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ENHANCING THE ATTRACTIVENESS OF SUB-SAHARAN AFRICA THROUGH LEGAL INNOVATIONS

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It is no surprise that the economic environment has drastically changed in Sub-Saharan Africa over the past 15 years. Increasingly attractive economies and the emergence of new business opportunities and of more sophisticated economic actors, including international investors with a heightened interest in the region, meant that the OHADA business law needed to be updated.

For close to three years, from mid-2010 to the end of 2012, we led the group of local and international experts responsible for helping modernize the OHADA Uniform Act on Commercial Companies and Economic Interest Groups (OHADA Corporate Law). OHADA is the French acronym for "Organization pour l'Harmonization en Afrique du Droit des Affaires" or "Organization for the Harmonization of Business Law in Africa". It is a system of business laws and implementing institutions adopted by 17 West and Central African nations.

We were engaged by the OHADA Permanent Secretariat and the World Bank Investment Climate Facility to review and propose amendments to the OHADA Corporate Law to adapt it to the changing economies of the 17 member States and make it more responsive to the needs and demands of the member countries and their private sector investors. The amended OHADA Corporate Law is expected to be adopted later this year.

Through our experience, we and the other experts involved were familiar with the legal needs and concerns of international investors in the OHADA zone. But, if you want to create laws that are effective, that the member countries can make their own, you also need to factor in the local perspective. It is important to make sure that the international perspective is criticized by local experts.

To help us achieve balance between international standards and local business customs, we worked with the World Bank to create a local taskforce comprising lawyers and professors. This taskforce was a group we could bounce our ideas off before discussing them with the representatives of the member States, who were themselves a very diverse crowd (magistrates, lawyers, regulators, businessmen, professors, etc.), which made our discussions pretty rich. They helped us understand whether the innovations we were proposing made sense in the local context. This group also provided us with the cultural and political perspectives, which are crucial to avoid making reforms that are irrelevant or not adapted to the context.

During our assignment, we met with representatives of the member States about every four months. When discussing our proposals, every member State representative would give his own national or local perspective, which helped us adjust some of the ideas. As some countries are more advanced than others, we had sometimes to work out compromises to make the proposed legal solutions workable in different countries. Most of the proposals retained are the result of a broad consensus, as unanimity is the decision-making rule within OHADA.

A key focus of our effort was to facilitate legal and financial engineering within the OHADA zone. In a context where the perception of risk is very high and capital is scarce, creative tools are critical

for businesses and investors to be able to find solutions for their mutual needs. For example, we have introduced a replica of the French business entity known as *société par actions simplifiée* (SAS), a corporate form that seeks to provide as much flexibility as US limited liability companies, a welcome addition to the rather strict existing corporate forms.

Another area where we innovated is the legal regime of equity and debt securities. When OHADA was formed in the late 1990s, no one had anticipated that private equity would someday become a key provider of finance for the local companies. But, over the past few years, we have seen many Africa-focused private equity firms emerge, and they are coming with the same technical needs as those operating elsewhere in the world, notably sophisticated legal tools such as equity-linked securities, convertible bonds, warrants, preference shares, etc. The extent to which issuance of these complex securities was permissible under OHADA law was unclear. For example, a share could not be non-voting and certain local lawyers contended that convertible bonds were not permitted. Obviously, having witnessed the increasing level of business sophistication in the OHADA markets, this situation was no longer acceptable. The possibility of structuring an investment in a way that is consistent with an investor's objectives and reflects the risks associated with a target company needed to be secured.

We also sought to pave the road for employee participation in profit and ownership of OHADA companies. In light of the latest developments in these countries, it has become important to find ways to attract and incentivize the many promising young professionals working in Africa. It is also crucial to retain skillful management for high potential companies, so we proposed amendments to allow these incentive plans to be implemented smoothly.

Unsurprisingly, we made various proposals that were not approved by the member States; sometimes because they felt they were unnecessarily sophisticated or inconsistent with how they thought the business environment in their countries should work. For some of our proposals, they said: "no, we will deal with it when it comes. For now, there is no need".

One example was our proposal to waive the requirement to involve public notaries in the formation of commercial companies. International investors are often surprised by the OHADA law requirement to resort to a public notary in addition to their international and local legal counsel. Typically, when you want to invest in, say, Senegal, you go with a law firm that will structure your investment and draft and negotiate your transaction agreements and the bylaws of the NewCo, and then at the last minute you need to go before a public notary and pay a service fee that is sometimes a percentage of the amount of share capital.

Our argument was that the mandatory recourse to public notaries was not warranted in the case of sophisticated private sector investors, and created inefficiencies and unnecessary costs and that it should be left to the investors to decide whether or not to retain a public notary. But the member States decided to maintain this rule, which in their view provides more legal security to corporate dealings because the public notary is a ministerial authority. They however made a little but potentially significant concession: while the public notary monopoly is still the OHADA law rule, member States are now allowed, if they so decide, to make the involvement of public notaries in company formation optional. It is therefore possible or likely that some OHADA States will use this flexibility.

Another proposal of ours that was not retained was the possibility of paying interim dividends. We submitted that, if there is cash available in a company, the shareholders could be allowed to pay interim dividends within certain restrictions to be clearly defined. However, the member State representatives decided not to move forward with this proposal.

Looking ahead, more will be needed to continue fostering local and foreign investments in the OHADA zone; and the onus is on the leaders of the OHADA countries to facilitate business in terms of opening up opportunities for investors and, in particular, adopting the regulatory

implementing measures that will enhance the impact of the innovations our reform will put forth. Indeed, tax and employment laws remain under the individual authority of each member State through its national legislation. Thus, each member State is expected to come up with favorable tax measures to enhance the attractiveness of employee participation schemes.

For the last 15 years, there has been no change to OHADA Corporate Law and it is likely there will not be another reform for many years to come. During this assignment, we have therefore done our best to propose as many innovations as possible, drawing from the examples of more sophisticated jurisdictions, to anticipate future changes. Nevertheless and based on our experience in the region, we believe new needs are likely to arise at a faster pace than before, especially given the increasing attractiveness of African countries, which is fuelling the development of M&A, private equity and capital markets.

The beauty of OHADA is that it provides a harmonized framework for a great community of countries and their businesses. One of its big constraints, however, is that its treaty format makes legal innovations difficult. OHADA Corporate Law needs to find a way to be more responsive to changes in the local business environment. It will not be possible to wait 15 more years for another reform, so unless the OHADA member countries devise a more flexible approach to making adjustments to their corporate law, the many innovations of today may no longer meet the investors' needs in a few years' time.

Overall, we believe we have helped create a modernized legal regime which, once adopted later this year and effective beginning of next year, will significantly facilitate doing business in the OHADA member countries.

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