PROLOGUE

My research project for the seminar on “Global Africa: Between Engagement and Intervention” this academic year has been to assess the success of a supranational legal regime established slightly more than 20 years ago by West and Central African countries. I first came across the Organisation pour l’Harmonisation du Droit des Affaires en Afrique ("Organization for the Harmonization of Business Law in Africa," known by the acronym OHADA) in the late 1990s when I was part of a team that evaluated the OHADA Uniform Act on Security. At the time I accumulated a file drawer full of French- and English language materials on OHADA. For a variety of reasons both professional and personal, however, I abandoned the area in the early 2000s. When, however, the SMU interdisciplinary seminar was proposed in 2014 I jumped at the chance to catch up with what had become of OHADA. Little did I know how much catching up I would have.

Reading for my research project fell into three categories. First, of course, I had to read about OHADA itself. When I had collected my file drawer of materials there was virtually no experience with the actual operation of this new legal regime. The published evaluations were therefore all based on what was on paper. With more than a decade of experience I was looking for more informed assessments. At the same time, I was looking for insights into how one should assess the institutions and uniform laws that make up OHADA. For this I turned to a body of literature usually classified as “law and development.” Thinking that it would be useful to have an illustration that would pull together an overview of OHADA as a whole and the law and development literature I chose to read about the OHADA Uniform Act on Security, which had been revised since I had first studied it in 1998, and the literature analyzing the role of such secured transactions laws in economic development.

Not surprisingly, of these three sets of readings the literature on OHADA was the most difficult to access. The Internet and digital databases make a difference but are less helpful for French-language materials published in Africa. OHADA itself has a website (www.ohada.org) with official French-language texts and there is a useful unofficial website (www.ohada.com) sponsored by the Association pour l’Unification du droit en Afrique (UNIDA), a Paris-based body that provides both official and unofficial materials and announcements. Other databases provide texts and bibliographies (see the separate Bibliography attached to this paper) but the texts are not always up-to-date and the publications cited difficult to obtain. More importantly, these resources yield few on-the-ground assessments of how the OHADA institutions and uniform laws work in practice. The most useful general
assessment I found was published in the World Bank Justice and Development Working Paper Series.¹

There was one pleasant surprise. I discovered that a U.S. law professor, Claire Moore Dickerson, had taken up a study of OHADA in a serious way.² She has made numerous trips to Cameroon and other parts of Africa and has published thoughtful assessments in readily accessible law journals. She is not the only author writing in the English language – a recent search of the WestlawNext lists 197 secondary sources for a search under “OHADA” – but her publications stand out.

Access to the law and development readings is much easier. Indeed, the problem is not access but the sheer volume of potentially relevant readings. I solved the problem by focusing on authors and writings that self-identified as contributing to “law and development” literature. There are limitations to this solution. Most of the authors are trained in law in the United States or work for international bodies that use English as the working language. They have usually gained their knowledge of development from working as consultants in law reform projects in developing countries. Economists, including some distinguished economists such as Douglass C. North, fall outside this definition of the relevant literature despite their indirect influence in defining the objectives of international sources of funding law reform in developing countries.³

Readings about the law of secured transactions is more manageable. There are informed studies identifying the issues that should be addressed in such laws and how these issues should be resolved in legislation. There is also a growing number of case studies analyzing the introduction of such laws into specific legal systems and suggesting what steps are effective. Unfortunately, I found few publications that go beyond a doctrinal analysis of the OHADA uniform act.

With this reading under my belt, I report in this paper what I learned – and did not learn – about OHADA this academic year. I first introduce OHADA and then consider whether the law and development literature is helpful when evaluating OHADA. I conclude by examining the OHADA Uniform Act on Security and relevant law and development literature.

² See the separate Bibliography for a list of her publications.
I

OHADA

The Organisation pour l’Harmonisation du Droit des Affaires en Afrique (OHADA) is a supranational business law regime created by treaty between West and Central African States. The unofficial history written by a leading participant⁴ traces its origin to 1991 meetings of Ministers of Finance from “la zone franc,” first in Ouagadougou and later that year in Paris. The Ministers’ immediate concern was the dire economic condition of most of these countries and the perceived need to attract capital investment. Diagnosis suggested that a principal reason for the lack of investment was that the business laws in the individual countries were out of date and their enforcement uncertain because of a lack of training for magistrates and limited budgetary support (not to mention corruption). Following study of possible solutions, the governments endorsed a proposal to establish a supranational regime by treaty. Fourteen States signed a treaty implementing the proposal in October 1993 at a Francophonie Summit in Port Louis (Mauritius).⁵ The treaty came into force on 18 September 1995. As of March 2015 there are seventeen member states: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, and Togo.


⁵ Traité relatif à l’harmonisation du droit des affaires en Afrique, signed 17 October 1993. The original Frech text is available on the OHADA official website, www.ohada.org. There are numerous English translations. In this paper I have used an unofficial translation included in materials distributed to potential donors at a Round Table organized by the UNDP in April 1997. OHADA, Part I!: Presentation of OHADA (Geneva: UNDP, 29-30 April 1997).
The preamble to the 1993 treaty states the reasons for adoption:

**Determined** to accomplish new progress on the path to African unity and to establish a climate of trust in their countries’ economies in order to create a new pole of development in Africa;

**Reaffirming** their commitment to the institution of an African economic community;

**Convinced** that belonging to the franc area, a factor of economic and monetary stability, constitutes a major asset for the gradual achievement of their economic integration and that this integration should also be pursued within a broader African framework;
Equally convinced that the achievement of these objectives requires the introduction in their States of a simple, modern system of harmonized business law, adapted to facilitating the activity of enterprise;

Aware that it is essential that this law be applied diligently, in conditions such as to guarantee the legal security of economic activities, with a view to favouring the latter’s growth and encouraging investment;

Wishing to promote arbitration as an instrument for the settlement of contractual disputes;

Decided to make new joint efforts to improve the training of magistrates and legal staff;

Agree as follows:6

Article 1 of the treaty states that the objectives of the treaty are (1) to harmonize business laws in member states by drafting and adopting common legal rules that are both simple and adapted to their economies, (2) to introduce appropriate judicial procedures, and (3) to encourage arbitration of contractual disputes.7

The initial response from foreign investors was positive. Foreign law firms praised OHADA as an advance on what went before, noting in particular the advantage of having uniform rules for infrastructure8 and mining9 projects. A Paris-based lawyer with Price Waterhouse commented, for example, that:

“Previously there was such a wide disparity in business law and the codes, rules, regulations, laws, and local conventions affecting business law, it was sometimes a barrier to doing business. With Ohada, many of the impediments are removed and there is much greater certainty for investors. Business law in these nations will be more visible, easier to understand, consistent, and reliable.”

6 1993 OHADA Treaty, note 5 supra, Preamble.
7 Id., art. 1.
8 See e.g., “White & Case takes OHADA for a ‘test drive’ in project financing,” Africa Finance Review (1 February 1999) (describing the involvement of an international law firm in advising an international consortium of lenders in the financing of the Azito Power project in the Ivory Coast).
To implement its objectives the 1993 treaty provided for four institutions and set out a process for drafting and enacting uniform business laws. The four institutions are a supranational court (Cour commune de justice et d’arbitrage), a regional school to train magistrates (École régionale de la magistrature), as well as a Council of Ministers (Conseil des ministres) and a permanent secretariat (Secrétariat permanent). By 1998 a permanent secretariat, a supranational court, and a regional school for magistrates had been established. The Council of Ministers selected Abidjan (Ivory Coast) as the seat of the court, Cotonou (Benin) as the site of the regional school for magistrates, and Yaoundé (Cameroon) as the location of the permanent secretariat. On 1 January 1998 the first three uniform acts -- general commercial law, commercial companies and economic interest groups, and secured transactions – became effective. Since 1998 the Council of Ministers adopted six more uniform acts and revised the first three. In accordance with Article 10 of the treaty, these uniform acts not only automatically become the equivalent of national legislation in each member state but also supersede conflicting national laws, whether existing or subsequently enacted.

One development not contemplated by the treaty has been the creation of national commissions to advise governments of member states regarding proposed uniform acts prepared by the permanent secretary. Businessmen and jurists criticized OHADA for not providing them an opportunity to comment on the draft acts. Creation of the commissions was in response to this criticism. The Council of

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10 A fifth institution – the Conference of Heads of State and Government – was added by revision of the treaty in 2008.

11 As the price of being chosen as a site, each of these states undertook to fund the establishment of the institution for which it was responsible either directly from the state budget or indirectly from outside donors.

12 These six acts and their effective date are General Commercial Law (1 January 1998); Simplified Debt Collection Procedures and Enforcement Measures (1 January 1999); Insolvency (effective 1 January 1999); Arbitration (11 June 1999); Accounting (Phase 1: 1 January 2001; Phase 2: 1 January 2002); Carriage of Goods by Road (1 January 2004); and Cooperative Societies (15 May 2011).

Ministers endorsed this development in 2003\textsuperscript{14} but the national commissions are not mentioned in either the original treaty or the revised treaty. The national commissions do, however, meet together periodically.\textsuperscript{15}

Revision of the 1993 treaty was adopted in October 2008 at a meeting in Québec and the revised treaty entered into force on 21 March 2010.\textsuperscript{16} The revisions modify the law-making process to make it more flexible and tweak the judicial provisions to address problems that had arisen in practice. Although more important symbolically than otherwise, the revision also adds English, Spanish and Portuguese as working languages, although French texts prevail in case of inconsistency.\textsuperscript{17} The revision left Article 1 untouched.

Since 2010 OHADA has celebrated its 20\textsuperscript{th} anniversary (2013), adopted one new uniform act and revised the three uniform acts initially adopted in 1997, the Common Court continues to decide a growing number of cases, and the regional school for magistrates still exists.

With this sketch of the OHADA regime in mind, I turn to the implications of OHADA membership, the uniform acts, and the judicial institutions.

1. Implications of Membership

An overwhelming majority of the OHADA member states are francophonic. Official languages of Guinea-Bissau (Portuguese), Equatorial Guinea (Portuguese, Spanish and French), and Cameroon (English and French) are the exceptions. The 1993 treaty designated French as the official language of OHADA but the treaty was revised in 2008 to add English, Portuguese, and Spanish to the list of “working

\textsuperscript{14} 12 OHADA Journal Officiel 23 (2003).
\textsuperscript{15} The most recent plenary meeting of the national commissions was held in Abidjan on 30-31 March 2015. See www.ohada.org/ communiqueannonces.html.
\textsuperscript{16} Traité portant révision du traité relatif à l’harmonisation du droit des affaires en Afrique, adopté le 17/10/2008 à Québec (available on www.ohada.com). Although unofficial English-language translations of the revised treaty exist, I have not found one that is satisfactory.
\textsuperscript{17} Id., art. 42.
languages.”18 The change was made not only to reflect the official languages of several of the member states but also to emphasize the goal of ultimately unifying business law for all of Africa.19 Implementing the change, however, has been slow. Although, for example, the official OHADA website has added links to the non-French websites, the reader who clicks on the English link is greeted with “The english version of OHADA official website is coming soon!” and similar messages appear when clicking the Spanish and Portuguese links. Numerous translations into English circulate but the quality of the translations is not always of the highest quality. This difficulty of accurate translations has been duly noted,20 but translators must be trained and resources are limited.

More important than language, however, is the shared civil law background of member states, with only the English-speaking territory of Cameroon having a common law background. This has made it easier to create a common legal “space” in which business law is uniform but it does pose potential barriers to expansion in Africa to states with an English common law background.

The situation is further complicated by the fact that OHADA member states belong to different economic, monetary, and trade unions.21 There are separate economic and monetary unions for West and Central Africa (UEMOA; CEMAC) intended to create a common market. They regulate banking and finance as well as trade. As a result, their regulations have the potential of overlapping or conflicting with OHADA uniform acts. More problematic still is the Economic Community of

18 Article 42 of the treaty as revised reads: “Les langues de travail de l’OHADA sont: le français, l’anglais, l’espagnol et le portugais . … En cas de divergence entre les différentes traductions, la version française fait foi.” Id., art. 42.

19 The first paragraph of the preamble to the revised treaty reaffirms the determination of OHADA member states “à accomplir de nouveaux progrès sur la voie de l’unité africaine.” Id., preamble.


21 For a useful summary of the problems posed by the multiple African international bodies that touch on economic and monetary matters as well as legal ones, see Beauchard & Kodo, note 1 supra, at 13-15.
West African States (ECOWAS), which has the goal of establishing an integrated economic union of West African countries. The community includes both OHADA and non-OHADA states. It is intended to coordinate economic policies and remove barriers to development projects that cross national borders. Its interest in harmonizing transport laws, for example, overlaps with OHADA’s uniform act on road transport.

The issue of potential membership of African states with a common law background has been prominent in English-language publications. It has been reported that both Ghana and Nigeria have made approaches to OHADA22 but there has been no sign of progress in recent years. There has been a growing number of English-language publications introducing OHADA, often favorably.23 At the same time several authors have stressed that the civil law background of the OHADA uniform rules were compatible with common law concepts and business practices. Noting the convergence of the common law and civil law, Professor Salvatore Mancuso states “the OHADA legal framework already contains principles that can be handled with the lens of a common law lawyer, and should bring us to affirm that the problem of the relation between OHADA and the common law is considerably less significant than the way it is currently viewed and presented.” 24

2. Uniform acts

Article 2 of the 1993 OHADA treaty defined “business law” as including “all rules governing company law and the legal status of traders, debt recovery, sureties and execution procedures, the assessment of enterprises and bankruptcy proceedings, the law of arbitration, labor law, accounting law, the law of sale and transport.” The


24 Mancuso, note 22 supra, at 53.
Council of Ministers is authorized to expand this list by unanimous decision.\(^{25}\) The Council did so in 2001 when it added competition law, banking law, intellectual property law, contract law, and evidence. A uniform act for the protection of consumers has also been authorized.

The procedure for drafting, review, and adoption of the uniform act is set out in Articles 5 through 12 of the OHADA treaty. The Permanent Secretary arranges for the preparation of initial drafts. Initial drafts are submitted to the governments of each member state. Although not provided for by the treaty, as noted earlier, the Council of Ministers has authorized governments to consult with national commissions selected from businesses and professionals. The governments have 90 days (or for an additional 90 days if the Permanent Secretary considers circumstances so require) to submit written comments on the draft act. The act, these comments, and a report by the Permanent Secretary are then sent to the Common Court of Justice and Arbitration for an opinion on the compatibility of the draft with the treaty. The Court has 60 days to provide this opinion. The Permanent Secretary then arranges for the preparation of the draft uniform act and submits the text to the Council of Ministers. The Council must adopt the act by unanimous vote of member states present at its meeting subject to the condition that at least two-thirds of member states approve. If approved, the text comes into force a stated number of days following publication in the OHADA *Journal Officiel*.\(^{26}\)

A uniform act that comes into force following the procedure outlined in the treaty automatically becomes the law of each member state. Article 10 of the treaty provides that “Uniform acts shall be directly applicable and compulsory in the Contracting States, notwithstanding any provision to the contrary in prior or subsequent legislation.”\(^{27}\) Whether the effect of inconsistency between a uniform act and a national law is limited to the specific contrary provision or the whole of a

\(^{25}\) Revised Treaty, note 15 *supra*, art. 2.

\(^{26}\) Revisions of existing uniform acts follow the same procedure.

\(^{27}\) Revised Treaty, note 15 *supra*, art. 10.
national law is an issue still debated notwithstanding an advisory opinion given by the Common Court of Justice and Arbitration.\textsuperscript{28}

Several reasons in support of this supranational law-making procedure have been given. There is concern that the parliaments in the member states deliberate very slowly and it is highly likely that the date the “uniform” act entered into force throughout the territory covered by OHADA would be delayed. It has also been suggested that the procedure limits opportunities for corruption of lawmakers. The price paid for these advantages, however, is the charge that the process is not democratic. As noted, stakeholders initiated \textit{sua sponte} the creation of national commissions that national governments consult.

As of March 2015 there are nine uniform acts in force. These include acts regulating general commercial law, commercial companies and economic interest groups, secured transactions; simplified debt collection procedures and enforcement measures, insolvency, arbitration, accounting, carriage of goods by road, and, most recently, cooperative societies. Revised texts of the three first uniform acts have entered into force in the last four years. In addition to these acts now in force, drafts covering contract and labor law exist but their present status is uncertain. A draft consumer protection act has apparently been withdrawn. Of these texts, the contract law draft is of most interest because the Permanent Secretary turned to the International Institute for the Unification of Private Law (UNIDROIT) in Rome to help prepare the draft text.\textsuperscript{29}

Topics covered by these uniform acts are “private law” topics. OHADA does not propose to cover the many regulatory areas of economic law. Thus, economic policies are left to member states -- which helps to explain the several different unions (CEMAC, ECOWAS, UEAC, UEMOA, UMAC) that West and Central African states have formed.

\textsuperscript{28} Advisory Op. J-02-04 (30 April 2001). For continuing debate, see Professor Dickerson’s analysis in the text accompanying footnote [x] \textit{infra}.

\textsuperscript{29} A double-issue of the \textit{Uniform Law Review/Revue de Droit Unifie} is devoted to the draft contract text prepared by Marcel Fontaine, a distinguished Belgian professor. 13 Unif. L. Rev., Issue 1-2 (2008).
3. Common Court of Justice and Arbitration

Article 14 of the OHADA treaty states that the Common Court of Justice and Arbitration “shall ensure the common interpretation and application in the Contracting States of the present treaty, of regulations passed in application thereof and of the uniform acts.”  The Court has the final say on matters concerning interpretation of the uniform acts. Unlike the French cour de cassation, the Court makes a final decision on disposition of the case rather than ruling on the law and remanding to a national court. Judgments of the Court are enforceable in member states as if they were judgments of a national court. Parties that have exhausted their remedies in the national courts may challenge the decision in the Common Court. If a matter is in its exclusive jurisdiction, the Common Court may annul a decision of a national court.

Judgments of the Court are readily available. An initial annotated survey of decisions has recently been published. The most important of the decisions address the jurisdiction of the Court. For example, the Court decided that when an appeal included both issues of OHADA law and national law, the Court would consider both issues rather than only OHADA.

Expansive interpretation of its jurisdiction stokes animosity from national courts. It has been reported that national courts have resisted or even refused to apply OHADA uniform acts. While lower courts may be unaware of the OHADA acts, the supreme courts of member states deliberately refuse to apply them. It is

30 Revised Treaty, note 15 supra, art. 14, 1st para.
33 Id., at 223. For a general comment on the issue, see Beauchard & Kodo, note 1 supra, at 23-24.
34 Beauchard & Kodo, note 1 supra, at 26-28.
suggested that this is an issue of sovereignty: the supreme courts resent the removal of business to the OHADA court.\textsuperscript{35}

Removing cases from national courts by expansive decisions on jurisdiction has added to the overwhelming workload for the Court – an overload which Beauchard and Kodo suggest is an inherent result of making the OHADA court, rather than national supreme courts, the final court of appeal.\textsuperscript{36} The revised treaty expanded the number of judges from seven to nine but the Court is reported to be “severely understaffed.” Although additional funding will help, some outside reviewers think that it will be necessary to introduce performance-based measures of performance.\textsuperscript{37}

Notwithstanding the significant challenges faced by the Court, Beauchard and Kodo conclude that OHADA has been a “surprise achievement, as illustrated not least by the commitment of Member States’ legal professionals to the treaty and the interest in it expressed by neighboring nonmember states.”\textsuperscript{38} The authors note challenges: “resource deficits, institutional deficiencies, language ambiguities, and intransigent attitudes within Member States,” but state that these challenges are overshadowed “by the need to effectively and uniformly implement OHADA within the Member States.”\textsuperscript{39} The \textit{insécurité juridique et judiciaire} which so worried the States which signed the 1993 treaty has not yet been overcome.

II

LAW AND DEVELOPMENT

Legal literature found under the rubric of law and development is fascinated by the evolution of the “field”—although some authors question whether there is a field

\footnotesize{\textsuperscript{\textsuperscript{35} Id. at 27-28.}}
\footnotesize{\textsuperscript{\textsuperscript{36} Id., at 19.}}
\footnotesize{\textsuperscript{\textsuperscript{37} Id.}}
\footnotesize{\textsuperscript{\textsuperscript{38} Id., at 31.}}
\footnotesize{\textsuperscript{\textsuperscript{39} Id.}}
or whether it matters whether or not there is a field.\textsuperscript{40} It is generally accepted that there have been at least three stages of evolution -- 1960s through the mid-1070s, mid-1980s through the mid-2000s, and fresh start following soon after the end of the second stage. It is primarily literature in this “new” third stage that I have looked to in order to assess the OHADA project.

The most recent stage of law and development is characterized by four main themes:

• attention should be focused on pragmatic experimentation with studies to determine what works;\textsuperscript{41}
• law must be considered in the broader social, cultural, and political context (“Law cannot deliver in and of itself because it swims in the social sea with everything else”\textsuperscript{42}), with the corollary that legal reforms that might work in one milieu may not work in another;
• the traditional goal of economic growth should be broadened to include development of personal freedom,\textsuperscript{43} with particular attention to improving this freedom for women and the poor;
• there should be less reliance on state-centric solutions and closer attention to populations not reached by state law and judicial institutions.

Implicit in these themes is rejection of prior approaches. One-size-fits-all solutions are rejected, as are top-down, state-centric solutions. Formal institution-building alone – e.g., enhancing property rights and contract enforcement – does not, it is conceded, ensure democracy, economic growth, and equitable distribution of that growth.\textsuperscript{44}

\textsuperscript{40} See the survey in Benjamin Van Rooij & Pip Nicholson, Inflationary Trends in Law and Development, 24 Duke J. Comp. & Int’l L. 297 (2013). [I distributed an excerpt in the joint seminar session Karisa Cloward and I led in the Fall.]


A flavor of the literature in this latest stage is apparent in an informal essay by David Trubek, co-author of a 1974 law review article announcing the failure of the first stage of law and development programs45 and co-editor of a book announcing the latest stage46:

I think the time has come to abandon all of the simple-minded formulae and models that have been paraded under the name of law and development. Decades of practical experience and critical scholarship have revealed the dangers of master narratives and universal formulae.

*** Does this wisdom, this hard-won enlightenment, mean that law and development is or should be coming to an end? I think not. Rather, I see this as a time to redouble our commitment to better knowledge and more effective practice. We should not be deterred because there are no simple, universal ideas, no prepackaged reforms ready for immediate and effective transplantation, no clear consensus in the world of scholarship about the nature, history, and impact of law in any society. This condition makes the job of effective reform more daunting but also more exciting.

*** What is needed now is a way to live with the knowledge we have gained without abandoning the commitment that led us to the enterprise in the first place. To do that, we must find new approaches to replace the "one-size-fits-all" formulae that have guided practice in the past. The first step is to look very closely at what has actually happened.***

[In his study of the role law played in economic development in Northeast Asia during the "Asian miracle"47] Ohnesorge ends with suggestions for an approach to reform practice that is open to complexity, distrusts holistic schemes and universal formulae, and looks at each country and each area of law in its particularity. Such realism is the necessary first step towards better practices. It requires detailed empirical knowledge of the conditions in any given country and critical assessment of the role of actually existing legal regimes. But it must be complemented by processes that allow clear articulation of values; close participation of stakeholders in the design of reform projects; careful attention to successful reform efforts in similar settings; and careful monitoring of the effects of change.


So this essay is a plea for a new approach. Let’s call it “post-law and development,” not because this term offers a new big idea, but because it suggests we have to build our new practices on the shards of the past. Let’s abandon the hope for one big idea and for universal schemes while searching in the complexity of actually existing legal systems for opportunities for emancipation. Let’s leave pre-packaged reforms at home but not abandon the idea of reform itself. Let’s look back at what has actually happened and see if there are small lessons that can be learned. Above all, let’s continue to be engaged.48

From the perspective of this “new” law and development literature OHADA is suspect. It is state-centric on steroids. Uniform laws are handed down by a supra-state organization.49 Even commentators generally supportive of OHADA concede as much. Professor Dickerson, for example, writes: “The OHADA structure is a brilliant approach, both as a conceptual and as a procedural matter. In fairness, however, it is not without moral difficulty. Specifically, anyone who moderates from a purely universalist position will recognize that the OHADA system is aggressively top-down, and that it inserts an aggressively Western/Northern legal system.”50 The uniform laws are one-size fits all in that they apply to all seventeen-member states (and, in theory, to the entire population of each state) no matter what the stage of their development. These laws are treated as discrete from the cultural, social, and the economic environment. The goal51 is to attract foreign investment on the apparent assumption that investment alone will lead to economic growth and that this without question is a Good Thing. OHADA does not ignore small businesses -- the uniform law on cooperative societies provides local communities a way to access markets in the formal sector – but other than trying to lure businesses in the


49 Claire Moore Dickerson, Harmonizing Business Laws in Africa: OHADA Calls the Tune, 44 Colum. J. Transnat’l L. 17, 59 (2005). Query what she means by “moral” difficulty. There may be a democratic deficit (i.e., not all stakeholders are consulted), but is this a “moral” issue?

50 Id.

51 A secondary goal is to expand OHADA into a pan-African business law regime. Such an aspiration raises political, rather than economic, issues.
informal sector into joining the formal one OHADA shows little interest in business activity in the informal sector.\(^{52}\)

At the same time, however, the new law and development literature calls for studies of what works. The obvious topic for empirical study would be to consider the reception of one or more of the OHADA uniform laws in each of the member states. OHADA’S stated goal is to provide investors with trustworthy legal rules together with the predictable application of these rules. Studies could examine whether businesses perceive added trust and act upon this trust by increasing investment or trade.\(^{53}\) The studies might identify whether the effect is the same in the different member states and in the different economic sectors.\(^{54}\)

OHADA’s unique supranational law-making process\(^{55}\) – drafting uniform laws by experts working with the permanent secretary, consulting member state governments and the Court within strict time-limits, adopting the laws by the Council of Ministers, and making these laws automatically the law of each member state – is another topic ripe for study. Questions for study come tumbling out. Do “stakeholders” participate adequately in the process? Would uniform laws be more effective if there was greater participation by democratically selected stakeholders? What participation, if any, do foreign investors or their professional advisers have in

\(^{52}\) From some of her early articles Professor Dickerson has been concerned about the informal sector. In a recent article she suggests ways in which law for the formal sector might influence business activity in the informal economy. See Claire Moore Dickerson, Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law, 59 Am. J. Comp. L. 179 (2011). She does not suggest, however, that this is within the mandate of OHADA.

\(^{53}\) For one such study in a single OHADA member state, see Julie Paquin, Legal Reform and Business Contracts in Developing Economies: Trust, Culture, and Law in Dakar (Burlington, Vt.: Ashgate Publishing, 2012).

\(^{54}\) Professor Dickerson’s latest published law review article is an example of a study of what techniques might make formal business law (tax law in her study) effective even in informal economic sectors. Claire Moore Dickerson, Bringing Formal Business Laws to Cameroon’s Informal Sector: Lessons and Cautions from the Tax Law Example, 13 Wash. U. Global Stud. L. Rev. 265 (2014)

\(^{55}\) The process is no longer unique. French-speaking Caribbean nations have created OHADAC, a legal regime modeled on OHADA. See www.ohadac.org
the review of proposed uniform laws? Why have some proposed uniform laws been drafted but not approved?

Yet, while these proposed studies address pertinent issues and are worthy of study, the proposals illustrate the difficulty with this third wave of law and development literature: other than urging experiments in law reform that are sensitive to the social, political, and economic context, the literature gives no direction on where to begin. OHADA exists and can be studied to see if it succeeds. The literature proposes an accumulation of studies of experiments that will allow reformers to make more educated judgments about what might or might not work in particular contexts. What if, however, there is no OHADA and you are asked to prepare reforms that will improve the lives of the poor. Where should you begin? Just as important, assume a series of case studies of a specific reform the literature does not indicate how to evaluate these experiments. Contexts are not only different but they are constantly changing. As one commentator has pointed out, “legal development” is different from “law and development”: legal development refers to the “ongoing construction of legal institution that occurs in all societies,” while law and development projects are intentional interventions to introduce reforms, often based on transplanted institutions and non-indigenous norms.56 It would be helpful to have some understanding about the dynamics of the relation between “law” and context.

When wrestling with these issues I have tried to identify projects that address at least the issue of where to begin. The work of Professor Boris Kozolchyk, Director of the National Law Center for Inter-American Free Trade at the University of Arizona, comes to mind.57 He has spent decades introducing secured transactions legislation into Central and Latin American countries. His goal is to enhance the availability of credit in all sectors of the economy but he recognizes that the ultimately value of economic growth is expanding life choices of individuals. He is

persuaded that one way to increase credit at lower cost is to provide creditors with greater assurance that they will ultimately be paid. He has therefore articulated twelve principles for legal reform in the area. He works country-by-country identifying in each all relevant existing laws, compiling business customs, and making a meticulous “roadmap” of existing lending practices in representative sectors of the economy. He is particularly sensitive to the need to identify custom, which any legislation must take into account. Recognizing that the social, political, and economic context of law reform may differ in each country, there is no one-size-fits-all law reform and he adapts proposed legal changes in response to the existing institutional and political context. Once a reform is made, he and his Center continue to study the effect of legal reform, often tweaking legislation to address issues that have arisen in practice.

In West and Central Africa, Boris Kozolchyk would no doubt question the failure of the OHADA regime to identify business customs and the lending and borrowing practices. Much more emphasis would be placed on identifying and consulting “stakeholders” before acting. And he would recognize that effective law reform takes time.

III

UNIFORM ACT ON SECURITY

Professor Kozolchyk’s work with secured transaction law reform was in my mind when I was selecting a particular aspect of OHADA to examine in greater depth. I therefore turn in this final part of the paper to the Acte Uniforme portant organisation des sûretés\textsuperscript{58} (translated here as the Uniform Act on Security\textsuperscript{59}), one of the OHADA uniform laws.

\textsuperscript{58} The original act was adopted on 17 April 1997 and entered into force on 1 January 1998. This act has been substantially revised. 15 OHADA Journal Officiel No. 22 (15 Février 2011). The Council of Ministers adopted the revised act on 15 December 2010 and it entered into force on 15 May 2011.

\textsuperscript{59} “Security” as used in this context refers to legal devices used to enhance the likelihood that a creditor will be paid what is owed. Although the conceptual classification of these devices may differ, legal systems derived from European sources divide these devices into
The Uniform Act on Security was one of three uniform acts adopted initially. The Act provides legal devices (suretyship contracts, first-demand guarantees, pledges, security interests in tangible and intangible personal property, mortgages of real property) that enhance the likelihood a creditor will ultimately receive what is owed by its debtor. The Act therefore fulfills the objective of attracting potential investors. As one author recently wrote, security devices are the “moteurs de l'économie et du crédit, et nécessaires lors de la mise en œuvre des investissements privés à longue terme.” The Act was not controversial. Not only was the Act perceived as necessary but it also did not displace widely used national laws, which in any event was antiquated and fragmentary law inherited from the colonial period. Before 1990 only Senegal had attempted a systematic codification to pull the fragments together.

The substance of the 1998 Uniform Act was clearly derived from French law. It covered both personal security (surety contracts; first-demand guarantees) and “real” security (security interests in both land and personal property, whether tangible or intangible), thus bringing together rules that formerly were dispersed. The presentation had all the virtues of French legal drafting: succinct but clear provisions coherently organized. Authors trained in French law had nothing but those that are personal and those that are “real” (from the latin “res”). An example of a personal security is when a mother signs a suretyship agreement by which she promises to pay a lender who has made a loan to her son if the son fails to repay the lender. The lender is more likely to be paid because it has two promises rather than just one. A mortgage of land (real property) is an example of a real security. The lender has only the promise of the mortgagor but the likelihood of being paid in full is enhanced because the lender is entitled to collect what it owed by having the debtor's mortgaged land sold. A security interest in personal property, like a car, is also “real” interest.

60 Christian Gamaleu Kameni, Réflexions sur la réglementation de l'investissement privé étranger dans l'espace de l'OHADA, 141 J. dr. int'l 1219, 1226 para. 14 (2014). The importance of secured transactions legislation is echoed by other commentators. See, e.g., Beauchard & Kodo, note 1 supra, at 36 (“This uniform act might be among the most important, as it is designed to spur the flow of credit within the OHADA area and is a prime concern for outside investors”).


Focused as it was on luring foreign investment by introducing security devices and concepts borrowed from French law, the Uniform Act ignored arrangements in the informal sector, such as the tolmé in Niger, that are functionally similar to – and perhaps an improvement on -- the devices provided in the Act. As Professor Dickerson has written, there remains a “complex and unclear” issue as to the effect of the Uniform Act on the status of the tolmé or similar arrangement in other OHADA member states. Fieldwork, however, suggests that the Act has had little impact in the informal sector.

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62 See, e.g., Joseph Issa-Sayegh, L’Intégration juridique des États africains dans la zone franc, Part 2, Rev. Pénit., No. 824, 125 at 155-156 (1997) (“la simplification et le renforcement des garanties des créanciers inspire profondément l’acte uniforme sur les sûretés dont la réglementation était restée inchangée depuis le code civil de 1804”)


64 Professor Dickerson describes the tolmé as follows:

It requires the debtor physically to hand over the security to the creditor only if the property is a movable and thus capable of dispossession. But the tolmé can cover realty as well. The tolmé includes concepts that are unusual to the Northern eye, including allowing the creditor to use the security, but without reducing the debtor’s obligation by the value thus transferred to the creditor. As to repayment, the debtor is obliged to repay “when able to,” but the understanding imposes a greater obligation than that phrase would under Northern legal concepts. Indeed, the creditor may choose not to seek repayment, preferring instead to use the collateral. Thus, the security interest can buy more time for a strapped debtor than does the classic Northern analogue.


65 Professor Dickerson analyzes the issue as follows:

If the OHADA uniform act on security interests supersedes all law, regulation or other enforceable legal obligation on the same subject matter, the tolmé probably no longer has any force beyond the purely cultural. If, as is likely the case, only a legal obligation that directly contradicts the OHADA uniform act is invalidated pursuant to the OHADA Treaty, the tolmé may retain the legal force of any traditional law wholly outside OHADA’s purview. The latter appears to be the favored understanding, but the scope of the OHADA uniform laws’ abrogation
Experience with the Uniform Act was less troubled about such issues as its effect on business in the informal sector than about difficulties with the operation of the *Registre du Commerce et du Crédit Mobilier* (Trade and Personal Property Credit Register) in which security interests are recorded. Under the OHADA regime, the *Acte Uniforme relative au Droit Commercial Général* provides for the organization and function of the RCCM, but each member state is responsible for the local and national registers. Authors consistently report shortcomings, or worse. Commenting on the operation of the local registers in Cameroon, one author said:

“The commercial registry has not fully achieved its objectives of ensuring legal security because of inefficiency, maladministration and lack of basic infrastructure. … There is as yet [2010] no well-organized and equipped commercial registry in Cameroon. … There are no computers and skilled employees. Commercial operators are plagued by delay and inefficiency.

Effect remains unsettled. Even if the tolmé, the security interest, no longer has the force of law against third parties, the underlying obligation of the debtor to repay continues in effect as between the debtor and creditor to the extent provided by domestic law, but the creditor’s right to use the collateral without compensation may well be considered inconsistent with OHADA law. Nevertheless, importantly, the reality is that for the foreseeable future, the tolmé will continue to be used in the informal sector, and enforced by informal means, regardless of what formal law may dictate. It is highly unlikely that a nano-entrepreneur would ever overcome the cost and complexity of securing an obligation under formal law, and rely on the formal law’s version of a security interest.

Id., at 192-93.


67 Regulation of the RCCM is found in the *Acte Uniforme relative au Droit Commercial Général*. Books 2 through 4 address local court registers, national registers, and a central OHADA register respectively. A 2010 revision of this Uniform Act added a Book 5 to deal with the implications of digitalization and electronic communication. The national registers consolidate information gathered by local registers and the central register consolidates information in the national registers. Security interests must be recorded in a local court register but that information is then to be made available nationally and regionally.
The registration process is slow. The delay is often caused by inadequate personnel, inadequate facilities and crude registration process.\textsuperscript{68}

Professor Dickerson provides a similar but more detailed assessment:

“OHADA describes the registry’s intended structure and role, but the national governments establish, run, and organize the registry. In Cameroon, the registry is housed in the local courts of first instance—the trial courts. I went to one such court in Cameroon’s commercial capital and in one of the commercial centers in Cameroon’s Anglophone region to find what was available. *** First, all input to the registry is manual; no computerization in sight. That is okay. But the information is listed only chronologically, without an index. This information includes the formation details of business enterprises, the identification of property used as collateral to secure credit, and other substantive material. Thus, a creditor considering lending to a particular debtor must literally go back from the beginning and review every subsequent entry to locate the desired information. How useful is this? The registry is not searchable in any meaningful way. And, additionally, it is highly unlikely that a random potential creditor will have direct access to the registry as it will be under the court clerk’s control for safekeeping. To access the information, the potential creditor must rely on the thoroughness and accuracy of a civil servant’s review.”\textsuperscript{69}

Much of the difficulty relates to funding of the registers. Member states must find the funding to establish and operate the registers. Foreign donor sources have funded efforts by some states to introduce electronic registers. The African Development Bank has extended funds for a regional register but it has been slow and the strategy of starting with a regional register, which is reliant on information gathered from national registers, has been questioned.\textsuperscript{70} The Central Bank of the Central African Monetary Union has created an on-line system that provides banks with information about the population with credit history in states that are members of the union.\textsuperscript{71} This system is not, however, a register as envisioned by


\textsuperscript{70} Beauchard & Kodo, note 1 \textit{supra}, at 24-25.

\textsuperscript{71} \textit{DOING BUSINESS 2014: REGIONAL PROFILE: ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA (OHADA) 48} (World Bank, 11\textsuperscript{th} ed. 2014).
OHADA: it is limited as to the people covered and only banks have access to the information.

Implementation of the RCCM remains a problem today. An assessment in 2013 concludes that “reforming the RCCM might turn out to be a very long-term project, in view of the very disparate civil status registries among OHADA members. Without proper coordination of civil status registers, the RCCM might prove to be a very illusory tool in the effort to increase legal certainty in OHADA Member States.”72

The substance of the 1998 Uniform Act did not go unexamined during its first decade. A revised Act became effective in May 2011. The revision made significant changes.73 The creation of a security interest was made simpler by requiring only a written document. A creditor could take a security interest in a debtor’s existing property but also in property the debtor acquired later without the need to conclude a new security agreement. A creditor now has a security interest in the proceeds of any disposition of property serving as collateral. New types of intangible property could serve as collateral: bank accounts, intellectual property, and cash. Enforcement of a security interest following default of a debtor was standardized and, in some limited cases, banks could proceed to realize the value of specific types of collateral owned by “professional” debtors. A particularly sophisticated innovation is the introduction of the “security agent” who can represent syndicates of lenders. Because have such an agent greatly reduces the formalities involved in creating, transferring and terminating security interests when there are multiple financers, this new provision is of particular interest to foreign investors in project finance.74

72 Beauchard & Kodo, note 1 supra, at 25.
73 For a useful summary of the 2011 Uniform Act on Security, see id. at 36-39.
These changes have been attributed to recent modifications to the French law of secured transactions.\textsuperscript{75} This attribution appears to be too limited. Between the time that the 1998 Act was being drafted and the revision, there had been growing consensus among law and development practitioners not only that the economic case for secured transactions legislation has been made,\textsuperscript{76} but also on the objectives of such legislation. The objectives listed in the Legislative Guide for Secured Transactions Law of the United Nations Commission on International Trade Law is the most frequently cited statement of such objectives.

To promote low-cost credit by enhancing the availability of secured credit;
To allow debtors to use the full value inherent in their assets to support credit;
To enable parties to obtain security rights in a simple and efficient manner;
To provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions;
To validate non-possessory security rights in all types of asset;
To enhance certainty and transparency by providing for registration of a notice of a security right in a general security rights registry;
To establish clear and predictable priority rules;
To facilitate efficient enforcement of a secured creditor’s rights;
To allow parties maximum flexibility to negotiate the terms of their security agreement;
To balance the interests of all persons affected by a secured transaction; and
To harmonize secured transactions laws, including conflict-of-laws rules relating to secured transactions.\textsuperscript{77}

These objectives are found in Article 9 of the Uniform Commercial Code and in the Personal Property Security Acts found in common-law Canadian provinces. In recent decades both the United States and Canada have promoted their laws as models for modernizing the laws in other countries—including European countries, such as France. “Over the last dozen years,” suggests the late Professor Rod

\textsuperscript{75} Beauchard & Kodo, note 1 \textit{supra}, at 37. French law was modified by Ordinance No. 2006-346 (23 March 2006).


\textsuperscript{77} UNCITRAL, \textbf{LEGISLATIVE GUIDE ON SECURED TRANSACTIONS: TERMINOLOGY AND RECOMMENDATIONS} (2007)
Macdonald of Quebec, “there have been signs that ... a comprehensive, global, and systematic [transnational secured transactions legal order] may be emerging, albeit as an informal, not a codified, legal order.”78 By informal, he means principles or objectives, such as those promoted by UNCITRAL, which are not binding law; by codified, he refers to international treaties or national legislation used as model laws. The principles, Professor Macdonald suggests, have become the BIG idea promoted successfully by the U.S. and Canada, international financial interests from North America, and financial institutions, like the World Bank. Not that Professor Macdonald approves. He writes with apparent regret that “[t]he historical approach of national law in Europe, whether of civil law or of common law origin, which held consensual secured credit to be a policy instrument to be deployed, even rationed, by states to achieve specific economic goals has given way to a consensus in favor of a default principle of unlimited secured lending: unlimited in terms of parties, obligations secured and assets susceptible of security.”79

The French – and the Québécois – have responded to the challenge of English-speaking North American aggression by reforming their own codes. Older security devices have been adapted to deal with modern business and financing practices, many of which are transnational. One consequence is that the French texts do incorporate many of the objectives of this new North American consensus model. Nevertheless, creditors and debtors do not have complete freedom of contract. Enforcing a security interest following a debtor’s default, for example, usually requires recourse to courts or public auctions. Only limited classes of creditors and debtors may avoid state control when enforcing security interests.

Directly or indirectly, therefore, the 2011 OHADA Uniform Act incorporates concepts and rules that have their source in western practices and legal models. Opining elsewhere that it is more difficult to modernize secured transactions laws in civil law jurisdictions and in former French colonies, one U.S. scholar grudgingly concedes:

78 Roderick A. Macdonald, note 65 supra, at 146.
79 Id., at 147.
“Reflecting the tension between the UCC Article 9 paradigm and the Roman civil law paradigm, the OHADA countries of West Africa also recently enacted a new uniform secured transactions laws [sic], but a law that is based on the French Civil Code model. Even these, however, do make certain advances, such as following security interests into proceeds of collateral, permitting extrajudicial enforcement, and expanding the range of permitted collateral including after-acquired property.”

Needless to say, these advances are all found in U.S. law. Not all U.S. authors, however, have approved the UNCITRAL Legislative Guide unquestioningly. One author argues:

there are very real gains to be made by the launch or expansion of strong and well-functioning secured-credit systems, and there are very few scenarios in which introduction of elements of the Guide will actively harm a developing country. With that said, there should be a dampening of the zeal with which the Guide and other similar instruments are proselytized, since the willingness of the West to hammer square pegs into round holes stands as the foremost scenario by which harm to the recipient developing nation would result. How then should the Guide be advanced? With humility. In lieu of using carrots or sticks to induce compliance with the Guide’s recommendations (in a fashion that would be in keeping with the outdated approaches of the Washington Consensus), aid organizations, IGOs, NGOs, and powerful Western states should genuinely support flexibility in the adoption and implementation of aspects of the Guide, even if the result is a total absence of incorporation of the Guide’s principles.

He concludes, however, by suggesting that the solution may be to consider secured transactions law as merely one of a number of interconnected institutions that support each other. As an example of such institutions he mentions rule-of-law efforts. Training and equipping the judiciary or educating magistrates in business reorganization techniques might be examples. If so, of course, OHADA has taken the right approach by addressing secured transactions law in the context of related business laws and with the support of a dedicated judiciary and a school for the

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82 Id.
training of magistrates and court personnel. The problem with OHADA from this institutionalist perspective is the weakness of the institutions.

CONCLUSION

Is OHADA a success? It exists: after 20 years there are nine uniform business acts and its institutions function notwithstanding challenges. Whether it has been the cause of increased investment and trade requires studies that have not been carried out. Even if a success in the formal economic sector, there remains the question whether economic development can occur without attention to the large informal economic sectors – a question that OHADA does not address directly.