The Cameroonian Experience under OHADA: Business Organizations in a Developing Economy

Claire Moore Dickerson, Rutgers Law School - Newark

Available at: https://works.bepress.com/claire_dickerson/2/
I. Introduction

When a legal system is unreliable, the “shadow of the law” is faint to non-existent. In such an environment, corporate governance still may have meaning, as may the larger principle, corporate social responsibility. However, the meaning of these terms, and even our understanding of the business organization will be based on social reality, not on statutory constructs.

In the course of two years, I have spent close to three months in Cameroon to study the application of the business laws there. Cameroon and fifteen other countries have adopted a uniform business law. The regime, known as OHADA, includes eight uniform acts which under the treaty automatically become part of each member-state’s internal law. As I learned in Cameroon, laws are sometimes enforced because of formal legal structures, and sometimes because they conform to existing norms. Sometimes they will be ignored because they are incompatible with social norms. I also learned that business will take place even in those conditions of uncertainty. Entrepreneurs seek traditional means of accessing capital when the law is unpredictable because that context
allows them to gain some predictability through traditional sources of social influence. Nevertheless, transaction costs are high, and capital remains hard to access.

Over time, the social realities will either reinforce or trigger modification to the laws. In their turn, if the laws have any practical reality, they will influence social realities. The existence of this feedback loop is not news, but its application to developing countries’ embryonic legal regimes offers a valuable tool to understand norms underlying legal principles. For example, as this process unfolds social realities will mold societal understanding of the business organization’s role in society. Put another way, society defines the organization’s corporate social responsibility. In the North where developed nations predominate, we have forgotten this reality; we would do well to follow the example of the South and its developing economies, and reanalyze what it is that society wants of our business institutions.

For its part, because of weak legal systems the South falters in implementing the concepts of corporate social responsibility it adopts. As a result, political governance is a more critical need than is corporate governance. Nevertheless, even here law can be useful: it can help move the national political regimes toward the rule of law. It can be a kind of patterning for legal professionals and their clients, where the very consideration of sophisticated text followed by enforcement—even if sporadic and unreliable—can encourage a serious approach to law.

II. Corporate governance: relevance in the developing world
For reasons of tradition, I will continue to use the adjective “corporate” in the phrases “corporate governance” and “corporate social responsibility,” but I also argue that the former constrains management behavior, and the latter describes the role society imposes on business, whatever the business form.

Considering corporate governance before corporate social responsibility may seem counterintuitive. It would arguably be more logical to start with the larger principle (what is the purpose of the business organization?) and then see how businesses implement respect for that principle. However, I am starting from the assumption that law is relevant to the North and the South in very different ways. Thus, I want to start with a discussion of law that is in fact applied.

A. Concept in the North

Because understanding our own environment is useful to understanding another’s, the analysis starts with a review of corporate governance principles in the developed world.

1. Concept: Corporate Governance

   a. Separation of Ownership from management

The concept of corporate governance is least relevant when ownership is not separated from management. The simplest example is that of the single-person business, where the
owner also is the manager. This manager cannot take from the owner in any meaningful way and has no incentive to shirk. The discussion of corporate governance thus assumes the separation of management from ownership.

Separation of interests does not necessarily imply classic centralized management. Separation can occur as soon as there are two or more owners even if all the owners do serve as managers as well. If there is another owner from whom to steal by commission (taking) or omission (shirking), governance is relevant.4

b. Size, form, limited liability not determinative

Our experience in the north also confirms a fact relevant to the types of businesses that operate in the South’s less developed economies: governance issues can arise whatever the size or form of the organization, and whether or not the organization limits owners’ liability.

Whatever the business’s size, as soon as the owner relies on an advisor for policy or on an agent for implementation, the potential for conflicts of interest, and the opportunity to self-deal and the incentive to shirk exist. Similarly, the form of the business does not determine the relevance of corporate governance: familiar parlance emphasizes “corporate,” but a limited liability company, various forms of limited partnerships and even a general partnership can give rise to issues of corporate governance. Each of these
business forms can have more than one owner, and each can include the delegation of authority to a non-owner.

Although a familiar issue concerning business forms, limitation—or not—of owners’ liability to their investment also does not determine whether corporate governance issues exist. Lack of limited liability does increase owners’ incentive to monitor and thus decreases managers’ independence, but managers’ incentive to self deal or shirk typically will depend on the extent of the assets available in the business, whatever the personal liability of the owners.\(^5\)

2. Concept: Corporate Social Responsibility

This discussion of corporate governance is quite technical; it also is not a scaffold that can stand alone. Instead, it rests on basic, typically unarticulated assumptions about the role in society of business entities in general. The concept of corporate governance which, as a reminder, applies to all forms of business, is merely the method by which the goals of the larger principle are realized.

a. The United States: Shareholder primacy

By way of illustration, in the United States as is well known the dominant perspective is shareholder primacy. Milton Friedman has been an important proselytizer of and apologist for this point of view. He explained to the lay public that managers who use the
corporate treasury for purposes other than to maximize the corporation’s profits are unconstitutionally arrogating to themselves the taxing power of government.⁶

If society’s goal for corporations—for business, as Friedman more broadly asserts—is to maximize profits, this defines how managers are to behave. It tells them what is a loyal, non-shirking act: to maximize shareholder (owner) profits.

b. **An alternate Northern vision: “Intérêt Social”**

Other Northern systems have different assumptions. Here I focus on French corporate law because it has heavily influenced Cameroon’s law, which I discuss below. Under French law, the goal of the corporation is to respect the “intérêt social,” variously translated as “social interest” or “corporate interest.” Case law and scholarly gloss suggest that there are several different understandings of the concept, the narrowest of which is that corporate interest concerns the best interest of shareholders. At the other extreme is the interpretation that describes corporate interest as the collective interest of the business’s shareholders, but also of its employees, suppliers and customers, and even the interest of the larger community affected by the business’s actions.

The most commonly held understanding is that corporate interest includes at least shareholders, and in many circumstance the employees, and probably suppliers and customers as well. This concept of corporate interest rests on the expectation that society is structured for the greater good of all French citizens.⁷
The applicable goal for the business defines management’s role. What effect do these underlying assumptions have on enforcement mechanisms?

3. Application of Corporate Social Responsibility through Enforcement of Corporate Governance

For purposes of this discussion, there are two principal sources of restraint on management. They are law on the one hand, and social constraints on the other. If these institutions are correctly designed, both should encourage management behavior that leads to corporate conduct consistent with the applicable conception of corporate social responsibility, whether it be shareholder primacy or social interest.

a. Law encourages conforming behavior

The first line of inquiry is whether law in the United States, for example, does encourage management to behave in a manner consistent with the relevant understanding of corporate social responsibility, that is, with the concept of shareholder primacy. In the arena of public corporations, management does have significant authority, but the legal system regularly pulls back in the face of perceived management excess. The Sarbanes-Oxley Act is only the most recent example; judge-imposed checks on management responding to a takeover are another.
In the context of the types of the multiparty business forms most frequently used in
developing economies—the close corporation, the limited liability company and the partnership—the United States’ Northern perspective is definitely pro-owner (perhaps in part because some of the owners typically are also managers of these forms). Case law discussing the heightened duty of a managing partner, for example, does emphasize the interests of owners. Even when a state like Delaware lowers the duties by expressly allowing owners of limited liability companies to opt out of these duties,\(^{10}\) it is focusing on owners: the legislation allows owners to contract for the precise relationships they desire.

Federal securities laws, too, play a role in supporting and enhancing fiduciary duties and analogous obligations. For example, trading in securities on inside information gives rise to civil and criminal liability. This constraint applies to any trading in securities, whether or not in the public markets.\(^ {11}\) Cases suggest that the obligation of insiders is not only to current, but even to potential shareholders.\(^ {12}\)

In the interests of completeness, it is useful to note that other Northern systems, too, impose sanctions on managers who violate obligations mandated by law. For example, Jean-Marie Messier, then the Board chair and chief executive officer of Vivendi International lost his position and has been prevented from taking under the golden parachute.

b. **Social constraints: stick and carrot**
Even in a Northern environment like the United States where hard law is effective, reputational issues are important. Indeed, applicable social norms often serve to reinforce the legal ones.

There is evidence that managers care how they are viewed by their communities outside of business. For example, managers’ behaviors are constrained by how they will be viewed by the other members of their country club. Managers may thus cause their businesses to respect the spirit of the contract even when there might be a legal out. Of course, behaving to a standard higher than the minimum required by contract law will not violate that contract law, although it may violate some other applicable hard law if in the process it breaches an obligation to the business’s owners, for example. The long view suggests that the behavior can nevertheless be consistent with pro-owner concepts of corporate social responsibility: managers protecting their own reputations also protect the business’s reputation for fair play. To the extent that these reputational restraints are effective, shareholders and other constituencies that would be hurt by managerial bad behavior will have diminished risk and thus can invest more cheaply.

There are extra-legal market rewards that emphasize making shareholders happy. The classic example is the takeover as a threat to underperforming managers. If management is the reason why stock price is depressed, new management will replace prior management at the first reasonable opportunity. Management thus attends to share price, which promotes an outcome consistent with the principle of shareholder primacy, with all the usual caveats about the costs of short-termism.
On the carrot side, a manager with a good reputation will be more likely to find a favorable market for his or her services, and to move into the envied ranks of serial managers. This goal again encourages managers in a positive manner to perform in accordance with both law and applicable social norms.

c. Law and social realities in a feedback loop

No discussion of these topics would be complete without acknowledging the impact of law and society on each other. Simply put, law influences social norms; social norms influence the evolution of law. That is hardly a novel insight. However, it is useful to revisit quickly how this has played out recently in the United States.

As the bubble of the 1990s expanded, company law was on a pro-management trend. It had become increasingly difficult for cases to be brought against management for cheating shareholders.\textsuperscript{15} However, so long as the shareholders continued to get rich, they did not seem to mind whether the directors took a bit on the side. That is one aspect of the Enron story,\textsuperscript{16} one which made it politically feasible for the federal and state legislatures to favor managers’ interests ahead of those of shareholders.

Because of existing norms, senior executives of companies like Enron and its ilk expected to break laws with impunity. Only after the bubble burst and Enron’s debacle was followed by others, did Congress intervene and pass the Sarbanes-Oxley Act. Even
if many of the act’s provisions can be viewed as classic Congressional overreaction, newly evolving social norms affected the development of law, which influences behavior: courts are sending to prison very senior executives of very major corporations, and corporate governance focuses on independent, non-conflicted directors.

Put differently, even in a political and social environment where law is respected and enforced, its power comes substantially not from actual enforcement, but from the shadow that it casts. The actual authority of the law is exercised largely by its social influence, although at the margins the full weight of the law will be brought to bear in a reasonably predictable manner, thus maintaining the effectiveness of its social influence.

B. Concept in the South

In addition to the eight uniform business acts referred to in the introduction, OHADA provides various supranational institutions, including a legislature and a court. The legislature, the Council of Ministers, is made up of the member countries’ justice and finance ministers. The supranational court, the Common Court of Justice and Arbitration (“CCJA”), receives appeals from the member-states’ national courts on matters relating to OHADA law. The CCJA’s decisions are published both on paper and on the internet, thereby introducing some transparency from the top and simultaneously protecting the laws’ uniformity of interpretation and application. This is the juridical context of OHADA law.
1. OHADA
   a. Corporate governance

As is the case in the North, OHADA company law contains provisions to constrain management, and these provisions are particularly relevant when management is separated from ownership. To follow a modern trend present also in the United States, the OHADA law does recognize that many businesses do not have the split between management and ownership that gives rise to governance issues. Under OHADA, even the business form that can be used for a public as well a private company, the société anonyme, can have a single owner. So long as there are no more than three owners, there can even be a single manager who, whether or not an owner, can have authority to exercise Board functions plus those of senior executives.¹⁹

Where management is separated from ownership, scholarship and cases under OHADA frequently interpret those laws using standards applicable to French company law. For example, management is not to abuse its rights, and expressly, neither majority nor minority shareholders, now in a quasi-management role, are to abuse their power.²⁰

More generally, management of a company formed under OHADA does have the obligation to disclose to the owners important matters and issues of conflict of interest, and to monitor the business. Instead of relying on fiduciary duty, however, OHADA tends to enlist formal structures and apply express rules.
For example, OHADA provides a centralized registry and insists on publication of essential filings. When the registry is finally computerized, it will be a source of substantial disclosure. These requirements are serious: organizational forms that otherwise shelter owners from liability will lose that ability if they fail to register and publish constitutive documents as required by company law.

Businesses that do not offer limited liability also must file with the register. This applies even to sole proprietors: any natural person who is active in business, as statutorily defined, is obliged to file, this time as a “trader” (“commerçant”). OHADA law specifies the rights and obligations among such traders. Further, a business organization that is like a general partnership except formed only upon a filing with the registry, can have only “traders” as its members, thus requiring double disclosure.

The registry’s jurisdiction is broader than receiving and posting filings at formation. It also centralizes information concerning a business’s operations. For example, it records various forms of secured interests, including mortgages. In this way, too, the structure forces disclosure.

As does Northern company law, OHADA also values monitoring. However, it again relies on structure more than on fiduciary-like standards to accomplish its goal. Thus, for on-going operations of a certain size, a combination of disclosure and monitoring is imposed by official, statutory auditors. These are more regulated and more constraining
than are the classic certified public accountants who serve as auditors in the United States. The statutory auditors also have an affirmative duty to monitor and to warn if they find that the business is in imminent danger.23

In summary, therefore, governance under OHADA functions rather like governance under US law, except that OHADA forces greater disclosure and tends to use rules and external structures rather than standards like fiduciary duty.

b. Corporate Social Responsibility

It is one thing to say that managers are to disclose and monitor; it is quite another to determine what kinds of behaviors are to be disclosed and monitored. As we have seen, the corporate governance constraints are designed to support and enhance underlying values. These values, as noted above, are embodied in the concept of corporate social responsibility. That is why, in the United States, management must exercise its disclose-monitor duties so as to maximize shareholder wealth.

According to scholarship, OHADA takes a different tack; instead of endorsing shareholder primacy, it embraces a form of the French “intérêt social.”24 Regression toward the mean suggests that the likely outcome for OHADA is a moderate flavor of the doctrine: neither will the OHADA company be limited to owner primacy; neither will it include an obligation to all of society. Management probably will owe an obligation not
only to shareholders, but also to such integral constituencies as the employees, and perhaps suppliers and customers.

In developing economies, it may be relatively simple for management to take into account the interests of employees, for example, as well as shareholders. Employees, because they invest their human capital and cannot generally be well diversified, will tend to have a long time-horizon. In a closely held environment, the owners, too, are probably reasonably undiversified and may well thus have a relatively long-term view of the company and its needs. Because very few businesses in a developing economy are publicly traded, in most cases the interests of owners and employees will thus be aligned at least to the extent that neither constituency is looking for short-term, extractive returns. Nevertheless, there will certainly still be areas of non-alignment for management to negotiate—the amount of wages to be paid being an obvious example.25

Business in any form, however, does not work in a vacuum. Thus, after this quick tour of a few concepts concerning governance and social responsibility under OHADA, we must turn to the economic realities that an OHADA-organized business faces. The Cameroonian business environment provides the illustration.

2. Political governance trumps corporate governance.

A salient feature of Cameroon is the level of corruption. In 1999, Cameroon was the absolute cellar-dweller in Transparency International’s corruption perception index.26
Since then, it remains among the most corrupt nations by that measure. This lowly status is a proxy for a lack of respect for private property rights, and generally for the inadequacy of commercial practices.

It is in this context that my Cameroonian interlocutors have asserted that corporate governance is not a particularly important issue. The lawyers and business people with whom I spoke did include persons working with businesses that, at least to outward appearance, had effected some separation of management. Even those professionals asserted that political governance—predictability and a sense of security—is far more important than corporate governance.

a. The limitations of law.

Under circumstances of juridical uncertainty, law inevitably has a limited impact. In this context, social and cultural realities become especially important.

i. Optical vs. actual: single owner-manager defined

Classic issues of corporate governance are less salient in the South than in the North first because many businesses in the developing world in fact do not separate management from ownership. Importantly, even where there is such separation, cultural realities overwhelm legal ones.
Assume that a business is formed using an organization that lacks the structural assumption that one or more owners are powerless within the organization. A limited liability company, in other words, can easily be organized where one person—in Cameroon, typically one man—will have total authority. The other titular owners are typically subordinate members of the extended family, referred to as “sleeping partners” even if the organization does not formally take advantage of the officially available single-manager form. The existence of other members (owners) does not as a practical matter create a cultural presumption that they must have intended to exercise authority. In a context where the law is enforced unpredictably, people often will not rely on the legal niceties, and this reality reinforces the assumption that cultural norms trump legal ones.

Indeed, the disconnect between official structures and reality is even deeper. Most businesses do not separate ownership from management because the separation is culturally unexpected and functionally unnecessary. This is the case whatever the organization’s form, and whether or not technically the business has more than one owner, thus giving the managing owner both the motive and the opportunity to take more than the legal share. What really is happening is that the managing owner is assumed to be taking care of the relevant community, often the extended family plus a few close friends, that participates in the business. As a conceptual matter, the owner-manager is expected to take whatever profits the business generates and to manage them for the community. While this could be interpreted as a separation of management from ownership, the incidents of ownership do seem to be united in the manager, even if others
nominally are owners. For deeply cultural reasons, there is no reasonable likelihood that those others will ever assert their rights as owners; thus, it is hard to view the reality as a concentration of power in one of several owners. The technical alibi that all the owners started with management authority and then delegated it to the general manager simply does not reflect reality.

Even if the business has lawyers regularly on retainer and even if the general manager is highly educated in Northern or Northern-style universities, the official form of the organization is largely irrelevant. The manager of one of Cameroon’s largest companies does not know the form under which the business operates; this underscores the lack of importance of technical legal structures and requirements. Perhaps even more revealing is that the company’s legal counsel was unaware that, whatever the official form, the business could not shelter its owners from liability because it had not filed with the official registry. The discussion occurred fully seven years after the OHADA company law mandating filing as a precondition to limited liability for owners had come into effect.

ii. Law: not the actual restraint on managerial behavior

The failure of the political structure to create and sustain a predictable and independent judiciary is a major contributor to the business community’s reliance on extralegal constraints. In the North, these types of constraints include circumstances where parties
end up performing in a manner consistent with, but perhaps to a higher standard than that required by applicable law. A classic illustration is Stewart Macaulay’s study of Wisconsin businessmen behaving to a standard more rigorous than basic contractual good faith.27

We have seen that in the South cultural realities of authority and ownership trump official structures. Far more unusual from the Northern perspective are Southern examples of behaviors that clearly violate applicable law, but that social norms not only condone but actively applaud. Here, social realities clearly overwhelm the legal ones.

Consider the following story about raising capital for a Cameroonian business. An uncle had taken a sibling’s son under his wing and had gone into semi-retirement, leaving the nephew to manage the business. Unambiguously, by granting authority to his nephew, the uncle separated management from ownership.

Without informing his uncle, the nephew transferred assets from his uncle’s business to his own new operation, which prospered. Under United States law this behavior is of course a clear violation of the nephew’s duty of loyalty under agency law and may include a taking of corporate opportunity. It may also be theft. Similarly, under OHADA law, the nephew’s conduct is impermissible as an abuse of rights, whatever the actual form of the business. Depending on local law—OHADA leaves criminal law to the national regimes—the activities may also be theft. Nevertheless, when the uncle found out, far from feeling betrayed and hauling the swindling nephew to court and prison, the
uncle was proud that a member of the family had so efficiently managed family assets. To emphasize: the uncle did not merely tolerate the nephew’s behavior; he approved of it.

As I was told in the context of non-commercial criminal conduct: in an environment where application of the law is notoriously unreliable, family and tribal structures maintain order. This outcome would be far more unlikely if official statutes generally were enforced even if this particular uncle, given his personality and whatever else is known about him, might be reluctant to sue or bring charges.

I am not suggesting that governance of businesses is irrelevant or non-existent in Cameroon. Instead, the values defining acceptable behavior flow from generations-old cultural norms rather than legal requirements. Because the legal norms are not enforced regularly and predictably, they in many contexts do not effectively influence behavior. Thus, in the South we can find social norms very much at odds with the legal constructs.

iii. Flexible organizational borders: networks as business organizations

The nephew-uncle story also illustrates another point about the difference between business structures provided by law and cultural realities. Even if parties do actually form an official business structure, the actual business organization’s borders may be very different from the legal expectations.
The uncle may have formed a limited liability company, since OHADA law expressly permits the single-owner limited liability company; however, such an organization would not define the business’s boundaries. For both the uncle and the nephew, the actual business extends to include not only the uncle’s original business, but also the nephew’s business. To the extent that the commercial fortunes of the family are increased, the relevant “business” is enhanced.

The overarching concept of flexible organizational borders should be familiar to a Northern reader. We have corporations operating as the hub of a complex, integrated business that includes suppliers to which the hub has outsourced production, as well as captive clients. The business includes not only the hub, but also those suppliers and clients.29

The corollary of the revised business borders is that if a nephew takes assets but does not use them well, his behavior will be condemned, but only within the community. The uncle typically will not take the nephew to court. This may be in part because the judicial system’s expense and unreliability makes a suit economically unjustifiable. But another part of the reason is that if the patriarch’s admonishment is insufficient, the ultimate punishment is exclusion from the family group. This, as we will see, can have dire economic (as well as psychological) consequences.

For right now, however, there are two critical points. One is that business norms exist and have internal logic, but often are inconsistent with and even contrary to legal norms.
The other is that in a weak legal structure law cannot influence local norms to any meaningful degree, let alone trump them.

b. Lack of political governance: Impact

Raising capital is crucial to the establishment of business. Commercial transactions are the most direct and straightforward exemplars of business activities. We turn to each of these activities to see how they are effected when political realities allow the legal environment to remain deeply unreliable.

i. Effect on business transactions.

Hernando de Soto, the Peruvian economist, has powerfully shown that the ability to put capital to work is central to any properly functioning economy. We can question the appropriateness of placing classic capital at the center of the discussion, but the cost to an economy of locking up capital is clear.\textsuperscript{30} In many of de Soto’s examples, capital cannot be released effectively because the poorest cannot obtain mortgageable title to land and thus must rely on extralegal lenders if they need to borrow. This unsecured, extralegal credit is more expensive than loans extended against security by banks and other official lenders.

In Cameroon, the lack of a credible legal system creates a similar burden even for those who are part of the country’s middle class, or even part of its elite class. Because the
political actors have not corrected the legal system’s fundamental unreliability,
Cameroon’s economy is basically a cash economy.

Bankers do assert that their banks lend, and they have stories supporting that contention. Lending officers will describe the kind of analysis they do. If the loan is large enough, they will even physically view the debtor’s inventory. This is laudable although it suggests that the bankers have no confidence in paper evidence produced according to accounting standards. Certainly, a perceived need to effect a physical count increases the bank’s transaction costs. Further, bankers report that security interests, even in land, are of limited value because of delays and difficulties in obtaining judgments and executing on them. And even if the lender is able to foreclose on property, it will find that potential purchasers are few. Discussions with potential borrowers suggest that demand for credit vastly exceeds credit available from the classic sources used by first-world borrowers. So what is a potential borrower to do?

For start-ups, the entrepreneur will look to the family for capital, as is classically the case in the North as well. When business needs exceed what the family alone can provide, the full richness of alternate sources becomes evident. World wide, there are extralegal arrangements that go by various names; in Cameroon they are often referred to as “tontines.”

The simplest form of tontine that is found around the world has all members contribute the same amount at the beginning of each month and then has the order in which the
members can take out the entire pot determined by drawing lots. The length of the arrangement is equal to the same number of months as there are members. Because of the time value of money, and assuming that the members take the pot for a single capital expenditure that requires the entire amount available, every member except for the one who takes in the last month is better off than he or she would have been without the tontine. Every member except the last one can make the capital expenditure earlier than would have been the case otherwise.

Technically the member who takes is borrowing: the pot (the principal) is repaid out of the monthly contributions that are made before and continue after the taking. However, the tontine members typically do not sue a taker who fails to repay. The ultimate punishment is exclusion from tontines in the future. This is serious since tontines typically are based in the members’ home village: a person cut out of the home-village’s tontine possibilities cannot easily substitute another venue. The economic cost is significant because credit available from tontines often is substantially cheaper than bank loans—were they even available.

Supplier-client relationships are similar. As a former head of the Cameroon bar stated, cases are too often won or lost based not on what a lawyer knows but on whom the lawyer knows. In a court system thus weakened suppliers cannot rely on the protections offered in an economy used to stranger-transactions. Thus, everyday business transactions depend on personal relationships; a printer is able to obtain equipment only because his brother knows the supplier.
This system depends on personal relationships as a basis of trust, and when trust is lacking, it depends on cash.

ii. Effect on business form

From a different perspective, legal insecurity means that power defines the business entity. That is why the supplier and customer are to some degree part of the same enterprise. This is exactly the same relationship that exists between a Northern multinational and a regular supplier to whom it has outsourced manufacture: the supplier is in fact part of a single enterprise with its client.31

The analogy is not hyperbolic. The supplier to the major multinational tends to be captured; often its only customer is that multinational. A supplier of Cameroonian cocoa, too, tends to have a single purchaser to whom the supplier has sold for years. While a multinational such as Nike or Walmart has enormous market power throughout the world, the cocoa-purchaser in its own context has a very similar situation. The Northern multinational’s suppliers are overwhelmed by its remarkable economic power. The cocoa producer’s purchaser has less absolute power, but it has enough to make the supplier’s future depend on the purchaser’s continued success. Indeed, the power distribution can be so unequal that the producer-purchaser relationship might not be different even if Cameroon did have a reliable judicial system.
In Cameroon, OHADA company law does not control the relationship between an unrelated supplier and customer. Other than in the context of transactions between “traders,” contract law is entirely outside the OHADA regime and in theory is determined by regular principles of non-OHADA internal Cameroonian law. In fact, the unreliable judicial system often means power relationships determine outcomes.

Thus, as a practical matter the business form has little consequence when analyzing corporate governance. Instead, power and cultural norms dominate.

c. If there is no political governance, what works?

To summarize, business transactions happen, and they occur through the intermediation of business forms. The transactions and the forms, both, are defined by and define the realities. In contexts like the United States, the legal system is part of and contributes to these realities. In contexts like Cameroon, the legal system has only a limited impact. Nevertheless, in both cases, business gets done, and business organizations, defined by function, are governed.

When Cameroonians say that political governance is more relevant than corporate governance, they understand that corporate (business) governance inevitably exists. They also realize that commercial realities shaped by cultural norms and economic power determine the rights and obligations, unless and until political governance creates an effective legal system. The transaction costs are huge. It is extraordinarily difficult to
have more than a retail operation under such conditions; nevertheless, business gets done, and some larger businesses do exist. The challenge will be to conform OHADA’s technical requirements to the social realities, but also to have the sophisticated and modern aspects of the law influence some of those social realities—at least enough to permit better and cheaper access to capital.

3. What OHADA can contribute

In a political environment like Cameroon’s, there are three principal reasons to try to create a serious, sophisticated regime of laws to control business. The first of these reasons is that people in Cameroon do bring suits. Moreover, conversations with lawyers and business people who have engaged in litigation confirm that the professionals expect litigation to progress in what we in the North would consider a relatively normal fashion. To the extent that the relevant law is clear and well-adapted to commercial realities, it will be less likely that incompetence or worse will lead to inappropriate decisions.

The second reason is that lawyers who behave professionally, or at least appear to do so, are patterning behavior that may in time substantively affect social norms. While some judicial decisions reflect a profound misapprehension of underlying law, others to the contrary evidence a careful and sophisticated reading of the texts. To the extent that lawyers and their clients have expressed to me concern about the system, they tend to focus not on OHADA substantive law but, instead, on the national legal regime’s
handling of judgments to be executed. Interestingly, even in so difficult a legal environment, the effort to analyze law appears to enhance and reward professionalism.

The third reason, the importance of OHADA’s concept of corporate social responsibility, deserves a bit more articulation. Various aspects of the OHADA statutes reflect the importance of employees as a social value. For example, in the uniform act on bankruptcy procedures, unsecured wage earners recover on liquidation ahead of secured interests. Similarly, as we have seen, “corporate interest” as the expression of corporate social responsibility almost certainly instructs managers to include employees in the constituencies for whom they operate the business. If the courts of OHADA’s member states and the CCJA adopt a broadly encompassing definition of corporate interest, managers may well be required to take into consideration the interests of the community affected by the business. In the United States, this kind of obligation exists only in the most unusual and egregious circumstances and is imposed by laws other than corporate law. For example, suits charging environmental discrimination can force a business to consider the surrounding community. Under OHADA, it is the company law itself whose understanding of corporate interest can include environmental impact.

The inclusion of the environment within the concept of corporate interest ultimately will depend at least in part on social and political realities. Again, the relationship between corporate governance as the manifestation of corporate social responsibility, and political governance proves to be very close. Conceptually that is a defensible outcome, at least so long as the political governance at issue is itself defensible. For example, if the
political input accurately reflects social realities, which generally will mean that the political realm is relatively democratic, businesses will more likely reflect the wishes of the body politic.

The citizenry of the 16 OHADA states could conclude that much of their countries’ exports is from extractive industries, and that the nations have a long-term interest in preserving natural resources. All 16 countries can then impose the same costs on potential investors, both domestic and foreign. They can assert that foreign investors and domestic investors cannot use business forms to poach animals or timber. On the other hand, if the governments are relatively undemocratic, the political power may well be in the hands of persons who will instead seek rents by collaborating with the extractive industries. In that situation the political oligarchs, arguably acting for their own purposes against the interest of the people, exert their power to influence the countries to adopt a narrower vision of corporate interest.

The point is that the OHADA regime’s commercial and company laws offer its member states an opportunity to serve their citizens’ own long-term interests. To achieve this result, however, requires focus on political governance and on harmonizing the standards inherent in the company law to existing social norms. It requires a discussion among all social constituencies.

III. Conclusion
The developed world has highly evolved and sophisticated legal constraints on managerial behavior; this is corporate governance. Against this backdrop compatible social constraints also exist. To be sure, all these constraints fail from time to time, where failure means that managers are exercising their authority so as to cause the business to act contrary to the underlying norms of corporate social responsibility. In the North, the United States modifies legal constraints to shepherd business conduct back toward shareholder primacy.

The developing world, to the extent that it has a weak legal system, relies more on extra-legal constraints than on law to channel the behavior of managers. Technical form matters relatively little. The underlying definition of corporate social responsibility, too, is more obviously influenced by cultural norms. Law, in this context, has social influence chiefly to the extent that it becomes a virtual forum for the discussion of socio-legal norms and a vehicle for reinforcing professionalism.

By casting themselves back on the social bedrock rather than on laws, the developing countries underscore concepts that are too easily forgotten in the North. The experiences in the South emphasize that corporate governance is not a first principle; that it merely implements socially constructed values collected under the concept of corporate (business) social responsibility. For the South, the corporate governance laws also offer a forum and a vocabulary for discussing with the political authorities what should be the applicable standards.
We in the North can learn from these realities that any conception of corporate social responsibility currently being applied by courts is fundamentally political and needs to be revisited in the context of evolving social expectations. Research and ultimately the ballot box may show that, for example, shareholder primacy does conform to cultural norms in the United States. However, it may find that other constituencies and other values dominate in the culture at large, although not necessarily in the moneyed class. It may find that court decisions have not heard and therefore cannot yet address a shift in norms. Developing countries tell us that the definition of corporate social responsibility deserves a public debate, and that concepts of corporate governance cannot be divorced from the underlying purpose of the business organization.

---

1 As of June 25, 2006, the West African members are Benin, Burkina Faso, Côte d’Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo, and the Central African members are Central African Republic, Chad, Cameroon, Comores, Congo, Equatorial Guinea and Gabon. My assertions in this part II.B are based primarily on observations in Cameroon, but also on briefer visits to Senegal and Côte d’Ivoire.


3 They cover the following disciplines (in order of adoption) : company law and economic interest groupings; general commercial law; law of security interests and other encumbrances; simplified recovery procedure and methods of execution of judgments; bankruptcy and insolvency law; arbitration law; accounting law; law on transport of goods by road. See OHADA: TRAITE ET ACTES UNIFORMES COMMENTES ET ANNOTES,
4 ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6-7 (1932) (discussing the significance of separation of ownership from management).

Limited liability generally applies to all owners of a corporation or a limited liability company, and to the limited partners of a limited partnership. Owners of certain newer hybrid forms such as the limited liability partnership also benefit from statutorily granted limitation on liability. See, e.g., Delaware Limited Liability Partnership Act, DEL. CODE ANN. Tit. 6, Ch. 15 (1999 & Supp.) ; and Delaware Limited Liability Company Act, DEL. CODE ANN. Tit. 6, Ch. 18 (1999 & Supp.).


7 See, e.g., MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES 65 (1925; translated by Ian Cunnison 1967) (describing the rise of collectivism in France during the 20th century inter bellum).


See, e.g., Delaware 18-1101(c) – (e): Construction and Application of Limited Liability Company Agreement (however, the “contractual covenant of good faith and fair dealing” cannot be eliminated.


E.g., United States v. O’Hagan, 521 U.S. 641, 642 (1997). (misappropriation: O’Hagan owed a duty to his firm which owed a duty to the potential acquirer, which anticipated making a tender offer for target company shares)


See, e.g., William W. Bratton, Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: Enron and the Dark Side of Shareholder Value, 76 TUL. L. REV. 1275 (2002). Of course, that is the classic reality in any pyramid or quasi-pyramid scheme.

See Traité relatif à l’Harmonisation en Afrique du Droit des Affaires, 4 JOURNAL OFFICIEL (JO) OHADA 1 (Nov. 1, 1997), available at

18 The official site of OHADA’s executive branch, the Permanent Secretariat, is www.ohada.org. A private website sponsored by various donor organizations is as of the date of this writing more complete. See www.ohada.com.

19 Administrateur Général; Company law UA art. 385 (single shareholder possible); art. 494 (single administrateur général); Company law UA art 495 (the single administrateur général need not be a shareholder). See www.ohada.com.


21 Droit Commercial Général UA, arts. 2-7 ; 19 (definition of « commerçants » and stipulation of obligation to file with the register); DCG art 202 (contracts under this AU apply only to “commerçants”); Company law UA, art. 270 (all owners of a “société en nom collectif” are « commerçants »). See www.ohada.com.


24 See, e.g., MAMADOU KONÉ, LE NOUVEAU DROIT COMMERCIAL DES PAYS DE LA ZONE OHADA ; COMPARAISONS AVEC LE DROIT FRANÇAIS 16 (2003) (noting that OHADA’s concept of corporate interest is based on the French system). See also supra Part II.A.2.b (discussion of French company law’s adoption of corporate interest as a form of corporate social responsibility).

25 See infra Part II.B.3 discussing how the broadest definition of corporate interest could obligate management to protect the environment.
9 (Cameroon in last place on Transparency International’s 1999 Corruption Perception Index). In 2005, Cameroon was tied for 137th place out of 158.


27 See Macaulay, supra note 13.


29 See infra Part II.B.2.b (ii) (Walmart is a case in point).


See OHADA bankruptcy law, arts. 95 & 166 (concerning the privilege of salaried employees and priorities). See www.ohada.com.