Jonathan Bashi Rudahindwa*

OHADA and the Making of Transnational Commercial Law in Africa

https://doi.org/10.1515/ldr-2018-0024

Abstract: The Organisation for Harmonisation of Business Law in Africa (OHADA) was established in October 1993 with the ambitious aim of inciting economic development in its Member States. Through the adoption of Uniform Commercial Laws, the organisation is expected to create an enabling environment for business development, thereby providing for a path to economic growth and subsequent development. In light of this professed aim, both the transnational methodological approach and comparative law theories are used in this paper to critically analyse the various processes conducted under the OHADA banner and to engage in discussions on the highly debated role of law as a vehicle for development in sub-Saharan Africa. This exercise, which proves crucial in order to trace its origin within the global governance and law and development theories, allows us to present OHADA as a transnational legal system, while also highlighting both its strengths and limitations.

Keywords: law and development, OHADA, transnational law, law reform, legislative unification

1 Introduction: Why Transnational Law?

The Organisation for Harmonisation of Business Law in Africa (OHADA, French acronym for Organisation pour l'Harmonisation en Afrique du Droit des Affaires) was established a couple of decades ago, in October 1993.[1] By the harmonisation/unification of its 17 Member States' business laws, through the adoption of several Uniform Acts that are meant to be simple, modern and adapted to the Member States' economies,[2] the organisation is supposed to help attract more

1 Current Member States include Benin, Burkina-Faso, Cameroon, Central African Republic, Chad, Congo, D.R. Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo.

2 See Article 1 of the Treaty for the Harmonisation of Business Law in Africa, signed in Port-Louis (Mauritius) on 17 October 1993. Hereinafter Treaty of Port-Louis.

***Corresponding author: Jonathan Bashi Rudahindwa,** Post-Doctoral Research Associate, SOAS University of London, London, UK, E-mail: jb89@soas.ac.uk

foreign direct investment (FDI) in its Member States, thereby inciting growth and economic development.

Several studies have been conducted on OHADA and have attempted to dissect its structure and the processes that it conducts.[3] However, very few of these studies have tried to look beyond the apparent, beyond the professed aim assigned to OHADA by its founders. Moreover, whereas most studies present OHADA as a unique model of harmonisation of commercial law in Africa,[4] others have tried to study it as a successful model of regional law reform.[5] Although they do refer to globalisation and try to compare OHADA to other similar legal processes in the world, a majority of previous studies tend to focus on a general presentation of the OHADA process as well as its specific purpose and its particular approach to harmonisation, failing to connect their discussions to ongoing inquiries on global governance, and major law and development debates, in particular the various correlations between law and economic development.

In light of these considerations, this paper aims to provide a critical analysis of the process conducted under the OHADA umbrella, using comparative law theories and the transnational law prism as methodological approach in order to understand its very essence. This exercise is inspired from the model of transnational law analysis developed by Peer Zumbassen and Alfred Aman,[6] which focuses more particularly on the actors, the norms and the processes that are involved in the making of transnational law. The paper will therefore critically analyse the *norms* produced by the OHADA process (OHADA as transnational

3 The most relevant among these studies are J. Issa-Sayegh (ed.), *OHADA, Traité et Actes Uniformes Annotés* (Juriscope, 2008) [This is the reference book on OHADA, sometimes referred to as the OHADA Green Code. Under the supervision of Professor Joseph Issa-Sayegh, who has written extensively on OHADA, the authors review, analyse and comment each OHADA instrument – the Treaty, the Uniform Acts and the subsequent regulations. Each comment includes an extensive bibliography based on different works on OHADA, as well as case law from the CCJA and national courts within the OHADA territory]; B. Martor, N. Pilkington, D.S. Sellers and S. Thouvenot, *Business Law in Africa, OHADA and the Harmonization Process* (London, Sterling, VA: Kogan Page Publishers, 2002), C.M. Dickerson, *Harmonizing Business Law in Africa: OHADA Calls the Tune*, 44 Columbia Journal of Transnational Law, no. 1 (2005); and B. Fagbayibo, *The Harmonisation of Laws in Africa: Is OHADA the Way to Go?*, 42 The Comparative and International Law Journal of Southern Africa, no. 3 (2009), 309–322.

4 For example, in Fagbayibo (2009), *supra* note 3, OHADA is presented as "one of the most successful experiments in Africa". Harmonisation is presented here as a must, given the disparity of legal systems that African countries have inherited from the colonial period.

5 See, for example, C.M. Fombad, *Some Reflections on the Prospects for Harmonization of International Business Laws in Africa: OHADA and Beyond*, 59 Africa Today, no. 3 (2013), 51.

6 A.C. Aman and P. Zumbassen, *Transnational Law: Actors, Norms, Processes* (Charlottesville VA: Lexis-Nexis, 2012).

Uniform Acts), the *actors* that are involved in the elaboration of those norms (OHADA as supranational institutions) and the *processes* that are used to produce OHADA law (OHADA as a transnational legal system), ensuring each time to link those discussions to the relevant concepts of comparative law. This exercise proves very important, as it allows us to explore the underpinnings of the OHADA project, in order to understand both its nature and its scope and to trace its origin within the global governance and law and development theory. The ultimate goal of this paper is therefore to promote a better understanding of OHADA as a transnational legal system, highlighting its strengths and limitations, to consider whether it can achieve its goal of promoting economic development in Africa.

A particular focus is placed on the main processes conducted under the OHADA banner – i.e. law-making and judicial mechanism – the norms that result from these processes (Uniform Acts), as well as the actors that are involved in making them (OHADA institutions). On the one hand, the paper engages in a discussion on harmonisation/legislative unification, legal diffusion and the use of legal transplants in the OHADA law-making process, which uses legal borrowing to improve the legal systems that the Member States inherited from colonisation. On the other hand, the paper focuses on the OHADA judicial system, with a particular emphasis on the interaction between the Common Court of Justice and Arbitration (CCJA) and the Member States' national courts. The paper analyses the vital role played by the CCJA, while highlighting the different challenges faced by the OHADA legal framework in existing alongside its Member States' legal systems and bringing them together under the jurisdiction of the Court.

Three key questions, which stem from law and development theory, are used throughout the paper to inform our analysis:

Why law? – i.e. why is OHADA law considered as an appropriate tool to foster economic development in sub-Saharan Africa? This addresses the issue of law being presented as a vector for development in Africa. What law? – i.e. what particular form is the law supposed to take in order to achieve this objective? Whose law? This question refers to the debate on legal transplantation and examines the use of foreign rules in law reform projects.

2 OHADA as Transnational Commercial Law

Transnational law is conceived as law that is not particular to or the product of any one national legal system. In the view of its more expansive exponents,

transnational law is a collection of rules which are entirely anational and derive their authority by virtue of international usage and its observance by the merchant community.[7] Thus, transnational law refers to the extension of jurisdiction across nation states' boundaries and all law which regulates actions or events that transcend national frontiers.[8] Transnational law challenges the accepted conceptual framework which restricts the study of law under two types of regimes: state/municipal law, which focuses on law as a tool for ordering relations within the confines of the nation state, and public international law, which involves relations between nation states.[9] Transnational law has the ability to combine aspects of both municipal law and international law. In the case of OHADA, for example, while the Treaty includes various rules that apply directly to relations between the Member States (international law), the Uniform Acts provide for rules that are applicable to relations between individuals, corporations, etc. in those Member States (similar to municipal law).[10]

Transnational commercial law, at least in the modern context, can also be defined as the product of harmonisation endeavours. It is a deliberate mixture with its most forms being international conventions/treaties.[11] Transnational commercial law is born as law that is neither particular to nor the product of any one legal system. It represents the union of rules taken from many legal systems.[12] Admittedly, because they are derived from various national legal systems, transnational rules stand better chance not to reflect the outdated rules which may still be found in certain national legal systems. In that sense, the rules produced by OHADA may help to meet the concerns of modern business.[13]

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7 R. Goode, "Usage and its Reception in Transnational Commercial Law", in J.S. Ziegel (ed.), *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law* (Oxford: Hart Publishing, 1998), p. 2.

8 R. Cotterrell, *What Is Transnational Law?, Queen Mary University of London School of Law, Legal Studies Research Paper, 103 (2012)*, 37 Law and Social Inquiry, no. 2 (2012), 2. See also C. Tietje, A. Brouder and K. Nowrot (eds.), *Philip C. Jessup's Transnational Law Revisited – On the Occasion of the 50th Anniversary of its Publication*, Essays in Transnational Economic Law, Faculty of Law, Martin-Luther-University Halle-Wittenberg (2006), 45–55; and W. Twining, "Reviving General Jurisprudence", in M. Likosky (ed.), *Transnational Legal Processes: Globalisation and Power Disparities* (London: Butterworths, 2002), pp. 3–4.

9 Twining (2002), *supra* note 8, p. 3.

10 Tietje, Brouder and Nowrot (2006), *supra* note 8, p. 45. See also Cotterrell (2012), *supra* note 8, p. 3.

11 S. Gopalan, *Transitional Commercial Law: The Way Forward*, 18 American University International Law Review, no. 4 (2003), 811.

12 *Ibid*., 809.

13 E. Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* 17 Arbitration International, no. 1 (2001), p. 61.

2.1 OHADA as Transnational Uniform Acts (Norms)

The Uniform Acts, which are at the heart of the OHADA system, constitute the main norms enacted by the OHADA institutions. Adopted by the Council of Ministers after being drafted by the Permanent Secretariat, they cover the nine commercial law areas that are provided by the Treaty, namely general commercial law, corporate law (commercial companies and economic interest groups), cooperatives, security interests, insolvency law, simplified debt collection procedures and enforcement measures, arbitration, carriage of goods by road, accounting and financial reporting.[14] Once adopted, the Uniform Acts are directly applicable and have direct effect in every Member State, replacing any previous Member States' municipal laws governing the same matter.[15]

Discussing the Uniform Acts, the authors highlight the share of competence between the organisation and Member States in the subjects covered by the Uniform Acts: national laws which are not contrary to uniform laws remain in force and are still applicable and used as sources of law.[16] The Uniform Acts provide an overall legal framework which is, in general, based on Civil Law and has to a certain extent borrowed from modern French business law.[17] Because the majority of the OHADA Member States are former French colonies, it has been demonstrated that the French legal system has inspired most of OHADA legislation.[18] The majority of these Uniform Acts are also inspired from similar laws in industrialised and mostly Western settings, presumably ensuring that they are both simple and *modern*. The Western/Northern characteristic of the Uniform Acts is believed to be particularly appropriate for development, as it is expected that foreign investors will be more comfortable with rules that they are familiar with, therefore attractive and prone to reducing transaction costs.[19] However, no empirical evidence has been provided as to the impact of the OHADA Uniform Acts on transaction costs, in particular, for local small businesses which may not be familiar or acquainted with the sophistication of those Uniform Acts.[20]

14 See Article 2 of the Treaty of Port-Louis.

15 See Article 10 of the Treaty of Port-Louis.

16 Issa-Sayegh (2008), *supra* note 3, p. 28.

17 B. Martor, N. Pilkington, D.S. Sellers and S. Thouvenot, *Business Law in Africa, OHADA and the Harmonization Process* (2nd ed., London, Philadelphia: GMB Publishing, 2007), p. 2.

18 Dickerson (2005), *supra* note 3, p. 20.

19 *Ibid*., 59.

20 For further analysis of this aspect, see *infra* Section 4.1.2 legal transplantation/diffusion.

2.2 OHADA as Part of the Civil Law Tradition

As aforementioned, literature on OHADA indicates that a majority of Uniform Acts were strongly inspired from French business law, with an overall legal framework based on the Civil Law tradition.[21] The majority of founding Member States of the organisation were former French colonies, which inherited their legal system from France. Guinea-Bissau, Equatorial-Guinea and D.R. Congo, the Member States that joined OHADA later on and which inherited their legal systems from Portugal, Spain and Belgium, are also considered to belong to the Civil Law tradition. These observations, and the fact that OHADA is supposed to "harmonise" its Member States' commercial laws, suppose that the laws that are produced as a result of the harmonisation process are strongly rooted in the Civil Law tradition.

In Civil Law countries, legislation is seen as one coherent national confined system that is essentially statutory (in the form of *codes*), as such complete, and explainable from within. In this view, legislation is seen as capable to cover all eventualities and capable of resolving all issues arising. In this context, the code is therefore supposed to provide the judge with a general statement of principle as his starting point as well as the system of thoughts within which he is allowed to *interpret* the law. There is little room for other sources of law, like industry practice, customs and general principles, as the law is meant to be found through deductive and analogical reasoning from within the codes' own system.[22] All these features of the Civil Law tradition can be found in the majority of OHADA Member States' legal systems. Therefore, despite the fact that OHADA is a legal system existing through its Member States' legal systems and which produces transnational rules which are supposed to result from the mixture of rules originating from different legal system, the application of OHADA law in the Member States will undoubtedly be influenced by the Civil Law tradition, given the familiarity of the national courts with the techniques and procedures of this legal family.

3 OHADA as Supranational Institutions (Actors)

As stated in the OHADA Treaty, OHADA was created in order to provide its Member States with a legal framework meant to be secure and reliable,

21 Martor *et al.* (2007), *supra* note 17, p. 3.
22 *Ibid.*, p. 1.

specifically designed to attract more investment and, thereby, to stimulate economic development. OHADA is therefore presented as an international organisation created by a Treaty, which is aimed at harmonising commercial law, and provided with special institutions established to achieve this objective.[23] While the Conference of the Heads of State and Government is responsible for the overall vision of the organisation as well as Treaty revisions, the Council of Ministers, which is composed of Member States' Justice and Finance ministers, is a key institution that prepares and adopts the OHADA legislation, with the support of the Permanent Secretariat. In addition, a regional court, the CCJA, and a regional training centre, ERSUMA (Ecole Régionale Supérieure de la Magistrature), have been established in order to ensure the effective and uniform application of the OHADA legislation in every Member State.[24] This particular institutional framework is meant to provide smooth and efficient law-making and enforcement processes, which are necessary to improve the business environment of the Member States.

In a nutshell, the OHADA system is characterised by:

- a Conference of Head of States that provides the overall vision of the organisation and is in charge of Treaty revisions;
- a Council of Ministers that promulgates new Uniform Acts and revises and updates the old ones;
- a Permanent Secretariat attached to the Council of Ministers, which is responsible for the drafting of Uniform Acts and other legislation;
- a Common Court that interprets OHADA legislation in order to preserve its uniformity across the entire OHADA region; and
- a Regional Training Centre, to reinforce and support the work of the organisation by providing continuing legal education aimed at judges, court staff and lawyers in the region.[25]

The OHADA legal framework is therefore analysed in this paper as a *transnational* legal system which, through the production and the implementation of transnational commercial rules in every Member State, is presented as a regional mechanism to promote economic governance and development in sub-Saharan Africa, while also attempting to address the issue of legal pluralism.

23 *Ibid*.

24 Issa-Sayegh (2008), *supra* note 3, p. 26.

25 The Institutions are provided in Title V of the Treaty of Port-Louis. See also Dickerson (2005), *supra* note 3, p. 72.

4 OHADA as a Transnational Legal System (Processes)

In recent years, the establishment of a legal and regulatory environment where private transnational exchanges can safely take place has been presented as essential for developing countries to attract further investment as well as to promote the development of their local private sector.[26] Particularly in Africa, there seems to be a need for legal reforms to support further economic development. These reforms are meant to support economic growth by facilitating transnational business transactions.[27]

This is the logic behind the creation of the OHADA system established by the Treaty of Port-Louis. The application of the OHADA Uniform Acts through a special judicial system is meant to help establish a more secure and reliable legal framework, prone to attract more investment in the Member States. OHADA is therefore presented as an organisation that provides sophisticated laws to its Member States, which are implemented through a transnational legal system designed to promote predictability and transparency, and supposed to be uniform across all Member States.[28]

4.1 The OHADA Law-Making Process

In discussing the OHADA law-making process, most authors focus on the involvement of three key institutions in the law-making process: the Permanent Secretariat produces the draft of the new text which is discussed and adopted by the Council of Ministers after review and favourable opinion by the CCJA.[29] The involvement of the Member States' governments is also highlighted, as the final draft submitted to the Council of Ministers by the Permanent Secretariat includes comments and modifications submitted by each Member State.[30]

26 S. Mancuso, *Trends on the Harmonisation of Contract Law in Africa*, 13 Annual Survey of International and Comparative Law, no. 1 (2007), 157.

27 *Ibid*., 158.

28 See Dickerson (2005), *supra* note 3, p. 21. See also C.M. Dickerson (ed.), *Unified Business Laws for Africa, Common Law Perspectives on OHADA* (London, Philadelphia: GMB Publishing, 2009).

29 This process is provided in Article 6 of the Treaty of Port-Louis.

30 Issa-Sayegh (2008), *supra* note 3, p. 29.

However, the OHADA law-making process has also been criticised by some authors who have highlighted the insufficient national participation in the process. Their argument is that a total disregard of national parliamentary involvement in the drafting process will eventually create further political problems and raise several issues which might affect the good functioning of the organisation.[31] The establishment of OHADA national commissions by the Council of Ministers has been presented by a few authors as a pragmatic unofficial channel to solve this issue by increasing national participation.[32] Nevertheless, these Commissions, being composed of legal experts and public administration representatives, cannot, in any case, claim to sufficiently and legitimately represent the opinions and aspirations of the Member States' populations on the same level as their directly elected representatives (parliament).

4.1.1 Legislative Harmonisation/Unification

Article 1 of the OHADA Treaty provides that the goal of the organisation is to harmonise business law within its Member States by elaborating common rules meant to be simple, modern and adapted to the Member States' economies.[33] (Minimal) harmonisation can be defined as the coordination of different legal systems in order to reduce their differences and reach common goals.[34] With harmonisation, nations agree on a set of objectives and targets and let each nation amend their internal law to fulfil the chosen objectives, giving their laws some sort of similarity. In harmonisation, the focus is placed on making the laws of different countries *similar*, rather than the *same*.[35]

However, by adopting common rules which are meant to be the *same* in every Member State, OHADA has opted for maximal harmonisation or legislative

31 S. El Saadani, *Communication: OHADA, a Continent-Wide Perspective*, 13 Uniform Law Review, no. (1–2) (2008), p. 485.

32 Dickerson (2005), *supra* note 3, p. 61. See also Issa-Sayegh (2008), *supra* note 3, p. 30.

33 The notion of *legislative* unification, which is achieved through the use and application of uniform legislation, as opposed to *judicial* unification, which derives from judicial decisions, was examined in R.H. Graveson, *The International Unification of Law*, 16 The American Journal of Comparative Law, no. 1/2 (Winter-Spring 1968).

34 J. Issa-Sayegh and J. Lohoues-Obles, *OHADA, Harmonisation du droit des affaires*, Colloque de Droit uniforme Africain (UNIDA, Juriscope Bruylant, 2002), p. 44. On the difference between minimal and maximal harmonisation, see N.G. Foster, *Foster on EU Law* (Oxford: Oxford University Press, 2006), pp. 263–264.

35 See C.B. Andersen, *Defining Uniformity in Law*, 12 Uniform Law Review, no. 1 (2007), 15. See also W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006), p. 39.

unification. Legislative unification is defined as a process in which nations agree to replace national rules and adopt a unified set of rules chosen at the interstate level.[36] It is a process which is aimed at reducing the discrepancies between the national legal systems by inducing them to adopt common principles of law.

Similar to the European Union (EU)'s Regulations, the Uniform Acts constitute uniform laws that are drafted by experts, with their implementation and enforcement being ensured by the Treaty which obliges the Member States to apply them as their municipal laws.[37] Through the unification of their laws, the OHADA Member States have elected to share a set of rules, the defining element here being the voluntary sharing of laws.[38] The recognition of common legal principles is achieved through a foundational instrument, the OHADA Treaty. Through this instrument, the Member States have agreed to delegate their power to supranational organs and institutions aimed at producing those unified laws. Through these cooperative instruments, Member States increase to a greater or lesser extent the degree of similarity between their legal systems.[39] The ultimate goal sought by OHADA in establishing these unified laws is to encourage trade and industry and promote economic development.[40]

Through the use of unification, OHADA's objective is the substitution of better rules in each Member State's legal system. The adopted Uniform Acts provide the Member States with ready-to-adopt instruments meant to be simple and modern compared to their own national laws which could be considered as deficient.[41] The Member States therefore have an opportunity to modernise their business laws, with a view to improving on the status quo with respect to their normative social goals, such as economic development. Through this process, the goal of unification merges with OHADA's law reform mission.[42]

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36 E. Carbonara and F. Parisi, *The Paradox of Legal Harmonization*, 132 Public Choice, no. 3/4 (2007), 368. See also G. Bamodu, *Transnational Law, Unification and Harmonization of Commercial Law in Africa*, 38 Journal of African Law, no. 2 (1994), 125–143; and A. Allot, *Towards the Unification of Laws in Africa*, 14/2 The International and Comparative Law Quarterly (1965).

37 See K. Zweigert and H. Kötz (1998), *An introduction to Comparative Law* (3rd ed., Oxford: Clarendon Press), p. 24.

38 See Andersen (2007), *supra* note 34, p. 18.

39 Carbonara and Parisi (2007), *supra* note 35, p. 378.

40 See Andersen (2007), *supra* note 34, pp. 19–20.

41 Gopalan (2003), *supra* note 11, p. 805.

42 See J.E. Nzalie, *Reflecting on OHADA Law Reform Mission: Its Impact on Company Law in Anglophone Cameroon*, available at: <http://www.ohada.com/doctrine/ohadata/D-04-42.html>, accessed 30 January 2018. For a more detailed discussion on this issue, see P.B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, University of Virginia School of Law Legal Studies Working Papers, Working Paper 99-10 (1999), 5.

However, unification endeavours raise additional issues that can prove to be a constraint to, rather than a vehicle for, development.

Sovereignty is a crucial issue discussed by the literature on OHADA. Sovereignty is an issue in two aspects: the adoption of uniform laws is a relinquishment of sovereignty contemplated by the OHADA Treaty, in the subject area covered by the said law: a law that OHADA adopts is automatically and immediately an internal law of each OHADA's Member State.[43] Further, the CCJA, by acting as a regional supreme court, represents a transfer of national sovereignty to a supranational judicial authority. To thwart this system and maintain their sovereignty, national courts could sometimes be tempted to challenge the jurisdiction of the CCJA with the view to protecting their own authority. National courts may, in fact, not all be sending their business-related cases to the CCJA, and parties apparently often do not insist that their case be transferred to the CCJA – because of its location (Abidjan) and the related cost.

Moreover, the substitution of a uniform set of rules to a variety of rules provided by different national legal systems is said to increase legal predictability and reduce transaction costs. Despite the various claims made by authors, there is little empirical evidence, however, that legal pluralism (the fact that countries subscribe to different legal regimes) constitutes a significant impediment to cross-border business and quite a strong view from industry that often they do not.[44] Businesses are much more concerned with the consistency of decision-making within a specific legal system and with enforceability of commercial rules.

This assertion can be verified in the context of EU where, in addition to Regulations that are provided for unification endeavours in specific areas which are crucial for the advancement of the common market, Directives have been provided specifically to promote the *approximation/harmonisation* of the EU Member States' legal systems.[45] Rather than forcing all Member States to adopt the *same* laws, Directives constitute more flexible instruments which provide them with common goals and common standards to be achieved through their respective legislations.[46] Directives are considered as the most appropriate tool

43 *Ibid*., p. 55.

44 See D. McBarnet, "Transnational Transactions: Legal Work, Cross-Border Commerce and Global Regulation", in M. Likosky (ed.), *Transnational Legal Processes: Globalisation and Power Disparities* (London: Butterworths, 2002), p. 98.

45 See V.P. Nanda, R.H. Folsom and R.B. Lake (eds.), *European Union Law after Maastricht: A Practical Guide for Lawyers Outside the Common Market* (The Hague: Kluwer Law International, 1996), p. 5.

46 M. Boodman, *The Myth of Harmonization of Laws*, 39 The American Journal of Comparative Law, no. 4 (1991); L. Kähler, "Conflict and Compromise in the Harmonisation of European Law",

for genuine harmonisation, as they are designed to create some degree of similarity between the Member States' legal systems, while, at the same time, they retain the power to choose the means that they consider as the most adequate to achieve the common goals.[47] Thus, they allow Member States to fulfil their obligations while preserving and accommodating their respective legal cultures/traditions.

The creation of both Regulations and Directives derived from the logic that the adoption of common rules proves important in order to promote business development and cross-border transactions.[48] This logic was challenged later on through the adoption of the doctrine of mutual recognition by the European Court of Justice in Case 120/78 Cassis de Dijon, in which the Court created the right for Member States to mutually recognise their respective municipal laws that did not constitute an impediment to cross-border trade and did not put their respective national markets at risk. The EU has therefore provided for a regulatory framework which, rather than suppressing the Member States' legal systems through unification, accommodates and complements them by bridging the gaps and providing for common principles and doctrines designed for further market integration. Moreover, the impact of differences in domestic rules can also easily be eliminated by contractual provisions which lay down a common set of rights and duties in all relevant jurisdictions.[49]

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in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen aan den Rijn: Kluwer Law International, 2007); and R.C.C. Cuming, "Harmonization of law in Canada: an overview", in R.C.C. Cuming (ed.), *Perspectives on the Harmonization of Law in Canada* (Toronto: University of Toronto, 1985), pp. 3–4. These various authors stress the fact that, through harmonisation, legal systems, despite remaining individually different, are adapted to each other in order to form a coherent whole. In harmonisation, elements of these legal systems rather than entire systems are modified in order to create a level of complementarity between them. See also D. Wyatt (ed.), *Wyatt and Dashwood's European Union Law* (5th ed., London: Sweet & Maxwell, 2006), p. 164. Here the author highlights that, despite the fact that they do not have direct effect in the Member States' legal systems, Directives are nevertheless binding on Member States who have the obligation to adapt their legislation in light of the common goal provided by the said Directives.

47 T.C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (5th ed., Oxford: Oxford University Press, 2003).

48 S. Weatherill, "Why Harmonise?", in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century* (Oxford: Hart Publishing, 2004), p. 11. See also K. Armstrong, "Mutual Recognition", in C. Barnard and J. Scott (eds.), *The Law of The Single European Market* (Oxford: Hart Publishing, 2002), p. 229.

49 R. Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law*, 54 The International and Comparative Law Quarterly, no. 3 (2005), 555.

Specific rules are often suited to local traditions and customs, and even if their harmonisation may enhance foreign trade opportunities, it may impose quite substantial short-run adaptation costs.[50] This can be verified in recent attempts by OHADA to reach out to nations from the Common Law tradition, which raises yet more issues related to unification. Despite their negative perception, diversity and legal pluralism might prove to be an advantage, as competition between different legal regimes provides an enabling environment for innovations, for the improvement and the enhancement of the law.[51] In the specific case of OHADA, anachronism and lack of clarity in sub-Saharan African states, not the very existence of a diversity of legal systems, constituted an impediment to business development in the region.[52] Being strongly attached to their legal traditions, which are perceived to reflect the norms and accepted usages of their citizens, legal pluralism, combined with some degree of harmonisation, allows them to approximate their legal systems while retaining their legal cultures and identities.[53]

Moreover, the negotiations and drafting of international conventions are normally a lengthy and costly process which could be avoided at a domestic level.[54] Among the direct costs of legal change, there are the costs of drafting new Uniform Acts and the cost of adapting pre-existing legal rules and institutions in each adhering OHADA Member State. Unavoidably, the drafting and adoption of new Uniform Acts bring about additional costs both for dissemination across the OHADA Member States and for the training and the upgrade of judges, lawyers and academics.[55]

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50 Carbonara and Parisi (2007), *supra* note 35, p. 370.

51 Gopalan (2003), *supra* note 11, p. 806.

52 See M. Ndulo, *The Promotion of Intra-African Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems*, Paper presented at the Conference of the African Economic Community Treaty (Abuja, Nigeria: 27–30 January 1992), and Fombad (2013), *supra* note 5. These authors identify the legal and judicial uncertainty created, inter alia, by the existence of a diversity of legal systems, as the main cause for the stagnation of foreign investment and intra-African trade. As mentioned above, however, the mere existence of different legal regimes is not a key issue for business and can be addressed through various means different from legal harmonisation. However, Fombad later on (53) stresses the fact that archaic legal frameworks, rampant corruption and inefficiency of the judiciary were more pressing issues that needed to be addressed.

53 Gopalan (2003), *supra* note 11, p. 808. See also P. Legrand, *European Legal Systems Are Not Converging*, 45 International and Comparative Law Quarterly, no. 1 (1996), 62, and Andersen (2007), *supra* note 34, p. 27.

54 This issue was also highlighted in the context of the European Union in European Commission, *Completing the Internal Market*, COM (85) 310 final, para 64.

55 Carbonara and Parisi (2007), *supra* note 35, p. 370.

Furthermore, the unification of international commercial law happens through a process that is very technocratic and political by nature, thereby raising another set of issues. On the one hand, the drafting of these laws is usually entrusted to consulting firms or technocrats who may be tempted to advance their, the donors' or other influential groups', agendas.[56] This is evidenced, for example, in the drafting process of a new OHADA Uniform Act on Contract Law that was attempted in 2004. This process was funded by the Swiss Government and delegated by the Permanent Secretariat to the International Institute for the Unification of Private Law (UNIDROIT). Despite the fact that illiteracy and a poor level of legal culture were identified by the legal consultant responsible for drafting the new law as the main "uniquely African features" shared by countries across the OHADA region, the UNIDROIT Principles on International Commercial Contracts were chosen as model for the new Uniform Act. In this specific case, unification does not provide any welfare gains compared to national law-making processes through national parliaments.[57]

4.1.2 Legal Transplantation/Legal Diffusion

The history of law includes a history of legal borrowing or legal transplantation. OHADA is not an exception to this rule. Understanding this aspect of OHADA law is necessary to understand the issue of implementing Western-inspired laws in developing countries in order to comprehend their ability to promote economic development.

Three elements make OHADA a perfect example of legal transplantation:

- All of the OHADA Member States inherited their legal systems from European countries through colonisation.
- The OHADA Uniform Acts are made of legal institutions borrowed from different legal systems.
- By spreading transnational rules through the Uniform Acts, OHADA is also conducting legal transplantation in each of its Member States.

Legal transplantation refers to the alteration of a legal system due to factors and forces from outside its geographic borders.[58] It can also be described as the "moving of a rule or a system of law from one country to another or from one

56 See Stephan (1999), *supra* note 41, p. 39.
57 *Ibid*., p. 33.
58 *Ibid*., p. 13.

people to another".[59] In the particular case of OHADA, Member States received their legal systems by imposition through colonisation; Uniform Acts are being influenced by legal imports/borrowings; and transnational rules are being transferred in Member States through diffusion. In all cases, it is commonly assumed that legal transplantation involves the transfer or import of rules from an advanced (parent) Civil or Common Law system to a less developed one. In this particular case, these *better* rules are being transferred to OHADA Member States' legal systems. These transfers are meant to bring about technological change by filling in gaps or replacing prior local laws.[60]

In the process of legal transplantation, there is a general assumption that law can be summed up simply as a set of rules, independent of any historical, social or cultural foundations that have contributed to their development.[61] In this scenario, legal rules borrowed from other systems would easily fit in their new setting, as they are presumed devoid of any particularity related to their environment of origin.[62] In the OHADA context, borrowing other systems' law is seen as the fastest and most appropriate method of speeding up the process of finding legal solutions to similar problems – a process being encouraged all the more by the pressures towards convergence brought about by globalisation.[63] Legal transplantation might also be motivated by the desire to have laws that are deemed better, modern or superior. A prestigious model is therefore more likely to influence the development of the Member States' legal systems by shaping legal institutions and legal solutions.[64]

All of these assumptions raise a more systemic issue coined "reductive repetition", which suggests the inherent inferiority of African cultures and

59 A. Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed., London: The University of Georgia Press, 1993), p. 21.

60 *Ibid*., p. 18.

61 See P. Legrand, *The Impossibility of "Legal Transplants"*, Maastricht Journal of European and Comparative Law, no. 2 (1997), 112.

62 Watson, *supra* note 61, p. 21.

63 See G. Kenfack-Douajni, *L'Influence de l'Internationalité dans l'Elaboration du Droit OHADA*, 27 Revue Camerounaise de l'Arbitrage (2004), 41–44. According to the author, while the provisions of the Uniform Act on General Commercial Law were borrowed from the provisions of the United Nations Convention on Contracts for the International Sales of Goods, the Uniform Acts on Arbitration was inspired from the 1985 UNCITRAL Model Law on International Commercial Arbitration, the CCJA Rules of Arbitration from the rules of the International Chamber of Commerce and the Uniform for the Carriage of Goods by Road from the 1956 Geneva Convention on the Contracts for the International Carriage of Goods by Road.

64 M. Graziadei, "Comparative law as the study of transplants and receptions", in M. Reinmann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2008), p. 458.

institutions as well as their incapacity to face the challenges of the modern world, hence the need to borrow international (Western) solutions to effectively address these deficiencies.[65] Local elites in the OHADA Member States would unsurprisingly back this process, given their familiarity with Western laws, which are expected to produce the same effects and provide the same benefits as in their places of origin. Local elites' preference for this type of system can also be explained by the sense of power and dominance over the rest of the population that the familiarity with foreign laws provides them.[66] However, the metaphor of legal transplantation implies the need for the rules being transferred to be somehow "domesticated" to fit into their new context, as they may represent different cultures and different realities.[67] Legal rules lie on the surface of legal systems and do not carry the key historical and ideological formations which produced them. Rules that are transferred from one system to another are therefore a meaningless form of words, which are given meaning in their new receiving environment. Therefore, the rules received in the new legal system are deemed different and not the same as in their system or origin.[68] Transnational rules that are transplanted through OHADA may therefore take on different meanings when applied in the Member States' legal systems.

The use of legal transplants through the OHADA legal systems also refers to the use of the international approach to development and raises the issue illustrated by the dichotomy between *transnationalism from above* and *transnationalism from below*.[69] The international approach, used through the

65 The concept of "reductive repetition" has been developed in A. Laroui, *The Crisis of the Arab Intellectual: Traditionalism or Historicism?* (Berkeley: University of California Press, 1976), pp. 63–73, and E.W. Said, *Orientalism* (London: Penguin Books, 2003), pp. 296–300. The application of the concept to the international approach to development in Africa used in this paper has been discussed in S. Andreasson, *Orientalism and African Development Studies: The "Reductive Repetition" Motif in Theories of African Underdevelopment*, 26 Third World Quarterly, no. 6 (2006), 971–986. Similar criticism of transnationalism from above and the assumption that Western solutions are better designed to address the challenges of the modern world can be found in S. Mahler, "Theoretical and Empirical Contributions Towards a Research Agenda for Transnationalism", in M.P. Smith and L.E. Guarnizo (eds.), *Transnationalism from Below* (New Brunswick and London: Transaction Publishers, 2009), pp. 64–66.

66 See Mahler (2009), *supra* note 60, p. 64.

67 D. Nelken, "Towards a Sociology of Legal Adaptation", in J. Feest and D. Nelken (eds.), *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001), p. 13.

68 *Ibid*., p. 61. See also J.H. Merryman, D.D. Clark and J.O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Charlottesville, VA: Michie, 1994), p. 50.

69 The dichotomy between "transnationalism from above" and "transnationalism from below" is discussed in M.P. Smith and L.E. Guarnizo (eds.), *Transnationalism from Below* (New Brunswick and London: Transaction Publishers, 2009), pp. 3–6.

OHADA processes, is both preferred and encouraged in developing countries, as internationally inspired commercial laws are deemed sufficiently sophisticated and specifically designed to enable developing countries to integrate the global trading system.[70] While this approach seems desirable, insofar as it allows developing countries to be more attractive to multinational firms and thereby foreign investment and resources that are presented as necessary for their economic growth, it also runs the risk of alienating local businesses and grassroots who do not identify with the imported laws which, often, ignore the local context and culture. Further, while these laws are used to promote the spread of transnational financial capital and are therefore designed to meet the requirements and the needs of the world economy, local needs and priorities might be overlooked.[71] This may give rise to local resistance through the persistence of high level of informal economy.[72] In view of this issue, a more *bottom-up* approach (transnational law from below) should be adopted, focusing primarily on local legal cultures and realities to develop commercial rules that would be especially adapted to local needs and circumstances.

This analysis has allowed us to identify the transnational aspect of the OHADA law-making process, while highlighting a few of the shortcomings that might impede its ability to achieve the organisation's objective. In logical sequence, the next section focuses on the OHADA judicial system, which has been established to ensure the effective application of OHADA law.

4.2 Enforcement Mechanism

The OHADA judicial system is characterised by the key role that the CCJA plays at its core. Beyond the fact that it is the regional court of last resort for all Member States, the CCJA is also an original tool used to promote commercial arbitration as the preferred dispute settlement mechanism within OHADA. With this dual role, in both litigation and arbitration, it is a key institution at the heart

70 M. Fontaine, *The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contract*, 3 Uniform Law Review (2004), 576–577.

71 This issue is discussed in A.C. Drainville, "The Fetishism of Global Civil Society: Global Governance, Transnational Urbanism and Sustainable Capitalism in the World Economy", in M.P. Smith and L.E. Guarnizo (eds.), *Transnationalism from Below* (New Brunswick and London: Transaction Publishers, 2009), p. 39. See also R.W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (New York: Columbia University Press, 1987), p. 254.

72 Smith (2009), *supra* note 68, p. 3.

of the OHADA overall system.[73] Headquartered in Abidjan (Cote d'Ivoire), the CCJA can also hold hearings in a Member State when necessary, without financially depending on the concerned Member State.[74]

As provided by the Treaty, the Court has two functions: judicial and arbitral.

As a judicial instrument, the Court oversees the OHADA Judicial system as its Court of last resort and is aimed at ensuring common and harmonised interpretation and implementation of OHADA law by the Member States' national courts. The Court's advice can be requested by the Permanent Secretariat regarding draft Uniform Acts prior to their adoption by the Council of Ministers, to ensure their compatibility with the aims of the organisation. The Court may also be consulted by the Council of Ministers concerning a particular issue under OHADA law. Further, its advice can be required by a Member State's national court in a litigation case concerning the interpretation or application of OHADA law.[75] Serving as a court of last resort, the CCJA replaces the Member States' supreme courts in all matters related to OHADA law.[76] This function allows the Court to monitor the OHADA Judicial system, hence ensuring the uniform and effective application/enforcement of OHADA law.

Regarding its arbitral functions, the CCJA is responsible for the appointment and the confirmation of arbitrators for proceedings conducted according to the CCJA Rules of Arbitration, to the extent that the parties to a dispute have opted for this procedure in their contract. For monitoring purposes, the Court shall also be informed of the arbitration process and its progress. It also examines the drafts of the arbitral decisions.

It should be noted that national courts, having jurisdiction over OHADA-related matters in the first and second instance, therefore have a critical role to play in the effective application of OHADA laws. The hybrid nature of the OHADA judicial system needs to be highlighted, as it is composed of Member States' national courts headed by the CCJA, which can be considered as a regional supreme court. The authors point out the issue raised by this type of system, which could become an impediment to the uniform application of OHADA laws, because of aforementioned sovereignty issues, or in case the national courts continue to apply the national laws that have already been repealed by the OHADA Uniform Acts.[77]

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73 R. Masamba, *Modalités d'adhésion de la RDC au Traité de l'OHADA*, Rapport Final (2005: Comité de Pilotage de la Réforme des Entreprises du Portefeuille de l'État), 30.

74 See Article 19 of the Regulation related to the CCJA procedure (hereinafter the CCJA Rules).

75 The functions of the Court are provided in Title III and IV of the Treaty of Port-Louis.

76 See Martor *et al.* (2007), *supra* note 3, p. 10.

77 Issa-Sayegh (2008), *supra* note 3, p. 36.

By providing for the creation of a regional court designed to monitor the judicial systems of the OHADA Member States, as well as to promote arbitration as a preferred dispute settlement option, the Treaty of Port-Louis was aimed at promoting judicial security within the OHADA area. The CCJA is therefore the regional tool used to ensure that the national courts' decisions can be reviewed, hence promoting more clarity and more transparency in dispute settlement proceedings. This feature of the OHADA judicial system is provided in order to guarantee the protection of local and foreign investors against arbitrary and biased decisions, thereby creating an enabling environment for the development of their businesses.

5 OHADA as a Transnational Legal System Designed to Stimulate Economic Development

As analysed in the two sections above, OHADA's transnational nature is twofold: on the one hand, its law-making process is transnational in essence, through both the use of legal transplantation and the involvement of transnational institutions in the enactment of the Uniform Acts. On the other hand, by ensuring the application of the OHADA transnational commercial laws across the Member States' boundaries, the CCJA maintains and monitors a transnational enforcement system made up of the Member States' national courts and arbitral tribunals.

As discussed above, the main rationale for the establishment of OHADA was the identification of major issues that were considered as obstacles to development: archaic laws, inefficiency of the judiciary, as well as rampant corruption. By providing for a set of stable expectations, it is thought that the uniform laws implemented through the OHADA system can stimulate the economy by providing private entrepreneurs with greater certainty than that previously existed in the Member States' legal systems.[78] This objective assigned to OHADA links law to economic growth and connects to law and development theory. Law and development explains the current practices of those who seek to change legal systems in the name of development.[79] It moves law to the centre of development policymaking; it changes also the rational for legal development assistance. Law is considered as a tool to bring about development, and development

78 K. M'BAYE, *Historique de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, Avant-Propos de la Revue Penant n° 827 (1998), Spécial OHADA, p. 126.
79 *Ibid*., p. 3.

means economic growth. Rather than *reflecting* the society to which it is applied, law is expected to *create* a new and better society,[80]

Moreover, in recent years, FDI has come to be considered as an important source of the capital and technology necessary for economic development. Most governments have therefore sought new ways to induce foreign investors to locate within their jurisdiction.[81] As it is implied that FDI flows are to some extent determined by the effectiveness of the host State's legal system, the founding members of OHADA decided to establish a transnational legal system capable of attracting more FDI. OHADA is therefore supposed to provide an effective transnational enforcement, which implements laws efficiently and predictably.

Regarding substantive law, as mentioned above, the adoption of Western laws within OHADA is sponsored by elites in Member States who are concerned with the modernisation of their society and eager to bring them to the same level as advanced or developed nations. Imported or imposed laws through the OHADA system are believed to be specifically designed to change the existing conditions in the Member States rather than reflect them. Member States engage in this process with the hope that the imported rules may be used as means for resolving current poverty and underdevelopment issues, by transforming the existing societies into ones that are more similar to the countries that produced such borrowed laws. Borrowed laws are deemed capable of bringing about the same conditions of a prospering economy which are present in the social and economic context from which they have been imported.[82]

6 Conclusion

The analysis conducted in this paper was aimed at examining both the nature and the scope of the processes conducted by OHADA, with a view to considering its ability to achieve its professed objective of promoting development in its Member States. OHADA therefore constitutes a perfect example of a transnational commercial legal system aimed at promoting development in sub-Saharan Africa. This assertion has allowed us to reach several conclusions, which can be summarised in the following points:

80 *Ibid*., p. 9.

81 A. Perry, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 The International and Comparative Law Quarterly, no. 4 (2000), 779.

82 A. Watson, "Legal Culture v. Legal Tradition", in M. Van Hoeke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004), p. 118.

First, OHADA has opted for a substantive (hard) approach to transnational law, the main objective here being the spread of uniformity across the Member States' national boundaries.[83] This process differs from minimal harmonisation processes such as the one conducted in the context of the EU, for example, where the pluralistic approach, which focuses on the similarity/complementarity of various legal systems rather than their uniformity, is preferred.[84] Whereas in the EU process, the use of law is geared towards market integration and increased cross-border trade, the process under OHADA, in fact, constitutes a transnational commercial law reform project which is said to be designed to promote economic development in its Member States.

Second, through the analysis of legal transplantation identified in both its law-making process and its judicial system, the paper was also used to underline the "transnationalism from above" approach adopted by OHADA and the preference given to macro-level/international solutions for local problems. This analysis was used to stress the need to resort to more "transnationalism from below" in the OHADA legal system, in order to develop laws that would truly be adapted to local needs and local legal culture, as genuine development should be endogenous (self-reliant) rather than exogenous (externally led).

Last, the analysis also highlighted the danger brought by legal uniformity as, despite the fact that it brings a sense of certainty and security which is deemed necessary to establish an enabling environment for business development; it also runs the risk of becoming counterproductive by suppressing competition between different legal systems, thereby compromising their ability to resort to legal creativity and the search for innovative solutions to business-related problems.

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83 H.J. Berman, *World Law*, Fordham International Law Journal, no. 18 (1995), 1617–1622.
84 *Id., Global Legal Pluralism*, Southern California Law Review, no. 80 (2007), 1155–1237.

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