and the world to be adapted to newly independent nation-states on the continent, and the desire of emerging African elites to maintain control over systems they had learned to manoeuvre in during independence battles[107] resulted in many African states building their legal systems upon the remnants of the departed colonial regimes. French commercial laws remained in force in former French colonies, with only few statutes being superseded and some amended. The maintenance of French law facilitated the transition to independence since the then few African jurists who had received formal legal education prior to independence had been trained in French law.

In the 1990s, soon-to-be OHADA member states regrouped to form the organisation. Their shared civil law colonial inheritance was a determining factor in their coming together and in the project itself coming to life.[108] France contributed considerably to the OHADA through political and financial support,[109] while French-trained jurists drafted initial versions of the majority of the Acts.[110] On

105 European legal traditions were transmitted as follows among OHADA states: Benin (FR), Burkina Faso (FR), Cameroun (FR, GR, BR), Comoros (FR – note that they are the Indian Ocean), Côte d'Ivoire (FR), the Central African Republic, Congo Republic (FR), Gabon (FR), Equatorial Guinea (FR et SP), Mali (FR), Niger (FR), Senegal (FR), Chad (FR) and Togo (GR, FR), Guinea-Bissau (POR), Guinea-Conakry (FR) and the Democratic Republic of Congo (BG). (Legend: FR: French; BR: British; GR: German; BG: Belgian; POR: Portuguese; SP: Spain.).

106 For example, the Organisation for African Unity (now the African Union) created in 1963 and the African Development Bank in 1964.

107 Joireman (2001), *supra* note 10, at 576-577.

108 Other shared characteristics included common borders and French as an official language.

109 France's initial contribution to the project included FCFA 2,000,000,000 disbursed in 1998 and a pledge of FCFA 2,000,000,000: Mouloul (2008), *supra* note 82.

110 For example, the 1997 Act on General Commercial law was drafted by French lawyer and arbitrator Alain Fénéon (Conversation with Me Alain Fénéon, *supra* note 14); the 2010 Act on Secured Transactions was drafted by a team of mostly French and French trained jurists amongst whom law professors Pierre Crocq and Jean-François Riffard (Conversation with Prof. Pierre Crocq, Paris, France, May 2010; Conversation with Prof. Jean-François Riffard, Montreal, March 2010).

the other hand, organisations such as the World Bank initially had little interest and faith in the project.[111]

The Bank's scepticism in the OHADA was grounded in part in claims, mostly by American law and economics scholars aspiring to develop a Legal Origins Theory, that common law is more economically efficient than civil law.[112] In particular, these scholars contended that common law rules and institutions promote economic and financial development better than civil law ones. They argued that this is because, for one thing, common law regimes offer more protection to investors.[113] Referring to empirical findings, they contended that the level of protection of foreign investors is a good indicator of financial development and they argued that common law systems offer better protection to foreign investors than do civil law ones.[114] They also drew parallels between civil law and larger government ownership, between civil law and heavier regulation,[115] all of which they linked with more corruption, larger informal economies and higher unemployment.[116] They also maintained that common law involves less procedural formalism and greater judicial independence than civil law.[117] Other sets of claims concerned the relationship between Western legal traditions and the Rule of Law. Again, the contention was that common law promotes the Rule of Law better than civil law.[118]

In 2004, the debate on the consequences of legal origins of business laws was given an international spotlight by the World Bank's first *Doing Business*

111 Conversation with Me Alain Fénéon, *supra* note 14; Comments of Kalidou Gadio, General Counsel, African Development Bank, International Economic Law African Regional Conference, Johannesburg, May 2011. UNIDROIT is also said to have had little faith in the OHADA in its early years.

112 La Porta (2008), *supra* note 9; Joireman (2001), *supra* note 10; S. Djankov et al., *The Regulation of Entry*, CXVII Quarterly Journal of Economics no. 1 (2002), 1 (calculating business start-up times, costs and requirements in 85 countries world-wide and concluding that heavier regulation correlates with heavier corruption, larger "informal" economies and greater benefit for politicians and bureaucrats while not increasing the quality of private and public goods. Authors also claim that civil law states except for Scandinavian ones (e.g. those of French, German and Socialist legal origin) have more regulation than states of English law tradition).

113 R. La Porta et al., *Law and Finance*, 106 Journal of Political Economy, no. 6 (1998), 1113, at 1130-1131.

114 La Porta (2008), *supra* note 9, at 285-286.

115 Djankov (2002), *supra* note 112.

116 *Ibid*; La Porta (2008), *supra* note 9, at 286; Joireman (2001), *supra* note 10, at 590-592.

117 S. Djankov et al., *Courts*, 118 Quarterly Journal of Economics, no. 2 (2003), 453; R. La Porta et al., *Judicial Checks and Balances*, 112 Journal of Political Economy, no. 2 (2004), 445; La Porta (2008), *supra* note 9, at 286.

118 Joireman, *supra* note 10.

publication (*Doing Business in 2004–Understanding Regulation*[119]). The publication was prepared largely by the same scholars advocating the superiority of the common law tradition.

According to the OHADA Secretary General, the World Bank's 2004 report may have contributed to the decision of OHADA states' to shelve the draft OHADA *Acte uniforme sur le droit des contrats*.[120] The draft Act was prepared by a Belgian law professor[121] acting for UNIDROIT and was largely inspired by French law and the UNIDROIT principles on International Commercial Contracts.[122] If anything, the setting aside of the draft evidences the political impact of the legal origins thesis scholarship.

Beyond the strong political weight that claims of common law superiority may have, and the significant criticism they have been subjected to,[123] what is important for the purposes of this article is to determine whether the legal origins thesis can provide useful insight for predicting and assessing the capability of the OHADA Acts to promote the sustainable operation of businesses –

119 (Washington, DC: World Bank and Oxford University Press, 2004).

120 UNIDROIT, *supra* note 4.

121 Professor Marcel Fontaine, Faculté de droit de l'Université catholique de Louvain (Louvain-la-Neuve, Belgique).

122 The UNIDROIT principles reflect a negotiated compromise between common law and civil law. See: UNIDROIT, *supra* note 4 (for a description of the mandate given to UNIDROIT by the OHADA and of work carried out. Three drafts Acts on contracts were prepared by UNIDROIT). Initially the mandate given by the OHADA indicated the need to integrate principles from all of private international law, common law and Roman-Germanic law. However, as a result of pressures and requests by local jurists protective of their civil law tradition, the first version of the draft Act was revised so as to incorporate more French civil law concepts. A third draft of the Act was requested, with still stronger grounding in French civil law but was also considered to integrate too many common law influenced rules. Given OHADA states' attachment to their French inherited Civil Code rules on contracts and the controversy around the legal origins thesis embraced by the World Bank Doing Business Report 2004, the adoption process was put on indefinite hold: Fontaine & Comments of Dorothé Sossa, OHADA Permanent Secretary, Forum OHADA, *supra* note 4.

123 B. Fauvarque-Cosson and A.J. Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, 57 American Journal Comparative Law (2009), 811, at 812-824 (analyzing French reactions and criticism of the legal origins theory and methodology including with regard to the Doing Business Reports); C.J. Milhaupt, *Beyond Legal Origin: Rethinking Law's Relationship to the Economy – Implications for Policy*, 57 American Journal Comparative Law (2009), 831 (criticizing the "static" approach of the law and economics/legal origins thesis); Acemoglu (2001), *supra* note 49 (arguing that the environment of African colonies rather than the identity of the colonizing power or legal system influenced the type of institutions set up by Europeans. In environments that led to high mortality rates, Europeans set up more extractive institutions. These institutions impacted the development of the colonies to this day).

particularly MSMs – in West and Central Africa. As was noted earlier, some of the Acts are quasi-exclusively grounded in the civil law tradition, others in both the civil law and the common law.

There are many grounds on which the legal origins thesis can be challenged.[124] A number of them are specific to the OHADA. The following paragraphs address some of these grounds and expose why in its current form the legal origins thesis is inadequate to help assess the Acts' impact and potential impact on the operation of business and poverty alleviation in member states.

First, claims of common law superiority lack comprehensive empirical grounding in OHADA States. Indeed, very few of the studies carried out by "legal origins" scholars included OHADA states, and where they did, only a minute number were surveyed.[125]

Second, the World Bank's *Doing Business 2011-OHADA – Making a Difference for Entrepreneurs*,[126] which draws on the Legal Origins scholarship and measures regulations in OHADA states that come into play in nine stages of a business' life, either does not assess or only indirectly assesses *actual* accessibility and uptake of laws by businesses. Stages considered are starting a business, dealing with construction permits, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business. Many of the research criteria and assumptions of the report (as is the case of "legal origins" studies[127]) explicitly exclude variables linked to the actual accessibility and usage of laws. For example, the section of the report measuring procedures, costs, time and paid-in minimum capital for starting a business assumes that "any required information is readily available and that all agencies involved in the start-up process function without corruption." In practice, these two assumptions seldom reflect business realities in OHADA states.[128] What is more, the "starting a business" variables in the report only apply to businesses

124 *Ibid*.

125 Djankov (2003), *supra* note 117 (of the 109 countries examined, only two are OHADA States: Senegal and Côte d'Ivoire); La Porta (1998), *supra* note 113 (of forty-nine countries assessed, none were OHADA States – authors chose to restrict their investigation to states where firms were trading publicly since without shareholder information, they claim their discussion on investor rights would be less meaningful); Djankov (2002), *supra* note 112 (of 85 countries examined for assessing the impact of start-up regulation, only 3 are OHADA states: Mali, Senegal, Burkina Faso); R. La Porta et al., *Judicial Checks and Balances*, 112 Journal of Political Economy, no. 2 (2004), 445; La Porta (2008), *supra* note 9, at 286.

126 (Washington, DC: IFC and the World Bank, 2012).

127 For example, Djankov (2002), *supra* note 112, looks at official times and official costs.

128 Informal discussion with the owner of Bénin Marché, Cotonou, Benin, June 2010, who said she often has to make gifts to civil servants to speed-up start-up procedures.

that have 10 to 50 employees, which leaves out a large segment of OHADA states' economy, namely micro and small businesses that often operate in the "informal sector".

Moreover, the Acts currently do not directly regulate three of the nine criteria measured by the report namely (i) obtaining construction permits; (ii) paying taxes; and (iii) trading across borders.[129] As a consequence, even assuming that the methodology of the report was impeccable, and the data absolutely accurate, the report would only provide a partial snapshot for measuring the impact of the OHADA regime.

The World Bank *Doing Business 2011-OHADA* report can nonetheless be a reference for comparing, from a theoretical perspective, the requirements for operating businesses in OHADA countries. It should also be noted that some of the variables for measuring credit access look at actual uptakes (for example, they look at the number of individuals and firms listed in public registries).[130] The 2011 report can thus be seen as one where the World Bank revisits the theoretical and all-encompassing "legal origins" thesis assertions made in its 2004 report.[131]

Third, as the proponents of the legal origins thesis recently acknowledged,[132] the divide between civil and common law traditions is increasingly narrowing as a result of globalisation and vast migration movements.[133] Examples of states in Africa where hybridisation of the common law and civil law has been occurring include Cameroon and South Africa. As Edward Said wrote, "every domain is linked to every other one, and (...) nothing that goes on in our world has ever been isolated and pure of any outside influence."[134] Thus attempting to draw correlations between any given legal origin and economic development is a task that is becoming more difficult as cross-border relations increase and traditions mix and mutually influence each other. It is also a task

129 Dickerson (2010), *supra* note 48, at 564. The scope of the definition of "business law" in the OHADA Treaty does not exclude the possibility that OHADA law regulate aspects of dealing with construction permits, cross-border trade and taxes.

130 World Bank & International Finance Corporation, *Doing Business 2011-OHADA, Making a Difference for Entrepreneurs* (Washington, DC: World Bank/IFC, 2011), 15.

131 See also: Dickerson (2010), *supra* note 48, at 564-565 (discussing the 2009 Doing Business report and highlighting that the Bank nuanced its "civil law counters development" position between 2004 and 2009).

132 La Porta (2008), *supra* note 9.

133 V.V. Palmer, *Québec and Her Sisters in the Third Legal Family*, 54 McGill Law Journal (2009), 321 (describing a third mixed common law/civil law tradition in the province of Quebec, Canada).

134 E.W. Said, *Orientalism* (New York: Vintage, 1979).

that can be counterproductive because it leads scholars to seek out contrasts rather than similarities and to exacerbate such distinctions in order to attribute determinate effect to them. What is more, the exercise generates purely academic debate between experts from competing legal traditions and waste research resources simply in proving or disproving the thesis.

Fourth, the legal origins thesis fails to address the question of the influence of legal traditions other than civil law and common law. It is telling that the World Bank *Doing Business in 2004* publication affirms that "there are five possible [legal] origins [of the Company Law or Commercial Code of any given country]: English, French, German, Nordic and Socialist."[135] In the particular context of the OHADA, this is problematic since Islamic, animist, voodoo and other indigenous traditions have been modelling the conduct of people, businesses and politicians for much longer than civil law and common law. For example, consumers and businessmen and women in Benin, Cameroon and Côte d'Ivoire make widespread use of "tontines" or "reunion", which are traditional rotating credit and savings associations (**ROSCAS**).[136] Indigenous normative orders interact or sometimes conflict with formal Western inherited business rules in the OHADA region. If the legal origins thesis were to have any explanatory power in the OHADA context, it would have to account for these legal traditions and look at their impact, alongside that of civil law and common law, on economic development in the region. In so doing, it would have to examine the complex interactions between indigenous and Western normative orders and how these interactions shape formal and unofficial business laws.[137] Once these interactions were understood, the next step would be to determine whether the

135 At 105. The list also does not account for differences between the significantly distinct U.S. and U.K. regimes of commercial law (corporations, secured financing, corporate financing, securities regulation, etc.) For a good example of the significance of these distinctions see: G. McCormack, *UNCITRAL, Security Rights and the Globalization of the US Article 9*, 62 Northern Ireland Legal Quarterly, no. 4 (2011), 485 and *American Private Law Writ Large? The UNCITRAL Secured Transactions Guide (2011)*, 60 International and Comparative Law Quarterly, 597.

136 Other examples concern rituals and chthonic beliefs that regulate the procedure for the sale of traditional medicine in South Africa. See also: D. Etounga-Manguelle, "Does Africa need a Cultural Adjustment Program?", in L.E. Harrison and S.P. Huntington (eds.), *Culture Matters: How Values Shape Human Progress* (New York, NY: Basic Books, 2000), pp. 65-77 (quoting ex Ivoirian prime minister Felix Houphouet-Boigny as stating that no matter what religious beliefs Africans have today – Muslim, Catholic, Protestant, etc. – they all have an animist past).

137 By analogy, see: J. Comaroff and J. Comaroff, *Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa*, 29 Law & Social Inquiry, no. 3 (2004), 513, 534 & ss (discussing the complex relation between traditional beliefs and customs, the Rule of Law and formal Western inherited law in postcolonial Africa particularly regarding witchcraft regulation in South Africa).

mixed legal origins of business law in the OHADA zone can actually help assess the potential merits and the effects of the Acts on the operation of businesses and socio-economic development in OHADA states. Only in the affirmative could the legal origins thesis be used to evaluate the Acts and help lawmakers determine whether and which of civil law, common law and/or indigenous norms and structures should be promoted and incorporated in the OHADA regime.

The question of whether civil law and common law regimes are compatible and capable of being harmonised is a related but separate debate being raised in the context of OHADA's efforts to increase its membership to common law countries (Nigeria, Ghana, etc.) and of the controversial reception of OHADA law in Anglophone Cameroon. Ultimately though, the point should not be to determine whether common law and civil law are compatible but rather to find or design the rules that work best in member states.

Some jurists argue that there is no such thing as purely indigenous business rules in West and Central Africa. This, the argument goes, is in part because pre-colonial trade was for the most part subsistence-based thus not requiring the development of a coherent and comprehensive business law system. Accordingly, there would be no indigenous business rules or legal origins to account for in modern day commercial law making. Moreover, if any local business laws did exist before Europeans arrived, the argument continues, these derived from trade between the peoples of Sub-Saharan African kingdoms and Muslim merchants during the Middle Ages and are not adapted to modern day commerce. Law reformers would thus only have one choice: start from scratch or start from the regime put in place during colonial times.

This argument does not withstand scrutiny. Indeed, subsistence-based commerce and simpler social relations do not equate with the absence of trading rules.[138] The increased complexity as well as the intensification and changing nature of business do not necessarily imply that traditional rules should be disregarded. This is especially true where large segments of a population continue to abide by them, as is the case in OHADA states today.

138 Deschamps (2011), *supra* note 51, at 30-33; R.F. Oppong, *Private International Law Scholarship in Africa (1884–2009) – A Selected Bibliography*, 58 American Journal Comparative Law (2010), 319.

2 Conclusion – towards a clinical legal pluralist approach to law reform

Assessing the merits of the OHADA Acts on the basis of the legal origins thesis as it currently stands or on conclusions founded on ideal world assumptions such as those in the 2011 World Bank Doing Business report is insufficient to appreciate the regime's real and potential impact on the operation of businesses in Benin, Cameroon, Burkina Faso, Guinea-Bissau and elsewhere in the OHADA zone.

An approach, which I have qualified as clinical legal pluralist (CLP) may be more useful for determining how commercial law in OHADA states can effectively promote the operation of business and contribute to alleviate poverty in the region. Briefly stated, clinical legal pluralism insists on the importance of being attentive to the social, economic and political context in the course of law-making activities. It calls on lawmakers to be informed both by specific empirical data and secondary empirical information on the actual uptake of laws and by legal theory.[139]

Regarding the latter CLP draws from critical legal pluralism,[140] critical development studies,[141] legal pragmatism[142] and transsystemia ("across" "legal systems").[143] It views rules originating from distinct normative orders (indigenous, religious, state, international, regional) in a non-hierarchical manner. As such, the specific set or sets of rules that will govern any given transaction will

139 See: Deschamps (2011), *supra* note 51, at 15-30 (for a preliminary discussion on clinical legal pluralism) and I. Deschamps, *Stimulating Sustainable Economic Growth in Sub-Saharan Africa with Legal Systems Enabling Women Entrepreneurs' Creativity*, Policy Brief No.6, McGill Institute for the Study of International Development/Canadian International Development Agency, 2012, available at: <www.mcgill.ca/isid/> (for CLP inspired proposed policy goals and strategy recommendations for attaining Canadian International Development Agency's objective of contributing to sustainable economic growth in Sub-Saharan Africa).

140 M.-M. Kleinhans and R.A. Macdonald, *What Is a Critical Legal Pluralism?*, 12 Canadian Journal of Law and Society (1997), 25.

141 M. Castells, *Changer la ville: A Rejoinder*, 30 International Journal of Urban and Regional Research, no. 1 (2006), 219.

142 T.C. Gray, *Freestanding Legal Pragmatism*, 18 Cardozo Law Review (1997), 21.

143 R. Jukier, *Challenging the Existing Paradigm: How to Transnationalize the Legal Curriculum*, 24 Pennsylvania State International Law Review (2005), 775. Jukier equates "trans" with "many" but our view is that "across" conveys the idea of the "trans" in transsystemia better. According to a transsystemic approach, it would not be enough for law reformers to understand different conceptions of law. They also need to appreciate how these different conceptions relate to each other with "the entire mindset of the tradition in question."

depend more on the specific circumstances surrounding said transaction than on predetermined normative ordering.

CLP seeks to provide a methodology to follow at the main stages of law making: (i) the preliminary needs-appreciation stage (ii) the law design stage (iii) and the application and acculturation stage. At each of these stages, CLP favours a multifaceted approach aimed at identifying the legal practices and conditions in the host community and not taking them for granted. It aims at developing techniques for law reform that account for the multiple legal orders that interact in the host system and finding solutions that prioritise individual agency. At the application and acculturation stage, it calls for persistent monitoring of the actual outcomes of laws rather than only checking that prescribed reform procedures were fulfilled.

In the context of OHADA states, CLP calls for the methods used to assess the need(s) for reform, to design or revise business legal structures and to ensure acculturation should pay more attention to autochthonous legal traditions and to the modes and usages of local economic actors *in addition to* seeking to please the interests of foreign investors as is currently the case. While the OHADA 1993 and 2008 Treaties do not explicitly indicate the intention of member states to focus on large businesses and foreign investment,[144] the underlying ambition of the regime has been outward looking and aimed at larger enterprises and economic actors operating in the official sector. Stakeholders make this ambition clear in various fora. Indeed, legal and economic writings that promote the OHADA's main objective as that of attracting foreign investment significantly outweigh works highlighting the need to promote local businesses.[145] Moreover, OHADA and foreign Western scholarship discussing law reform and legal certainty objectives often tend to analyse these objectives strictly from the perspective of foreign investors, as if legal uncertainty were not also an impediment for local economic agents. For example, in "How Law Affects Lending",[146] Katarina Pistor, Rainer Haselman and Vikrant Vig argue that foreign lenders are more at risk than local lenders in middle-income countries because they lack local know-how. They contend that formalisation of lending conditions would place foreign lenders on the same level playing field as local lenders. Yet, they do not provide evidence of the extent to which local know-how actually assists local lenders and better safeguards their

144 1993 OHADA Treaty, preamble; 2008 OHADA Treaty, preamble.

145 *Forum OHADA*, *supra* note 4; K. Mbaye, "ntroduction", in Issa-Sayegh (2008), *supra* note 13; Moulouol (2008), *supra* note 82; Kamga, *supra* note 12.

146 R. Haselman, K. Pistor and V. Vig, *How Law Affects Lending*, 23 The Review of Financial Studies, no. 2 (2010), 549.

rights. While formalisation may be advantageous for foreign investors who have "formal" know-how, this may not be the case for local investors who may find the formalised operations more costly and complex.

At the moment, the Acts reflect rules and principles that are often too foreign and abstract with regard to the needs of MSMs and other local agents. Although recent revisions of the Acts sought to adapt some rules to the realities of the countries' large informal sectors (for example, ss 30 to 33 of the 2010 Act on General Commercial Law on the "entreprenant" and s 14 of the 2010 Act on Secured Transactions on illiterate sureties), few steps have been taken to ensure that the Acts and the OHADA regime comprehensively address the challenges faced by local MSMs in the operation of their activities.

In order to ensure that these challenges are addressed, reform methods need to be devised for uncovering local economic agents' business practices and commercial usages, for assessing the extent of actual uptake of the formal laws promulgated by OHADA and ensuring that findings are systematically accounted for within OHADA processes. This is important because significant portions of OHADA states' economies rest on the shoulders of local businesses, in particular MSMs.[147] Examples of law reform in line with a CLP approach may include enacting rules that marry the multiple legal traditions operating in the OHADA,[148] assessing reform needs and monitoring outcomes of laws through participatory learning and action methods,[149] using singing as a method of legal education among micro-entrepreneurs,[150] facilitating close work relationships and team work between foreign experts and key institutions in host countries,[151] having foreign experts acquire local knowledge (of languages, traditions, and the like) so that their contribution may be more effective.[152] CLP also places

147 Schneider (2010), *supra* note 91.

148 See J.-F. Gaudreault-Desbiens, "Transformer les cultures juridiques?", in Jean-François Gaudreault-Desbiens (ed.), *Les solitudes au Canada- Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* (Montréal: Éditions Thémis, 2007), pp. 120-121 for proposals of methods for designing laws that best reflect diverse legal traditions at play in a given region, here Québec and Canada.

149 IIED, *Participatory Learning and Action 63 – How Wide are the Ripples? From Local Participation to International Organisational Learning* (London: Park Communications Ltd, 2011), available at: <www.iied.org>.

150 Singing is widespread in African culture including in political demonstrations, in the religious sphere (choir singing), in schools and in celebrations. Its popularity across classes and ethnic groups as well as in rural and urban settings make it an ideal tool of legal education and acculturation in the region.

151 M.J. Trebilcock and R.J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar, 2008).

152 *Ibid.*

particular emphasis on legal education for cultivating support for the new laws in Africa and helping MSMs better understand their rights and obligations under formal laws,[153] using local references to help local entrepreneurs understand the purpose and the use of proceeding with the new regulation as opposed to continuing with their old practices.[154]

Using comprehensive empirical research and methods such as the ones listed above for reforming commercial laws in the OHADA zone will help account for the fact that business norms (whether produced by the State, commercial associations, religious associations, labour unions or other individuals and groupings) do not operate in a vacuum. In particular, these methods will help lawmakers better appreciate the real and potential consequences of the rules they design on socio-economic development.[155]

Significant resources have been deployed to date in Africa to provide multilateral or bilateral aid and to sanction crimes against humanity, but too little attention has been paid to the role that private economic law should play at contributing to poverty alleviation on the continent. The OHADA project is a significant effort to modernise and streamline this key area of legal regulation. This article sought to pose the key questions for assessing how successful it has been in promoting MSM activity and thereby alleviating poverty among member states.

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153 Findings from interviews I carried out in Benin in June 2011 tended to show that legal education is a most efficient tool for obviating arbitrary fees. Odile (pseudonym), vendor of school materials in Dantokpa market, Cotonou shared her delight of having joined Street Net, a union of "informal" workers, because it helped her better understand what payments were mandatory for her business and which ones were merely arbitrary and illegal: Interview conducted with Odile, Cotonou (Bénin), June/July 2011.

154 By analogy: J. Boddy, *Womb as Oasis: The Symbolic Context of Pharaonic Circumcision in Rural Northern Sudan*, 9 American Ethnologist (1982), 682. (to help change perceived negative cultural practices Boddy suggests understanding the meaning of the practice (for example "employing" "child-slaves" ("vidomingons")) by reference to those practising it rather than only from second-hand accounts of it and using arguments derived from local traditions and knowledge rather than foreign information to convince the people it is a practice worth stopping.)

155 Data I collected in Benin, Cameroon and Côte d'Ivoire from 2010 to 2012 allows to draw preliminary conclusions on the interactions between socio-economic realities of women micro-traders (motherhood, spousal union, ethnic identity and literacy), their economic practices (levels of "formalism" of businesses; types and size of business; types of products and product sourcing; sources of financing; network and associations) and formal business law in the OHADA zone. They show persisting gaps between the "law of the books" and the laws of the street, the detailed analysis of which is beyond the scope of this article.

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