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Facilitation of Transport and Trade  
in Sub-Saharan Africa

A Review of International Legal Instruments

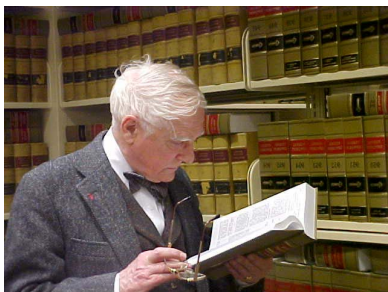
Treaties, Conventions, Protocols, Decisions, Directives

Jean Grosdidier de Matons

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The Sub-Saharan Africa Transport Policy Program (SSATP) is a joint initiative of the World Bank and the United Nations Economic for Africa (UNECA) to facilitate policy development and related capacity building in the transport sector of sub-Saharan Africa.

The findings, interpretations, and conclusions expressed here are those of the author and do not necessarily reflect the views of the World Bank, UNECA or any of their affiliated organizations.



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## FOREWORD

Facilitating trade flows between countries belonging to the same sub-region does not only require adequate transport infrastructure, or the availability of competitive and reliable transport services. Both will be used effectively only to the extent allowed by the legal framework governing their operations.

Similarly, better regional economic integration will be served not only through harmonization of national development policies, but also, and perhaps to a greater extent, through the preparation, ratification and implementation of supranational legal instruments, going from the sub-region to the continent and to the level of international conventions. Those instruments provide the necessary framework underpinning the sustainable development of trade flows, themselves harbingers of economic growth and employment generation.

Sub-Saharan Africa clearly illustrates this situation, where several sub-regions are working hard from East to West to establish institutional and economic ties to help stimulate the joint progress of forty-eight countries. Actually, as a result of both whimsical politics and geography, the existence in Africa of fifteen landlocked countries has only strengthened the need to codify the rules governing the exchanges between coastal states and landlocked ones, so that the latter can benefit from a facilitated access to external markets.

So, while numerous efforts are at play to push ahead with the regional integration of the continent, it appeared timely to draw an inventory of the legal instruments in force in sub-Saharan Africa, aiming at facilitating transport and trade flows between countries of the region. This document presents this inventory, together with an analysis of the main components and characteristics of all listed instruments. In fact, the issue of practically implementing the provisions of the various agreements, protocols, treaties and conventions, has much less to do with the dearth than the multiplication of such regional instruments. We therefore hope that this piece of work will make the necessary task of harmonizing and bringing consistency between those instruments easier, so that they can eventually serve their original purpose.

Of course this is just a first step, in so far as national legislations and regulations will have to undergo the same scrutiny, to make sure they actually translate in practice the decisions and principles endorsed by the various sub-regional economic communities.

Further to the publication of this paper, this is the approach the Sub-Saharan Africa Transport Policy Program intends to follow in partnership with all countries of the region.

Marc H. Juhel  
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## ABBREVIATIONS AND ACRONYMS

|        |  |
|--------|--|
| AALCC  | Asian African Legal Consultative Committee   |
| ACP    | Africa, Caribbean and the Pacific [countries]  |
| AEC    | African Economic Community   |
| AFCAC  | African Civil Aviation Commission  |
| AGIRS  | African Group on International Road Safety   |
| AHSG   | Authority of Heads of State and Governments  |
| AJICL  | <i>African Journal of International and Comparative Law</i> , London                                     |
| AMU    | Arab Maghreb Union   |
| Art.   | Article  |
| AU     | African Union  |
| AYIL   | African Yearbook of International Law, The Hague   |
| BCEAO  | <i>Banque centrale des États de l'Afrique de l'Ouest</i>   |
| BDEAC  | <i>Banque de développement des États de l'Afrique centrale</i>   |
| BEAC   | <i>Banque des États de l'Afrique centrale</i>  |
| BOAD   | <i>Banque ouest africaine de développement</i>   |
| BTS    | British Treaty Series, Her Majesty's Stationery Office, London   |
| CACEU  | Central African Equatorial Customs Union   |
| CCMM   | <i>Code communautaire de la marine marchande</i> (CEMAC)   |
| CCR    | <i>Code communautaire de la route</i> (CEMAC)  |
| CEAO   | <i>Communauté économique de l'Afrique de l'Ouest</i>   |
| CEMAC  | <i>Communauté économique et monétaire de l'Afrique centrale</i>  |
| CEP    | Committee of Eminent Persons   |
| CEPLG  | <i>Communauté économique des pays des Grands Lacs</i>  |
| CIETRM | <i>Convention inter-États de transport routier de marchandises diverses</i>                              |
| CIF    | Cost, Insurance, Freight   |
| CIMA   | <i>Conférence interafricaine des marchés d'assurance</i> (Inter-African Conference on Insurance Markets) |
| CMM    | <i>Code de la Marine marchande</i> (UDEAC)   |
| CMR    | <i>Convention relative au contrat de transport international de marchandises par route</i>               |
| COMESA | Common Market for Eastern and Southern Africa  |
| COTIF  | Convention on international transport by rail  |
| CSC    | Container Safety Convention  |
| CTD    | Combined Transport Document  |
| CTO    | Combined Transport Operator  |
| DJI    | <i>Documents juridiques internationaux</i> , Montréal  |
| DRC    | Democratic Republic of Congo   |

|           |   |
|-----------|---|
| EAC       | East African Community  |
| ECA       | Economic Commission for Africa  |
| ECCAS     | Economic Community of Central African States  |
| ECOWAS    | Economic Community of West African States   |
| EEC       | European Economic Community   |
| EU        | European Union  |
| FLS       | Front Line States   |
| FOB       | Free on board   |
| FUND      | 1971 Brussels Convention on compensation fund for pollution   |
| GATT      | General Agreement on Tariffs and Trade  |
| GC        | General Cargo   |
| GCM       | Gross Combination Mass  |
| HCLT      | Higher Committee on Land Transport  |
| IATA      | international Air Transport Association   |
| ICAO      | International Civil Aviation Organization   |
| ICC       | International Chamber of Commerce, Paris  |
| ICCOSB    | International Commission for the Congo-Oubangui-Sangha River Basin  |
| IGAD      | Intergovernmental Authority on Development  |
| ILM       | International Legal Materials, Washington   |
| IMDG Code | International Maritime Dangerous Goods Code   |
| IMO       | International Maritime Organization   |
| IMT       | International Multimodal Transport  |
| IOMAC     | Indian Ocean Maritime Affairs Cooperation   |
| ISRT      | Inter-State Road Transit or Inter State Road Transport Convention   |
| JCMS      | Journal of Common Market Studies, Oxford  |
| JORF      | <i>Journal officiel de la République française</i> , Paris  |
| LSB       | UN Law of the Sea Bulletin  |
| MoU       | Memorandum of Understanding   |
| MTO       | Multimodal transport operator   |
| OAU       | Organization for African Unity  |
| OHADA     | <i>Organisation pour l'harmonisation du droit des affaires en Afrique</i><br>(Organization for Harmonization of Business Law in Africa) |
| OPL       | <i>Officier permanent de liaison</i>  |
| OTIF      | Office des transports internationaux ferroviaires   |
| para.     | paragraph   |
| PTA       | Preferential Trade Area   |
| REC       | Regional Economic Community   |
| RGDIP     | <i>Revue générale de droit international public</i> , Paris   |
| RJP-IC    | <i>Revue juridique et politique – Indépendance et Coopération</i> , Paris   |
| RTCD      | Road Transport Customs Document   |
| RTRN      | Regional Trunk Road Network   |
| SACU      | Southern African Customs Union  |

|          |   |
|----------|---|
| SADC     | Southern African Development Community  |
| SARP     | Standards and Recognized Practices  |
| SDR      | Special Drawing Right   |
| SIL      | Society of International Law  |
| TGS      | Transactions of the Grotius Society, London   |
| TIPAC    | <i>Transit inter-États des pays de l'Afrique centrale</i>                                       |
| TIR      | <i>Transport international par la route</i>   |
| TKCMC    | Trans-Kalahari Corridor Management Committee  |
| TMI      | <i>Transport multimodal international</i>   |
| TRIE     | <i>Transit routier inter-États</i>  |
| TTCA     | Transit Transport Coordination Committee  |
| UCOMAR   | Continental Unit for Maritime Transport (in OAU)  |
| UDE      | <i>Union douanière équatoriale</i>  |
| UDEAC    | <i>Union douanière et économique des États de l'Afrique centrale</i>                            |
| UEAC     | <i>Union économique de l'Afrique centrale</i>   |
| UEMOA    | <i>Union économique et monétaire ouest-africaine</i> (West African Economic and Monetary Union) |
| UN Stat. | United Nations Statement of Treaties and International Agreements deposited                     |
| UN       | United Nations  |
| UNCTAD   | United Nations Conference for Trade and Development   |
| UNTS     | United Nations Treaty Series  |
| UNYrBk   | Yearbook of the United Nations  |
| VAT      | Value added tax   |
| vol.     | Volume  |
| WCO      | World Customs Organization  |

## I. BASIC LEGAL ISSUES RELATED TO INTERNATIONAL INSTRUMENTS

### A. DEFINITIONS<sup>1</sup>

1. **International agreements.** The basic following definitions apply to all legal instruments described in this review.

- (a) An international agreement is a written instrument between two or more sovereign or independent public law entities such as States or international organizations, intended to create rights and obligations between the parties and governed by international law.
- (b) Such instruments are designated as treaties, conventions, agreements, protocols, covenants, compacts, exchange of notes, memoranda of understanding, agreed minutes, letters, etc., the latter being known as *accords en forme simplifiée* or agreements under simplified format. In what follows, and except in specific cases, the word “treaty” is a generic term designating any treaty, agreement, convention or other international instrument.
- (c) Treaties may be bilateral or multilateral. Bilateral treaties are contracts in which two parties balance their claims on a specific matter. A multilateral treaty, usually titled convention, sets rules of law to be observed by all parties to the treaty, in their joint or individual interest. A contract in form, it is substantially akin to a law.

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<sup>1</sup> **BIBLIOGRAPHY** Ch. Rousseau, *Droit international public*, Sirey, Paris, 1970, t. I, p. 88-126. D. Garreau, *Droit international*, Pedone, Paris, 1977. E. Zoller, *Droit des relations extérieures*, Dalloz, Paris, 1992. P. Freymond, *la ratification des traités et le problème des rapports entre le droit international et le droit interne*, Liège, 1947. H. Blix, *Treaty making power*, Stevens, London and Praeger, New York, 1960. D. Lasok, *Les traités internationaux dans le système juridique anglais*, LXX Revue générale de droit international public (RGDIP), Pedone, Paris, (1966) 961-964. J.B. Scott, *Ratification of treaties in Great Britain*, 17 American Journal of International Law (SAJIL), Washington (1924), 296. Nguyen Quoc Dinh, *La Constitution de 1958 et le droit international*, LXXV Revue de droit public, Paris, (1959), 515-564.

- (d) A treaty, even after it has become part of the law of the land after ratification (see below) and even when, as a convention, it borrows from the nature of a law, remains a contract and must be interpreted as such. Enforcement of its terms and conditions by a government agency is more than the implementation of domestic law provisions. It is a contribution to international relations; it has therefore an impact on the nation's and State's reputation as partners in such relations.

**2. Ratification.** Ratification is the procedure, possibly set forth by the Constitution, by which a treaty is incorporated to the domestic law of one of the parties to it. Agreements under simplified format are usually ratified by the executive branch, while major treaties and conventions are ratified by the legislature. In the United Kingdom, under a non-written constitution, politically important treaties, modifying domestic law or having a financial impact, are ratified by Parliament. The Constitutions of Anglophone African States do not formulate rules in that respect. Constitutional practice may vary from one State to another. It is likely that legislatures have jurisdiction, but it may be distributed between the executive and the legislative branch, according to the importance of the treaty. In France, the 1958 Constitution stipulates that ratification is by a law or by a presidential decree. The Constitution indicates which treaties should be ratified by law. One criterion is whether the treaty has a financial impact, in which case a law is necessary since parliament is master of the purse (1958 Constitution, Art. 53). The same wording is to be found in many constitutions of Francophone or other African States. Other constitutions provide for ratification by presidential decree, rendered after agreement given by the legislature (see Democratic Republic of Congo, Art. 179 of the Constitution). Lastly, in some States, jurisdiction for ratification is left to the President, whatever the treaty. This is the case in Equatorial Guinea and in the Central African Republic. The United States know of executive agreements, quasi treaties which do not require ratification by the Senate under Art. II of the American Constitution.

**3. Registration.** All treaties, conventions and other international agreements entered into must, according to Article 102 of the United Nations Charter, be registered and published by the General Secretariat. Non-published treaties remain valid between signatories but may not be accepted when invoked in relations with the United Nations and its agencies. Treaties are numbered in the order of registration in the volumes of the United Nations Treaty Series. The UN Treaty Series, which replaced the same Series of the League of Nations, may be consulted on the United Nations website [www.un.org](http://www.un.org).

**4. Identification and localization of instruments.** At the start of the exercise, it seemed that the international and inter-regional legal instruments in existence were quite well known. This is not the case. There are many more instruments, Conventions, Memoranda of Understanding, etc. than originally believed. Not all were filed in the United Nations Series of international agreements, but with the Organization for African Unity (OAU), which makes them less easy to locate. Filing of instruments in either system also takes place after some delays. After which they need to be published locally, distributed to the relevant agencies, and their en-

forcement should be monitored. Many instruments may well be dormant or ignored. Others are obsolete despite that they are still officially in existence, some overlap. Finally, and this is important, at the time of issuing this Review:

- Some bilateral instruments, executed either for the implementation of the international or inter-regional instruments or executed independently from these instruments, may remain to be identified and analyzed;
- Domestic laws, regulations and circulars, also have to be identified and compared to the multilateral and bilateral instruments, with which they may or may not be in conformity.

As mentioned, some instruments are dormant.

**5. Issues.** There are four basic issues related to:

- a) The conditions of enforceability of a treaty or other international instrument in the territory and in the legal regime of a State party to such instrument
- b) The ranking of legal norms (treaties and domestic law)
- c) Whether treaties, agreements and other international instruments are actually enforced
- d) Whether:
  - (i) treaties and other agreements deal with issues of **public law** (Customs facilitation, traffic police, safety, etc.) or whether they aim at modernizing and streamlining **private law**, commercial practice and procedures (carriage contracts, insurance, etc.), or
  - (ii) and as a consequence, whether they are oriented towards public administration by public agents or towards the association of the community of traders and carriers to a viable and sustainable development of the transport system.

These issues are detailed herein below.

## B. ENFORCEABILITY<sup>2</sup>

### a. *International enforceability*

6. Treaties only bind signatories. Where a State, not a party to a treaty, accepts its provisions and desires to become a party thereto, it does so by acceding to the treaty, which may be before or after the treaty comes into force<sup>3</sup>. As regard the United Nations, they are effective only after registration and publication (see above) and only as consistent with obligations of the United Nations members under the Charter. A number of inter-regional African conventions and agreements appear not to have been registered with the UN. They are identified occasionally in this document.

### b. *Territorial enforceability*

7. **General.** As seen above, ratification makes the treaty enforceable between signatories. Whether newly created States, resulting from the break-up of other States (e.g. Yugoslavia) or colonial territories reaching independence, are bound by treaties entered into before their creation, has been the subject of considerable argument.<sup>4</sup> Different solutions were proposed or implemented for different categories of treaties, treaties including financial obligations being especially prone to controversy.

8. **Basic principles and the clean slate doctrine.** The principle and practice are at present that, unless there is a formal denunciation, earlier treaties remain in effect. Sometimes succes-

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<sup>2</sup> **BIBLIOGRAPHY** C. Rousseau, *Droit international public*, Dalloz, Paris, 1984, p. 56-65. D. Carreau, *Droit international*, Pedone, Paris, 1997. *Application du droit international dans l'ordre interne*, p. 408-525. J.M. Bipoun-Woum. *Le droit international africain ; problèmes généraux et règlement des conflits*, L.G.D.J. Paris, 1970. A.K. Kouomegni, *Les constitutions africaines et le droit international*, in G. Conac. *Les institutions constitutionnelles des États de l'Afrique francophone et de la République malgache*, Economica, Paris, 1979, 238. P.F. Gonidec, *Droit international et droit interne en Afrique*, 8 African Journal of International and Comparative Law (AJIL), London (1996), 789-807. A. Sall, *Le droit international dans les nouvelles constitutions africaines*, LI Revue juridique et politique. Indépendance et coopération, Paris, (RJPIC), 1997, p. 339-352.

<sup>3</sup> D. Garreau, *Droit international*, Pedone, Paris, 1997. Adhésion aux traités, p. 126-127.

<sup>4</sup> **BIBLIOGRAPHY** V.D.P. O'Connell, *The law of State succession*, Cambridge, 1856. Same author, *State succession in international and municipal law*, Cambridge, 1957. H. Beemelmans, *State succession in international law*, XV Boston University International Law Journal, (1977), 71-121. M. Mrak, *Succession of States*, Nijhoff, The Hague, 1999. Ch. Rousseau, *Droit international public*, III, Paris, 1977, 483-510. Y.D. Decan, *La succession d'États en matière de traités et les États nouveaux*, XLII Annuaire français de droit international (AFDI), 1996, 207-227.

sion is automatic except in case of formal declaration to the contrary; sometimes it is considered a formal declaration of adhesion. African States provide many examples of the latter solution. Significant is the case of five East African States (Burundi, Kenya, Malawi, Tanzania and Uganda), which pleaded the so-called clean slate or Nyerere doctrine<sup>5</sup>. According to it, these States could not be bound by any treatise signed and ratified prior to independence, even if such treaties were ratified in their name by the colonial power in charge. Whether the instrument was bilateral or multilateral was irrelevant. These States were free to adhere or not to treaties and conventions of their own choice, in all sovereignty, after they had obtained independence. They existed in international law only after independence had been obtained. When Tanzania, on November 16, 1962, adhered to the 1924 Brussels Convention on certain rules applicable to carriage of cargo by sea under bills of lading, and through a Declaration of Succession, the Tanzanian Government made clear to the Kingdom of Belgium as Depository of the Convention, that the words "Declaration of Succession" were purely formal and did not mean that Tanzania recognized having inherited the Convention from Her Majesty's Government despite that it had extended its own ratification to Tanganyika. Accession to the Brussels Convention was a sovereign decision, without a precedent, by the Republic of Tanzania.

**9. The doctrine of succession.** This doctrine considers that States succeed to treaties concluded in their name by another power. However, to be enforceable in the newly independent State, the treaty must have been specifically enforceable when the future State was under foreign control. The case of colonies was complex. In some systems, they had no juridical personality separate from that of the colonizing State. In others, they were fully incorporated but may have not been juridical entities of international law. Certainly territories under the League of Nations mandate or United Nations trusteeship ought to have been considered as international law entities. Protectorates, whose governments concluded protectorate treaties, certainly were. Past and consequently present enforceability by succession necessitated a specific proclamation of extension of the treaty to such colony or territory. This was the case for a large number of British possessions. Conversely, France tended to issue specific denial of enforceability as regards its colonies. But it did associate protectorates (Morocco, Tunisia)<sup>6</sup> or States under mandate (Lebanon) to the ratification of some multilateral conventions (e.g. the 1923 Geneva Convention on the international regime of maritime ports). The Spanish and Portuguese practice seems to have been mixed.

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<sup>5</sup> V. Makonian, *International law and the new States of Africa*, UNESCO, Paris, 1980.

<sup>6</sup> Particularly significant is the case of Morocco under French protectorate. All international law instruments concluded by France for Morocco were in the name of the *Meghzen* and not in the name of the French Republic. See B. Jofé, *Le statut international du Maroc*, XXVI *Revue de droit international et de droit comparé*, Bruxelles (1949), 35. H. Ouezzani Chahdi, *La pratique marocaine du droit des traités*, L.G.D.J, Paris, 1982.



**10. Denunciation and obsolescence.** A treaty like any agreement or contract may be denounced. The denunciation may be implicit when a new treaty on the same subject matter has been entered into, whose provisions cannot be reconciled with the provisions of the former treaty. For example, the 1885 Berlin Convention on the regime of the River Niger expired de facto when the 1964 Niamey Convention between Niger, Nigeria, Mali and Chad came into effect (see Annex VII-35).

*c. Enforceability under common law regimes*

**11. English law<sup>7</sup>.** Under English law doctrine and practice, treaties are not self-executing<sup>8</sup>. They cannot operate by themselves within the State, but require the passing of an enabling statute. Government or the Head of State may retain the right to sign and maybe to ratify treaties, however, ratification is in many States the privilege of the legislature. Jurisdiction is distributed between the legislative and the executive branch, according to the importance of the instrument. The executive branch may create obligations by signing and ratifying, but only the legislature can decide how the obligation borne with the treaty is to be performed. In United Kingdom, for instance, an Act of Parliament is essential before a treaty can become part of the English law. To make the treaty effective, three successive steps are necessary: signature, ratification and statute. The record of court decisions indicates that the process is similar in Australia and in Canada. It is likely to be the approach in Anglophone Africa.

**12. U.S. law<sup>9</sup>.** U.S. law makes a distinction between self-executing and non self-executing treaties. The former are able to operate automatically and the latter require enabling acts of

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<sup>7</sup> **BIBLIOGRAPHY** C. Elliott, F. Quinn, *English legal system*, Longman, London, 1998. P. St J. Langan, *Maxwell on the interpretation of statutes*, Sweet and Maxwell, London, 1949, p. 183-186. A.D. Mc Nair, *The Law of treaties*, Oxford, 1962. F.A. Mann, *The enforcement of treaties in English courts*, 44 Transactions of the Grotius Society (TGS), London, (1058-59), 29. D. Lagok, *Les traités internationaux, dans le système juridique anglais*, LXX RGDIP, (1966), 961-994.

<sup>8</sup> See J. Verhoeven, *La notion d'applicabilité directe en droit international*, 15 Revue belge de droit international, Bruxelles et Louvain, 1980, 2. T. Buergenthal, *Self-executing and non self-executing treaties in national and international Law*, Revue canadienne de droit international, 1992 IV-243.

<sup>9</sup> **BIBLIOGRAPHY** B.E. Carter and P.P. Tumble, *International law in the United States in International Law*, Aspen Law and Business, Aspen, Col. 1995, 165-278. J.J. Post, *International Law as Law of the United States*, North Carolina Academic Press, Durham, N.C. 1996, 51-142. R.A. Falsk, *The Role of Domestic Courts in the International Legal Order*, Princeton, 1964. L. Henkin, *International Law as Law of the United States*, 82 Michigan Law Review (1984), 1555. Y. Iwasawa, *The Doctrine of Self-Executing Treaties in the United States, a Critical Analysis*, 26 Virginia Journal of International law (1986) 633. M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 American Journal of International Law (1995), 695.

municipal legislation before they can function in the country and be accepted by courts. Whether a treaty belongs to one category or to the other is left to court interpretation based on its political content. For example, the United Nations Charter, because of its political content, has not been judged to be a self-executing treaty.

*d. Enforceability under civil law regimes<sup>10</sup>*

**13. French law.** Under French law, international instruments are valid and applicable as soon as ratified and published. Ratification and publication are therefore successive and necessary steps in one enabling procedure; law courts are strict on the need for publication since the Foreign Service tends to be negligent in that respect as regards agreements under simplified format – *accords en forme simplifiée* such as exchange of letters (see para. 1). According to the 1958 Constitution, ratification is either by Act of Parliament or by decree; one criterion for ratification by the legislature is whether or not the treaty raises issues of public finance, since the power of the purse is with Parliament. The text of the treaty is attached verbatim to the text of the act or decree of ratification, the treaty being de facto self-executing. Publication is in the local government gazette (*Journal Officiel*). But a rule of reciprocity applies: the treaty is enforceable only if ratified and enforced by the other contracting party.

**14. Francophone sub-Saharan States.** Francophone States in Africa follow the civil law model. Treaties are attached to the law or decree of ratification. Both are published in the local government gazette (*Journal Officiel*). The constitution of a few States, such as Rwanda and Burundi (1998, at Art. 168) or Madagascar (1992, at Art. 82-VIII) rules that, if the provisions of a treaty are contrary to the Constitution, the treaty cannot be ratified before the Constitution has been modified.

*e. Conclusion*

**15. Enforceability versus enforcement.** It results from the above that the signature of a treaty or agreement is only a first step towards the performance of the obligations created by it. A number of treaties solemnly concluded never came in effect because of second thoughts of governments, then using delaying and other procedures to escape their obligations. A State may sign a treaty as a gesture of political significance and then indefinitely delay ratification.

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<sup>10</sup> **BIBLIOGRAPHY** Ch. Rousseau, *Droit international public*, Dalloz, Paris, 1984. V.A. Mestre, *Les traités et le droit interne*, Recueil des cours de l'Académie de droit international de La Haye, 1981, IV. V. Erlich, *L'interprétation des traités*, idem, 1938.IV. V.S. Regourd, *L'article 55 de la Constitution et les juges*, LXXXIV RGDP, (1980), 783-810. D. Garreau, *La supériorité du droit international sur le droit interne*, in *Droit international*, Pedone, Paris, 44-64. *La supériorité du droit international sur le droit régional, same treatise, 84-91.*

There are such cases amongst the treaties and agreements reviewed in this Review. Moreover, when a treaty is formulated in general terms and when detailed domestic statutes are necessary for its effective enforcement, especially regulations issued by decree and for the guidance of the civil service, not issuing these statutes renders the treaty ineffective, even if duly ratified, proclaimed or published. Significantly, legal issues have been identified as major legal obstacles to economic integration in Africa<sup>11</sup>:

- Ratification and implementation of instruments;
- Derogation from national sovereignty of Member States;
- Diversity and variations of constitutional law, especially their interaction with public international law;
- Dissimilarities and divergence between municipal laws, with local legislation ignoring duly ratified conventions and treaties;
- Lack of fully developed and, mainly accepted legal principles regulating, for example contractual liability, liability in tort, etc.
- Lack of conflict of laws rules; and
- Poorly equipped courts of law.

A more detailed review would be necessary to establish whether or not such problems affected the enforcement of transit and other transport agreements in sub-Saharan Africa.

## C. RANKING OF NORMS<sup>12</sup>

Whether international instruments prevail over domestic legislation is the second basic issue.

### a. *Ranking of norms in common law*

**16. English law and the incorporation doctrine<sup>13</sup>.** The rule is that international law is part of the law of the land, meaning an absence of a priori preeminence of international law, i.e.

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<sup>11</sup> See B. Thompson, *Legal problems of economic integration in the West African sub-region*, 2 AJICL (1990), 85-102. See also para. 153 on OHADA and Note 60.

<sup>12</sup> E, Van Bogaert, *Les antinomies entre le droit international et le droit interne*, LXVIII RGDIP, (1968), 346-360.

<sup>13</sup> R. Higgins, *The effect of treaties in domestic law*, F, Jacobs and S. Roberts, London, 1987. See also references in Note 8 above.

treaties. When reviewing statutes at the light of a treaty, English law makes a distinction between statutes that are intended to bring a treaty or agreement into effect and other statutes. Where the provisions of a statute implementing a treaty are capable of more than one meaning, and if one interpretation is compatible with the terms of the treaty while others are not, legislation under review will be construed so as to avoid a conflict with international law that is the treaty. But where the words of an existing statute are unambiguous, there is no choice but to apply them irrespective of any conflict with international agreements. The treaty, while incorporated to municipal law (the incorporation doctrine) does not automatically prevail. This is likely to be the rule in Anglophone sub-Saharan Africa.

17. Given the well-established incorporation doctrine, references to duties under international law are therefore few in the constitutions of Anglophone States South of the Sahara. Article 40 of the Constitution of Ghana states that:

*Government shall promote respect for international law, [and] treaty obligations...adhere to the principles enshrined in or as the case may be, the aims and ideals of the Charter of the United Nations, the Charter of the Organization of African Unity, ...the Treaty of the Economic Community of West African States and any other international organization of which the Ghana is a member.*

This is a broad statement of policy rather than a specific rule of law that courts may use for guidance in interpreting statutes and treaties. A similar policy statement is to be found in Art. 14 of the 1975 Constitution of Angola – a civil law country – whereby the State considers itself bound by the principles of the UN Charter and of the OAU Charter. Article 144 of the Constitution of the Republic of Namibia refers to international law but places domestic law above international law and agreements, which means that at any moment, the Parliament may free the Republic of Namibia from a binding obligation. The Article stipulates that:

*Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the laws of Namibia.*

18. **U.S. law and the Last in Time doctrine**<sup>14</sup>. U.S. law is even stricter. Early efforts in constitutional history for making treaties paramount to acts of legislation did not prevail. Treaties and acts of legislation are on the same footing and in any case the Constitution prevails domestically as the supreme law of the land, even if it places the United States in violation of international law at international level. In case of direct conflict between a self-executing treaty and a legislative act or statute of Congress, the last in time prevails (the Last in Time doctrine). At any moment therefore, the position of a foreign party to a treaty with the United States, exposed to the Last in Time doctrine, may be very weak.

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<sup>14</sup> See B.E. Carter and P.R. Tumble, op. quoted Note 10.

*b. Ranking of norms under civil law*

**19. Treaties as paramount in civil law.** Civil law States, whose legal tradition has a strong influence on non-Anglophone sub-Saharan Africa, tend to consider international law as paramount to municipal law. According to the 1958 French Constitution:

- 1) Treaties duly ratified and published operate as laws within the domestic system,
- 2) The provisions of a particular treaty are superior to those of domestic laws, but only if this situation applies also as regards the other party or parties to the treaty (*rule of reciprocity*).

French courts may also declare a statute inapplicable if it conflicts with an earlier treaty, a totally different approach from that resulting from the Last in Time doctrine, in fact prohibiting the legislature to issue a statute that would contradict a treaty. The Basic Law of the Federal Republic of Germany goes further by stating that the general rules of public international law are an integral part of federal law, which goes beyond treaties and includes custom, a major source of international law. Treaties take precedence over laws and directly create rights and duties for the inhabitants of the German territory. In other words, treaties are self-executing.

**20. Sub-Saharan Africa.** Most constitutions of Francophone African States follow the civil law model, the wording being<sup>15</sup>:

*Treaties and agreements ratified or approved in accordance with statutes on the matter, as soon as they are published, shall have an authority superior to that of laws, contingent upon the application by the other party, for such agreement or treaty.*

The rule is set forth in the Constitution of Benin (1990, at Art. 147), Burkina Faso (1991, at Art. 151), Cameroon (1996, at Art. 46)<sup>16</sup>, Central African Republic (1994, at Art. 69), Chad (1996, Art. 222), Côte d'Ivoire (2000, Art. 88), Guinea (1990, Art 77 to 79), Mali (1992, Art. 116), Mauritania (1990, Art. 88), Niger (1996, Art. 121), and Senegal (2001, Art. 98). Yet it is missing in the Constitutions of Congo (1992), Gabon (1994), and Madagascar (1991) as well as in civil law States such as Cape Verde, Sao Tome and Principe, and Guinea Bissau.

**21. Example.** The influence of the civil law doctrine of paramount ranking of treaties is well illustrated by the instruments concerning the *Union économique et monétaire de l'Afrique de l'Ouest* (UEMOA-West Africa Economic and Monetary Union). The 1994 Dakar

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<sup>15</sup> M. Monelle Konbi, *Les dispositions relatives aux conventions internationales dans les constitutions des États africains francophones*, 8 African Yearbook of International Law (AYIL) (2000), 223-264.

<sup>16</sup> On the evolution of the regime of treaties in Cameroon constitutional law see A.D. Alinga, *Considérations sur les traités dans l'ordre juridique camerounais*, 8 AJICL (1996) 283-308.

UEMOA Convention between eight Francophone States (see para. 338 and 389) stipulates a comprehensive regime, clearly owing much to the European Union system.

- (1) *Instruments resulting from the Union or issued by the Union take precedence over any past, present or future national legislation. Partner States shall take all necessary measures to eliminate contradictions or overlapping of prior instruments, commitments or conventions entered into or acceded at, with third parties.* (Article 14).
- (2) *Regulations issued by UEMOA are directly enforceable in Partner States* (Article 43 of the Convention).

In addition:

- (3) Directives indicate which results ought to be obtained and as such, are binding obligations for Partner States.
- (4) The implementation of UEMOA decisions by Partner States is compulsory.

In UEMOA only recommendations and opinions are not directly enforceable. All instruments except recommendations are to be issued with motives. Writs of execution are issued and enforceable in accordance with domestic rules of civil procedure.

## D. PUBLIC LAW VERSUS PRIVATE LAW

**22. Importance of public law.** Many of the treaties and conventions reviewed here seem to be instruments oriented towards the performance of government regulatory functions. They deal with issues of public law. In all the institutions described, it is clear that governments and government staff are everywhere and in charge. There is hardly any mention of the professionals of transport, chambers of commerce, consultative procedures, etc. Five exceptions are however significant:

- (i) UEMOA officially gives a role to the chambers of commerce, reflecting the French legal set-up. Such set-up considers chambers of commerce as official entities, representatives of traders and to whom are assigned tasks and missions of public interest (port and airport management concessions, bonded warehouses, training, etc.).
- (ii) The Walvis Bay Corridor, essentially a private project by which professional and operators are organizing a public service of opening two corridors to the hinterland.
- (iii) The Treaty establishing the *Organisation pour l'harmonisation du droit des affaires en Afrique* (OHADA) – Harmonization of Business Law in Africa. This treaty deals with the modernization of business law and of the law of transport, and addresses the problems of the carrier and of its clients.

- (iv) The Southern African Development Community Treaty (SADC) provides for private sector representation in the road authorities to be established.
- (v) The 1999 Agreement, establishing a uniform river regime and creating the International Commission for the Congo-Oubangui-Sangha, provides for representation of carriers in the Management Committee of the Commission.

**23. Lesser importance given to private law.** In many instruments, except as regards third party insurance schemes, very little interest seems to be given to the transport operation and to the carrier itself. They seem to be stranger to the process. Significantly, no State seemed anxious to ratify the Convention on International Multimodal Transport. Incoterms<sup>17</sup> and their use are never mentioned. What is the legal regime of waybills is obscure. How litigation is settled between carriers and shippers and consignees is not known. The shortage of financial resources limits access to law reports and legal periodicals, and impoverished courts of law lack the necessary information to adjust their jurisprudence to changing laws and legal doctrine. The information gap is a permanent concern of judges and of the bar. Whether the recourse to law courts or to arbitration is frequent and unknown.

## E. PRESENTATION

**24.** The position of sub-Saharan States as regards conventions is described in the following chapters. Conventions are distributed between

- (i) Worldwide conventions, either setting rules of general policy, or specific to a transport mode, except aviation, not been included in the terms of reference of this Review, and
- (ii) Regional instruments valid or projected to be valid in the whole of the African continent; and
- (iii) Sub-regional instruments, conventions and treaties specific to Africa.

Each section or sub-section summarizes the stipulations of the convention and indicates the status of ratification or adhesion. Whether instruments described are attached as Annexes to the Review is indicated.

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<sup>17</sup> **BIBLIOGRAPHY** F. Eisemann, *La pratique des Incoterms*, CCI, Paris, 1988. I. Ramberg. *A Guide to Incoterms*, CCI, Paris, 1991. M.L.M. Granziera, *Contratos internacionais, negociação e renegociação, comentários aos Incoterms*, Sao Paulo, Brasil, 1993. F. Reynolds, *Incoterms for Americans, simplified and answers questions about Incoterms for U.S. foreign traders*, International Projects, Holland, 1993.

## II. WORLDWIDE CONVENTIONS

### A. GENERAL POLICY CONVENTIONS

#### a. *General*

**25. History.** Facilitation and the freedom of movement of vessels, land vehicles and goods is not a new thing. The centuries-old movement for such freedom, inaugurated by Grotius as regards the sea in the early XVII<sup>th</sup> century developed especially after the creation of the League of Nations in the early 1920's in reaction against the XIX<sup>th</sup> century protectionism of many nations. The international and regional conventions presently in effect or recently concluded are therefore not innovations. They are the follow-up, updating and extension of a movement towards a worldwide free trade system that is now nearly one hundred years old.

**26. Listing of conventions.** Nineteen general policy instruments applicable to all modes of transport (air, sea, land) are presented herein below:

- (a) The *1921 Barcelona Convention on freedom of transit*.
- (b) The *1947 General Agreement on Tariffs and Trade* (GATT), later *General Agreement on Trade and Services* (GATS).
- (c) The *1965 New York Convention on Transit Trade of landlocked countries*, together with its predecessors, the *1921 Convention and Statute on Freedom of Transit* and the *1958 Geneva Convention on the High Seas*. All three conventions are protective of the interests of landlocked States.
- (d) Five conventions related to the functioning of Customs: the *1950 Brussels Convention establishing a Customs Cooperation Council*, the *1973 Kyoto Convention on the simplification and harmonization of Customs procedures*, preceded by a 1923 Geneva Convention on the same subject matter, the *1977 Nairobi Convention on mutual administrative assistance for the prevention, investigation and repression of Customs offences*, and the *1982 Geneva Convention on the harmonization of frontier control of goods*.
- (e) Five technical conventions related to transport equipment, the *1960 Brussels Convention on pallets*, the *1956 and 1972 Geneva Customs Convention on containers*, the *1960 Brussels Convention on Packings*, and the *1994 Convention on Pool Containers*.



- (f) Four customs conventions on the temporary import of goods and equipments.

These nineteen conventions constitute a coherent body of international law. They ought to have been ratified and enforced by all States interested in facilitation of trade in sub-Saharan Africa.

*b. 1921 Barcelona Convention and Statute on Freedom of Transit*<sup>18</sup>

**27. History.** Freedom of transit is essential for landlocked countries. A landlocked country is a country with has no seacoast and which, therefore, relies on one or more neighboring States for access to the sea. The 1921 Barcelona Convention is based on the principle that *transit is a service to be rendered to others in the international interest, not a privilege to be the source of undue and excessive benefits, if not straight abuse of a controlling position (position dominante)*. As a follow-up on Article 23(e) of the Covenant of the League of Nations, this Convention was important in its days since the breaking up of the Austro-Hungarian Empire had resulted in the formation of new States, many of them landlocked. It was necessary to obtain from coastal States some recognition of the right of access of land-locked States to the sea, formerly in the 1815 Act of Vienna on the regime of the Rhine and in other XIX<sup>th</sup> century conventions on international rivers. One of the main objectives of the 1921 Convention was therefore to provide for a mean of enforcing the right of free transit without prejudice to the rights of sovereignty of the transit States over routes available for transit. A new international instrument on transit, the Customs Convention for the international transit of goods (the ITI Convention) was made in Vienna, Austria on June 7, 1971. Burundi and Chad signed it but the convention never took effect. Temporary admission of goods, an important aspect of transit, had earlier been the subject of the 1961 ATA Convention reviewed below (para. 65 and sq.).

**28. Enforceability.** The Convention is still in force and has 42 parties, mainly members of the League of Nations in 1921<sup>19</sup>. Hong Kong, not a member in 1921, signed and ratified it in 1997. The United Kingdom ratified for its colonies and protectorates, except South Africa which being a Dominion, had the right to sign separately. Ex-British colonies and protectorates of sub-Saharan Africa may therefore be bound by the Convention, unless the clean slate doctrine (see para. 8) is invoked. But Rwanda (1965), Lesotho (1973), Swaziland (1969) and Zim-

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<sup>18</sup> **BIBLIOGRAPHY** E. Lauterpacht, *Freedom of transit in international law*, 44 Transactions of the Grotius Society (TGS), London, (1958-59), 313. L. Oppenheim, *International law*, Longman, London, 1955, 675. G. Schwarzenberger, *A Manual of International Law*, Professional Books, Milton, U.K. 1961, 103 and sq.

<sup>19</sup> For each of the conventions, treaties or other agreements quoted in this document, the status of ratification or accession relating to sub-Saharan African States is indicated. It is based on the UN Treaty Series and is up to date only as far as such Series are.

babwe (1998) formally acceded to it after independence. Possibly these landlocked States saw in accession a way of reinforcing their position in their relations with coastal States. Significantly, the Preamble to the 1985 Northern Corridor Transit Agreement between Kenya and the landlocked States of Burundi, Rwanda, Uganda and Zaire makes express reference to it (see para. 227 and sq.). Other colonial powers did not automatically ratify it for their colonial possessions. It is therefore not enforceable by all African States. But, even for those, it is an important document because it sets forth the basic principles of any transit policy, especially of the transit policies that will be developed and implemented for the benefit of landlocked States.

The text of the **1921 Barcelona Convention and Statute on freedom of transit** (reference 7 League of Nations Treaty Series 11) is attached to this Review as **Annex II-1**.

**29. Provisions.** Main provisions of the Convention are:

- (1) **(Article 1) Definition of transit.** Transit is defined as that passage of persons, goods, means of transport, etc. through a territory which is only a portion of a complete journey beginning and terminating beyond the frontier of the State across whose territory the transit takes place. As noted in paragraph 31 below, this is in fact quite a narrow definition.
- (2) **(Article 3) Facilitation.** Measures taken by contracting States for regulating and forwarding traffic shall facilitate free transit.
- (3) **(Same) Equal treatment.** No distinction shall be made based on the nationality of persons, flag of vessel, etc. or any circumstance relating to the origin of goods or of means of transport.
- (4) **(Articles 4 and 5) Dues and tariffs.** Traffic in transit shall not be subject to any special dues. *Dues should be levied only to defray the expenses of supervision and administration.* Tariffs shall be reasonable as regards both their rates and methods of application. They shall be fixed so as to facilitate international traffic. No charges, facilities or restrictions shall depend, directly or indirectly, on the nationality or ownership of means of transportation.

*c. General Agreement on Tariffs and Trade (GATT)*

**30. General.** The 1947 GATT Agreement was ratified or adhered to by all sub-Saharan African States. There is no issue of enforceability<sup>20</sup>. The Agreement was later broadened and com-

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<sup>20</sup> **BIBLIOGRAPHY** D. Garreau et P. Juillard, *Droit international économique*, L.G.D.J. Paris, 1998. A. de Laubadère and P. Delvolvé, *Droit public économique*, Dalloz, Paris, 1986. J.M. Djossou, *L'Afrique, le GATT et l'OMC entre territoires douaniers et régions commerciales*, Presses de l'Université Laval, Ste

pleted (Kennedy Round, Uruguay Round, Tokyo Round, etc.). Its objective was to open international trade and particularly to reduce or eliminate customs and administrative restrictions to trade, extend enforcement of the most favored nation clause, while providing for some derogations and protective measures when necessary.

The text of GATT, filed under N° 814 with the UN Secretariat (reference 35 UN Treaty Series 194), is attached as **Annex II-2** to this Review.

**31. Definition of Right of Transit.** As regards transit, the GATT, reviewed below, borrowed from the principles, and at times reproduces verbatim the provisions from the 1921 Barcelona Convention and Statute on Freedom of Transit, reviewed above. Article V of the GATT deals with transit of vessels, land vehicles, and cargoes. It defines traffic in transit as traffic whose passage across a territory *is only a portion of a complete journey beginning and terminating beyond the frontier of the country where the passage takes place*. This is quite a restrictive definition as far as African landlocked countries are concerned. If “journey” means the total trip from, say, Antwerp to Niamey through Abidjan, then the truck journey between Abidjan and the Mali frontier is transit. But if the truck journey originating in Abidjan is considered separately, then that fraction of the journey taking place in Côte d’Ivoire is not transit. In other words, the truck loading cargo in Abidjan for Bamako is not in transit in Côte d’Ivoire, but only in journeying across Burkina Faso. Technically, GATT rules do not apply; still the cargo interests in Bamako have the feeling that transit takes place in Côte d’Ivoire as well as in Burkina; Côte d’Ivoire Customs statutes consider the goods loaded on the truck to be in transit, since their final destination is outside Côte d’Ivoire. The definition of transit trade adopted here and in the 1921 Barcelona Convention did not satisfy the needs of landlocked countries. Encouraged by the United Nations Commission for Trade and Development (UNCTAD), they lobbied for a conference and a convention that would recognize without ambiguity their right to access to the sea. This resulted in the 1965 New York Convention, reviewed below (see para. 39 and sq.).

**32. Exercise of right of transit – fairness.** After stating that no distinction in transit shall be made which is based on the flag of vessels, the place of origin or destination, or the ownership of goods and means of transport, Article V-2 stipulates that *there shall be freedom of transit through the territory of each Contracting Party via the routes most convenient for international transit, for traffic in transit to or from the territory of Contracting Parties ...* Article V-8 states that *...Such traffic shall not be subject to any unnecessary delays or restrictions and shall be exempt from Customs duties and from....all other charges imposed in respect of transit, ex-*

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Foy, Québec, 2000. J.H. Jackson, *The world trading system. Law and policy of international economic relations*. MIT. Press, Cambridge, Mass. 1989. C. J. Herr, *L’Accord général sur le commerce des services*, XL AFDI (1994), 748-757.

*cept charges for transportation...and for...administrative expenses.* Such charges must be *reasonable* and in relation with the actual administrative cost of service rendered.

**33. Exercise of right – equal treatment.** Charges should be applied equally: *each contracting party shall accord to traffic in transit to or from the territory of any other contracting party no less favorable treatment than the treatment accorded to traffic in transit to and from any third country.* The same rule of equal treatment applies to goods and products in transit. Despite that the paragraph of Article V regarding equal treatment mentions only products (that is goods) and not vehicles, it is generally understood that it applies also to lorries and other means of land transport. A State may prohibit or limit traffic of certain heavy vehicles for valid reasons (e.g. night or week-end traffic) provided the restriction is applicable to lorries of all national origins.

**34. Evaluation.** As regards facilitation, GATT is incomplete. Its definition of transit is narrow; no reference is made to the specific needs of landlocked countries. It admits a basic right to transit, which can be invoked. A bilateral agreement is necessary for its exercise and GATT sets forth some of its conditions, such as the rule of equal treatment, itself derived from the principle of equality between States. *But GATT is not self-executing; if no agreement is passed, the basic right of transit is void.* This being stated, GATT is not ignored. Significantly, Article 77[b] of the Treaty for the *Union monétaire et économique ouest-africaine* (UEMOA) (see para. 389 and sq. *infra*) makes specific reference to it and to the rights and obligations deriving from it. Furthermore, in Article 41 of the 2000 Cotonou African Caribbean Pacific States (ACP) Partnership Agreement with the European Union (EU) (see para. 133 *infra*), the parties reaffirmed their respective commitment to the provisions of GATT.

*d. Transit trade of land-locked countries – 1958 Geneva Convention of the High Seas and 1965 New York Convention*

**35. Natural right or privilege<sup>21</sup>.** The issue of the right of access of landlocked States under international law deserves here some consideration and developments. Whether customary international law permits a landlocked State access to the sea has generated considerable academic debate among lawyers. For some authors, it is a natural right; for others it is only a privilege, which has to be authorized by a special treaty. As seen in paragraph 31 above, the right, if not natural, seems to have been created or recognized by the General Agreement on Tariffs and Trade. Three other treaties are significant as regards how this right can be exercised:

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<sup>21</sup> **BIBLIOGRAPHY** M.I. Glassner, *Access to sea for developing landlocked States*, Nijhoff, The Hague, 1970. Same author, *Bibliography on landlocked States*, Nijhoff, Dordrecht, 1995. L. Savadogo, *Essai sur une théorie générale des États sans littoral. L'expérience africaine*, L.G.D.J. Paris, 1997. E.D. Upadhya, *Transit trade of landlocked countries*, The Hague, Institute of Social Studies, 1975.

- The 1921 Barcelona Convention and Statute on Freedom of Transit, reviewed above at sub-section b.
- The 1958 Geneva Convention on the High Seas; and
- The 1965 New York Convention on transit trade of landlocked countries.

The two latter conventions are reviewed herein below. The 1982 Montego Bay Convention on the Law of the Sea does not deal with the issue. It only considers the right of landlocked States to participate in the exploitation of the surplus of the living resources of the exclusive economic zones of coastal States, a subject matter not reviewed here.

**36. 1958 Geneva Convention on the High Seas - General** <sup>22</sup>. Article 3 of the 1958 Geneva Convention on the High Seas stipulates that States having no seacoast should have free access to the sea, by common agreement with States situated between the sea and such landlocked State, due consideration being given to the rights of the coastal State or State of transit. The wording is quite restrictive. The Convention was ratified by Burkina Faso (1965), Kenya (1969), Madagascar (1962), Mauritius (1970), Nigeria (1961), Senegal (1961), Sierra Leone (1962), South Africa (1963), Swaziland (1970) and Uganda (1974). It was signed but not ratified by Ghana (1958), and Lesotho (1958). A fair number of coastal States of Africa have therefore not recognized the rights of the landlocked States through this Convention. Conversely, some landlocked States did not seize the opportunity offered here to see their right of access to the sea given recognition.

The relevant extracts of the **Convention on the High Seas**, filed under N° 6465 with the UN Secretariat (reference 450 UN Treaty Series 82), are attached as **Annex II-3** to this document.

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<sup>22</sup> **BIBLIOGRAPHY** The Law of the Sea, *A bibliography of the Law of the Sea 1968-1988, Two decades of lawmaking. Le droit de la mer. Deux décennies de législation, de pratique des États et de doctrine.* New York, Office for Ocean Affairs and the Law of the Sea, United Nations, 1991. A. Bermes, *Bibliographie du droit de la mer*, Éditions techniques et économiques, Paris, 1974. *African Intergovernmental meeting on aspects of the provisions of the Convention of the Law of the Sea*, Addis Ababa, 1984 New York, United Nations Economic and Social Council, 1984. J.C.F. Wang, *Ocean politics and law. An annotated bibliography*, Greenwood Press, New York, 1991. As regard land-locked States see *Rights of access of land-locked States to and from the sea and freedom of transit. Legislative history of Part A, art. 126 to 152 of the United Nations Convention on the Law of the Sea.* Office of the Special Representative of the Secretary General for the Law of the Sea, United Nations, New York, 1987. S.C. Viascannie, *Landlocked and geographically disadvantaged States in the international law of the sea*, Ckarendon Press, Oxford, 1990. A.M. Sinjela, *Land-locked States and the UNCLOS III Regime*, Oceana, New York, 1983. See Note under SADC as regard South African land-locked States. Trainmar France (UNCTAD) *La desserte portuaire des pays sans littoral*, Séminaire de Dunkerque, France, 1993.

**37. Provisions of the Convention on the High Seas.** Article 3 of the Convention sets forth, explicitly or implicitly, a number of principles regarding transit and facilitation:

- i) States having no seacoast have a right to enjoy the freedom of the seas on equal terms with coastal States. Therefore “*they should have free access to the sea*”.
- ii) To this end access to the sea shall be provided *by common agreement...in conformity with existing international conventions, on a basis of reciprocity*.
- iii) In ports of the coastal State, equal treatment should be granted to vessels flying the flag of the landlocked State.
- iv) States situated between the coastal State and the State having no access to the coast shall settle by agreement with the latter, all matters related to the right of transit and equal treatment in ports.

**38. Evaluation.** The Convention on the High Seas was probably clumsy in stating that sea access is “*free*” as this may be construed as meaning that no charge may be levied for access to the coast. *Unimpaired* would have been more accurate. More important, the wording of the Convention raises the same issues as that of GATT. Quite clearly, it stipulates that the right of access can only result from a bilateral agreement between the concerned States. The Convention has no direct effect, no imperative force. Sure it creates an obligation to negotiate and execute an agreement (*access...shall be provided...by...agreement*), but there is no delay set for an agreement to be concluded, nor any sanction if no agreement is concluded. The convention was not norm-creating.

**39. 1965 New York Convention on transit trade of landlocked countries.** The Convention on transit trade of landlocked countries was concluded in New York on July 8, 1965 (the New York Convention), together with the Final Act on the United Nations Conference on the subject matter. In force since June 9, 1967, it was ratified or acceded to by Burkina Faso (1987), Burundi (1968), Central African Republic (1989), Chad (1967), Lesotho (1969), Malawi (1966), Mali (1967), Niger (1966), Nigeria (1966), Rwanda (1968), Senegal (1985), Swaziland (1969), Zambia (1966). Cameroon and Uganda signed it in 1965 but did not ratify. There is therefore an issue of enforceability. Clearly a number of coastal States may have selected to leave the matter to bilateral agreements rather than recognizing a fundamental right to landlocked States through a multilateral convention. However, the African Maritime Charter (see para. 150) contains commitments by all signatory States concerning the rights of landlocked States of the Region. A State that was not bound by the New York Convention may be bound by the Maritime Charter, which was not, however, filed with the United Nations Secretariat and apparently is not self-enforcing.

The text of the **1965 New York Convention on Transit Trade of Landlocked Countries**, filed under N° 8641 with the UN Secretariat (reference 597 UN Treaty Series 3) is attached as **Annex II-4** to this Review.

**40. Provisions of the 1965 New York Convention.** This Convention went a step further than earlier instruments by stipulating in its Article 125 that

- (i) *landlocked States shall have the right of access to and from the sea [and] to this end, shall enjoy freedom of transit through the territory of transit States by all means of transport; and*
- (ii) *the terms and conditions for exercising freedom of transit shall be agreed... through bilateral, sub-regional or regional agreements.*

This formulation is less than originally requested by a group of landlocked States from all continents (including Mali and Zambia) that wanted the right of access not to be dependent on the conclusion of bilateral agreements with coastal States. They would have preferred a self-enforcing instrument. The Organization for African Unity (OAU) itself stated in a declaration prior to the opening of negotiations on the treaty *African States endorse the right of access to and from the sea by landlocked countries....* Still, Nigeria, a coastal State, insisted for the need of bilateral or regional conventions setting forth the conditions of exercise of such right. Again, and despite the principle formulated by GATT, there was a failure to recognize the right of access as a basic and self-executing right of landlocked States.

**41. Incomplete ratification or accession.** Significantly, all African countries that ratified the Convention on transit to landlocked countries or acceded to it (see para. 39 above) were landlocked except Senegal and Nigeria. Despite their formal commitments in favor of landlocked countries in regional and sub-regional treaties and protocols, all the other coastal States ignored it, again maybe because they wanted to draw the maximum from bilateral agreements without recognizing the basic rights and adhering to the principles formulated in the Convention. This may indicate suspicion towards multilateral worldwide treaties, regional agreements been preferred. Significantly also, in 1968, Chad and the Central African Republic, both landlocked, denounced the 1964 Brazzaville Treaty on the Economic Community of Central African States (*Union des États de l'Afrique centrale*, UDEAC, see para. 175 and sq.) because no agreement could be obtained on compensation from the coastal States of limitations suffered by the landlocked countries of the sub-region. Over the years, the situation has improved; regional and sub-regional instruments reflect acceptance of the special rights of landlocked States. For instance, Article 378 of CEMAC (*Communauté économique et monétaire de l'Afrique centrale*) Shipping Code (see para. 190 *infra*) makes express reference to specific agreements to be executed between landlocked and coastal States *in accordance with the United Nations Convention on trade of landlocked States*. Lastly, non-ratifying States of the New York Convention are parties to the ACP-EU 2000 Partnership Agreement (see para. 133), which acknowledges the limitations suffered by the landlocked States and their right to specific corrective measures. While the coastal States are not bound by one convention, the other binds them.

**42. Rights of transit States.** The Fifth Principle formulated in the Preamble of the New York Convention is that transit States have the right to take all necessary measures to ensure that the exercise by landlocked countries of the rights and facilities provided by the Conven-

tion *do not infringe their legitimate interests*. It has been pointed out that the Convention is however silent on the question of who is entitled to determine, and upon which criteria, the existence and nature of such legitimate interests.

*e. 1950 Brussels Convention establishing a Customs Cooperation Council*

**43. History.** The Convention establishing a Customs Cooperation Council was concluded in Brussels on December 15, 1950 by thirteen European States, together with a Protocol concerning the Study Group for the European Customs Union. The convention was opened for accession to any State from April 1955. On December 31, 1995, 123 States had acceded to it<sup>23</sup>. It seems that the Customs Cooperation Council is at present designated as World Customs Organization, but information is missing on that change of denomination and maybe of structure, even on the UN website.

The 1950 **Brussels Convention establishing the Customs Cooperation Council** was registered under N° 2052 by the UN Secretariat. It was published in the Treaty Series, volume 171 No 305. The Protocol relating to the Study Group was registered under No 2111 and is in the Treaty Series, volume 160, No 267. The text is attached as **Annex II-5** to this document.

**44. Objective.** The objectives of the Convention are: (i) to secure the highest degree of harmony and uniformity in customs systems; (ii) to study the problems inherent to the development and improvement of customs techniques and legislation; and (iii) to develop cooperation in customs matters.

The Convention (**Article I**) creates a Customs cooperation Council in Brussels and of which all signatories or States having acceded to the Convention are members. Each State has one representative at the Council (**Article II**). The Council has the following main functions (**Article III**):

- (a) To study all matters related to customs cooperation;
- (b) To examine technical aspects of and economic factors related to, customs systems and operations;
- (c) To prepare draft customs conventions;
- (d) To make recommendations to governments to ensure a uniform interpretation of customs conventions; and

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<sup>23</sup> It has not been possible to determine which African States acceded to it. On this point, information from the UN Treaty Series is quite different from that in G.L. Viktor, *Calendar of Multilateral Treaties, 1648-1995*, M. Nijhoff, The Hague, 1998. The figure of 123 originates from that source while the UN Treaty Series mention a much smaller number.



- (e) To issue and circulate information on customs regulations and procedures.

**45. Organization** (*Article VI*) The Council elects its Chairman and vice-chairmen for one year. It has (i) a Nomenclature Committee, (ii) a Valuation Committee, (iii) a Permanent Technical Committee, and (iv) a General Secretary (*Article IX*). The Council establishes with the United Nations and any of its organs or agencies such relations as may best ensure collaboration in the achievement of their respective tasks. It also establishes relations with non-governmental organizations interested in matters within its competence. An Annex to the Convention sets forth provisions regarding the Council's legal statute, privileges and immunities.

*f. 1923 Geneva Convention and 1973 Kyoto Convention on the Simplification and Harmonization of Customs Procedures*

**46. 1923 Geneva Convention.** In its effort of international cooperation significant of the 1920-1930 decade, the League of Nations, based on Article 23 of its Charter on the fair treatment of international trade, prepared and proposed a first Convention on the simplification of Customs procedure concluded at Geneva on November 8, 1923. This Convention is still in existence as it has been acceded to by Niger (1966) and Malawi (1967). These two States do not seem to have yet ratified the Kyoto Convention below. Nigeria, Lesotho and Zimbabwe also acceded to the 1923 Convention, but later ratified the Kyoto Convention, which superseded Geneva.

**47.** The 1923 Geneva Convention based the customs regime on fairness (*Article 2*). But fairness, for the authors of the convention, went beyond procedures and facilitation. The Convention was a first instrument for the opening of international trade, long before GATT, the Uruguay Round and other international agreements on the subject matter. Article 3 of the Convention therefore deplored the obstacles to international trade by *prohibitions and restrictions*; these should be reduced to *as few as possible* with a regime of import licenses, if necessary, as flexible as possible. Measures should be taken (*Article 7*) so that customs legislation, regulations and procedures are not enforced arbitrarily. Despite its interest in the history of facilitation, the 1923 Convention is a residual document, for which reason its text is not annexed to the present Review<sup>24</sup>.

**48. The 1973 Kyoto Convention.** This Convention entered into force in September 1974. It was ratified or acceded to by Botswana (1991), Burundi (1974), Cameroon (1977), Côte d'Ivoire (1978), Democratic Republic of Congo (as Zaire, 1978), Gambia (1974), Kenya (1983), Lesotho (1982), Nigeria, Rwanda (1981), Senegal (1983), South Africa (1981), Uganda (1989), Zambia

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<sup>24</sup> See League of Nations Treaty Series, volume 30, No 371.

(1984) and Zimbabwe (1988). Not only a significant number of sub-Saharan States did not accede to the Kyoto Convention yet, but entries into force were spread over a number of years, which seems to indicate a reluctance to simplify and harmonize customs procedures.

The text of the **1973 Kyoto Convention on the simplification and harmonization of customs procedures**, filed under N° 13561 with the UN Secretariat (reference 950 UN Treaty Series 269), is attached as **Annex II-6** to this Review.

**49. Scope.** The Convention was drafted under the auspices of the Customs Cooperation Council reviewed above (para. 44). But the word *procedures* used in the convention should not be interpreted narrowly, as applying only to Customs formalities. Procedures mean all processes of foreign trade. Significantly, while the English text uses the word “procedures”, the French text uses “régime”, implying that the objective of simplification and harmonization is located well beyond the limited domain of procedures.

**50. Structure and contents.** The Convention proposes definitions of Customs Terms, Standards and Recommended Practices. The Convention itself is drafted in very broad terms. Standards and Recommended Practices are described in Annexes to the Convention. Parties to it must accept, with or without reservations, at least one Annex and implement its provisions. They may accept one Annex and not the other; or refrain from enforcing a procedure recommended in an Annex, provided they formulate the necessary reservation(s) at the time of ratifying the Annex. States should notify the Customs Cooperation Council the differences between their national legislation and the provisions of the Annexes to be adopted. Such communication encourages the contracting parties to modify their legislation to bring it in line with the provisions of the annex; it also provides the Secretariat of the Council with the necessary information on Customs practices and procedures in the State. Facilities granted under the Convention are a minimum; States are free to grant more favorable conditions.

**51. Revision.** The Kyoto Convention was revised in 2000<sup>25</sup>. The new convention has placed all Standards and recommended Practices in one single General Annex, that the Parties are supposed to observe in full. In addition, language has been made more incisive and the suggestion that Customs “may” implement a rule or a procedure was replaced by the instruction that they “shall”. The revised convention is not in force and doesn’t seem to have been signed nor has it been filed in the UN Treaty Series.

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<sup>25</sup> See J. Raven, *The Kyoto Convention, A New Port-Customs Relationship*, Ports and Harbors, Tokyo, Sep. 2000, p. 24.

*g. The 1982 Geneva Convention on the Harmonization of Frontier Control of Goods*

**52. General.** This Convention appears as a useful complement to the Kyoto Convention. It was concluded on October 21, 1982 and, unhappily for the facilitation of trade in Africa, ratified only by South Africa (1987) and Lesotho (1988). The forty other parties are mainly European States. The Convention is in force.

Its aim is to facilitate the international movement of goods by reducing the requirements for completing formalities and the number and duration of controls, by national and international procedures and their methods of application.

The text of this **1982 Geneva Convention on the Harmonization of Frontier Control of Goods**, filed under N° 23583 with the UN Secretariat (reference 1409 UN Treaty Series 3), is attached to this Review as **Annex II-7**.

**53. Sources of harmonization (Articles 4 to 9).** Harmonization of control and procedures shall be ensured by (i) a sufficient number of qualified personnel consistent with traffic requirements; (ii) adequate equipment and facilities; and (iii) official instructions to Customs officers.

Opening and controlling hours should be harmonized. Information shall be exchanged. Contracting Parties shall endeavor to use documents aligned on the United Nations Layout Key. Documents produced by any appropriate technical process shall be accepted, provided they are legible, understandable and comply with official regulations.

**54. Goods in transit (Article 10).** The Contracting Parties shall whenever possible provide simple and speedy treatment of goods in transit, especially for those traveling under cover of an international transit procedure, limiting inspections to cases where they are warranted by the actual circumstances or risks.

The situation of landlocked countries shall be especially taken in consideration.

The transit of goods in containers or other load units affording adequate security shall be facilitated to the utmost.

**55. Annexes.** Seven Annexes to the Convention deal with details of implementation:

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| <b>Annex 1</b> | Harmonization of Customs controls and other controls                            |
| <b>Annex 2</b> | Medico-Sanitary inspections, with special provisions regarding goods in transit |
| <b>Annex 3</b> | Veterinary inspections, with special provisions regarding goods in transit      |

|                |  |
|----------------|--|
| <b>Annex 4</b> | Phyto-sanitary inspections   |
| <b>Annex 5</b> | Control of compliance with technical standards   |
| <b>Annex 6</b> | Quality control  |
| <b>Annex 7</b> | Rules of procedure of the Administrative Committee to be established for amending the Convention if needed |

*h. 1977 Nairobi Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences*

**56. Scope and structure.** This convention is a follow-up of the 1950 Brussels Convention establishing a Customs Cooperation Council and organizing a Customs cooperation (see para. 44 above). Its objectives are to establish an effective cooperation between Customs of different States to prevent and repress Customs offences, detrimental to the interests of trade and to the economic and financial interests of States. The Convention is composed of (i) the main text and (ii) ten Annexes, which are integral part of the Convention. Each annex describes an area of cooperation and assistance:

- Assistance by a Customs Administration on its own initiative
- Assistance in the assessment of dues and taxes
- Assistance relating to controls and enquiries
- Appearance of Customs Officials at court abroad
- Presence of Customs Officials in the territory of another Party
- Pooling of Information
- Participation to Investigation abroad
- Assistance relating to surveillance
- Assistance in action against smuggling drugs
- Assistance in action against smuggling works of art

No reservation on the Convention is accepted, but Contracting Parties may either accept all Annexes, or select one or more and decline the others. This may hamper cooperation but eliminates or reduces chances of conflicts of law or frontier incidents. Niger, for example, accepted six Annexes out of eleven, not accepting assistance on request relating to surveillance.

**57. Enforceability.** The Convention came into force on May 21, 1980. It was ratified or acceded to by Côte d'Ivoire (1986), Kenya (1988), Malawi (1985), Mauritius (1985), Niger (1989), Nigeria (1989), Zambia (1986) and Zimbabwe (1986). The inadequate rate of ratification in

West Africa is partially offset by the signing of the 1982 Cotonou Convention for Mutual Administrative Assistance in Customs Matters (see para. 385 and sq., and Annex VII-28).

The text of the **1977 Nairobi Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences**, filed under N° 19805 with the UN Secretariat (reference 1226 UNTS 143 in the UN Treaty Series), is attached to this Review as **Annex II-8**.

**58. Provisions.** While setting forth the rule of cooperation between Customs agencies, the Convention seems anxious to prevent any abuse. Main provisions of the Convention are:

- (1) The Customs administration of a Party to the Convention may request mutual assistance in the course of any investigation or in connection with any administrative or judicial proceedings, within the limits of its competence. On this point, the Convention may reflect a concern that Customs administration may be tempted either to invade the turf of other agencies, or act *ultra vires* so infringing on legitimate public or private interests, individual rights of citizens or foreigners, or others.
- (2) Mutual assistance does not extend to the arrest of persons or to the collection of duties, fines or other monies.
- (3) Any intelligence, document and other information communicated or obtained under the Convention may be used only for the purposes specified in the Convention. All communications will pass directly between the interested Customs departments.
- (4) The capacity of assistance is to be reciprocal if the Customs Department of a contracting party requests an assistance that it could not give if it were requested to do so, it must inform the other party, who may or may not provide the requested assistance.

*i. 1972 Geneva Customs Convention on Containers and Associated Conventions*

**59. Scope and objectives.** Four conventions are to be considered:

- (1) The 1960 (December 9) **European Convention on Customs treatment of Pallets used in International Transport**. Its objectives are to permit the import of pallets without the payment of import duties and of pallets due to be re-exported.
- (2) The 1972 (December 2) **Customs Convention on containers**. Its objective is to permit a fast and easy movement of containers and their temporary admission in countries open to international trade. This Convention was itself preceded by a first **Customs Convention on Containers**, dated May 28, 1956, which it superseded.

- (3) The 1994 (January 21) **Convention on Customs Treatment of Pool Containers used in International Transport**. Its objectives are also to facilitate the Customs treatment of that category of containers.
- (4) The 1960 (October 6) **Customs Convention on the temporary importation of packings**, with a similar objective and similar provisions.

**60. Enforceability.** The status of enforceability is diverse and complex:

- (1) The 1960 **European Convention on Customs treatment of pallets** is in force. It was ratified or acceded to by the European States, Australia and Cuba. No sub-Saharan Africa State signed or ratified it.
- (2) The 1972 **Customs Convention on containers** is in force but Burundi appears to be the only State that acceded to it. Kenya, Malawi, Uganda and Gambia acceded to an earlier and now obsolete 1956 Customs Convention on Containers.
- (3) The only State to ratify the **Convention on the temporary importation of packings** was the Central African Republic.
- (4) The 1994 **Convention on pool containers** was signed by Uganda but not ratified. The Convention is in force since 1998 mainly in European countries.

However, Annex II to Protocol No 3 attached to the Northern Corridor Agreement between Kenya, Rwanda, Burundi, Uganda and Zaire stipulates that the parties to the Agreement undertake to accept transport units (containers) approved in accordance with the above conventions (see para. 227 and sq.). It results that, as regards the Corridor, Kenya and Uganda are bound by two conventions on the same subject matter, the 1956 Convention and through the Corridor Agreement, the 1972 Convention. For other segments of their transport network, they are bound by the 1956 Convention. Only Zaire, Rwanda and Burundi are bound by the 1972 Convention through the Corridor Agreement but by no convention on the other segments of their transport network.

The text of the **1960 (Geneva) European Convention on Customs Treatment of Pallets in International Trade** was filed under N° 6200 with the UN Secretariat (429 UN Treaty Series 211) and is attached as **Annex II-9** to this Review.

The text of the **1956 Geneva Customs Convention on Containers** was filed under N°4834 with the UN Secretariat (338 UN Treaty Series 103) and is attached as **Annex II-10** to this Review.

The text of the **1972 Geneva Customs Convention on Containers**, filed under No 14449 with the UN Secretariat (988 UN Treaty Series 43), is attached as **Annex II-11** to this Review.

The text of the **1960 Brussels Convention on the Temporary Importation of Packings**, filed under N°6861 with the UN Secretariat (473 UN Treaty Series 131), is attached as **Annex II-12**.

The convention on pool containers has not been published yet in international series.

**61. Containers.** The Annexes to the 1972 Convention set forth in detail the technical characteristics of containers and of their markings.

According to the Convention:

- (1) Each contracting party shall grant temporary admission to containers, whether empty or loaded, for a period of up to three months, which may be extended.
- (2) Containers may be re-exported through any competent Customs office, even if that office is different from the office of temporary admission.
- (3) Containers under temporary admission may be used for domestic traffic.
- (4) To qualify for approval for goods transport under Customs seal, containers must comply with regulations set out as annex to the Convention; but containers approved by a contracting party for transport under Customs seal and meeting the conditions set forth in the regulations shall be accepted by the other Contracting Parties for any system of international carriage involving sealing of containers. Contracting Parties shall avoid delaying traffic when the defects found on one container are of minor importance and do not involve any risk of smuggling.

**62. Application to sub-Saharan Africa.** Whether sub-Saharan African countries ought to be encouraged to request accession to this Convention certainly deserves to be considered. Significantly, the 1975 Geneva Convention on the international transport of goods under cover of TIR carnets (see para. 113 and sq. *infra*) stipulates that containers approved for the transport of goods under the 1972 Convention shall be considered as complying with the provisions of such 1975 Convention regarding containers acceptable for transport under TIR carnets.

**63. Pallets and packings.** These two conventions contain similar provisions. Pallets and pickings may be imported temporarily for up to three to six months, provided they are re-exported. Specific provisions apply to pallets and packings destroyed or damaged during their temporary period of importation.

*j. Customs convention dealing with the temporary import of goods*

**64.** These instruments are as follows:

- (a) The main and central instrument in that respect is the 1961 Customs Convention on the ATA carnet for temporary admission of goods, reviewed in the following paragraphs. The other three listed here were drawn on the same lines. They are not reviewed in detail in this document.

- (b) The Customs Convention on the temporary importation of professional equipment (June 8, 1961) ratified by South Africa, Côte d'Ivoire, Madagascar, Niger, Nigeria, the Central African Republic, Sierra Leone, Sudan and Zimbabwe (UN No 6862, Treaty Series, Vol.473, No 153).
- (c) The Customs Convention on the temporary admission of scientific equipment (Brussels, June 11, 1968) ratified by Benin, Gabon, Ghana, Niger and Chad (UN No 5667, Treaty Series, Vol. 690, No 97).
- (d) Customs Convention on the temporary admission of pedagogic material (Brussels, June 8, 1970) ratified by Cameroon, Niger, Rwanda, Somalia and Togo (UN No 11650, Treaty Series, Vol. 817, No 313).

**65. ATA Convention.** The Customs Convention on the ATA carnet for the temporary admission of goods was signed in Brussels on December 6, 1961. According to the UN records, it was ratified or acceded to by Côte d'Ivoire (1962), Nigeria (1973), South Africa (1975), Senegal (1977), Niger (1978), Mauritius (1982), and Lesotho (1983). According to the International Customs Organization records, the treaty was also ratified or acceded to by Cameroon, Ghana, Malawi, Mali and Tanzania. It was filed with the UN Secretariat under No 6864 and appears in the Treaty Series, Vol. 473, No 219.

**66. Provisions.** The ATA system of temporary admission of goods is based on a system of guarantee of payment for customs dues by agreed professional associations such as chambers of commerce. These associations issue ATA carnets valid for a maximum of one year, describing the goods in temporary admission and indicating their value. The recourse to carnets is strictly reserved for goods in transit to be re-exported. Goods intended for processing or repair shall not be imported under ATA carnets (Article 3). In case of non-compliance with conditions of temporary admission or transit, the association issuing the carnet pays the import dues and any other sum that may be payable but limited to ten per cent of the customs dues (Article 5). Importers are jointly and severally liable for payment (same). It belongs to the association issuing the carnets to give evidence of the re-export of goods (Article 6). As a protection against possible abuses, the convention stipulates that the service of carnets at customs offices shall not be subject to the payment of charges *for customs attendance... during the normal hours of business.* (Article 10).

The Convention is not attached as an annex as the above information is sufficient for the purpose of this Review.



## B. MARITIME CONVENTIONS

### a. *General*

67. **Scope.** Maritime conventions are numerous and fall under different categories, based on either public or private law.

68. **Public law conventions.** The 1948 High Seas Convention, setting forth the basic principles of the freedom of the seas and control of coastal States on the waters adjacent to their littoral, opens the way. Then a first sub-category of conventions deals with the safety of ships and shipping, the 1955 London Convention on Load Lines, the 1910 Brussels Convention on Unification of Rules of Law with respect to Collisions between Vessels, etc. A second sub-category deals with conservation and environment, such as the 1969 Convention on intervention in high seas in case of accidental pollution or the 1954 Convention for the prevention of maritime pollution (MARPOL). Among these conventions two are of special interest in terms of facilitation.

- The 1923 Geneva Convention on the international regime of maritime ports
- The 1965 London Convention on facilitation of international maritime traffic

69. **Private law conventions.** A second category deals with the commercial aspects of shipping, especially (i) liability for sea carriage (Brussels/Visby and Hamburg Rules), and (ii) ship owner's liability. Instruments in these categories bear indirect relation to facilitation, as adherence to their rules develops uniformity of commercial practice, makes shippers and carriers feel safer and has therefore an impact on freight rates and insurance premiums. These conventions and their status of ratification or accession are therefore reviewed briefly below:

- The 1924 Brussels Convention on the unification of certain rules of law relating to bills of lading;
- The 1978 Convention on the carriage of goods by sea;
- The 1991 Vienna Convention on the liability of terminal operators; and
- The conventions on the unification of rules relating to the limitation of liability of owners of sea-going vessels.

### b. *1923 Geneva Convention on the International Regime of Maritime Ports*

70. **General.** This Convention is one of the 1921-1929 conventions by which, after the signature of the Treaty of Versailles, the League of Nations engaged in an effort to encourage States to open their economies and to cooperate in an overall facilitation of international trade. It is well in line with the 1921 Barcelona Convention on Freedom of Transit (see para. 27). The

Convention is binding not only governments and their port authorities but all concessionaires and terminals “of any kind” It is clearly a norm-creating and self-executing instrument.

**71. Enforceability.** This Convention was adhered to by the United Kingdom (September 2, 1925) for Gambia, Ghana (as Gold Coast), Cameroon (as British Mandate of Cameroon), Kenya, Mauritius, Nigeria, Sierra Leone, Somaliland, Tanganyika, and Zanzibar. Quite to the contrary, France specifically excluded from its adhesion (December 1, 1924) all its colonies, protectorates and other dependencies. As a result, and based on information available to date, the Convention was acceded to, after independence, only by Côte d’Ivoire, Burkina Faso and Madagascar.

The **Convention on the regime of maritime ports** was filed with the League of Nations under N° 1379 (reference 58 League of Nations Treaty Series 285). The text is attached to this Review as **Annex II-13**.

**72. Issue.** Whether foreign vessels have a basic right of access to a port is a point in dispute in international law<sup>26</sup>. International custom does not recognize such a right. English law does and the Dangerous Vessels Act of 1995 in the United Kingdom has been necessary to give to port authorities the necessary powers of prohibition of entry of such vessels. French law submits any entry to an authorization issued by the sole harbormaster and the courts consider that he has in that respect *a total freedom of appreciation*. The problem has become more acute with the risks of pollution of port waters and there is a trend towards prohibition rather than the recognition of the right to entry. But any refusal of entry, in all legal systems, must be justified by a valid reason.

**73. The Convention.** It does not stipulate explicitly an automatic right of entry, but is setting forth a rule of equal treatment between national and foreign vessels, as regards *freedom of entry, utilization and the complete use of port facilities*. There is in fact, therefore, the implicit recognition of a right to entry, which may be restricted *for reasons of good administration* provided the principle of equal treatment is safeguarded. The regime is therefore:

- (i) **(Article 1) Definition.** A maritime port is a port normally frequented by sea-going vessels and used for foreign trade.
- (ii) **(Article 2) Equal treatment of vessels.** Equal treatment of all vessels, either national or foreign, in ports of the States parties to the convention, as regards berthing, loading and unloading, port dues and rates and services in general.

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<sup>26</sup> **BIBLIOGRAPHY** A.W. Lowe, *The Right of entry onto maritime ports in international law*, San Diego Law Review, San Diego, Cal. 4.1977, p. 597-622.

- (iii) **(Article 4) Publication of tariffs.** All schedules of port dues and charges should be published before being applicable.
- (iv) **(Articles 5 to 7) Equal treatment as regards dues.** Equal treatment of all cargoes as regards Customs and other duties and rates, whatever the flag of the vessels on board of which such cargoes are imported or exported. Exception to the rule such as based on special economic or other conditions shall not be used as a means of discriminating unfairly.
- (v) **(Article 11) Pilotage and towage.** Each State may organize port towage and pilotage services as it considers fit, subject to the conditions of equal treatment.

The Convention admits the right and the need for local port authorities to limit and restrict port access in exceptional circumstances, provided the measures taken are applied equally to all vessels and goods, without unjustified discrimination based on flag of vessels, origin or destination of cargo, etc. The Convention does not apply to coastal traffic and to fishing vessels and their catch.

**74. Application to goods carried by rail.** Of special interest are the provisions of Article 6 of the Convention, which make applicable to parties the provisions of Articles 4 and 20 to 22 of the 1923 Geneva Convention on railways, whether or not the State party to the Convention on the regime of ports is a party to the Convention on railways. As will be seen below (para. 94), none of the Francophone States is a party to the 1923 Railways Convention. However, they are bound by some of its articles through the *renvoi* operated in the Convention on ports. In Article 6, the States parties agree to abstain of any discrimination in railway operations against other States. In Articles 20 and 21, they commit themselves to avoid any abuse and to any hostile discrimination in the area of railway tariffs. Article 22 extends the application of the provisions of the preceding articles to cargo stored into ports. But the Ports Convention makes no reference to carriage by road trucks, which is significant of the domination of railways in land transport when it was signed. As a result, goods carried by rail are protected others are not.

**75. Enforcement.** Whether this convention is actually enforced is uncertain. There has been evidence that in one African State party to it port authority staff, including the head of Legal Department, did not know of its existence. There is some suspicion that African States are not aware of their obligations under the convention and/or do not seem eager to enforce it since they tend to grant special regimes to their vessels in their ports. Significantly, the parties to the 2000 ACP-EU Partnership Agreement, and among them thirty African States, fifteen of which coastal, committed themselves to grant to vessels of any other party a treatment no less favorable than that accorded to its own ships, with respect to access to ports, use of infrastructure, as well as related fees or charges, Customs facilities and the assignment of berths and terminals (see para. 133). These provisions were unnecessary concerning States parties to the 1923 Ports Convention. They have an obligation of equal treatment regarding all vessels, whether flying flag of a State party to the ACP-EU Agreement or not. Also and at an earlier stage, the

basic principles of the 1965 New York Convention on access to the sea of landlocked States (see para. 39 and sq) mentions rights to be granted in ports of coastal States to vessels flying flags of landlocked States. These rights were in fact already granted by the 1923 Convention here presented and the States, which were party to that convention, were bound by its provisions. All vessels, whether or not they were flying the flags of States parties to the EU-ACP Agreement, were entitled to equal treatment. Earlier, the basic principles of the 1965 New York Convention on access to the sea by landlocked States (see above para. 39 and sq.) also mention the rights to be granted to vessel flying flags of landlocked States, rights also granted by the 1923 Convention here presented.

*c. 1965 London Convention on Facilitation of International Maritime Traffic*

**76. Objective.** This Convention has for objective to facilitate maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international trade.

**77. Enforceability.** This convention was drafted and proposed by the International Maritime Organization (IMO). To date, it was ratified or acceded to by Angola, Benin, Cameroon, Cape Verde, Congo, Congo DRC, Côte d'Ivoire (1967), Ghana (1965), Guinea Bissau, Liberia, Mauritania, Mauritius, Nigeria (1967), Senegal, Seychelles, Sierra Leone, South Africa, Togo, Zambia. CEMAC, Shipping Code (para. 190 *infra*) makes express reference to it.

The text of the **Convention on Facilitation of the International Maritime Traffic**, filed under N° 8564 with the UN Secretariat, (reference 591 UN Treaty Series 265), is attached as **Annex II-14** to this Review.

**78. Scope and Structure.** The Convention was adopted to prevent unnecessary delays in maritime traffic, to develop co-operation between Governments and to secure the highest practicable degree of uniformity in formalities and other procedures. The objective is to prohibit the harassment of vessel captains, crews, passengers and shipping agents, by excessive formalities in ports. It reduces to a minimum the number and types of documents requested from the ship's captain. An Annex to the convention lists the eight documents, which unless special and exceptional circumstances justify additional requests should suffice to port and other authorities to perform their regulatory duties in respect to the vessel. The format of the Convention is similar to the one of the Kyoto Convention on the simplification of Customs procedures: an Annex contains "Standard" and "Recommended Practices" on formalities.

- The Convention defines *standards* as internationally agreed measures necessary and practicable to facilitate international maritime traffic.
- *Recommended practices* are these measures that permit the application of what is *desirable*.

For instance, simplified procedures should be applicable to passengers from cruise ships visiting the country. Port offices should be open at standard working hours and no additional charge should be enforced when government staff has to work overtime. IMO has also developed eight standardized forms covering arrival and departure of goods and passengers and is promoting the use of electronic data interchange to relay these forms between ship and port offices.

*d. 1924 Brussels Convention for the unification of certain rules of law relating to bills of lading*

**79. General.** This instrument is about sea carrier liability. The original convention was the 1924 Brussels Convention. It was modified in 1968 by a Protocol setting forth the so-called Visby Rules, increasing the limits of liability and widening the scope of the Convention<sup>27</sup>.

**80. Enforceability.** The 1924 Brussels Convention was ratified or adhered to by Angola, Cape Verde, Cameroon, Congo, Congo R.D. (as Zaire), Côte d'Ivoire, Gambia, Ghana (by UK as Gold Coast), Kenya, Mauritius (by UK as Ile Maurice), Mozambique, Nigeria (by UK), Senegal, the Seychelles, Sierra Leone and Somaliland (both by UK). Only Liberia and Congo appear to have ratified the 1968 Protocol (Visby Rules), but this needs to be explored. The Convention has been denounced by the United Kingdom, Sweden, Norway, the Netherlands, Italy, Finland and Denmark, as a result of a movement developed for the elaboration of a new convention, the *Hamburg Rules* reviewed herein below (para. 82). Besides, a number of States, such as, in Europe, France and in sub-Saharan Africa, the CEMAC States (see para. 190 *infra*) impose recourse to their domestic legislation for any transport to and from their respective ports, a source of conflicts of law between parties to the maritime carriage contract. Congo and Cameroon, for instance, are both signatories of the Brussels Convention and members of CEMAC whose Shipping Code, issued in 2001, sets forth rules different from those of the Brussels Convention. There is ground here for a conflict of laws.

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<sup>27</sup> **BIBLIOGRAPHY** Sir Alan A. Mocatta and al., *Scrutton on Charterparties and Bills of Lading*, Sweet and Maxwell, London, 1995. W. Tetley, *Marine Cargo Claims*, Buttersworth, London, 1987. E. du Pontavice and P. Cordier, *Transport et affrètement maritimes*, Delmas, Paris, 1990. R. Rodière et E. du Pontavice. *Droit maritime*, Dalloz, Paris, 1991. M. Bourcelet, *Le transport maritime sous connaissance, droit canadien, américain et anglais*, Presses de l'Université de Montréal, Montréal, 1972. C.K. Nubupko, *Les pays en voie de développement, usagers du transport maritime face au droit maritime*, Thèse, Paris, 1984.

**81. Scope.** The convention stipulates rules regarding sea carrier liability, from the time of loading to the time of discharging, when carriage is under a bill of lading, including bills of lading issued under charter-party. It is therefore the standard source of rules of law as regards sea carriage of general cargo. It does not apply to deck transport and to charter parties themselves, without bills of lading. Also, it does not cover land operations before and after ship loading and unloading, even if cargo is in the hands of the sea carrier. It is therefore not applicable to terminal operations even if these are under carrier's control. Other liability regimes then apply. The convention applies when the bill of lading has been issued in a State party to the convention, when carriage starts in a contracting State and when the bill of lading specifically refers to the convention (*paramount clause*). It results that while the Brussels Convention within the narrow limits of its enforceability is generally applicable for international traffic between industrialized countries and sub-Saharan African countries, it may not apply in cases of intra-Africa trade. Altogether, the liability regime under the Brussels rules, with the burden of proof of the carrier's fault falling on the shipper or cargo consignee, has been viewed by cargo interests, especially in developing countries, as too favorable to carriers and to their agents, who are also covered by the limits of liability stipulated in the Convention.

The text of the Brussels Convention is not attached as an annex to this Review as the above summary is sufficient for the purpose of this Review.

*e. 1978 (Hamburg Rules) Convention on the Carriage of Goods by Sea<sup>28</sup>*

**82. Enforceability.** The so-called *Hamburg Rules*, adopted on March 31, 1978, are in force since November 1, 1992. The Convention stipulating the rules was not signed nor ratified by most maritime States. Twenty-five States ratified or acceded to it, of which one is landlocked in Europe, four are ex-Eastern block States and eighteen are from Africa, Burkina Faso, Cameroon, Democratic Republic of Congo, Egypt, Gambia, Guinea, Kenya, Lesotho, Malawi, Morocco, Nigeria, Senegal, Sierra Leone, Tanzania, Tunisia, and Zambia. It is therefore enforceable for carriage between these States and under the law of these States.

**83.** The limited attractiveness of the Hamburg Rules is also illustrated by the failure of the signature and ratification process of the draft 1980 Convention on multimodal transport of

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<sup>28</sup> **BIBLIOGRAPHY** C.F. Luddeke et A. Johnson, *The Hamburg Rules from Hague to Hamburg through Visby*, Lloyd's of London, 1995. F. A. Nlerim, *The application and some implications of the Hamburg Rules for Nigeria*, 9 AJICL (1997), 386-408. J.E. Bokalli, *Le nouveau droit des transports maritimes internationaux de marchandises: les règles de Hambourg*, 9 AJICL (1997) 836-852. P.Y. Nicolas, *Les Règles de Hambourg devant les tribunaux français*, Droit maritime français, Paris, n° 583, 6.1998, 547. B. Makins, *The Hamburg Rules: a casualty?* B. Making, Bayview, NSW, 1994. S. Leif, *The Hamburg rules and transport documents*, Nordisk Institute for Sjøret, Oslo, 1980.

Goods (see para. 123 and sq.). This draft convention used the Hamburg rules as basis for its liability regime and was therefore not acceptable to those States, which did not accept the Hamburg Rules. The 2001 CEMAC Shipping Code (para. 190 *infra*) incorporates the Hamburg Rules and makes specific reference to the Hamburg Convention.

**84. Scope.** The United Nations Commission for Trade and Development (UNCTAD prepared the Hamburg Rules) under the impulse of the developing countries seeking an instrument more favorable to cargo interests than the 1924 Brussels Convention. These Rules are also said to have been inspired by the French 1966 Maritime Transport Act, which updated the Commercial Code in a way more protective of cargo interests. In French law, enforcement of the new provisions is compulsory (*d'ordre public*); no paramount clause contrary to its provisions in a bill of lading or carriage contract is valid. The Convention has been described as a package embracing the whole transport operation. Mainly:

- (1) The Convention applies to all transports of goods by sea, under bill of lading or not, on deck or in holds;
- (2) The period of liability of the carrier is no longer limited from tackle to tackle but extends to cover the whole period during which the goods are under its custody;
- (3) There is a presumption of liability against the carrier; the burden of proof is reversed; carrier must demonstrate its due diligence; and
- (4) The list of exonerating circumstances and cases is limited.

The text of the Hamburg Rules is not attached as an annex to the present Review as the above details are adequate for the purpose of this Review.

**85. Evaluation.** There are few chances that the Hamburg Rules will be accepted by the shipping world and that the Convention will be ratified by the maritime nations. Significantly, despite its own domestic statutes protective of shippers the French Government, after passing the 81-348 (April 15, 1981) Act authorizing ratification, never ratified. A study would be necessary to identify the types of sea carriage contracts used between the industrialized world and sub-Saharan Africa and evaluate their impact on transport costs and facilitation.

*f. 1991 Vienna Convention on the Liability of Terminal Operators in International Trade*

**86. History.** The package deal approach used to elaborate the Hamburg Rules led the United Nations to prepare a *Convention on the Liability of Terminal Operators of Transport Terminals in International Trade*. It was concluded in Vienna on April 19, 1991. Like the Hamburg Rules, it is oriented towards eliminating legal obstacles to the interests of shippers and consignees of cargo from developing countries. *The Convention aims at establishing uniform rules concerning liability for loss, damage, delay in delivering, etc. concerning goods*

*while they are in the charge of operators of transport and are not covered by the laws of carriage arising out of conventions applicable to the various modes of transport.* The Vienna Convention did not enter in force. There are few prospects that it will collect the necessary number of ratifications and/or acceptances. Its provisions may be of interest for drafting a regional or sub-regional convention on the subject matter. No African State, however, has seemed to be anxious to submit its own terminal operators – many of them government-owned – to the discipline imposed by the convention. No African convention or regulation was therefore developed or issued.

The text of the **Convention on the liability of operators of transport terminals in international trade** is attached for reference as **Annex II-15** to this Review, as the text of this not ratified convention is uneasy to locate.

**87. Provisions.** Main provisions of the Convention are:

- (1) **(Article 1) Definition of operator.** The operator of a transport terminal is defined as a person who, in the course of its business, undertakes to take in charge goods involved in international carriage in order to perform transport related services in relation to these goods in an area under its control.
- (2) **(Article 2) Applicability.** The rules are applicable when the transport related services are performed by an *operator* whose place of business is located in a State party to the Convention or when the transport related services are governed by the law of a party State.
- (3) **(Article 4) Onus of proof.** The operator is to issue a receipt of goods and is presumed to have received them in good condition, unless he proves otherwise. In case of damage, delay, etc. during the performance of services, the operator is presumed liable unless he proves that damage, delay, etc. is not attributable to its action or negligence.
- (4) **(Articles 6 to 9) Limitation of liability.** The operator may limit its liability. Right of limitation of liability is not granted when loss, damage, delay, etc. originates in an act of omission of the operator itself or of one of its servant or agent.
- (5) **(Article 17) Convention as compulsory instrument.** Any stipulation in a contract concluded by an operator for the purpose of terminal operations is null and void if it derogates, directly or indirectly, from the provisions of the Convention.

*g. Conventions for the Unification of Rules relating to the Limitation of the Liability of Owners of Sea-Going Vessels*

**88. History.** Conflicts of law between English law and Continental law have led, starting in 1885, to a series of conferences and draft instruments on the subject matter. The first conven-



tion dealing with it was concluded in 1924 and is no longer in effect. It was replaced by the October 10, 1957 Convention ratified by Congo, Ghana, Madagascar and Mauritius. This Convention permitted the vessel owner to limit its liability for damages, including death caused to passengers and for damages to cargo, provided there is no fault from the owner or its agent. In turn, another convention was substituted in 1976. It is reviewed below.

The text of these conventions is not attached as an Annex as the information given in this section is adequate for the purpose of this Review. Its reference in the UN Treaty Series is 1412 UNTS 73.

**89. 1976 London Convention on limitations of liability for maritime claims.** The 1976 (November 10) London Convention sets forth the rules applicable to ship owner's liability. It defines and enumerates the cases when a liability limitation applies, which includes not only losses to passengers and cargo, but also delays in carriage. A simple fault no longer prohibits recourse to limitation of liability; it must be proved that the fault is deliberate or inexcusable. The convention also stipulates that liability ceilings are set in Special Drawing Rights (SDR).

**90. Enforceability.** Benin was one of the first twelve States to ratify the convention, which became effective between signatories in 1996. This State seems to have remained the only sub-Saharan State bound by the Convention. However, as regard Central Africa, the provisions of the convention are incorporated in the CEMAC 2001 Shipping Code (Title V at Article 100 to 113) and are therefore enforceable in the CEMAC States and as regard CEMAC traffic.

**91. 1961 Brussels Convention on carriage of passengers by sea.** This Convention was signed on April 29, 1961. It was ratified or acceded to by Congo, Democratic Republic of Congo, Liberia and Madagascar. Articles 419 to 426 of CEMAC Shipping Code are a transcript of the provisions of the 1961 Convention (see para. 190), which makes it de facto enforceable in and by CEMAC States. The Convention, which does not apply to luggage but to passengers only, stipulates a contractual due diligence obligation for the carrier. It belongs to the passenger to give evidence of the carrier's lack of due diligence, except when damage was caused by fire, explosion, grounding, wreck and other total losses. The convention also provides for a ceiling in monetary damages.

**92. 1974 Athens Convention on carriage of passengers and luggage by sea** (modified by a 1976 Protocol). This Convention is in effect since 1987. It stipulates that carrier is liable if damage is suffered on board the vessel or in case of negligence. Negligence is presumed if there is fire, grounding or collision of vessel. Ceilings of carrier liability are set higher than in the Brussels Convention. The only sub-Saharan State who ratified this Convention is Liberia (1987). An additional Protocol to the Convention was issued in 2002 improving the guarantees offered to passengers, especially as regard carrier's liability and compulsory insurance. No sub-Saharan State ratified the Protocol. The European Union ruled in June 2003 that it would ratify the Protocol for all European Union States and then issue a European Regulation to be implemented and enforced by all these States, as the Protocol is not self-enforcing. The procedure is certainly

an example that may inspire regional and sub-regional organizations, provided, of course, that individual States accept to release their treaty-related powers to the organization

## C. RAIL TRANSPORT CONVENTIONS

**93. The 1923 Geneva Convention on the international regime of railways.** Railways have played a major role in the development of international cooperation in the area of transport and facilitation. Being in a monopolistic position as long distance carriers in the XIX<sup>th</sup> century, they lent themselves easily to abuses of dominant positions. One of the sources of the first convention on the international regime of railways, the 1890 *Convention de Berne* was the abuses of German railways enforcing tariffs detrimental to the Austrian port of Trieste and to the Dutch port of Rotterdam, but artificially attracting traffic to Bremen and Hamburg.<sup>29</sup> The 1890 Convention was amended by the 1923 Convention, reviewed herein after.

**94. Enforceability.** The 1923 (December 9) Convention is, like the Convention on the international regime of maritime ports (see above, para. 70 and sq.) significant of the conventions concluded after the Treaty of Versailles. Like all successive conventions on rail transport, it did not penetrate sub-Saharan Africa, except through its ratification by the United Kingdom in 1925, for most of its possessions or protectorates: Sierra Leone, Gold Coast, Nigeria, Cameroon under British mandate, Tanganyika, Northern and Southern Rhodesia, Nyasaland and Gambia. The Convention is certainly well alive, as it was formally adhered to by Malawi and by Zimbabwe in 1969 and 1989, respectively. Tanzania, by enforcing the clean slate doctrine (see para. 8 above) does not consider itself bound by the Convention.

The text of the **1923 Convention on the Regime of Railways**, filed in the League of Nations (reference 75 League of Nations Treaty Series 55) is attached as **Annex II-16** to this Review.

**95. Provisions.** Provisions of the Convention fall in two categories: (i) commitments of contracting parties regarding the development and facilitation of international traffic; and (ii) rules of law regarding the relations between railways and their users.

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<sup>29</sup> The dispute over distortions of competition for the benefit of German ports was settled only at the end of the XX<sup>th</sup> Century. In 1971, the European Commission declared contrary to the Treaty of Rome the tax exemptions granted to German truckers by the July 28, 1968 Federal Act, when these truckers were servicing German ports. In fact, these tax rebates were also an oblique breach of the provisions of the 1923 Convention on the international regime of ports, which stipulated equal treatment (see para. 70 and sq. above).

Main facilitation provisions are:

- (1) *(Articles 1 to 3)* Existing lines of the different national networks ought to be connected. Common frontier stations should be established whenever possible. The State on the territory of which these stations will be located should offer every assistance to railway staff of the other State.
- (2) *(Articles 4 to 7)* Freedom of operation is the rule but it should be exercised without impairing international traffic. Unfair discrimination directed against the other contracting State is prohibited.
- (3) *(Article 8)* Customs, police and immigration formalities should be regulated so as not to be a hindrance for international traffic.
- (4) *(Articles 9 to 13)* The Contracting Parties should enter into agreements to facilitate the exchange and reciprocal use of rolling stock.

Among the provisions of special interest regarding the relations between railways and their clients is the commitment to use, whenever possible, a through carriage contract covering an entire journey, and to develop the greatest possible measure of uniformity in the conditions of execution of such through contract.

**96. 1980 Bern Convention on international railway transport.** The 1923 Convention has been since replaced by other conventions such as the 1952 Convention. The latest in date is a series of conventions and protocols dated February 7, 1970, filed with the UN Secretariat under N° 16900 (reference 1100 UN Treaty Series 164), in turn modified in 1973, 1977 and 1980. No African State is party to the 1970 conventions and protocols. Finally, on May 9, 1980 a new Convention on international railway transport (COTIF) was concluded in Bern<sup>30</sup>. The Convention (i) defines the role and jurisdiction of the intergovernmental Organization for International Rail Transport (OTIF) and of its General Secretariat; (ii) sets forth the standards applicable to international rail transport, or Uniform Rules (UR). These Uniform Rules are to be enforced in all international rail transport of goods under a direct consignment note for a carriage operation using at least two railway networks belonging to COTIF member countries. Signatories to the Convention agree on the railway lines on which Uniform Rules apply. On the other lines, the law of the State where the carriage contract was concluded applies. No African State south of the Sahara concluded the 1980 Convention, basically a European instrument. None is

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<sup>30</sup> **BIBLIOGRAPHY** B. Mercadal, *Droit des transports terrestres, et aériens*, Dalloz, Paris, 1996, p 177-248. M. Allégret, *Transports internationaux ferroviaires*, Jurisclasseur commercial, Paris, Fasc. 680, 1996.

an OTIF member. But if projects of connection of African railways networks develop, governments may revise their position and seek to accede to the 1980 Convention<sup>31</sup>.

## D. CONVENTIONS ON RIVER TRANSPORT

**97. 1921 Barcelona Convention<sup>32</sup>.** The United Kingdom ratified in 1922, for the British Empire and at the exception of the Dominions (South Africa), the April 20, 1921 Barcelona Convention and Protocol on the Regime of navigable waterways of international concern. As a result, and subject to the clean slate doctrine, the African States enumerated in paragraph 8 are parties to this Convention, which they inherited. But the provisions of the convention were not introduced in the CEMAC River Shipping Code (see para. 188).

The text of the **Convention on the Regime of Navigable Watercourses** (reference 7 League of Nations Treaty Series 35) is attached to this Review as **Annex II-17**.

**98. Provisions.** Like all the conventions of the League of Nations period, this convention rests on principles of freedom of movement, equal treatment between States and minimum charges.

- (1) **(Article 3) Free navigation.** Vessels flying the flag of a contracting State have free passage on these parts of navigable waterways under the sovereignty of another contracting State.
- (2) **(Articles 4 and 5) Equal treatment.** Property and flags of the contracting States to be treated *on a footing of perfect equality*. No distinction shall be made between the nationals and flags of non-riparian States. Exception to the rule is for traffic between one port under the sovereignty of a contracting State and another of its

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<sup>31</sup> The 1980 Bern Convention is not available on the UN Treaty Series web site. English version in BTS 1 (1097) and BTS 52 (1993). French version in JORF 1987, p. 10154.

<sup>32</sup> **BIBLIOGRAPHY** Ch. Rousseau, *Droit international public*, Paris, 1970, vol IV, Les relations internationales, p. 484-564. *Les cours d'eau internationaux*, Fondation Carnegie, 1967. F.J. Berber, *Rivers in international law*, Stevens, Londres, et Oceana, New York, 1959. P. Corthésy, *Etude de la Convention de Barcelone*, Pedone, Paris, 1927. R.E. Bacon, *British and American policy and the right of fluvial navigation*, British Yearbook of international law, London, 1932, p. 72-92. R.W. Johnson, *Freedom of navigation for international waters*, 63 Michigan Law Review, Ann Arbor, Mi, 1964, p. 465-484. Cl. Parry, British Digest of International Law, tome III, 1967, p. 53-190. R. Zacklin, and L. Caflisch, *Le régime juridique des fleuves et des lacs internationaux*, Nijhoff, The Hague, 1981.

ports, or reservation of traffic between two riparian States to vessels and operators of these States.

- (3) *(Article 7) Dues.* No dues shall be levied *other than dues [for] payment of services rendered and intended solely to cover in an equitable manner the expenses of maintaining and improving the navigability of the waterways...*
- (4) *(Article 8) Transit.* Transit shall be governed by the rules of the Statute of Barcelona on Freedom of Transit (see *above* at para. 27).
- (5) *(Article 9) Equal treatment* as regards Customs, dues or other duties. Customs duties not to be higher *than those levied on the other Customs frontiers of the State interested.*
- (6) *(Article 10) Costs* to be shared. Costs of upkeep shall be shared and riparian States cannot refuse to carry out the necessary improvements to the waterways if another State offers to pay the cost of the works and a fair share of the cost of the upkeep.

## E. CONVENTIONS ON ROAD TRANSPORT

### a. *General*

99. Carriage by road developed considerably during the last century and expanded enormously since the end of World War II. In industrialized countries, subject to the importance of bulk tonnage, usually carried by rail, road transport carries from 55 to 80% of all goods transported. With the development of international transport, the need arose for a uniform body of rules. These rules are either of public law such as traffic, signs, vehicles, Customs procedures, or of private law, dealing with carriage, insurance and other contracts.

100. These matters and the conventions on these subject matters are reviewed herein in the following order:

- (1) Traffic and vehicles, with an objective of safety and harmonization of standards between States and jurisdictions. These are the *Geneva and Vienna Conventions on road traffic and road signs and signals.*
- (2) The regulation of transport, particularly as regards Customs. In that respect the *Customs Convention on the International Transport of Goods under cover of TIR Carnets* is also of special interest.
- (3) The regime to be applicable to commercial road vehicles temporarily imported or used in international transport.

- (4) The carriage contract itself, for which a European convention, the *Convention for the Contract for the International Carriage of Goods by Road* (CMR), provides a good model. It has an impact on sub-regional conventions and codes (see para. 162 and sq. *infra*).

These conventions are reviewed in the following sections and paragraphs.

*b. 1949 (Geneva) and 1968 (Vienna) Conventions and Protocols on Road Traffic and Road Signs*

**101. The 1949 Geneva Convention on Road Traffic.** A first convention was concluded in Geneva on September 19, 1949 following the United Nations Conference on Road and Motor Transport. It entered into force in 1952. In sub-Saharan Africa, it was adhered to or ratified by Benin (1961), Botswana (1962), Congo (1962), Côte d'Ivoire (1961), Ghana (1959, with reservations), Lesotho (1973), Madagascar (1962), Mali (1972), Niger (1962), Rwanda (1962), Senegal (1962), Sierra Leone (1962), South Africa (1952), Togo (1962), Uganda (1965) and Zimbabwe (1998).

The Convention was filed under N° 1671 with the UN Secretariat (reference 125 UN Treaty Series 22). The text of the **1949 Geneva Convention on Road Traffic** is attached as **Annex II-18** to this Review.

**102. Protocol on signs and signals.** A Protocol on road signs was adopted at the same time as the Convention. It came in force on December 20, 1958. None of the sub-Saharan States seem to have ratified it or adhered to it.

The **Protocol on signs and signals** was filed with the Convention under N° 1671 with the UN Secretariat (reference 182 UN Treaty Series. 224). The text is attached as **Annex II-19**.

**103. International traffic objectives and scope of the 1949 Convention.** The objective of the Convention was to promote the development of international road traffic by establishing uniform rules regarding it. Basic principles applicable were, according to Chapter I of the Convention:

- (1) While reserving its jurisdiction over the use of its own roads, each Contracting State agreed to the use of its roads for international traffic under the conditions set out in the Convention.
- (2) International traffic is traffic by vehicles owned by non-residents, not registered in the State and temporarily imported. No contracting State was to be required to extend the benefits of the provisions of the Convention to any vehicle or to any driver having remained in its territory for more than one year.

- (3) Measures that the contracting States may agree with a view to facilitate international road traffic by simplifying Customs, police, health or other requirements were to be regarded as in conformity with the object of the Convention.
- (4) A bond or other form of security guaranteeing payment of import duties or other taxes may be required by any contracting State, but a contracting State shall accept for that purpose the guarantee issued by an organization established in its own territory and issuing a valid Customs pass.
- (5) The Convention is not self-enforcing and it belongs to the contracting States to take the appropriate measures for the observance of the rules set in it.

**104. Other provisions.** Other provisions of the Convention and of its Annexes are rules of the road applicable to international traffic and the format of documents such as driving permits or licenses.

**105. 1968 Vienna Convention on road traffic.** A second convention was concluded on November 8, 1968 in Vienna and came in force in 1977, the Final Act of the 1968 United Nations Conference on Road Traffic, attended by government delegations, seven inter-governmental organizations and nineteen non-governmental organizations. No specific African organization attended it.

**106. Status.** The 1968 Vienna Convention was signed, ratified or adhered to by Côte d'Ivoire (1985), Ghana (signature only, 1989), Niger (1985), Senegal (1972), the Seychelles (1977), South Africa (1977) and Zimbabwe (1997).

**107. Summary of applicable legal regime.** As a result of the small and uneven number of ratifications or adhesions to the two conventions, three regimes are applicable to road traffic in sub-Saharan Africa:

- (1) The 1949 Convention regime in these States that ratified the 1949 Geneva Convention but did not ratify the 1968 Vienna Convention.
- (2) The 1968 Vienna Convention in these countries whose government ratified the Convention; all these States, except Seychelles, had ratified or adhered to the 1949 Convention.
- (3) The States which ratified neither the 1949 nor the 1968 Conventions enforce the domestic legislation or are bound by the provisions of regional or sub-regional instruments on the subject matter, such as CEMAC's Road Traffic Code, covering Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon. Whether these regional or domestic instruments are in line with the provisions of the 1949 and/or 1968 Conventions remains to be explored.

The **1968 Vienna Convention on Road Traffic** was filed with the UN Secretariat under N° 15705 (reference 1091 UNTS 3). A copy is attached as **Annex II-20** to this Review.

**108. Objectives and scope of the 1968 Vienna Convention.** The 1968 Vienna Convention proposes *to facilitate international road traffic and to increase road safety through the adoption of uniform traffic rules*. The definition of vehicles in international traffic is similar to that used in the 1949 Convention (see para. 101 above).

**109. Provisions of convention.** Main provisions of the convention are:

- (1) *(Chapter I)* This Chapter sets forth general provisions. The Convention is not self-enforcing. In accordance with Article 3, the contracting parties are to take all appropriate measures to ensure that the rules of the road in their territories conform *in substance* to the provisions of the Convention. Contracting parties shall be bound to admit to their territories in international traffic motor vehicles and drivers that fulfill the conditions laid down in the instrument.
- (2) *(Chapter II)* Here the Convention stipulates a number of rules relating to signs and signals, drivers, position of the carriage, overtaking, passing of traffic, speed and distance between vehicles, change of direction, standing and parking, flocks and herds, pedestrians, loading and unloading of vehicles, etc.
- (3) *(Chapter III)* This chapter sets forth the conditions for the admission of motor vehicles and trailers to international traffic. The driver of the vehicle shall carry a valid national certificate bearing at least the particulars listed in the Convention. Vehicles shall bear the identification marks as described in the Annexes of the Convention.
- (4) *(Chapter IV)* This Chapter sets forth the rules applicable to drivers and driving permits. Any domestic or international permit conforming to the provisions of the Convention and of its Annexes shall be recognized and accepted by the contracting parties. Permits may be suspended or withdrawn for a breach of regulation rendering the holder of the permit liable under domestic legislation to forfeiture of permit.
- (5) *(Chapter V)* Provisions of this Chapter deal with cycles and mopeds.

**110. Annexes to the 1968 Vienna Convention on Road Traffic.** Six Annexes are attached to the Vienna Convention and are integral part of it. These Annexes deal with:

- (Annex 1) Exceptions to the obligation to admit motor vehicles and trailers in international traffic. Contracting parties may refuse to admit to their territories overweight or over dimensioned vehicles and other (listed) vehicles whose technical characteristics are not satisfactory
- (Annex 2) Registration number of vehicles in international traffic



- (Annex 3) Distinguish signs of vehicles in international traffic
- (Annex 4) Identification marks of vehicles in international traffic
- (Annex 5) Technical conditions of vehicles. This is a very detailed set of standards, characteristics and equipments
- (Annex 6) Domestic driving permit. Rules and format of permit, without specific reference, in fact, to international traffic

**111. 1968 Vienna Convention on Road Signs and Signals.** On November 8, 1968 was also concluded in Vienna a Convention on road signs and signals, to replace the 1949 Protocol. The Convention was ratified or adhered to by Senegal (1978), Seychelles (1978) and Democratic Republic of Congo (1978).

As in the case of the Convention on road traffic, the small number of ratifications results in three regimes of two categories of countries: those enforcing the 1968 Convention, and those enforcing neither or enforcing sub-regional rules on signs and signals.

The **1968 Vienna Convention on Signs and Signals** was filed with the UN Secretariat under N°16743 (reference 1091 UN Treaty Series 3). The text is attached as **Annex II-21** to this Review.

**112. 1958 Geneva Agreement on Uniform Technical Prescriptions.** Lastly, an Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions was concluded in Geneva on March 20, 1958 and came into force on June 20, 1959. The Agreement was filed with the UN Secretariat under N° 1789 (reference 335 UN Treaty Series 215). This Convention was followed by the issuance of some 110 regulations on standards of mechanical and other equipment for wheeled vehicles. The name of the Convention was changed on August 18, 1994 to that of *Agreement concerning the adoption of uniform conditions of approval and reciprocal recognition of approval for motor vehicles and parts*, which reduced the scope of the instrument. In sub-Saharan Africa, only South Africa ratified the Agreement (2001), with the reservation that it would not be bound by 78 (enumerated) of the Regulations annexed to the Agreement or issued for its enforcement.

The **Agreement on Technical Prescriptions** was filed with the UN Secretariat under N°1789 (reference 335 UN Treaty Series 215) in the UN Treaty Series. No copy of it is attached to this Review as an Annex.

c. *1975 Geneva Customs Convention on the International Transport of Goods under cover of TIR Carnets*

**113. Objective.** The objective of the TIR (*Transports internationaux par la route*) Convention has been both the improvement of transport conditions and the simplification and harmonization of administrative formalities in the field of international transport, particularly at frontiers. Its objective is definitively facilitation.

**114. Enforceability.** The Convention has been enforced since 1960 and modified many times. Largely enforced in Europe, the Maghreb, the Middle East including Iran, North America, even Chile, and Indonesia, it has remained foreign to sub-Saharan Africa. However, it has not been ignored since, like the CMR Convention, it has been used as a model for sub-regional TIR Conventions. For example, Annex II to Protocol No 3 attached to the Northern Corridor Agreement between Kenya, Rwanda, Burundi, Uganda and Zaire states that the parties to the Agreement undertake to accept transport units (containers) approved in accordance with the above convention.

The **TIR Convention** was filed under N° 16510 with the UN Secretariat (Reference 1679 UN Treaty Series 89) and is attached to this Review as **Annex II-22**.

**115. Provisions.** Main provisions of the Convention are as follows. Details of procedures, markings of trucks, etc. are given in Annexes to the Convention.

- (1) Goods carried under the TIR procedures in sealed road vehicles are not as a general rule submitted to examination in Customs offices *en route*. But they may be inspected when an irregularity is suspected. Customs authorities shall not require vehicles to be escorted at carrier's expense on the territory of their country.
- (2) Contracting parties authorize agreed professional associations to issue TIR carnets. These associations guarantee that they will pay the import or export duties and taxes, including penalty interest in case of irregularities. For the purpose of identification of the goods on which duties have to be paid, details of these goods are entered in the TIR carnet. Customs authorities discharge TIR carnets after conclusion of the transport operation. Discharge is equivalent to clearance and Customs authorities cannot claim taxes and dues after discharge.
- (3) Irregularities render the offender liable to the penalties of the country where the offence was committed. In case of doubt, the offence is deemed to have been committed in the country where it was detected. Any person guilty of irregularities may be in future excluded from the operation of the Convention.

d. *Customs Conventions on the Import of Land Transport Equipment*

Three conventions are of interest and were unevenly ratified or adhered to by some of the sub-Saharan States.

**116. New York 1954 Customs Convention on the Temporary Importation of Private Road Vehicles**, entered into force on December 15, 1957. This Convention was ratified or acceded to by the Central African Republic (1962), Ghana (1957), Mauritius (1968), Nigeria (1961), Rwanda (1964), Senegal (1972), Sierra Leone (1962) and Uganda (1965).

This **Customs Convention on Import of Private Road Vehicles** filed with the UN Secretariat under N° 4101 (reference 176 UN Treaty Series 192) is attached to this Review as **Annex II-23**.

**117. Provisions.** Main provisions of the Convention are:

- (1) *(Articles 2 to 5)* Contracting States shall grant temporary admission without payment of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation, to vehicles of non-residents and utilized for private use on the occasion of a temporary visit.
- (2) *(Articles 6 to 11)* Authorized associations may be granted the right to issue temporary importation papers (*carnets de passage en douane*), whose validity shall not exceed a year. Only non-residents can drive vehicles.
- (3) *(Articles 12 to 19)* Vehicles need to be re-exported. Badly damaged vehicles may not be re-exported but, as the Customs authorities will decide, (i) are subjected to import duties, or (ii) are abandoned to the Exchequer, or (iii) are destroyed under Customs supervision.

**118. Geneva 1956 Convention on the Temporary Importation of Commercial Road Vehicles.** This Convention was concluded in Geneva on May 18, 1956 and was acceded to by Sierra Leone in 1962. The Convention refers specifically to the 1954 New York Convention with the intention to apply similar provisions to the temporary importation of commercial vehicles. It provides that commercial vehicles shall be granted temporary admission without payment of import duties and taxes, subject to their re-exportation. Each contracting party may authorize associations, such as those affiliated to an international organization, to issue the temporary importation papers necessary for the enforcement of the Convention. Vehicles damaged beyond repair need not be re-exported, but duties and import taxes shall be paid and the vehicles destroyed or abandoned to the domestic Exchequer.

This **Convention on Temporary Importation of Commercial Vehicles** filed with the UN Secretariat under N° 4721 (Reference 327 UN Treaty Series 123) is attached to this Review as **Annex II-24**.

**119. Geneva 1956 (December 14) Convention on the Taxation of Road Vehicles engaged in International Goods Transport.** The only sub-Saharan State to have acceded to this Convention is Ghana (1962). The Convention stipulates the exemption from taxes of vehicles imported in the territory of a Contracting Party in the course of international goods transport.

This **Convention on the Taxation of Road Vehicles engaged in international goods transport** was filed with the UN Secretariat under N° 6292 (Reference 339 UN Treaty Series 3). The text is attached to this Review as **Annex II-25**.

*e. Convention on the Contract for the International Carriage of Goods (CMR)*<sup>33</sup>

**120. Presentation of the CMR.** The CMR is basically a European Union affair *to elaborate uniform conditions of contract for international road transport of goods*. It is typically an international transport instrument and does not apply to domestic transport. It originated in the joint efforts, starting in 1948, of the International Institute for the Unification of Private Law (UNIDROIT), the International Road Transport Union, the International Chamber of Commerce (Paris) and other professional institutions. Then, the United Nations Economic Commission for Europe associated itself with the work and an international convention was drafted. According to its Article 42, it is open for signature and accession by country members of the Economic Commission for Europe and countries admitted to the Commission in a consultative capacity, under paragraph 8 of the Commission's Terms of Reference. In fact, and this point was raised by a number of States when they ratified the Convention, it is a sovereign right of a State to access or not to an international convention.

**121. Success of the CMR.** The success of the Convention as an international transport framework has been such that it governs an increasing number of contracts for the carriage of goods by road to the Middle East and North Africa. This success is certainly a consequence of its origin as a document elaborated by the profession. Unlike the conventions relating to international carriage of goods by rail, which affect only a limited number of national railways, the CMR is used by thousands of international truck operators. As a result, interpretation of the convention by national courts has tended to be uniform, a powerful tool for the unification of law. The CMR was used as a model for drafting the 1996 Libreville Road Transport Convention (*Convention inter-États de transport routier de marchandises diverses*) of the *Union douanière et économique de l'Afrique centrale* (UDEAC) (see Annex IV-2). The UDEAC Convention reproduces verbatim the main provisions of CMR and makes their enforcement compulsory. The

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<sup>33</sup> D.J. Hill, *CMR Contracts for the international carriage of goods, by road*, Lloyd's of London, 1984. B. Mercadal, *Droit des transports terrestres et aériens*, Dalloz, Paris, 1996, p. 78-152, *Le contrat de transport routier*.

CMR has also been used apparently as a model for the 2003 OHADA Uniform Act relative to Contract for road transport of goods (see para. 162 *infra* and Annex III-7).

The **CMR Convention on the contract for international carriage of goods** was filed with the UN Secretariat under n° 5742 (reference 399 UN Treaty Series 189). The text is attached for reference as **Annex II-26** to this Review.

**122. Provisions of the CMR.** Main provisions of the CMR are:

- (1) **(Article 1) Scope.** The convention covers any (emphasis added) international carriage of goods by single and successive carriers when at least one of the two countries of origin and destination is party to the Convention. It does not apply to multimodal transport if the goods leave the road vehicle.
- (2) **(same) Government agencies.** The Convention applies also when carriage is conducted by States or governmental organizations or institutions.
- (3) **(same) Exclusivity.** No contract provision different and adverse to CMR is valid in any carriage contract under CMR.
- (4) **(Articles 4 to 7) Consignment Note.** Goods travel under a consignment note established under a format set by the CMR. The consignment note is evidence of the carriage contract. Recourse to the format is compulsory, but the absence of a consignment note does not make the carriage contract invalid. The consignment note gives evidence against the carrier.
- (5) **(Articles 8 to 16) Duties of shipper and of carrier.** The shipper is responsible for specifying the particulars of the goods to be carried and for a number of statements. The carrier is responsible for checking accuracy of statements, whenever possible. Reservations thereof are consigned on the consignment note. Documentation for Customs purposes is the responsibility of the sender. The shipper may dispose of the goods by issuing instructions to the carrier as to the location of the delivery, the delivery to a consignee other than the original consignee, etc. All expenses pursuant to changes in instructions, requests for instructions, etc. are charged to the shipper.
- (6) **(Articles 17 to 29) Liability.** The carrier is *prima facie* liable for damages and the convention details the grounds on which a carrier may be relieved of its liability. The burden of proof that loss, damage or delay was due to one of enumerated causes rests upon the carrier. The shipper is liable for any damage caused by inadequate information given to the carrier.
- (7) **(Articles 30 and sq.) Venue and jurisdiction.** The CMR sets forth which courts have jurisdiction for hearing cases between carriers and shippers. This is to prevent any abusive clause giving jurisdiction only to courts selected for that purpose by one of the parties to the carriage contract. However, while the carrier and the shipper are parties to

the CMR, the receiver or consignee of cargo is not. The clause is inoperative in its respect. In Francophone States that have kept Article 14 and 15 of the French Civil Code, any citizen may select to see his case judged by a local court when defendant or counter-claimant. Despite that CMR is an international agreement superseding municipal law courts tends to consider Articles 14 and 15 of the Civil Code as paramount. They therefore prevail.

## F. CONVENTIONS AND RULES ON MULTIMODAL TRANSPORT

### a. *Geneva 1980 (May 24) Convention on Multimodal Transport of Goods (the TMI Convention)*

**123. Definitions.** Multimodal or combined<sup>34</sup> transport entails two or more different modes of transport, such as rail and road, or road, sea and road. The 1980 TMI Convention aims at ruling on transport between one country where the goods are loaded and taken in charge by a Multimodal Transport Operator (MTO) appointed for delivery to another country<sup>35</sup>.

**124. History.** As early as 1975, rules for combined transport had been set forth by the International Chamber of Commerce in Paris (*Chambre de commerce internationale* – CCI). They were based, *inter alia*, on the traditional rules of sea carrier liability (1924 Brussels Convention and Visby Rules). The TMI Convention here reviewed in cooperation with UNCTAD, aimed at replacing these privately issued rules and formulates new rules applicable to this type of carriage.

**125. Elaboration.** The convention was prepared during two conferences on the subject matter, which met in Geneva in November 1979 and May 1980. Many representatives of professional bodies from the transport industry joined representatives of governments. The long preamble to the Convention is significant of the concerns of the parties to its elaboration: (i) desirability to facilitate international trade and concern for the problems of transit countries; (ii) need for equitable rules of liability for multimodal transport operators; (iii) need to take in con-

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<sup>34</sup> Both terms are used. *Combined* is specially used in the U.S.

<sup>35</sup> **BIBLIOGRAPHY** Prof. Dr R. De Witt. *A brief review of legal problems in multimodal transport*, Ports and Harbors, Tokyo, Sept 2000, p. 18-24. D. Glass, *Multimodal Transport*, in D. Yates, *Contracts for the carriage of goods by Land, Sea and Air*, Lloyds of London, 1993. B. Mercadal, *Droit des transports terrestres et aériens*, Dalloz, Paris, 1996, p. 332-340 (*Les transports multimodaux internationaux*). V.M. Allégret, *L'aspect juridique du transport combiné vis-à-vis du rail*, Bulletin des transports internationaux ferroviaires, Paris, 1995, p. 27. *Benchmarking intermodal transport*, OECD, Paris, 2002.

sideration the special problems of developing countries; (iv) need to facilitate Customs procedures. Then the basic principles of the Convention are set forth as:

- (1) Establishment of a fair balance of interests between developed and developing countries with an equitable distribution of activities in international multimodal transport between these two groups; and
- (2) Consultation should take place on terms and conditions of service before and after the introduction of any new technology in the multimodal transport of goods between the multimodal transport operator, shippers, shippers' organizations and appropriate national authorities.

**126. A package approach.** The principles set forth indicate that the proponents of the Convention may have selected to go beyond the strict operational approach of the earlier international instruments. The approach seems to reflect the doctrine of the New Economic Order of the 1970-1980s, with a flavor of state control over multimodal operations. Besides, the principle that there should be consultations before the introduction of new transport technologies is not realistic. On this basis, consultation between governments would have been necessary to move from sail to steam, a major technological change of the past. Altogether, the policy approach adopted here may have been one of the motives for the reluctance of the industrialized States to sign and ratify the convention. A more neutral convention might have been more successful.

**127. Enforceability.** The Convention is not in force yet due to an insufficient number of signatures and ratifications. It was signed, ratified, accepted or approved by a small number of States of different continents, from Chili (1992) to Morocco (1993). Except for Norway, it has not been signed by any European State. In sub-Saharan Africa, it was acceded by Burundi (1998), Malawi (1984), Senegal (1984) and Zambia (1991). Given its inspiration, the reluctance of developing countries to ratify it appears to demonstrate that there was little consensus on the principles on which the instrument was drafted. As will be seen in paragraph 180, States of the *Union des États de l'Afrique centrale* (UDEAC) drafted and issued their own convention on multimodal transport, whose enforceability is limited to trade between these States or any outside State, shipper or carrier that may accept its provisions. Equally, the Northern Corridor Agreement in Eastern Africa makes reference to the Multimodal Convention, although it is not in force (see para. 240 *infra*).

The text of the **UN Convention on International Multimodal Transport of Goods** is attached as **Annex II-27** to this Review.

**128. Lack of legal safety.** The Convention, like the CMR, is norm creating. When adopted and ratified by the State parties to the transport operation, it is mandatory and governs any multimodal carriage contract. However, it does not affect the right of each State to regulate and control at the national level multimodal transport operations and operators, including the right

to take measures relating to consultation, especially before the introduction of new technologies. The multimodal transport operator, on the other hand, has to comply with all its provisions. The consequence of these provisions is that operators derive no legal safety from the Convention. They are bound by its provisions, but the State party keeps a considerable freedom of action. This, again, may explain the reluctance to sign and ratify.

**129. Liability regime and other provisions.** The liability regime is that of the Hamburg Rules (see para. 82), still to be accepted by most trading countries, especially maritime ones. The onus of evidence that the multimodal transport operators or its agents were not guilty of fault or negligence and took all the necessary measures that could be reasonably required weighs on the operator. There are monetary ceilings on liability, but they are not applicable in cases of gross negligence. Other provisions of the TMI Convention set forth the format of consignments or bills of lading, statutes of limitation, jurisdiction, etc., a number of provisions being similar to those contained in CMR.

*b. International Chamber of Commerce Rules for Combined Transport Document, 1975 and 1992*

**130. History.** The failure of the adoption of the TMI Convention created the risk of too great a diversity in multimodal carriage contracts. But, as seen above, and as early as 1975, the International Chamber of Commerce had issued, on the basis of work by the International Maritime Committee, a major professional body, rules for the drafting of a *Standard Combined Transport Document*. The liability regime proposed was flexible and the parties to the carriage contract had some freedom in drafting their document (see ICC Publication No 298). The ICC replaced the successive documents (consignment notes, bills of lading, etc.) that are traditionally used in point to point transport by a single start to finish transport document. This combined transport document (CTD) may be issued by the provider of transport or by an arranger or commissioner for the provision of all or part of the transport by others. In any case, the person issuing the CTD acts as principal for the shipper and is responsible for the performance of the transport operation. He is therefore liable for damage, loss or delay occurring during any phase of the transport operation. Like the rules governing the Incoterms and the Incoterms themselves,<sup>36</sup> the ICC provides a brilliant example of the capacity of a profession to establish universally accepted rules of law without the intervention of governments and their agents. UNCTAD, while waiting for a possible ratification and enforcement of the TMI Convention, approached ICC for a modernization of the 1975 Rules on the basis of applicable liability rules and due account being taken

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<sup>36</sup> On the Incoterms, see I. Ramerg, *Guide to Incoterms*, ICC, Paris, 1991. F. Reynolds, *Incoterms for Americans, simplifies and answers questions about Incoterms for U.S. foreign traders*, International Projects, Holland, OH, USA, 1993. M.L.M. Granziera, *Contratos internacionais, nagoiacao e renegoçiacao comentarios aos Incoterms*, CCI, 1990, Sao Paulo, Leone, 1993.



of acquired experience. This resulted in the *UNCTAD/ICC*<sup>37</sup> *Rules for Multimodal Transport Document* (1992).

The text of the **UNCTAD/ICC Rules for Combined Transport Document** is attached as **Annex II-28** to this Review.

**131. Details of rules.** The main rules governing the CTD and referring to the Hague-Visby Rules are:

- (a) **(Rule 1)** The Rules apply only when incorporated into a contract of carriage, irrespective of whether there is a multimodal transport document or not (MTD). Parties by referring to the Rules agree that these Rules would supersede anything that has been stated to the contrary. Derogations to the Rules are thus void, except when they increase the responsibility and obligations of the carrier.
- (b) **(Rule 2)<sup>38</sup>** A MTD may be issued as a negotiable or non-negotiable document, either to order or to the bearer; it may be issued as a paper or as an electronic document.
- (c) **(Rules 4 and 5)** A Multimodal transport operator (MTO), by issuing the MTD, undertakes to perform the transport or to have it performed, accepts responsibility and assumes liability for its acts and the acts of its agents and servants.
- (d) **(Rules 6 and 7)** The MTO may limit its liability, except in case of personal act or omission, acting with intent to cause damage and with knowledge that damage would probably result (Hague-Visby Rules).
- (e) **(Rule 13)** These Rules may only take effect to the extent that they are not contrary to the provisions of mandatory laws or provisions of international conventions that cannot be departed from by private contract (*d'ordre public*) are applicable.

Other multimodal transport documents exist similar to the ICC/UNCTAD rules, such as the Negotiable FIATA Multimodal Transport Bill of Lading or the Negotiable Combined Transport Document issued by the Baltic and International Maritime Conference (BIMCO).

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<sup>37</sup> In fact, ICC/UNCTAD Rules would be more accurate as the original text is an ICC document.

<sup>38</sup> Rule 2 is all in definitions.

### III. REGIONAL INSTRUMENTS

#### A. GENERAL

132. **Presentation.** At the regional (Africa) level, the following set of instruments of cooperation can be identified:

- (1) The instruments related to the *Organization of African Unity* (OAU) which include the OAU Charter, the African Declaration of 1973 (Abidjan and Addis Ababa), the 1979 Monrovia Declaration, the Lagos Plan of Action of 1980, and the African Maritime Charter. These are reviewed in **Section B** herein after.
- (2) The *African Economic Community* established by the Treaty of Abuja in 1991. This is reviewed in **Section C** herein after.
- (3) The *Traité relatif à l'harmonisation du droit des affaires* (Treaty for Harmonizing Business Law) concluded in Port Louis on October 17, 1993. While, because of differences in legal traditions, this treaty is special mainly to Francophone countries, it is a major tool of cooperation and modernization and, consequently, has its place here. The treaty is especially important as it deals with private law issues in a free market approach, rather than many other instruments strongly inspired by a tradition of State control or which seem anxious to ensure government control on economic life and economic operators. It is reviewed in **Section D** herein below.

133. **The [2000 Cotonou] ACP-EU Partnership Agreement<sup>39</sup>.** The *Cotonou Agreement* between the European Union (EU) and the African, Caribbean and Pacific (ACP) States was concluded on June 23, 2000. Thirty-five African countries are associated to the EU through this Agreement, of which fifteen are landlocked (list in Article 2 of Annex VI to the Agreement).

According to the Cotonou Agreement:

- (1) **(Article 84)** Special attention shall be paid to transport and communication infrastructure.

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<sup>39</sup> See P. Hugon, Ed, *Analyse comparative des processus d'intégration économique régionale*, ministère des Affaires étrangères, Paris, 2001, p. 183-189. R.H. Thomas, *The EU-South Africa trade development and cooperation agreement: precedent or complicating factor?* Regional workshop in the Cotonou ACP-EU Agreement, *What are the options for SADC?* Harare, 2000.

- (2) *(Article 87)* Specific provisions and measures shall be established to support landlocked ACP States in their effort to overcome their difficulties and obstacles hampering their development.
- (3) *(Article 41)* The parties to the Agreement reiterate their commitment to the GATS (GATT).
- (4) *(Article 42)* Maritime transport is the only transport mode especially mentioned by the Agreement. It is seen as the main mode of transport facilitating international trade. The Agreement stipulates its liberalization, and free access to the market. It also stipulates equal treatment of ships of the States parties to the Agreement in their ports, which confirms the provisions of the 1923 Convention on maritime ports (see *supra* at para. 70 and sq. *supra*).

A copy of the significant Articles of the **ACP-EU Cotonou Agreement** is attached as **Annex III-1** to this Review. This Agreement does not appear to have been filed with the UN Secretariat.

## B. ORGANIZATION FOR AFRICAN UNITY (OAU)<sup>40</sup>

### a. 1963 OAU Charter

**134.** The OAU Charter was adopted at Addis Ababa on May 25, 1963. The Charter states that the reinforcement of African unity and solidarity shall be obtained, *inter alia*, through the coordination and harmonization of general policies, especially as regards transport and communications (Article 2-2-c). In early July 2002, the OAU became the African Union (AU).

### b. 1973 Declaration on Cooperation, Development and Economic Independence

**135.** The Ministerial Conference on commerce, development and monetary problems took place in Abidjan (Côte d'Ivoire) on May 9-13, 1973. It was followed by the 21<sup>st</sup> Ordinary Session of the Council of Ministers of the Organization for African Unity in Addis Ababa from May 17 to 23, 1973. Both meetings resulted on May 23, 1973, in the Addis Ababa Declaration on Cooperation, Development and Economic Independence. The Declaration identified the following objectives in the matter of infrastructure and transport.

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<sup>40</sup> See G.J. Naldi, *The Organization of African Unity: An Analysis of its role*. Mansell, London, 1989. Text of OAU Charter in 8 AYIL (2000), 481-523. L. B. Sohn, Ed. *Basic Documents of African Regional Organizations*, 4 cols, Oceana Publication, New York, 1972. M. Glele-Ahanhanzo, Introduction à l'Organisation de l'Unité africaine et aux organisations régionales africaines, LGDJ, Paris, 1986.

- (1) developing infrastructure as being the "fundamental basis of development"
- (2) as a priority, connecting the road networks, especially for access to the sea and to the benefit of landlocked countries
- (3) eliminating obstacles to traffic by simplifying Customs and police procedures and harmonizing legislations
- (4) establishing African consortia of shipping lines
- (5) taking joint positions in the matter of level of freight rates<sup>41</sup>
- (6) developing shippers councils
- (7) reinforcing cooperation between African airlines, exchanging traffic rights, developing joint action as regards selection of aircraft types, maintenance and training

A copy of the relevant **Sections (A 3 and B 1 and 2) of the Declaration** is attached as **Annex III-2** to this Review.

*c. Monrovia Declaration, 1979*

**136.** In the 33<sup>rd</sup> Ordinary Session of the OAU's Council of Ministers, in Monrovia on July 9-20, 1979, the Council issued a *Declaration of commitment*, the Monrovia Declaration on the main principles and measures to reach domestic self-sufficiency with a new international economic order as an objective. In the Declaration, the Council committed to implement completely the program of the United Nations Transport Decade in Africa<sup>42</sup>.

The text of the **Monrovia Declaration** is not attached as an Annex as the details above are sufficient for the purpose of this Review.

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<sup>41</sup> See A. Amjadi and A. Yeats, *Have transport costs contributed to the relative decline of sub-Saharan exports? Some preliminary empirical evidence*. World Bank Policy Research Working Paper No 1559, World Bank, Washington, D.C. 1995.

<sup>42</sup> The First Transport Decade was followed by a second one that was concluded circa 1990. Preparation of the Decade included identification of needs and was financed by UNDP. In fact, it does not appear that the identified programs and projects were specially selected for financing by the bilateral or multilateral donors and that the preparatory work had an actual impact on the selection of projects.

d. *Lagos Plan of Action, 1980*

**137.** The Lagos Plan of Action and Final Act was issued after the OAU Lagos meeting on April 28-29, 1980 and for the implementation of the resolutions formulated in the Monrovia Declaration<sup>43</sup>. It stated the will to establish before 2000 an African Common Market, followed by the establishment of an African Economic Community. Pending this, it assigned the objective to *reinforce effectively sectoral integration .... in transport*. See paragraph 195 and sq. for impact of Lagos Plan of Action on the creation of the Economic Community of Central African States (ECCAS).

The text of the **Lagos Plan of Action** and Final Act is not attached as the details above are sufficient for the purpose of this Review.

## C. AFRICAN ECONOMIC COMMUNITY (AEC)<sup>44</sup>

a. *General*

**138. The 1991 Treaty of Abuja.** The Treaty of Abuja (Nigeria), concluded on June 3, 1991, established the African Economic Community (the Community), the OAU being the Depository. There are 52 parties to the treaty, all African countries except Morocco, but including the country designated as Saharawui Democratic Republic. The Treaty establishes the Community as an integral part of OAU, with an Assembly of Heads of State and Government, a Council of

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<sup>43</sup> OAU – *Lagos Plan of Action for the Implementation of the Monrovia Strategy for Economic Development of Africa*, Lagos 1981. Resolution of the Lagos Plan of Action in UNDP *Economic cooperation and integration among developing countries: a review of recent developments in sub-regional, regional and interregional organizations and arrangements*, TD/B/C 7/51 (1988), Vol I,7.

<sup>44</sup> **BIBLIOGRAPHY** E. Berg, *Regionalism and Economic Integration in Sub-Saharan Africa*, United States Agency for International Development (USAID), Washington, D.C. 1988. D.A. De Rosa, *Regional Integration Arrangements. Static Economic Theory. Quantitative Findings and Policy Guidelines*, World Bank, Washington, D.C. 1998. E. Foroutan, *Regional Integration in Sub-Saharan Africa. Past Experience and Future Prospects*, in J. de Melo and A. Panagariya, Eds, *New Dimensions in Regional Integration*, Cambridge University Press, Cambridge, 1993. B. Thompson, *Legal Problems of Economic Integration in the West African Sub-Region*, 2 AJICL (1990), 85-102. Same author, *Economic integration efforts in Africa: a milestone, the Abuja Treaty*, 5 AJICL (1993), 743. J. Senghor, *The treaty establishing the African Economic Community, an introductory essay*, 1 AYIL (1993), 183-194. N. Luaba Lumu, *De la nature de la Communauté économique africaine*, 8 AJICL (1996) 51-66. S. Babalola Ajulo, *Temporal scope of ECOWAS and AEC Treaties, a Case for African economic integration*, 8 AJICL (1996) 111-138. A. Mahiou, *La Communauté économique africaine*, XXIX AFDI 1983, 798.

Ministers, a Pan African Parliament, an Economic and Social Council, a General Secretariat (of OAU) and specialized technical committees.

The text of the **1991 Abuja Treaty establishing the African Economic Community** is attached as **Annex III-3** to this Review. The Treaty cannot be traced in the treaties filed with the UN Secretariat. It does not appear in the UN Treaty Series, but is available in 30 ILM 1241 (1991) and 3 AJICL 792.

*b. Policy Objectives and Program*

**139.** The main objectives of the African Economic Community are:

- (1) To promote economic, social and cultural development as well as the integration of African economies;
- (2) To establish on a continental scale a framework for the development, mobilization and utilization of Africa's human and material resources;
- (3) To promote cooperation; and
- (4) To coordinate policies to foster the gradual establishment of the Community.

**140.** The main policies and measures in the area of trade and transport to be taken to attain these objectives shall be:

- (1) The strengthening of sub-regional<sup>45</sup> communities
- (2) The harmonization of policies
- (3) The promotion and strengthening of joint investment programs
- (4) The liberalization of inter regional trade by abolishing duties and non-tariff barriers
- (5) The adoption of a common trade policy and a common external tariff
- (6) The establishment of an African common market
- (7) The removal of obstacles to movement of persons, goods and services, with special measures for the landlocked countries

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<sup>45</sup> The treaty and other documents refer to the communities as "regional". However, since the Region in UN parlance is Africa, the communities are here designated as sub-regional.

*c. Timetable*

**141.** The timetable may be summarized as follows:

- (i) Within five years, the existing [sub]-regional economic communities shall be strengthened and additional [sub]-communities established where they do not exist yet.
- (ii) Within eight years, tariff and non-tariff barriers, Customs duties and internal taxes ought to be stabilized, and studies conducted for the gradual removal of tariff and non-tariff barriers.
- (iii) Within ten years, a free trade area should be established in each [sub] regional economic community.
- (iv) Within two years<sup>46</sup> tariff and non-tariff systems should be harmonized with a view to establish a Customs Union.
- (v) Within four years, the African Common Market should be established with harmonization of fiscal, financial and monetary policies.
- (vi) Within five years, consolidation of Common Market, regarding residence and movement of goods and services, setting up of a monetary union, an African central bank and an African currency, should take place.

According to Article 88 of the AEC Treaty, the continental Community shall be constituted through activities of five Regional Economic Communities (REC), North Africa, West Africa, Central Africa, East Africa and Southern Africa.

*d. Protocol on the relationship between the African Economic Community and Regional Economic Communities*

**142.** The Protocol on the relations between AEC and Regional Economic Communities (Protocol was concluded in Addis Ababa on February 25, 1998 between the OAU and (i) the Intergovernmental Authority for Development (IGAD); (ii) the Economic Community of West African States (ECOWAS); (iii) the Southern African Development Community (SADC); (iv) the Common Market for Eastern and Southern Africa (COMESA); and (v) the Arab Maghreb Union (AMU).

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<sup>46</sup> The date of the starting period is unclear. It may be either the original date or the date two years after the end of Phase III.

The text of the **Protocol on the relationship between the AEC and Regional Economic Communities** is attached as **Annex III-4** to this Review. The Protocol cannot be traced in the treaties filed with the UN Secretariat. It does not appear in the UN Treaty Series.

**(a) AEC's Policy – General**

**143.** Basically, the Protocol aims at implementing the provisions of Article 6 (iii) of the AEC Treaty by which activities of the African economic communities shall be coordinated and harmonized. Despite the statement (Article 5) that AEC's first priority is the development of sub-regional communities, it seems to reflect a concern that such communities tend to develop their own parochial policies and programs and lose sight of the ultimate objective of the establishment of an all-Africa common market. As a result, and as a reminder, it tends to reinforce AEC's position in its relations with the sub-regional communities. Significantly, the Protocol (Article 21) provides for Decisions by the AEC to be imposed to the sub-regional communities, with possible sanctions for unjustified delays in the integration process.

**144.** The Preamble to the Addis Ababa Protocol points out that one of AEC's first priorities is the reinforcement of sub-regional communities. Coordination and harmonization of policies, programs and activities with those of AEC are necessary for a progressive reinforcement and integration of the different communities. Sub-regional economic communities need to be integrated to an African common market (Article 3-b) and an institutional framework needs to be established for that purpose (Article 3-c).

**145.** As a result, two sets of objectives are identified, for AEC and for the communities. Objectives may be general or specific, immediate or long term. These objectives translate in commitments by the parties, stipulated in some details in the Protocol. Objectives are summarized as follows.

**(b) AEC Objectives and Commitments (*Articles 11 and 12*)**

**146.** These objectives are:

- (1) The identification of sub-regions without an economic community with a view to establish one;
- (2) The evaluation of sub-regional policies and activities of each sub-region to determine where they stand in relation to the integration objectives of the AEC Treaty and evaluation of financial or other assistance needed from AEC to reach these objectives; and
- (3) The follow-up of policies, programs and measures in relation to the integration objectives.



(c) **Sub-regional Communities Objectives and Commitments** (*Articles 13 and 14*)

147. Objectives are:

- (1) Liberalization, facilitation, etc. in view of the development of a free trade zone and a Customs Union;
- (2) Sectoral integration based on harmonized macroeconomic policies, free movement of capital, goods, services and persons, and cost reduction of border crossing; and
- (3) Adherence to the AEC Treaty timetables, but the process may be accelerated.

148. **Institutions.** To implement the coordination of policies, directives and programs, two Committees are established (Articles 6 to 10).

- (i) ***Coordination Committee.*** The Coordination Committee is chaired by AEC Secretary General, the heads of the sub-regional communities, the Executive Secretary of the United Nations Economic Commission for Africa (ECA), and the Chairman of the African Development Bank (ADB). It is in charge of coordinating policies (mainly transport) and of the follow-up of progress in each sub-regional community towards the integration objective of the AEC Treaty.
- (ii) ***Committee of Senior Secretariat Civil Servants.*** This Committee is composed of high level civil servants from the Secretariats of OAU, the sub-regional communities, the African Development Bank and the UN Economic Commission for Africa. It meets before the meetings of the Coordination Committee, prepares all documents to be approved by the Committee, conducts follow up and prepares reviews and budget documents.

*e. Transport*

149. In the matter of transport, Partner States agree:

- (1) To promote integration of infrastructure and develop transport coordination to increase productivity and efficiency;
- (2) To harmonize and standardize legislation and regulations;
- (3) To promote transport coordination, the development of local transport industries, local transport equipment industries and encourage the use of local material and human resources;
- (4) To reorganize and standardize railway networks in view of their interconnection in a Pan-African Network;

- (5) To restructure the road transport sector for the purpose of establishing inter-state links;
- (6) To harmonize maritime transport policies;
- (7) To harmonize air transport policies and flight schedules; and
- (8) In general, to coordinate and harmonize transport policies to eliminate non-physical barriers to free movement of goods, services and persons.

*f. African Maritime Transport Charter*

**150. General and references.** The Third Conference of African Ministers of Maritime Transport held in Addis Ababa from 13-15 December, 1993 adopted an African Charter on Maritime Transport to provide the framework for cooperation among African States and between African and non-African countries. In its Resolution CM/Res. 1520 (LX), the Council of Ministers of the OAU stressed the importance of and endorsed the Charter, which was issued on July 26, 1994. It is open for signature by Partner States at the General Secretariat of the OAU. The preamble of the Charter refers to the OAU Treaty, the UN Convention on a Code of Conduct for Liner Conferences and to the 1965 New York Convention relating to transit trade of land-locked States, although, as seen in paragraph 41, not all African States ratified the latter Convention.

The **African Maritime Transport Charter** is attached as **Annex III-5** to this Review. Whether the Charter can be considered as a treaty is uncertain. The instrument was apparently not filed with the UN Secretariat and does not appear in the Treaty Series.

**151. Objectives.** The objectives of the Charter are:

- (1) To define and implement harmonized shipping policies;
- (2) To encourage the development of African fleets and regional and sub-regional shipping lines; and
- (3) Generally to promote cooperation between the Partner States (Chapters I and II).

The Charter is an implementation and formulation of the policies set broadly in the Addis Ababa Declaration of 1973 (see para. 135), as regards maritime transport. It was to come into force thirty days after the deposit of the instruments of ratification by two thirds of the Partner States (Chapter IX) but a provisional entry in force was to take place after ratification by twenty Partner States. Whether it is in force or not remains to be established.

**152. Institutions (Chapter III).** In order to ensure effective coordination of maritime and port development policies, activities and programs of integration, the OAU establishes in its General Secretariat a Continental Unit for the coordination of activities of regional cooperation

organizations in shipping and port operations in Africa (UCOMAR). Similar Units are to be established in each sub-region. Furthermore, national shippers' councils are to be strengthened, together with port committees and other institutions, with a view to bring these agencies together in sub-regional specialized cooperation institutions. It will be seen in Chapter VII that this result was obtained, at least in legal terms, in West Africa.

**153. Cooperation in maritime transport (*Chapters IV and VII*).** Cooperation among African shipping lines is to be strengthened, with the development of consortia, pool agreements and joint services. Traffic should be reallocated in each sub-region and a harmonized system of cargo sharing developed. Multimodal transport joint ventures should be created within the framework of the UN Convention on International Multimodal Transport of Goods (see para. 123 and sq). A harmonized legal framework should promote and guarantee the stability of maritime transport joint ventures. Cooperation is also to be developed in the areas of ship repair; training and electronic data interchange (EDI). Member States should update and harmonize their legislation to make them compatible with one another.

**154. Cooperation in the area of assistance to shippers (*Chapter V*).** Shippers' organizations are to be encouraged. Effective consolidation of cargo at national, sub-national and regional level should be developed to obtain well-adapted shipping services at a lower cost. Facilitation and harmonization of Customs procedures should be developed.

**155. Ports (*Chapter VI*).** Port management should be autonomous. Harmonized port tariff and statistic systems on the UNCTAD models should be encouraged.

**156. Landlocked countries (*Chapter VII*).** Transit Partner States agree in the Charter to grant facilities and benefits to landlocked States and to apply non-discriminatory administrative, fiscal and Customs measures. They agree to coordinate their policies of acquisition and use of means of land, river, air and maritime transport, and port. They are encouraged to enter into bilateral and multilateral conventions on transit and to ratify those in force.

## D. TREATY ON THE HARMONIZATION OF BUSINESS LAW IN AFRICA (OHADA)<sup>47</sup>

### a. *General*

157. The Treaty on the harmonization of Business Law in Africa (*Organisation pour l'harmonisation du droit des affaires en Afrique* – OHADA) was concluded in Port Louis (Mauritius) on October 17, 1993. It entered into force on January 1, 1998 between Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo. Senegal is the depository. In addition, Madagascar aligned all its commercial code on OHADA standards.

158. All countries associated in the OHADA Treaty are civil law countries. Extension of OHADA beyond the range of civil law countries would have involved in depth review of the existing statutes and practices of the various common law States to arrive at a set of rules acceptable to all States of the region. In 2001, there were signs that Ghana, Ethiopia and Nigeria showed some interest in OHADA.

The text of the **OHADA Treaty** is attached to this Review as **Annex III-6**. The Treaty could not be traced in the instruments filed with the UN Secretariat and does not appear in the UN Treaty Series.

### b. *Institutions*

159. Enforcement of the Treaty is entrusted to a new institution, OHADA, the Organization for the Harmonization of Business Law in Africa:

- (1) The Council of Ministers composed of the Ministers in charge of justice and of those in charge of finance.

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<sup>47</sup> OHADA has been the subject of a considerable literature. A comprehensive bibliography was published as *Bibliographie des articles et ouvrages consacrés à l'OHADA* in 110 Penant, Paris, (2000) 232-240. M. Kirsch, *Historique de l'OHADA*, 108 Penant (1998) 129-135. L. Sawadogo, *Le traité relatif à l'harmonisation du droit des affaires en Afrique*, XL AFDI, (1994), 823-848. J.G. Gervais de Lafond, *Le traité relatif à l'harmonisation du droit des affaires en Afrique*, La Gazette du Palais, Paris, No 263, 11.1994, p. 26-27. PG. Pogoué, *Le droit des sociétés commerciales et du groupement d'intérêt économique*, Presses de l'Afrique, Yaoundé, 1998. P. Tiger, *Le droit des affaires en Afrique*, Presses universitaires de France (PUF), Paris, 1999. N. Morelle-Kombi, *L'avenir de l'OHADA*, LIV R.J.P-I.C. Paris, (2001), 243-251. See also OHADA Textbook published by Kagan Page, London, 2003.

- (2) A Permanent Secretariat, in charge of the *École régionale supérieure de la magistrature* for the training of future judges and magistrates.
- (3) A Joint Court of Justice and Arbitration composed of seven judges elected by the Ministers in Council from a list proposed by the Partner States (two candidates per State).

The Treaty stipulates that OHADA is an international institution and enjoys diplomatic immunity.

*c. Objectives and Content*

**160. Objectives.** The Treaty has for objectives:

- (1) To develop a framework of business law that is "*harmonized, simple, modern and well-adapted*" (at Preamble), so as to facilitate business and ensure the security of transactions; and
- (2) To develop arbitration as a standard technique of solving contractual issues and litigation.

**161. Provisions.** A summary of the provisions of the treaty follows.

- (a) **Common Rules.** Business law includes all rules regarding companies, debt, bankruptcy, arbitration, labor law, accounting, sales, transport and any other item the Council of Ministers would decide to include. All these matters should be covered by rules common to all parties.
- (b) **Uniform Acts.** Uniform Acts are prepared by the Secretariat in consultation with governments. Once adopted by the Council of Ministers, it belongs to each government to update its legislation to introduce the Uniform Acts, within ninety days of the adoption of the Acts. The Uniform Act supersedes any past, present or future domestic provision contrary to it. Interpretation of the Acts is within the jurisdiction of the Joint Court of Justice and Arbitration. To date, eight Uniform Acts were issued on commercial law (1997), on corporations and consortia (1997), on sureties (1997)<sup>48</sup>, on procedures for recovery and measures of execution (1998), on procedures for bankruptcy (1998), on arbitration (1999), on accounting standards (2000), and lastly on road carriage contract (2003), reviewed in more detail in the following paragraph.

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<sup>48</sup> See J.R. Gomez, *Analyse critique de l'avant-projet d'Acte uniforme organisant des sûretés dans les États membres de l'OHADA*, 107 *Penant*, (1997), No 825.

- (c) **Arbitration.** Arbitration is encouraged. The Arbiters are designated by the Joint Court of Justice and Arbitration, which does not conduct arbitration itself, but reviews arbitration decisions before they are issued. It does not, however, propose changes to the decision and only delivers an *exequatur* decision<sup>49</sup>.

*d. The Uniform Act on Road Transport of Goods*

**162.** The Uniform Act on Road Transport of Goods was issued on March 22, 2003. It is to be enforceable on January 1, 2004. The CMR was apparently used as a model (see para. 121), subject to some differences and additional provisions, due *inter alia* to the incorporation in the Uniform Act of rules resulting from judge-made law. Altogether, the Uniform Act<sup>50</sup> is more detailed and precise than CMR.

The text in French of the *Acte uniforme relatif aux contrats de transport par route* is attached to this Review as **Annex III-7**.

**163. Differences with CMR**

Main differences with CMR are:

- (1) No mention that the Uniform Act applies to carriage by governmental agencies or institutions (Article 1).
- (2) Definitions are given of main terminology; noticeable is the definition of a written document, which includes documents issued by e-mail (Article 2).
- (3) The carriage contract is in effect as soon as the parties agree on carriage against payment (Article 3).
- (4) Whether the consignment note is missing or irregular is without impact on the carriage contract (at Article 4). This is a judge made rule resulting from court decisions on the enforcement of CMR, which OHADA makes statutory.
- (5) Conditions regarding packing, description of cargo, hazardous cargos, etc. are stricter for the shipper (Article 7) compared to the wording of CMR.

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<sup>49</sup> OHADA's arbitration regime was the subject of a special issue of 110 *Penant*, (2000), 125-232.

<sup>50</sup> See 113 *Penant* No 845 (11.2003), K.M. Brou, *Le nouveau droit des contrats de transport de marchandises par route dans l'espace OHADA*, p. 394-446.

- (6) The liability regime is more favorable to the carrier (Article 17) as its due diligence is easier to demonstrate.

**164. Risks of conflicts of law.** As already mentioned, legal instruments, as they multiply, tend to overlap. The above Uniform Act provides an example. If, as stipulated in the OHADA convention, the Uniform Act is re-issued in each member state as domestic legislation, it will become law of the land. Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon, which are members of OHADA are also members of the Central African Customs and Economic Union (UDEAC), now replaced by the Central African Economic and Monetary Community (CEMAC). Still, Act No 3 issued by UDEAC in 1996 (see para. 178 and sq. *infra*) as legal framework for interstate road transport of general cargo is still in effect. OHADA has no authority to cancel it. If the UDEAC Act, issued by the UDEAC heads of State is to be rated as an international instrument (a point that needs clarification), it may well, in court, supersede OHADA's Uniform Acts since these will be issued as domestic legislation.

**165. Evaluation<sup>51</sup>.** Lawyers consider OHADA's impact to be quite positive. Not only a modern and market-oriented legal system is introduced, but also business operators, magistrates and the bar feel more secure. A body of law is being built, with an easy access thanks to a wide distribution, and inter-African francophone court jurisprudence is widely distributed through OHADA's website<sup>52</sup>. There are however some reservations on the following points:

- (a) A transfer of jurisdiction as regard commercial law (and apparently in a near future, as regard labor law) from parliaments and governments to the OHADA structure; and
- (b) OHADA's Uniform *Acts* are typically civil law legislation and may not be easy to adjust to the conditions in common law countries. OHADA, however, shows a direction that other sub-regional or regional ought to follow. Significantly, there are now requests for a unification of trading laws in Anglophone Africa, as differences in legislation and interpretation of the law are an obstacle to foreign trade<sup>53</sup>.

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<sup>51</sup> See X. Forneris, *Governance, development and globalization. Harmonizing commercial law in Africa: the OHADA*, University of Warwick, UK (2000).

<sup>52</sup> For jurisprudence in common law countries, see A. Milner, ed. *The African Law Reports, Commercial Law Series*, Oceana, New York, 3 vols/year.

<sup>53</sup> M. Ndulo, The need for the harmonization of trade laws in the Southern African Development Community, 3 AYIL (1996), 195-225.

## E. TREATY ESTABLISHING AN INTEGRATED ORGANIZATION FOR INSURANCE IN AFRICAN STATES<sup>54</sup>

166. The *Traité instituant une organisation intégrée de l'industrie des assurances dans les États africains* was concluded in Yaoundé (Cameroon) on July 10, 1992 (The Yaoundé Insurance Treaty). It came into effect on February 15, 1995. Signatories are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal and Togo. Comoros and Guinea Bissau, signatories of the OHADA Treaty, seem not to have acceded to the Yaoundé Treaty.

### a. Objectives and Formulation

167. The Yaoundé Insurance Treaty results from action by the Interafrican Conference of Insurance Markets (*Conférence interafricaine des marchés d'assurance – CIMA*), which is composed of officials and insurers from sub-Saharan civil law countries. The objectives of the Yaoundé Insurance Treaty are formulated in the preamble and in Article 1.

- (a) The Preamble sets forth the objective to establish African unity by harmonizing national insurance markets, thus continuing the efforts started with the cooperation conventions on the regulation of insurance companies and operations, concluded in Paris on July 27, 1962 and November 27, 1973.
- (b) Article 1 sets forth the following objectives:
  - (i) reinforcing national markets through a better use of resources;
  - (ii) transforming local (national) markets in a vast inter-regional market with common rules and regulation;
  - (iii) continuing the nationalization of local markets, with local reinvestments of reserves and provisions of insurance companies;
  - (iv) harmonizing and unifying of laws and regulations; and
  - (v) improving protection of clients and victims of insurance companies.

The Insurance Code (known as Code CIMA) is annexed to the Treaty. According to its Article 3, *it defines the one and only insurance legislation.*

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<sup>54</sup> See R. Dossou Yovo, *La nouvelle réglementation des opérations d'assurance dans les pays africains de la zone franc : un pas vers l'intégration économique régionale*, IL RJP-IC (1995) 132-146.



The text in French of the Yaoundé *Traité instituant une organisation intégrée de l'industrie des assurances dans les États africains* is attached as **Annex III-8** to this Review. The treaty was apparently not filed with the UN Secretariat and is not listed in the UN Treaty Series.

*b. Institutions*

**168.** The Yaoundé Treaty institutions deserve a short description hereinafter. They comprise (i) the Council of Ministers; (ii) the Regional Regulatory Commission; and (iii) the General Secretariat.

**(Articles 6 to 15)** The **Council of Ministers** is formed by the Ministers in charge of insurance in each contracting State. It meets twice a year. It is responsible for reaching the objectives of the treaty. It defines the insurance policy and controls the implementation of the joint insurance legislation in member States.

**(Articles 16 to 30)** The **Regional Regulatory Commission** is in charge of regulating insurance companies. It ensures overall control and contributes to the organization of local insurance markets. It formulates an opinion on the licensing of insurance companies, the license being delivered – or denied – by the Minister in accordance with the Commission's opinion. When the Commission is aware of breaches of insurance regulations, it may take sanctions up to suspension or revocation of the managers of an insurance company, cancellation of license, and transfer of portfolio to another insurer.

**(Articles 31 to 49)** The **General Secretary** prepares, conducts and supervises the implementation of decisions of the Council of Ministers. It may conduct inquiries in insurance companies. It produces an annual Review. The secretary is appointed by the Council for five years and performs his duties in full independence.

*c. Legal Arrangements for Implementation*

**169.** For exercising its jurisdiction, the Conference issues regulations and decisions; it also formulates recommendations and opinions. All these need to be issued with their motives.

**(Articles 39 to 43)** Regulations, which formulate general rules and decisions applying to individual cases, have a direct and imperative effect. Recommendations and opinions have no direct effect.

**(Articles 44 to 47)** Implementation of regulations and decisions is by governments, which take the necessary measures; they abstain from any measure that may be an obstacle to implementation. The Council may notify a Government who has not performed in compliance with the treaty of the need to take the necessary measures for the performance of its duties. Local

courts must enforce the provisions of the treaty, whatever provisions of municipal law are contrary to them and future legislation must be in line with the treaty.

*(Articles 48 and 49)* The validity of regulations, decisions and other acts issued or decided by the Conference can be disputed only in front of the Council and within two months after issuance or notification. The Council rules on the interpretation of the treaty and of municipal court decisions that may be an obstacle to the uniform enforcement of the law of the Conference. Interpretation by the Council has force of law for all agencies and courts.

The provisions of Articles 48 and 49 may be source of problems at the constitutional level, for they clearly impinge on judicial independence.

*d. Financial and Other Provisions*

**170.** *(Articles 50 to 57)* The Council is financed by contributions of member States coming from taxes on insurance companies and other fees and levies.

*(Articles 58 to 68)* The Conference is incorporated and, along with its institutions, it benefits from all immunities granted to international organizations<sup>55</sup>.

*e. The CIMA Code*

**171. History**<sup>56</sup>. The Yaoundé Treaty aimed at replacing the French July 13, 1930 Act on Insurance passed to discipline the insurance industry and eliminate the abuses from insurance companies in their relations with clients before insurance was regulated. The 1930 Act was generally enforceable in Francophone Africa before independence. The Act was modified over the years in France, but African statutes did not follow suit and the system became obsolete. The Yaoundé Treaty therefore updates the provisions of the 1930 Act with the same objective of establishing and maintaining a fair and sound insurance market.

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<sup>55</sup> This of course is valid only between parties to the treaty. There is no obligation whatsoever for other States or institutions (other African States, European States, etc.).

<sup>56</sup> See V.E, Bokalli, *Le nouveau droit du contrat d'assurance des États africains francophones*, 10 AJICL (1996) 423-445, (1998) 423 and sq.

**172. Provisions of the Code.** Main provisions are as follows:

- (a) The Code is applicable to road transport but not to maritime or river transport. Recent information indicates that it is not yet applicable to rail transport, despite requests to that effect from African railway companies.
- (b) The Code is imperative. Based on the modified 1930 French Act, (i) it reinforces the insurer's right to sincere information from the policy holder on risks, especially (Article 12), the policy holder must answer to precise questions from the insurers as formulated in standard questionnaires; (ii) it reinforces the policy holder's right to information on tariffs and condition, prohibiting "fine prints" contracts (Article 7); and (iii) it lists the clauses that ought to be in any case stipulated in the insurance contract (Article 8) such as delays in payment of damages due to the policy holder.

#### IV. SUB-REGIONAL INSTRUMENTS – CENTRAL AFRICA

##### A. GENERAL

173. **A private law approach.** Central Africa made considerable efforts for the unification of commercial and transport law. Its Conventions are of special interest as they codify the practice applicable to the relations between shippers and carriers, that are private (commercial) law relations, while many of other conventions are rather for the public administration of transport corridors, police, Customs procedures, etc., all matters of public law.

174. **Inventory of sub-regional instruments.** In Central Africa, the following main sub-regional instruments are enforceable:

- (1) The **Treaty of Brazzaville** dated December 8, 1964, for the establishment of the *Union douanière et économique de l'Afrique centrale* – UDEAC (**Central African Customs and Economic Union**), signed by Cameroon, Chad, Central African Republic, Congo and Gabon<sup>57</sup>. The UDEAC succeeded the *Union douanière équatoriale* (UDE) created in 1959, which shall not be reviewed here as it is an outdated and obsolete arrangement. UDEAC was replaced by CEMAC in 1998.
- (2) The **Treaty of N'djamena**, dated March 16, 1994, for the establishment of the *Communauté économique et monétaire de l'Afrique centrale* – CEMAC (**Central Africa Economic and Monetary Community**), between the same States and Equatorial Guinea, and to succeed UDEAC.
- (3) The **Treaty of Libreville** for the establishment of the *Communauté économique des États de l'Afrique centrale* – CEEAC (**Economic Community of Central African States** – ECCAS) concluded in Libreville on October 19, 1983. The Community has a broader reach than UDEAC and includes, in addition to the UDEAC and CEMAC partner States, Angola, Burundi, Democratic Republic of Congo, Rwanda, and Sao Tome.
- (4) The **Treaty of Gisenyi** for the establishment of the *Communauté économique des Pays des Grands Lacs* – CEPGL (**Economic Community of the Great Lakes Countries**) concluded on September 20, 1976 by Burundi, Rwanda and Zaire

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<sup>57</sup> In April 1968, the Central African Republic and Chad left UDEAC for the creation, with Zaire, of the *Union des États de l'Afrique centrale* - Central African States Union. In December 1968, the Central African Republic returned to UDEAC; Chad also returned in 1984. See *Yearbook of International Organizations*, 1995/1996, vol.1, p. 1473.

(now Democratic Republic of Congo). Central African States are also parties to the **Maritime Transport Charter for West and Central Africa**, a subject matter that is dealt with in the Section on West Africa (see para. 414 and sq.).

- (5) The Brazzaville Agreement establishing a uniform regime applicable to rivers and creating the **International Commission for the Congo-Oubangui-Sangha River Basin** (ICCOB). The Agreement was signed on November 6, 1999 and ratified or accepted by the States parties to it, that is Cameroon, the Central African Republic, Congo and the Democratic Republic of Congo, from March to July 2003.

**Table 1**

**Membership of sub-regional organizations**

**Central Africa**

|               | UDEAC<br>& CEMAC | ECCAS | CEPGL | OHADA | ICCOB |
|---------------|------------------|-------|-------|-------|-------|
| Angola        |                  | x     |       |       |       |
| Burundi       |                  | x     | x     |       |       |
| Cameroon      | x                | x     |       | x     | x     |
| Central A.R   | x                | x     |       | x     | x     |
| Chad          | x                | x     |       | x     |       |
| Congo         | x                | x     |       | x     | x     |
| DRC           |                  | x     | x     |       | x     |
| Equat. Guinea | x                | x     |       | x     |       |
| Gabon         | x                | x     |       | x     |       |
| Rwanda        |                  | x     | x     |       |       |
| Sao Tome      |                  | x     |       |       |       |

## B. UNION DOUANIÈRE ET ÉCONOMIQUE DE L'AFRIQUE CENTRALE (UDEAC) – CENTRAL AFRICAN CUSTOMS AND ECONOMIC UNION<sup>58</sup>

### a. *General*<sup>59</sup>

**175. Membership.** The 1964 (December 8) Treaty of Brazzaville was signed by Cameroon, Central African Republic, Congo, Gabon and Chad. Equatorial Guinea joined in 1983.

The text in French of the **UDEAC Treaty of Brazzaville** is attached as **Annex IV-1** to this Review. The Treaty does not appear to have been filed with the UN Secretariat and could not be located in the UN Treaty Series.

**176. Institutions.** The Treaty of Brazzaville established:

- (1) A Council of Heads of States, supreme agency of the institution. Decisions of the Heads of State need to be unanimous. The Council determines and coordinates the Customs and economic policies of the partner States (Article 8).
- (2) An executive Committee composed of two representatives per member State; one is the Minister of Finance and the other the Minister in charge of economic development or their representatives.
- (3) A General Secretariat.

As stated above, UDEAC was replaced in 1994 by CEMAC but a number of UDEAC covenants, agreements and regulations are still in place under their original UDEAC qualification.

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<sup>58</sup> **BIBLIOGRAPHY** D. Gbetnkom, *La dynamique de l'intégration économique régionale par le marché, l'exemple de l'UDEAC*, Thèse 3<sup>e</sup> cycle, Université de Yaoundé, 11.1995.

<sup>59</sup> **BIBLIOGRAPHY** S. Delaouane-Gherari and H. Gherari, *Les organisations régionales africaines*, La Documentation française, Paris, 1981, bibliographie p. 311-313. M.L. Marasinghe, *A review of regional economic integration in Africa with particular reference to Equatorial Africa*, 33 *International and Comparative Law Quarterly*, London, (1.1984) 39-56. L.K. Mytelka, *International Capital and Regional Integration in the UDEAC*, International Development Research Center, Ottawa, 1977. P. Robson, *L'UDEAC et la Communauté d'Afrique orientale, comparaisons et contraintes*, Études et Statistiques, Banque centrale des États de l'Afrique équatoriale et centrale, Brazzaville, No 131, 2.1968, p. 121-143. B. Vinay, *Coopération intra-africaine et intégration : l'expérience de l'UDEAC*, Recueil Penant, Paris, vol. 81, No 733, 1971, p. 313-331. M. Yondo, *Dimension nationale et développement économique, théorie et application dans l'UDEAC*, L.G.D.J. Paris, 1970.

*b. Infrastructure and Transport*

**177. Provisions.** In the matter of infrastructure and transport, partner States agreed

- (i) to foster integration of infrastructure;
- (ii) to harmonize and standardize facilities and equipment; and
- (iii) to promote transport coordination.

To reach these objectives the partner States will communicate their transport development projects to the General Secretariat as well as their documentation and regulations. The Secretariat shall prepare the transport plan and transport projects to be submitted for approval to the Executive Committee and to the Council.

While the 2001 CEMAC Merchant Shipping Code has now replaced the 1994 UDEAC Merchant Shipping Code, two major UDEAC sets of rules are still in effect, the Convention on road transport of general cargo and the Convention on multi-modal cargo transport. They are reviewed herein below.

*c. Inter-State Convention on Road Transport of General Cargo*

**178. General.** On July 5, 1996, UDEAC Council of Heads of States agreed on the legal framework of road transport of general cargo in the sub-region as Act 4/96-UDEAC-611-CE-31. This gave birth to the *Convention inter-États des transports routiers de marchandises diverses* (CIETRM) (The GC Road Convention). The preamble of the GC Road Convention insists on the desire to set forth the format and legal regime of the transportation documents and the carriers' liability regime. This wording is that of the *Convention relative au contrat de transport international de marchandises par route* (CMR), concluded in Geneva on May 12, 1956<sup>60</sup> (see para 120 and sq.) and based on the 1890 (modified) Bern Convention on international railway transport. The plans of the GC Convention and of the Geneva Convention are the same. However, the clauses in the CMR Convention that deal with multi-modal transport are missing from the GC Convention since, as reported below, UDEAC Heads of States agreed on a separate convention on such transport.

The French text of this *Convention inter-États des transports routiers de marchandises* is attached as **Annex IV-2** to this Review.

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<sup>60</sup>. The transcript from the CMR Convention to the GC Convention is not without editing errors. Article 51 refers to Article 39, which is irrelevant. Reference should be to Article 41. At the end of the second paragraph of Article 17, the word "*obéir*" should be replaced by the word "*obvier*".

**179. Salient points.** The main salient points of the **Interstate Convention on road transport of general cargo** are as follows herein below. This convention does not appear to have been filed with the UN Secretariat and cannot be traced in the UN Treaty Series.

- (1) **Applicability.** There is no statement in the Convention that it is but supplementary. Apparently, the parties to the transport contract are free to execute a contract different from that resulting from the Convention, or to use some of the clauses of the Convention and discard others. It has been ruled by a French appeal court that recourse to the CMR or part of it was at the choice and will of the parties "*whom the law leaves free to stipulate the clauses of their contractual relations in the matter of transport*"<sup>61</sup>. However, an important restriction derives from Article 51, which states that any stipulation derogatory to the provisions of the GC Convention would be void. Again, the wording is that of Article 41 of the CMR Convention.
- (2) **(Chapter I) General.** The GC Convention is applicable to all general cargo international transport involving a payment, when either the country of departure or the country where delivery takes place are parties to the Convention, and this whatever the nationality or domicile of the carrier. The Convention is also applicable when transport is conducted by government or international governmental or non-governmental organizations.
- (3) **(Chapter II) Waybill.** Transport takes place under a waybill in four copies (three in CMR), as evidence of the transport contract. Whether the absence of a waybill makes the contract void or whether it makes the Convention not applicable is unclear. The waybill format is detailed in the GC Convention and is compulsory.
- (4) **(Chapter III) Liability.** The carrier is liable except in "*circumstances that it could not avoid and to the consequences of which it could not escape*", that is, basically, *force majeure*<sup>62</sup>. Cases of exoneration of carrier's liability are enumerated (Article 17) and the onus of proof is on the carrier (Article 20).
- (5) **(Chapter IV) Claims and litigation.** There are statutes of limitation for delays in the matter of reservations, claims and litigation. In case of arbitration, arbitrators are bound by the stipulations of the Convention.

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<sup>61</sup> Bordeaux Ct of A. Dec 21, 1994, Bulletin des transports internationaux, Paris, 1995.74.

<sup>62</sup> European case law is strict on the interpretation of *force majeure*.



d. *Inter-State Convention on Interstate Multi-modal Cargo Transport*

**180. General.** International multimodal transport (see para. 123 and sq.) takes place when, under the coverage of a single document, goods are transported from one country to another through different modes of transport. On July 5, 1996, UDEAC Council of Heads of States agreed on the legal framework of multimodal transport in the sub-region under the name of the *Convention inter-États de transport multimodal de marchandises en UDEAC*. (Act 4/96-UDEAC-611-CE-31). The Geneva Convention on international multimodal transport (May 24, 1980) did not come into force since it was not ratified by a sufficient number of governments (see para. 127). UDEAC's initiative filled a gap in international law and provides its Central Africa member countries with a clear and undisputable framework for multimodal transport operations, the provisions of which were in fact borrowed from the non-ratified international convention.

**181. TIPAC procedures.** Besides, as will be seen below (para. 182[5]), the Multimodal Convention is associated to the enforcement of the *Transport Inter-États des pays d'Afrique centrale* (TIPAC) regime. The TIPAC regime is a Customs regime for international transit, with the objectives of (i) simplifying Customs procedures at origin and destination as well as during transit, and (ii) to assign liability for Customs duties to the carrier involved in a specific transit operation. Transit is on a fixed itinerary. Cargo in transit is covered by a TIPAC booklet describing the freight transported and used for Customs and other controls. Regional Guarantee Fund issues the booklets, provides the necessary financial resources for guaranteeing payment of Customs dues and settles any litigation.

The text in French of the *Convention inter-États de transport multimodal en UDEAC* is attached to this Review as **Annex IV-3**. This convention does not appear to have been filed with the UN Secretariat and cannot be traced in the UN Treaty Series.

**182. Provisions.** The content of the UDEAC MM Convention is as follows herein below.

- (1) **(Preamble).** The Preamble states that the partner States consider that "*liability of the multimodal carrier is based on a presumption of faulty act and negligence*". In fact, the liability regime of the multimodal carrier is here copied on the regime applicable to the sea carrier as per the Hamburg Rules in force since 1992 among the limited number of States that ratified them (see para. 82 *supra*). In case of damage, the burden of proof falls on the carrier.
- (2) **(Articles 2 to 4 and 29).** Recourse to the UDEAC MM Convention is compulsory; it applies automatically, without restriction, when acceptance and<sup>63</sup> delivery of

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<sup>63</sup> As it results from the wording of Article 2, there is still a doubt whether this is "and" or "or".

cargo takes place in one of the Party States. There is no room for a clause discharging all or part of the carrier's liability. The UDEAC MM Convention, at Article 29 is worded as Article 29 of the French 1966 Act, specifically voiding any clause having directly or indirectly as an objective to free the carrier from its responsibility or to place the onus of evidence on any other party than the carrier. This is a paramount clause. Still, domestic law remains applicable concerning other transport regulations, such as safety, licensing, security, insurance, etc.

- (3) **(Chapter II).** A multimodal waybill (*document de transport multimodal* or DTM) is signed by the carrier and may be negotiable. The format and content of the waybill shall be in accordance with the provisions of the Convention. The DTM is transferable. It makes specific mention that any clause contrary to the stipulations of the UDEAC Convention is void (Article 29).
- (4) **(Chapter III).** The carrier is presumed liable for damages and/or delays in delivery unless it gives evidence that itself, its employees and agents "*took all the necessary measures that could reasonably be required for the avoidance of the [damage or delay] and its consequences*" (Article. 16). This is an obligation of due diligence. A ceiling of liability is set and such ceiling is applicable in misfeasance or non-feasance liability (Article 21).
- (5) **(Annex).** The Annex to the UDEAC MM Convention deals with the enforcement of the UDEAC Inter-State Transit Regime (*Transit inter-États des pays d'Afrique centrale* – TIPAC) to multimodal transport in the sub-region. Provisions are standard:
  - (i) no physical check of cargo unless necessary
  - (ii) no special procedure except standard TIPAC procedures
  - (iii) no import and export Customs dues
  - (iv) dues may be charges or fees for financing health and security services but charges and fees should be limited to the amount necessary to cover the costs of such services

*e. Inter-State Regulation on Licensing of Road Carriers*

**183. General.** On July 5, 1996, the UDEAC Council of Heads of States agreed on the legal framework for the licensing of road carriers in the sub-region as Act 5/96-UDEAC-611-CE-31. All road carriers, either for transport for own account or for professional transport, need to be licensed and to adhere to the third party liability insurance guarantee system (TIPAC). Licens-

ing is by the Ministries of Transport of each member State for a duration of five years and for a specific road network or specific itineraries.

The text in French of the *Conditions d'exercice de la profession de transporteur routier* (Licensing Conditions) is attached to this Review as **Annex IV-4**.

## C. COMMUNAUTÉ ÉCONOMIQUE ET MONÉTAIRE DE L'AFRIQUE CENTRALE (CEMAC) CENTRAL AFRICAN ECONOMIC AND MONETARY COMMUNITY

### a. *General*<sup>64</sup>

184. CEMAC instruments are:

- (1) The *Traité instituant la Communauté économique et monétaire de l'Afrique centrale*, (CEMAC) concluded in N'djamena (Chad) on February 6, 1998, with an addition relating to the institutional and legal system of the *Communauté*
- (2) The *Convention régissant l'Union économique de l'Afrique centrale* (UEAC)
- (3) The *Convention régissant l'Union monétaire de l'Afrique centrale* (UMAC)
- (4) The *Convention régissant la Cour de justice de la CEMAC*

The text in French of the *Traité instituant la Communauté économique et monétaire d'Afrique centrale* (CEMAC) is attached to this Review as **Annex IV-5**. This treaty does not appear to have been filed with the UN Secretariat and cannot be traced in the UN Treaty Series.

185. **Policy.** While UDEAC was based on cooperation between partner States, CEMAC has an approach of integration. Main policy objectives, not formulated in the instruments but only in separate declarations of intent, are to:

- (i) Reinforce the competitiveness of economic and financial activities of the countries of the Community by harmonizing the legal framework (investment code, competition, regulation, etc.);

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<sup>64</sup> **BIBLIOGRAPHY** D. Avom, *Le traité de la CEMAC: nouveau départ pour le processus d'intégration en Afrique centrale*, LII RJP-IC, (1999) No 2, 158-179. C.K. Tchepnga, *Le droit public camerounais à l'épreuve du droit communautaire de l'UDEAC/CEMAC. L'exemple du contrôle de la profession d'expert-comptable*. 11 AJICL (1999), p. 474. J. Noaungue Kobilá and L. Donpack, *La CEMAC, à la recherche d'une nouvelle dynamique de l'intégration en Afrique centrale*, 6 AYIL (1998) 64-106.

- (ii) Coordinate economic and budgetary policies to ensure coherence with the common monetary policy;
- (iii) Establish a common market, with total freedom of establishment, immigration, free movements of goods and services;
- (iv) Coordinate sectoral policies, including trade and transport policies; and
- (v) Promote freedom of movement, residence and establishment.

**186. Institutions.** Compared to UDEAC, the number of Community institutions has considerably increased:

- (a) There are eight executive branch institutions: the Conference of Heads of State, the Council of Ministers, the Ministerial Council, the Executive Secretariat, the Inter-State Committee, the Central Bank, the Banking Commission and the Development Financing Institution. In addition, the treaty establishes the Central African States Development Bank.
- (b) Legislative and judicial institutions are the Community Parliament and the Supreme Court, which includes the *Cour des comptes*.

**187. CEMAC Codes and Regulations.** Rapidly after its creation, CEMAC issued new regulations and codes to replace those issued by UDEAC. These were the River Navigation Code (*Code de la navigation intérieure*) and the Hazardous Cargo Regulations (*Règlement de transport des marchandises dangereuses*) in 1999, the Civil Aviation Code (*Code de l'aviation civile*) in 2000<sup>65</sup>, the Commercial Shipping Code (*Code communautaire de la marine marchande*), and the Road Traffic Code. (*Code de la route*) in 2001. To date, the two UDEAC conventions on road transport and intermodal transport have remained in effect (see para. 178 and 181). Except for the civil aviation instruments, the CEMAC Codes are reviewed herein below.

#### *b. River Navigation Code*

**188.** The River Navigation Code was issued on December 17, 1999 as a CEMAC/RDC (Democratic Republic of Congo) Regulation 14/99/CEMAC-036-CM-03. It is mainly oriented towards the safety issues of river navigation, with some approaches to management issues. Ten titles cover rules applicable to channels and rivers, riverboats, health police, the environment,

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<sup>65</sup> An Inter-States Air Transport Agreement (*Accord relatif au transport aérien entre les États membres de la CEMAC*) was signed on August 18, 1999. Attached to it are the procedures for follow-up of CEMAC's air transport policy (*Mécanisme de gestion et de contrôle de la mise en œuvre de la politique des transports aériens dans la CEMAC*).

captains and crews. 31 Annexes give details on markings, signals, forms, etc. Pending the issuance of a CEMAC/RDC set of rules on transport operations in river shipping, one annex deals with the limitations of liability of river carriers there are in the main text provisions on sureties and mortgages, but no provision regarding carriage contract intermodal or multimodal transport and other commercial aspects of river transport. There is no provision either on the international regime of rivers in CEMAC, and of the respective rights and duties of member States.

The text in French of the *Code de la navigation intérieure* (CEMAC) is attached as **Annex IV-6**.

*c. Road Transport of Hazardous Cargo*

**189. Hazardous Cargo Regulations.** On June 25, 1999, CEMAC Council of Ministers issued a Regulation for carriage of hazardous cargo (*Transport des marchandises dangereuses*) enforceable in all States of the Community.

The text in French of the **Réglementation du transport par route des marchandises dangereuses** (Malabo 1999) is attached to this Review as **Annex IV-7**.

*d. The Merchant Shipping Code (Code communautaire de la marine marchande)*

**190. General.** The CEMAC Merchant Shipping Code was issued in Bangui (Central African Republic) on August 3, 2001 as Regulation 03/01 UEAC 088-CM-06. It replaced UDEAC Merchant Shipping Code issued as Act No 6/94-UDEAC-594-CE-30 on December 22, 1994. The Code rules on:

- (1) Applicability of the law to vessels
- (2) Ship safety, classification, salvage and wrecks
- (3) Marine environment and pollution
- (4) Seamen
- (5) Maritime transport, including charter parties, bills of lading and other carriage contracts; and Economic and Economic
- (6) Shipping and forwarding agents, consignees of cargo, pilots and stevedoring companies
- (7) Court and other procedures related to shipping

**191. References to international conventions.** The Code makes reference to and follows the rules set forth by international conventions, even when CEMAC member States did not ratify them. Vessels documentation to be handed over at arrival in port (Art. 10) is in accordance

with the 1965 London Convention (see para. 76 *supra*) with specific reference to it. Landlocked States may be members of boards of directors for ports in coastal states (Art. 14), in line with the 1965 New York Convention (see para. 35 *supra*). They may practice fishing in the exclusive economic zone (Art. 18) in line and with reference to the Montego Bay 1982 Convention on the Law of the Sea (see para. 35 *supra*) The liability regime of ship owners (Art. 100 to 113) is similar and makes reference to the 1976 London Convention on maritime claims. The regime of sureties on vessels is that of the 1999 Convention, which may be regretted, since the limitation of cases when sureties may be exercised is disputable and has been disputed. Lastly, the legal regime of the sea carriage contract is that of the 1978 Hamburg Rules (see para. 82 *supra*). According to Article 396 of the Code, these rules are applicable to any carriage by sea to and from CEMAC countries. Things may be not that simple and conflicts of laws are likely. The Code, incidentally, does not state that the provision is paramount and compulsory (*d'ordre public*) and whether parties to the sea carriage contract may agree on a different liability regime. Altogether, the Code appears to reflect the views of the International Maritime Organization (IMO) on points that are still very much in dispute in the maritime community, and still open to discussion or which may be left to contract provisions rather than be frozen in statutes.

**192. Maritime Transport Policy.** The approach to shipping is regulatory rather than market-oriented. Article 375 sets forth that the overall organization of maritime transport and measures of regional cooperation are defined by national authorities within the framework of the general policy adopted by the regional and sub-regional authorities. Article 376 states that *maritime traffic is distributed in accordance with the 1974 Geneva Code of Conduct of maritime Conferences and that freight rates are negotiated according to the provisions of such Code*. The UNCTAD Code of Conferences is applicable to all traffic rights of the member countries (Art. 312) (see Annex VII-39). But the provisions on reserved traffic are less constraining than those of the UDEAC Code. The latter (Art. 370 to 373 of UDEAC Code) reserved traffic between UDEAC ports, towage in UDEAC waters, transit, and interline cargo to UDEAC flag vessels. The CEMAC Code (Art. 5) simply reserves to CEMAC flag vessels (i) domestic coastal shipping; and (ii) sub-regional coastal shipping. But what is sub-regional remains undefined; whether it extends beyond frontiers of CEMAC is uncertain.

**193. Enforceability.** The Code needed not to be filed in the UN Treaty Series since it is issued as a regulation and not as a negotiated instrument. Still, it results from a negotiation and probably impinges on international law. It may raise issues of interpretation and enforceability. For example, the provision in Article 396 that rules issued by the Code, and regarding carriage contracts, shall be applicable to all cargoes to and from CEMA member States, may conflict with similar provisions in foreign laws. Whether the Code is suppletory or imperative on this important point is uncertain.

The text in French of its relevant chapters (*Organisation des transports maritimes*) is attached to this Review, as **Annex IV-8**.

e. *The Road Traffic Code (Code communautaire de la route)*

**194.** The Road Traffic Code was issued in Bangui as regulation 04/01 UEAC 089-CM-06 on August 2, 2001. Enforceable in all CEMAC States, it supersedes any earlier domestic provision particularly the UDEAC 1989 Road Traffic Code. Regulations apply to:

- 1) Driving permits
- 2) Weight, dimensions and other vehicle characteristics
- 3) Traffic
- 4) Signals

Nine Annexes are attached, with details of marks and signals.

The *Code communautaire de la route* is attached to this Review, as **Annex IV-9**.

## D. ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES (ECCAS)

a. *General*

**195. The ECCAS Treaty.** The Economic Community of Central African States – ECCAS was created by the Libreville (Gabon) Treaty on October 18, 1983. Members of the Community are Burundi, Cameroon, Chad, Congo, the Democratic Republic of Congo, Gabon, Equatorial Guinea, Central African Republic, Rwanda and Sao Tome. Angola has an observer status. Burundi and Rwanda are also members of the Common Market for Eastern and Southern Africa (COMESA, see below in the East and Southern Africa Section). Gabon is the depository. The Preamble of the Convention makes express reference to the OAU Charter, to the 1973 Declaration on Cooperation and Development Independence (see para. 135), to the Monrovia Declaration (see para. 136), and to the Lagos Plan of Action and Final Act (see para. 137). Chapter IV (Trade Liberalization), Chapter V (Residence) and Chapter IX (Infrastructure and Transport) are reviewed herein after. The wording of the ECCAS Treaty borrows a lot from the French text of the OAU Charter (see para. 134), frequently verbatim.

**196. Annexes.** The Treaty includes, as Annexes, nine protocols, which are integral part of the treaty and are dealing with:

- (1) (Annex I) Rules of origin for products to be treated between partner States
- (2) (Annex II) Non-tariff hindrance to trade
- (3) (Annex III) Export of goods within the Community
- (4) (Annex IV) Transit and transit facilities

- (5) (Annex V) Customs cooperation between partner States
- (6) (Annex VI) Compensation Fund for loss of revenue
- (7) (Annex VII) Freedom of movement
- (8) (Annex VIII) Clearing House
- (9) (Annex IX) Cooperation in agricultural development

The text of the **Libreville Treaty on the Economic Community of Central African States** is attached to this Review as **Annex IV-10**, together with the Annexes, except Annexes IV and VII that are reviewed in Sub-section herein below and are attached as separate Annexes. The Libreville Treaty does not appear to have been filed with the UN Secretariat. It cannot be traced in the UN Treaty Series but is reproduced in 23 ILM 945 (1984).

*b. Trade Liberalization*

**197. Phasing of Customs Union according to the ECCAS Treaty** (Articles 27 and sq.). The objective is a step-by-step creation of a Customs Union between the partner States, in three basic stages:

- (i) **(Phase 1)** Freeze of categories and levels of Customs duties, with a joint review of Customs issues by the ECCAS Secretariat.
- (ii) **(Phase 2)** Phased reduction and elimination of Customs duties, elimination of quotas, restrictions and other obstacle to inter-state commerce.
- (iii) **(Phase 3)** Setting up a Community Customs tariff and elaboration of Community Customs list of goods, procedures and regulations.

**198. Fairness in trade** (*Articles 32 and sq.*). Partner States agree that domestic taxes (e.g. value added taxes or VAT) will, in a member State, be the same for goods produced locally and goods produced in other partner States. No discrimination, direct or indirect, will be acceptable. However, if for reason of dumping or any other reason, there is a serious imbalance in a member State in its trade with another member State, the Council of Ministers of the Community will be informed and corrective measures proposed to the Conference of Heads of State. If balance of payment problems result, and after the member State experiencing such problems took all the necessary corrective measures, quantitative restrictions may be imposed, with prompt report to the Council of Ministers. Customs regulations and procedures are to be harmonized.

**199. Most favored nation treatment** (*Article 35*). Partner States should grant one another, in intra-Community trade, the most favored nation treatment. In no case shall tariff concessions



granted to a non-member State be more favorable than those applicable pursuant to the ECCAS Treaty.

**200. Transit Policy (Article 36).** Freedom of transit through their territories is granted to all partner States. The matter is reviewed in sub-section **e** below.

*c. Freedom of Movement and Right of Establishment*

**201. (Article 40 and Annex VII).** According to this Annex to the Libreville Treaty, Nationals of the partner States are considered as citizens of the Community. Partner States agree to simplify procedures and to facilitate their residence inside the Community. Provisions on the subject matter are developed in Annex VII to the Treaty (*Protocol relating to the freedom of movement and right of establishment of nationals of Partner States within the Economic Community of Central African States*).

The text of the **Libreville 1983 Protocol on Freedom of Movement and Right of Establishment** is attached to this Review as **Annex IV-11**.

Main provisions of the Protocol are:

**(Article 3) Freedom of movement** of nationals holding a valid passport and health certificates. Tourists may stay up to three months and are not authorized to work. Businessmen must hold a certificate from their national Chamber of Commerce. Workers are free to accept employment offered in a member State.

**(Article 4) Right of establishment** is granted to nationals of partner States. It does not include political rights. Liberal professions may be exercised, but in accordance with the legislation of each country.

*d. Infrastructure and Transport*

**202.** In the matter of infrastructure and transport, ECCAS (Libreville Treaty) is more ambitious than UDEAC (Brazzaville Treaty) and its program more comprehensive. Partner States agree to:

- (1) Promote integration of infrastructure and to develop transport coordination so as to increase productivity and efficiency;
- (2) Harmonize and standardize legislation and regulations;
- (3) Promote transport coordination, the development of local transport industries, and local transport equipment industries;
- (4) Reorganize railway networks in view of their interconnection; and

- (5) Develop sub-regional joint shipping lines, river transport companies and airlines.

*e. Transit and Transit Facilities*

**203.** As indicated above (para. 196), this is the subject matter of Annex IV to the Libreville Treaty, as a Protocol, probably inspired by the provisions of the International Convention on international road transport under cover of TIR carnets which, as mentioned above (para. 113 *supra*) was not ratified by sub-Saharan African States.

The text of **ECCAS Protocol on transit and transit facilities** is attached to this Review as **Annex IV-12**.

**204. General Provisions and Scope of application (Articles 2 to 5).** Fundamental rules of the Protocol on transit are as follows:

- (i) Economic partner States grant freedom of transit through their territories to cargoes and vehicles bound for other partner States or third party States, subject to prohibition for reasons of public safety or another enumerated cause.
- (ii) No import or export duties shall be levied on transit traffic.
- (iii) Transit and warehousing procedures shall be simplified to lessen the burden on landlocked countries.
- (iv) There will be no discrimination as regards rates and tariffs; partner States will grant to transit trade the same treatment and facilities than granted to their own traffic.
- (v) The transit regime shall be applicable to carriage of bonded goods, in means of transport approved by Customs, by licensed operators and under a surety.

**205. Bonds and sureties (Articles 5 to 8).** Bonds and sureties shall be issued by partner States, banks or approved institutions. All transit goods and means of transport shall be covered by and shall travel under cover of TIA (ECCAS) Carnets. Each member State shall, subject to such conditions as it may deem necessary, authorize a carrier or its agent to prepare a TIA (ECCAS) Carnet in accordance with rules set forth in the Protocol. Carnets shall be checked by Customs officers *en route*. Goods covered by carnets and bonds, and carried in Customs sealed means of transport shall be exempt of the payment of Customs duties and shall not be examined by Customs officers.

**206. Customs control (Article 9).** Save if irregularities are suspected, the Customs officers en route within the partner States shall respect the seals affixed by the Customs authorities of other partner States but they may affix any additional seal of their own. They may also either require the mean of transport to be escorted through the territory of the country, or require

the examination of the means of transport and of the goods. Goods destroyed by *force majeure* shall be exempted from paying Customs duties provided evidence is furnished of such destruction.

**207. Obligations of partner States (Article 10).** Partner States undertake to facilitate the transfer to the other partner States of the funds necessary for the payment of premiums or other charges and penalties incurred by the holder of a Carnet. Other obligations result from the duty of each member State to enforce the Protocol in good faith. The protocol states also that partner States shall cooperate in the establishment of a Multinational Coastal Shipping Line, the TransAfrican Highways project, a Joint Freight Booking Center and other inter-Africa transport projects.

## E. COMMUNAUTÉ ÉCONOMIQUE DES PAYS DES GRANDS LACS (CEPGL) ECONOMIC COMMUNITY OF THE GREAT LAKES COUNTRIES

### a. *General*

**208. General.** As stated above, the Convention establishing the Economic Community of the Great Lakes Countries was concluded in Gisenyi (Burundi) on September 20, 1976 between Burundi, Rwanda and Zaire (now Democratic Republic of Congo). The Convention originates in the Declaration of Goma, dated March 20, 1967, in which the three States committed themselves to develop their mutual cooperation. The 1969 Gisenyi Conference concluded with the Gisenyi Resolution confirming the intention to cooperate. This resulted in a number of agreements between 1971 and 1975 and, lastly, led to the Gisenyi Convention here reviewed. The Convention stipulates that cargos and goods in transit in one of the partner States shall be free of taxes and duties. On September 10, 1978, at Gisenyi the same States entered into a trade and Customs cooperation agreement (*Accord commercial et de coopération douanière*).

The **Convention establishing the Economic Community of the Great Lakes Countries (Gisenyi, 1976)** was filed under N° 16748 with the UN Secretariat (reference 1092 UN Treaty Series 43). The text is attached to this Review as **Annex IV-13**.

**209. Objectives (Article 2).** Objectives of the Community are (1) safety of populations; (2) development of common projects; (3) trade development; and (4) international cooperation in a number of areas, mainly transport and Customs administration.

**210. Institutions (Article 5).** Institutions of the Community are:

- (a) The Conference of Heads of States, with power of decision in all matters and an overall policy-making authority. Each Head of State is in turn Chairman of the Conference, for a period of one year.

- (b) The Council of Ministers and State Commissioners composed of members of governments, appointed by the Conference of Heads of States. The Council prepares the meetings of the Conference, and drafts proposals for decisions to be taken.
- (c) The Permanent Executive Secretariat, in charge of studies, reviews, the elaboration of decisions, the preparation and supervision of Community projects.
- (d) The Arbitration Commission composed of four judges, in charge of controlling the legal aspect of enforcement of the Convention.
- (e) The specialized commissions (policies, trade and finance, planning, transport, etc.) in charge of evaluating the degree of cooperation by member States in the areas of jurisdiction of the Conference of Heads of States.

*b. Trade and Customs Cooperation Agreement*

**211.** This Agreement between Burundi, Rwanda and Zaire was concluded on September 10, 1978 and amended on January 31, 1982<sup>66</sup> both in Gisenyi (Burundi). It does not seem to have been filed with the United Nations General Secretariat nor has it been published in the UNTS. The text is available in UNTACD document TD/B/C7/51 (Part II), Add.1 (Vol. IV), 1988,p.228.

The text in French of the **Accord commercial et de coopération douanière** is attached as **Annex IV-14** to this Review.

**212. Objectives.** The objectives of the Agreement and Amendment as formulated in the Preambles are to (i) develop and facilitate trade between the States parties to the Agreement and (ii) fight fraudulent practices in trade.

**213. Provisions.** Main provisions are as follows:

- (a) *(Article 1)* The Parties agree to the import and export to and from their respective territories of products listed in attachments to the Agreement, provided these products originate from such respective areas. In summary, there are no quantitative restrictions.
- (b) *(Article 2)* The domestic legislation of each State shall apply to these imports and exports but States may grant on each other, with reciprocity, any rebate on customs tariffs they may consider advisable to be granted.

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<sup>66</sup> Provisions regarding facilitation are the same in the 1978 and 1982 versions.

- (c) **(Article 3)** Parties States agree to grant right of transit to goods originating from and bound for one of said States “*within the limits and according to regulations on international transit of goods*” free of Customs and other duties, except fees and charges compensatory of costs of services rendered during such transit.
- (d) **(Article 4)** Jurisdiction and working hours of respective Customs agencies shall be harmonized.
- (e) **(Articles 10 to 14)** These are standard provisions on cooperation and exchange of information between Customs agencies, inspired by the Customs Cooperation Council in Brussels (see para. 43 and sq above).

c. *Protocol on Transit and Transport Standards*

**214. General.** A Protocol was concluded in Gisenyi (Burundi) (January 11, 1982) on transit and transport standards with the objective to harmonize road transport policies.

The text in French of the *Protocole relatif aux normes de transit routier* is attached to this Review as **Annex IV-15**.

**215. Provisions.** Main stipulations are:

- (1) **(Article 3)** Inter-States road corridors are identified.
- (2) **(Articles 4 and 5)** Pending agreement between Partner States, rules regarding axle-loads are those in force in each of the Partner States. Maximum dimensions of vehicles and trailers are set.
- (3) **(Articles 9 and 10)** Safety and other checks on vehicles are conducted every three months for vehicles of public transport of passengers and six months for vehicles carrying goods.
- (4) **(Articles 12 and 13)** Vehicles from any member State may load in another member State for international traffic only and in accordance with rules and regulations of freight bureaus and other regulations such as those relating to rail-road coordination.
- (5) **(Article 14)** Combined transport of passengers and of goods in the same vehicle is prohibited.
- (6) **(Article 17)** Third party liability insurance is compulsory in accordance with the provisions of the convention on the subject matter in force between CEPGL States.

## F. INTERNATIONAL COMMISSION FOR THE CONGO-OUBANGUI-SANGHA RIVER BASIN

### a. *General*

216. The above Agreement results from the interconnection of the different rivers of the Congo-Oubangui-Sangha Basin and the need to develop their capacity and potential in the common interest. The Agreement is also likely to open the way to a revision of the existing Protocol between the Republic Democratic of Congo and the Central African Republic on river maintenance by the interstate agency *Service commun d'entretien des voies navigables* (common management service of waterways). Significantly and despite that the above listed States are not or were not automatically parties to these instruments, the Brazzaville Agreement specifically refers to the major international instruments applicable to international rivers, such as the 1921 Barcelona Convention (see para. 97) to the 1885 Act of Berlin regarding the regime of the Congo River. It is therefore well in line with the tradition of international cooperation in the matter of international rivers inaugurated by the 1815 Treaties of Vienna.

The *Accord instituant un régime fluvial uniforme et créant la Commission internationale du Bassin Congo-Oubangui-Sangha* (CIBCOS) attached to this review as **Annex IV-16** was not filed with the UN Secretariat and does not appear in the UN Treaty Series.

### b. *Objectives*

217. The objectives of the Agreement are in line with the OAU objectives to create common institutions and to reinforce the existing ones. In addition, the Agreement (Article 2) aims are:

- (i) To establish a uniform river regime based on freedom and equal treatment
- (ii) To equip and operate the rivers on the basis of “a right to equitable and reasonable participation to the benefits derived from the lasting use of the rivers”, and
- (iii) To establish to that effect an International Commission of the Congo-Oubangui-Sangha River Basin. The seat of the Commission is in Kinshasa (Democratic Republic of Congo).

Precisions on the spirit in which the Agreement should be interpreted are contained in Article 15 concluding on the Special Provisions applicable to special circumstances (such as war). Article 15 stresses the importance of an integrated management of the river basin, on the optimal use of the existing navigable waters, and on the community of interest of the parties to the Agreement.

218. Detailed terms of reference are assigned to the Commission (Article 17) with short-term, mid-term and long-term objectives. Short-term objectives are basically to enforce exist-

ing regulations, police river traffic and develop common standards. Mid-term objectives are the formulation and implementation of a coherent maintenance policy and of a transport policy conducive to the opening of land-locked areas. The long-term one is to extend the implementation of the Agreement to other river basins and lakes of the sub-region.

*c. Operating Provisions*

219. **(Article 4). Access to river basin.** Freedom of navigation for riverboats of all nations is the rule. However, the carriage of cargo and/or passengers between two locations of the same contracting States (local cabotage) and by a riverboat of another contracting State necessitates a specific inter-State agreement.

**(Article 5). Rules regarding transport.** If navigation is free, transport is not reserved to the contracting States. A special regime, as determined by the Commission, is applicable to transport by third party boats.

**(Article 6). Fees.** Navigation in the river basin is tax-free and no duty, whatever its basis or denomination, may be levied. Fees may be levied for construction, maintenance and improvements of rivers and associated transport facilities. These fees are to be *equitable and reasonable*.

**(Articles 11 to 14). Special circumstances.** Special circumstances are mainly emergency and war. In both cases, action and compensation for damages is based on solidarity between States parties to the Agreement. In case of war, *the rivers, their facilities... enjoy the protection granted by rules and principles applicable to armed conflicts*.

*d. Institutions*

220. **(Article 16)** The International Commission is the basic institution established by the Agreement as an international institution. Institutions are:

- The Committee of Ministers
- The Management Committee
- The General Secretariat

**(Articles 19 to 24)** Members of the Committee of Ministers are the ministers in charge of river navigation in each member States. The Committee is a policy making body supervising the Management Committee and approving budget and accounts. It settles litigation between member States regarding river navigation.

**(Article 25)** The Management Committee is composed of two representatives of each member State, a representative from a government agency in charge of river transport and the other

from the carriers. The Committee prepares all deliberations of the Committee of Ministers. It reviews all proposals for decision by the Committee of Ministers and formulates recommendations.

*(Articles 26 and 27)* The General Secretariat conducts the day-to-day affairs of the Commission with wide powers of coordination and actions as regard the implementation of the Commission's plans, programs and budget.





## V. SUB-REGIONAL INSTRUMENTS – EASTERN AFRICA

### A. GENERAL

**221. History.** East Africa has a long history of inter-State cooperation, starting well into the colonial period, with the Customs Collection Center in 1900 and the East Africa Currency Board in 1905, continuing after independence with institutions such as the East Africa Common Services and Organizations in 1961<sup>67</sup>. On June 6, 1967, the **Treaty for East African Cooperation** was concluded at Kampala (Uganda). It established the East African Community and, as an integral part of such Community, the East Africa Common Market<sup>68</sup>. Parties to the Treaty were Kenya, Tanzania and Uganda. Lastly, in January 1986, by the Djibouti Agreement, the States of the Horn of Africa – Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda, later joined by Eritrea – established the Intergovernmental Authority on Drought and Development (IGADD). This was revitalized in 1996 as IGAD (Intergovernmental Authority for Development (see para. 254).

**222.** As trade and transport are concerned, objectives of the Community and Common Market were, according to **Article 2** of the 1967 EAC Treaty:

- (1) A common Customs and excise tariff
- (2) The abolition of restriction on trade between partner States
- (3) The operation of services common to the partner States
- (4) The coordination of transport policy

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<sup>67</sup> **BIBLIOGRAPHY** Cf. J. Banfeld, *The Structure and Administration of the East African Common Services Organisation* in C. Leys et F. Robson *Federation in East Africa, opportunities and problems*, London, Nairobi, 1965. A. Hazlewood, *The territorial incidence of East African Common Services*, 18 (1) Bulletin of East African economics and statistics, Oxford University, (9.1979) 40-58. A.R. Rok, *The impact of the East African Treaty on the distribution of East African Common Services Organization benefits*, 3 East African Economics Review, Nairobi, (12.1967), 39-52. J.H. Proctor and K.G.V. Krishna, *The East African Common Services Organization: an assessment*. 64 South Atlantic Quarterly, (1965), 526-548.

<sup>68</sup> **BIBLIOGRAPHY** I. Doimidi de Lupis. *The East African Community and Common Market*, Longman, London, 1970. W.C. Asare, *La Communauté d'Afrique de l'Est*, Université Paris I, 1977. D.Ghai, *Territorial distribution of benefits and cost of the East African Common Market*, East African Economic Review, Nairobi, 6.1964. (Same author) *State trading and regional economic integration*, 12 Journal of Common Market Studies, London, (1974) No 3. E.A. Brett, *Closer Union in East Africa*, in D. Austin and H.N. Weiller, *Inter-State Relations in Africa*, Fribourg, (1965), 51-67.

In addition, according to **Article 29** of the Treaty, partner States were to *cooperate in the coordination of their surface transport policies*.

**223.** The East African Community was dissolved in 1977 after a failure to develop adequately<sup>69</sup>, due especially to the uneven benefits derived from the different members of the Community and to the resulting inter-community tensions. The text of the 1967 Treaty of Kampala is not attached here as an Annex to this Review as it is now obsolete. A new treaty was concluded in 1999 between the same party States.

**224.** Three sets of instruments are at present enforceable in Eastern Africa:

- (1) The 1985 **Northern Corridor Transit Agreement** (NCTA) and protocols
- (2) The 1999 **Treaty for the establishment of the East African Economic Community** (EAC)
- (3) The 1986 (original) and 1996 (revised) **Djibouti Agreements** establishing and reorganizing the **Intergovernmental Authority for Development** (IGAD)

**225.** Institutions for Eastern and Southern Africa in fact largely overlap. The East African States are also party to the 1981 Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern Africa (PTA – see para. 281 and sq.) which itself is a first step towards the 1993 Treaty establishing the Common Market for Eastern and Southern Africa (COMESA – see para. 319 and sq.). Both instruments are described in Part VI of this Review. Tanzania also belongs to the Southern African Development Community (SADC – see para. 298 and sq.). Ethiopia, Kenya, Sudan and Uganda also belong to IGAD, whose mission is *inter alia* to promote intra-regional trade and improve communications infrastructure. IGAD, however, does not seem to have at present any project in transport and facilitation or to have developed any legal instrument related to such transport and facilitation.

**226.** The Table 2 summarizes the distribution of membership in the different sub-regional organizations described herein below.

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<sup>69</sup> **BIBLIOGRAPHY** F. Constantin, *La fin de la Communauté est-africaine : commentaires à l'usage de l'Afrique de l'Ouest*, L'Année africaine, 1977, p. 404-425. A. Hazlewood, *The End of the East African Community : what are the lessons for regional integration schemes ?* 18(1) Journal of Common Market Studies, (9.1979). 40-58. D. Kappeler, *Causes et conséquences de la désintégration de la communauté est-africaine*, 42 (3) Politique étrangère, Paris, (1978) 319-330. A.T. Mugomba. *Regional Organizations and Africa under development: the collapse of the East African Community*, 16 (2) The Journal of Modern African Studies (JMAS), Cambridge University Press, Cambridge, (1978) 260-272. N. Mwase, *Regional economic integration and the unequal sharing of benefits: background to the disintegration and collapse of the East African Community*, 8 (1.2) African Review, Dar es Salaam, (1978) A. Segal, *The East African Common Market: historic, cultural and incidental dysfunctions*, 8 (1.2) African Review, (1978).

Table 2

Membership of sub-regional organizations

Eastern and Southern Africa

|              | COMESA | EAC | SADC | PTA | NCTA |
|--------------|--------|-----|------|-----|------|
| Angola       | x      |     | x    | x   |      |
| Botswana     |        |     | x    | x   |      |
| Burundi      | x      |     |      | x   | x    |
| Comores      | x      |     |      | x   |      |
| Congo RD     | x      |     | x    |     | x    |
| Djibouti     | x      |     |      | x   |      |
| Egypt        | x      |     |      |     |      |
| Ethiopia     | x      |     |      | x   |      |
| Eritrea      | x      |     |      |     |      |
| Kenya        | x      | x   |      | x   | x    |
| Lesotho      |        |     | x    | x   |      |
| Madagascar   | x      |     |      | x   |      |
| Malawi       | x      |     | x    | x   |      |
| Mauritius    | x      |     | x    | x   |      |
| Mozambique   |        |     | x    | x   |      |
| Namibia      | x      |     | x    |     |      |
| Rwanda       | x      |     |      | x   | x    |
| Seychelles   | x      |     | x    | x   |      |
| Somalia      |        |     |      | x   |      |
| South Africa |        |     | x    |     |      |
| Sudan        | x      |     |      |     |      |
| Swaziland    | x      |     | x    | x   |      |
| Tanzania     |        | x   | x    | x   |      |
| Uganda       | x      | x   |      | x   | x    |
| Zambia       | x      |     | x    | x   |      |
| Zimbabwe     | x      |     | x    | x   |      |

## B. THE NORTHERN CORRIDOR TRANSIT AGREEMENT (NCTA)

### a. *General*

**227. Instruments.** The Northern Corridor Transit Agreement covers the use of transportation facilities of East Africa served by the port of Mombasa in Kenya. It was concluded in Bujumbura (Burundi) on February 19, 1985 between Burundi, Kenya, Rwanda and Uganda. To the Agreement, a somewhat short document, four Protocols were attached at signature; one Annex and five more Protocols were added at Nairobi on November 8, 1985. The signatories ratified the Agreement in 1985 and 1986, and Zaire (now Democratic Republic of Congo) acceded to it on May 8, 1987 in Kigali. The initial duration of the Agreement was ten years. The author of this Review has not yet determined whether and by which instrument and at which date its duration was formally extended. The depository of the Agreement is the United Nations Economic Commission for Africa. One Explanatory Note to the Agreement and ten such Notes to the Annex and protocols clarify their content.

**228.** The Preamble to the Agreement makes reference to a number of international instruments. Not all of them are in effect or were acceded to by the Contracting Parties, such as the 1977 International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences or the 1980 Convention on International Multimodal Transport of Goods. It results in a bizarre legal situation, by which States that have not ratified conventions seem to be bound by their provisions or by convention that never came into force.

The text of the **1985 Northern Corridor Agreement**, together with its **Annex on the Transport Coordination Authority** and **Explanatory Note** to the Annex are attached as **Annex V-1** to this Review. The Agreement does not appear to have been filed with the UN Secretariat and it is not listed in the UN Treaty Series.

**229. Objective.** The purpose of the Agreement is to promote the use of the Northern Corridor, as defined by the Agreement, as a most effective route for the surface transport of goods between Partner States. As a result, the Contracting States have agreed to grant each other the right of transit through their respective territories and to provide all possible facilities, regulations and procedures for that purpose, without any discrimination.

**230. No conflict with other instruments.** Nothing in the Agreement prevents any Contracting Party (a) from fulfilling its obligation under any other international convention; and (b) from granting facilities greater than those provided in the Agreement.

**231. Evaluation.** Altogether, this set of documents is probably the clearest, most complete and making the most judicious reference to other international conventions and other instru-

ments compared to any other of the regional treaties and conventions here reviewed. It shows a clear understanding of the problems and its explanatory notes (widely used in this presentation) make it an excellent legal document. It can and should be used as a model.

*b. Institutions*

**232. Transit and Transport Authority.** An authority for coordination of transit transport in the Corridor is established and known as the **Transit Transport Coordination Authority** (TTCA), composed of the Ministers responsible for transport matters in each of the participating States and of their Permanent Secretaries. The Annex makes explicit the role and duties of the TTCA and of its executive officer, the Transit Transport Coordinator. Authority for the study of all questions related to cooperation in transit transport matters remains with the Ministers. The Executive Board of the Authority conducts day-to-day operations, circulates information and furnishes advice to the Contracting Parties.

*c. Provisions*

**233. Financial provisions.** No mention is made of responsibility of the Authority in the matter of rates and charges on transit traffic. According to Section 11 of the Agreement, *no duties, taxes or charges of any kind....regardless of their designation and purposes, shall be levied on traffic in transit, except charges for administrative expenses entailed for traffic in transit.... and charges levied on the use of toll roads, bridges,.....warehousing,.....or similar charges....* Further, the Contracting Parties agree that said charges *should be calculated on the same basis as for similar domestic transport operations.* There is no explicit statement that the charges should correspond to the extent possible, with the expenses actually incurred by the State through which transit traffic takes place. This is however stated in Explanatory Notes with reference to Article 3 of the 1921 Barcelona Convention and Statute on the Freedom of Transit, Article 5 of the 1948 General Agreement on Tariffs and Trade and other international instruments quoted in such Notes.

**234. Settlement of disputes.** The NCTA includes provisions for the settlement of disputes by consultation and discussion between the Contracting Parties and if necessary by arbitration. The appointing authority for arbitration is the Arbitration Center in Cairo, a branch of the Asian/African Legal Consultative Committee (AALCC).

**235. Issue of immunity.** The Agreement does not provide for any form of immunity from jurisdiction and execution. However, there is a flavor of reservation in the Explanatory Notes, in which it is pointed out that under all normal circumstances national law will prevail in the case of offences (Article 47) and that some State-owned enterprises established as companies are considered as *an emanation of the State.* As a consequence, *...the company is not legally*

*distinct from the State and should benefit from the same advantages and privileges as the State it belongs to....*, that is immunity.

The issues here are:

- (a) whether immunity resulting from national law is limited to execution following the sanctioning of offences or applies to the execution of all judicial and arbitration awards; and implicitly,
- (b) whether in case of conflict of law in implementation of the Agreement, domestic law takes precedence over the Agreement, i.e. national law versus an international instrument.

In any case, whether a government-owned enterprise engaged in commercial operations is immune, very much open to question, State immunity implies that State entities perform government functions that cannot be conducted by private parties, in the common or public interest. This is the case, for example, for the exercise of the police power. The issue is different when the government-owned entity engages in operations that could be conducted by private operators who frequently are in competition with the State-owned entity. In which case, there are no grounds for immunity.

*d. Protocol No 1. Maritime Port Facilities*

**236. Provisions.** According to Section 5 of the Agreement, Kenya undertakes to provide the necessary port facilities, including sheds and warehouses, at Mombasa. The Protocol governs the use of these facilities. Ships registered in or chartered by one of the parties to the Agreement shall be treated equally; a somewhat redundant obligation and commitment, since Kenya is in any case bound by the equal treatment rule formulated in the 1923 Geneva Convention on the International Regime of Maritime Ports (see para. 70 and sq.). Fees and charges on vessels and cargoes shall not be discriminatory.

The text of **Protocol 1 on Maritime Port Facilities**, together with an Explanatory Note, is attached to this Review as **Annex V-2**.

*e. Protocol No 2. Transit Routes and Facilities*

**237. Provisions.** Pursuant to Section 5 of the Agreement, transit routes are specified in this Protocol. The objective is to allocate traffic to routes capable of carrying such traffic, or to avoid routes that are not. It is also to permit Customs control, and to distribute accurately the costs for construction, maintenance and repair of the road network. The selection of routes follows the principles set forth by the 1921 Barcelona Convention and Statute on the Freedom of

Transit and the 1965 New York Convention on transit trade of landlocked States. Roads should be safe, secure and in good condition. On these routes, facilities and services such as first aid services, repair facilities, fuel filling stations, storage areas, buildings, etc. ought to be made available. Any payment for the use of facilities or the delivery of services should be at the rates that apply to nationals of the country in which the facility is located or the service rendered. During repair work and in case of emergency, transit traffic may be prohibited by any Contracting State.

The text of **Protocol No 2 on Transit Routes and Facilities**, together with an Explanatory Note, is attached to this Review as **Annex V-3**.

*f. Protocol No 3. Customs Control*

**238. Structure.** Protocol No 3 has a main text and two Annexes setting forth the minimum requirements to be met by Customs seals and fastenings and giving the list of international instruments providing for the conditions and procedures for the approval of transport units. As indicated before in a number of paragraphs of this Review, the reference to these instruments, while useful and well intentioned, may be of uncertain legal value – especially in a court litigation – since the instruments were not formally ratified, adhered to or acceded to by the States parties to the Northern Corridor Agreement. As a result, shippers and carriers cannot be held by the provisions of instruments that are not enforceable.

The text of **Protocol No 3 on Customs Control**, together with an Explanatory Note, is attached to this Review as **Annex V-4**.

**239. Provisions of Protocol and Annexes.** Pursuant to Section 7 of the Agreement, the Contracting States must limit their Customs control to the minimum required to ensure compliance with applicable laws and regulations. Joint Customs control at border crossing (frontier points) shall be facilitated. Detailed procedure for transit traffic is detailed in the Protocol, which sets forth the rules regarding Customs security and guarantees for transit operations. Annex 1 to the Protocol sets the minimum requirements to be met by Customs seals and fastenings. Annex II gives the list of international instruments providing for the conditions and procedures for the approval of transport units. Comments in the Explanatory Notes to the Agreement seem to indicate suspicion that Customs will need to modify their working practice if the provision of the Agreement is to be adequately and usefully implemented. Joint control, with Customs officers of one State operating on the side of the frontier of the other State may raise legal issues, especially if legal action has to be taken against an offender. A Court of Law may not accept execution of the law by a national officer on the territory of another nation and therefore offer a welcomed loophole to offenders.



*g. Protocol No 4. Documentation and Procedures*

**240. Provisions.** Pursuant to Section 8 of the Agreement of which objective is to reduce the number of documents needed for transit of goods and the simplification of procedures, this protocol contains provisions related to the documents to be used in the Northern Corridor transit operations and refers for that purpose to a number of international instruments such as ISO standards, UN Layout Key for Trade Documents, the UN Convention on International Multimodal Transportation of Goods, etc. Standard formats of documents are attached. Of special interest is the reference to the recourse to Non-Negotiable Sea Waybills to be substituted to Negotiable Bills of Lading, which is significant of practice in multimodal carriage of goods.

The text of **Protocol No 4 on Documentation and Procedures**, together with an Explanatory Note, is attached to this Review as **Annex V-5**.

*h. Protocol No 5. Transport by Rail of Goods in Transit*

**241. Provisions.** Pursuant to Section 9 of the Agreement, this Protocol deals with transport by rail of goods in transit. It stipulates that detailed rules regarding the administration and operation of rail traffic shall be laid down in a railway working agreement between the rail carriers of Kenya and Uganda<sup>70</sup>. The Protocol identifies the border stations and traffic interchange stations where connecting and transit services will only be performed. There is a commitment that inspection of goods carried in transit shall be conducted in a manner that ensures that wagons in transit are not unduly detained. Lastly, the Protocol sets the rules regarding liability of the respective rail carriers involved in transit operations. It does not make reference to the past or existing international conventions on rail transport, which is good since Rwanda, Burundi and Zaire (now RDC) are not parties to these conventions.

The text of **Protocol No 5 on transport by rail of goods in transit**, together with an Explanatory Note, is attached to this Review as **Annex V-6**.

*i. Protocol No 6. Transport by Road of Goods in Transit*

**242. Provisions.** Pursuant to Section 9 of the Agreement, this Protocol provides for the transport by road of goods in transit. It sets rules regarding (a) road transit transport, (b) technical requirements of vehicles, and (c) transport contracts and the liability of road carriers. The basic rule is that national laws and regulations of the Contracting Party on whose territory the operation is being carried out are applicable.

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<sup>70</sup> At the date of this Review, the working agreement has not been located yet.

- (i) Road Transport Permits may be issued by States on the territory of which transport takes place, subject to issuance of a Certificate of Fitness to the vehicle and to compliance with the technical requirements for road vehicles as set forth in the Protocol.
- (ii) *Consignment Note.* Transport contract shall be confirmed by the issuance of a Consignment Note (bill of lading) containing the particulars enumerated in the Protocol plus any particular that the parties to the carriage contract may deem useful.
- (iii) *Liability regime.* The liability regime is inspired by the rules set forth in contemporary conventions such as the CMR (see para. 120 and sq. above). The carrier shall be liable for loss, damages and delays. Burden of proof shall rest on the carrier, who may be relieved from liability by the wrongful act or neglect of the claimant and in a number of circumstances enumerated in the protocol, such as defective condition of packing, carriage of livestock, etc. The Protocol also sets forth rules regarding liability in case of delay in delivery; goods should be delivered within thirty days. Rules on compensation in case of loss or delay in delivery are also set forth. Compensation is based on market value of goods at the place and time where and when they were accepted for carriage, with a ceiling computed in special drawing rights (SDR), applicable except when a special declaration of value has been entered in.

The text of **Protocol No 6 on Transport by Road of Goods in Transit**, together with an Explanatory Note, is attached to this Review as **Annex V-7**.

*j. Protocol No 7. Handling of Dangerous Goods*

**243. Provisions.** Pursuant to Article 31 of the Agreement, this Protocol deals with the carriage of dangerous goods. These are handled and transported "*in accordance with accepted international recommendations*". Accordingly, the Protocol refers to standard international instruments on the matter, such as the International Maritime Dangerous Goods (IMDG) Code, Regulations for the Transport of Radioactive materials, etc.

The text of **Protocol No 7 on Handling of Dangerous Goods**, together with an Explanatory Note, is attached to this Review as **Annex V-8**.

*k. Protocol No 8. Facilities for Transit Agencies and Employees*

**244. Provisions.** Pursuant to Section 10 of the Agreement, this Protocol covers the provision of facilities and making of arrangements for transit employees. Each Contracting Party shall

grant duly recognized carriers of another Party, permission to set up agencies within its territory. Multiple entry visas shall be issued to employees of transport enterprises and their travel shall be facilitated.

The text of Protocol No 8 on **Facilities for Transit Agencies and Employees** is attached to this Review as **Annex V-9**.

*1. Protocol No 9. Third Party Motor Vehicle Insurance*

**245. Provisions.** Pursuant to Article 20 of the Agreement, the Contracting Parties agree on provisions for the establishment of an international compulsory third party liability insurance scheme enabling road carriers to be adequately insured against third party liability risks in traffic in the territory of another Contracting State. An International Insurance Card shall be issued by a designated National Bureau and be equivalent to a certificate of insurance. National Bureaus will be an insurance company whose solvency shall be guaranteed by each Contracting Party. A Council of Bureaus shall be established to co-ordinate and supervise the legal, technical, administrative and financial operations of the National Bureaus.

The text of **Protocol No 9 on Third Party Motor Vehicle Insurance** together with an Explanatory Note is attached to this Review as **Annex V-10**.

## **C. CORRIDOR RELATED BILATERAL AGREEMENTS**

**246.** The Government of Tanzania has allowed the Government of Malawi to construct, own and operate dedicated inland container depots (ICD) or Cargo Centers, in the port of Dar es Salam and at Mbeya in Tanzania.

**247.** The Government of the Democratic Republic of Congo has an agreement with the Government of Kenya for the accommodation of storage facilities at Mombasa Port.

The texts of these two agreements have not yet been located.

## D. TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY

### a. *General*

**248.** The Treaty for the establishment of the East African Community (EAC) (the EAC Treaty) was concluded at Arusha (Tanzania) on November 30, 1999<sup>71</sup>. Parties to the Treaty are Kenya, Uganda and Tanzania. Its origin is an initiative of the Heads of State who, in 1997, instructed the Permanent Tripartite Commission for East Africa to start the upgrading of the November 26, 1994 Kampala Agreement, establishing the Commission into a new East Africa Community Treaty. The Commission itself had been equipped with a Secretariat based in Arusha, *inter alia* in charge of supervising the elimination of non-tariff barriers in the sub-region.

The text of the **1999 Treaty for the Establishment of the East African Community** is attached to this document as **Annex V-11**. The treaty does not appear to have been filed with the UN Secretariat. It cannot be located in the UN Treaty Series. It is found in 7 AYIL (1999), 421-509.

### b. *Institutions*

**249.** (*Article 9*) The organs of the East African Community are:

- (i) The Summit, composed of Heads of States
- (ii) The Council, composed of Ministers
- (iii) The Co-ordination Committee
- (iv) sectoral Committees
- (v) The East African Court of Justice
- (vi) The East African Legislative Assembly
- (vii) The Secretariat

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<sup>71</sup> W. Kaawha, *The Treaty for the establishment of the New East African Community. An overview*, 7 AYIL (1999) 61-84. A. Leon, *East African Cooperation*, in P. Hugon. *Analyse comparative des processus d'intégration économique régionale*, ministère des Affaires étrangères, Paris, 2000, 112-123. G.G. Maasdorp, *The establishment of an East African Trade Regime*, EAC Secretariat, 1999. A. Rajaram, A. Yeats, N. Ng'eno, N. Musonda, F. Mwau, *On the appropriate transition to an East African Customs Union*, EAC Secretariat, Arusha, 1999. H.G.K. Nyakoojo, *Freeing cross-border trade in agricultural products. Country Report Uganda*, in *Cooperation with GTZ*, EAC Secretariat, 2000.

- (viii) Such other organs as may be established by the Summit

**250. Transport Policy.** Chapter 15 of the Treaty is entitled *Cooperation in Infrastructure and Services* and covers transport. Common transport policies are the subject of Article 89. The partner States undertake *to evolve coordinated, harmonized and complementary transport and communications policies,... to improve and expand existing links and establish new ones*. To this end, the Partner States shall take steps to

- (i) Develop harmonized standards and regulatory laws, procedures and practices;
- (ii) Construct, upgrade and maintain facilities;
- (iii) Review and re-design intermodal transport systems and develop new routes;
- (iv) Grant special treatment to land-locked countries;
- (v) Provide security and protection to transport systems;
- (vi) Harmonize and conduct joint training of personnel; and
- (vii) Exchange information on the subject matter.

These provisions are further detailed in Article 90 on Roads and Road Transport; in Article 91 on Railways and Rail Transport; in Article 92 on Civil Aviation and Civil Air Transport; in Article 93 on Maritime Transport and Ports; in Article 94 on Inland Waterways Transport; in Article 95 on Multimodal Transport; in Article 96 on Freight Booking Centers; and in Article 97 on Freight Forwarders, Customs Clearing Agents and Customs Agents.

**251. Importance of infrastructure.** The EAC Development Strategy for 2001-2005 emphasizes cooperation in infrastructure. It States that *policies in this area should aim at improving the existing transport and communication links and establishing new ones as a mean of furthering the physical cohesion of the Partner States and facilitating and promoting the movement of traffic within the community...(also) to harmonize and simplify regulations, goods classification and procedures*.

Altogether, the EAC Treaty is the most detailed of all African cooperation treaties as regards transport and communications. Details on transport provisions follow in sub-section c and details on Customs provisions in sub-section d.

*c. Transport Provisions*

**252.** Main transport provisions and stipulations are as follows.

- (1) **(Article 90)** The provisions regarding transport deal mainly with technical and regulatory aspects. Except for the mentioning of common requirements for insurance, there is no reference to the terms of carriage contracts and to the

adoption of modern contractual formats. However, the Article mentions the importance of developing competition *to make road transport more effective*. There is a marked concern for equal treatment of carriers in all partner States (at Article 90(i) and (ii) and a reference to the need to *gradually reduce and finally eliminate non physical barriers to road transport within the Community* that is significant of a perennial problem in the Africa region.

- (2) **(Article 91)** Rail Transport is to be coordinated and new lines constructed where necessary. Railways would be made more efficient by developing their managerial autonomy. Documentation, packaging, procedures, standards, etc. would be harmonized. Tariff discrimination would be eliminated.
- (3) **(Article 92)** Civil aviation policies would be harmonized and joint services facilitated. It would be undertaken to make air transport services safe, efficient and profitable through autonomous management. The Chicago Convention would be implemented<sup>72</sup>, flight schedules coordinated, and ICAO policies and guidelines for the determination of user charges applied. Rules and regulations relating to scheduled air transport would be the same in all partner States.
- (4) **(Article 93)** Liberalization and commercialization of port services are seen as a way of promoting efficient and profitable port services. Landlocked States would be granted easy access to port facilities and opportunities to participate in the provision of port and maritime services. The partner States would agree to charge non-discriminatory tariffs in respect of goods from their territories and from other partner States *except where their goods enjoy domestic transport subsidies and apply the same rules and regulations in respect of maritime transport among themselves without discrimination*. Other provisions refer to other objectives of coordination and harmonization.
- (5) **(Article 94)** Partner States shall harmonize their inland waterways policies and harmonize and simplify their rules, regulations and administrative procedures and tariffs. Space would be provided on board vessels, without discrimination. Joint ventures would be developed.
- (6) **(Article 95)** Partner States shall harmonize and simplify regulations, procedures, and documents required for multimodal transport. They shall develop intermodal exchange facilities such as inland clearance depots and dry ports. They will take measures to ratify or accede to international conventions

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<sup>72</sup> A rather surprising statement given that the partner States did ratify the Convention individually.

on multimodal transport and containerization and take such steps as may be necessary to implement them.

- (7) **(Article 96)** Partner States shall encourage the establishment of freight booking centers.
- (8) **(Article 97)** The partner States shall harmonize the requirements for registration and licensing of freight forwarders, Customs clearing agents and shipping agents. They shall allow any person to register and to be licensed as freight forwarder or other transport services agent and they shall not restrict the commercial activities of such a lawfully licensed agent. There are indications that some partner States tend to limit access to transport services professions to their own nationals.

*d. Customs*

**253.** The partner States agree to develop an East African Trade Regime and develop jointly (a) trade liberalization, (b) a Customs Union, and (c) a Common Market.

- (1) **(Article 75) Customs Union Rules** are to be contained in a Protocol, to be issued within a period of four years. The Rules include the elimination of internal tariffs and of non-tariff barriers; the establishment of a common external tariff; also measures regarding dumping, subsidies and countervailing duties; and simplification and harmonization of trade documentation and procedures.
- (2) **(same) Establishment of the Customs Union** shall be progressive. With effect from a date to be determined by the Council, the partner States shall not impose any new duties and taxes or impose new ones or increase existing ones. Nor will they enact legislation or apply administrative measures that may directly or indirectly discriminate against the same or like products of other partner States.
- (3) **(Article 76) Common Market.** A Protocol shall be issued on a Common Market among the partner States. Within the Common Market, there will be free movement of labor, goods, services, capital, and the right of establishment.

## E. INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT (IGAD)

**254. General.** The Intergovernmental Authority on Development is a creation of six countries of the Horn of Africa: Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda. It was established by agreement on March 31, 1996 at Nairobi to revitalize and expand the duties of the existing Intergovernmental Authority on Drought and development established in 1986. It is incorporated with privileges and immunities similar to those accorded to regional or international organizations of similar status.

The text of the **Nairobi Agreement creating the Intergovernmental Authority for Development** is attached as **Annex V-12** to this Review. The Nairobi Agreement does not appear to have been filed with the United Nations Secretariat.

**255. Objectives (Article 7).** The preamble to the Nairobi Agreement refers both to the Treaty establishing the African Economic Community and to the Treaty establishing the Common Market for Eastern and Southern Africa. The aims of the Authority, in the area of transport, trade and facilitation, are to (Article 7):

- (a) Promote joint development strategies and harmonize policies as regard, *inter alia*, trade, transport, communications and customs, promote free movement of goods, persons and services;
- (b) Create an enabling environment for foreign, cross-border and domestic trade; and
- (c) Develop and improve a coordinated infrastructure of transport.

**256. Institutions.** Institutions of the Authority are:

- (a) **(Article 9)** The Assembly of heads of State and Governments, issuing policies and guidelines, directing and controlling the functioning of the Authority. The Assembly meets once a year.
- (b) **(Article 10)** The Council of Ministers, assisted if needed by sectoral committees. The Council meets at least twice a year. It issues recommendations to the Assembly, approves the budget of the Authority and supervises its functioning.
- (c) **(Article 11)** The Committee of Ambassadors comprising ambassadors of the member States appointed to the country of Headquarters of the Authority, and in charge *inter alia* of guiding the Executive secretary in the interpretation of policies and guidelines. The Committee informs the member States as needed.
- (d) **(Article 12)** The Executive Secretary, in charge of all executive functions of the Authority, financial, administrative or others.



- (e) (*Article 14*) Resources of the Authority are contributions by member States, and assistance from other sources.

**257. Transport and Facilitation.** In addition to defining the aims and objectives of the Authority, the Agreement stipulates the areas of cooperation between member States (*Article 13 A*). As regard trade, facilitation and transport, these areas are:

- (a) Work towards the harmonization of trade policies and practice and the elimination of tariff and non-tariff barriers.
- (b) Harmonization of transport policies and elimination of physical and non-physical barriers.

**258. Performance.** To date, and except for the identification of different infrastructure projects, especially road and port rehabilitation, IGAD took no action on the areas of trade, transport and facilitation. But it was not inactive. Two transport policy workshops took place in Addis Ababa in 1997 and in Nairobi in 1999. A meeting of IGAD Ministries of Transport met in Khartoum on October 10, 2001. It has concentrated on peacekeeping efforts in States of the Horn of Africa.

## VI. SUB-REGIONAL INSTRUMENTS EASTERN AND SOUTHERN AFRICA

### A. BASIC SUB-REGIONAL INSTRUMENTS<sup>73</sup>

259. In Southern, Eastern and South Western Africa, nine countries out of twenty-one belong to two different sub-regional groupings under a number of different treaties<sup>74</sup>.

- (1) The **Southern African Customs Union** (SACU, the Union) was formed in Pretoria (South Africa) on December 11, 1969 between South Africa, Botswana, Lesotho and Swaziland<sup>75</sup>. It was joined in 1990 by Namibia. In 1996, SACU was mentioned as the only Customs Union currently existing and operational on the continent. Details on the **Southern Africa Customs Union** and its instruments are in **Section B** herein below.

South Africa and Swaziland, two members of the Customs Union, are in addition the only sub-Saharan African parties to the 1982 Geneva Convention on the harmonization of frontier control of goods (see para. 52 and sq).

- (2) The *Accord général de Coopération* (the Accord général) establishing the *Commission de l'Océan indien* (the Commission) was concluded in Victoria (Seychelles) on January 24, 1984 by Madagascar, Mauritius and the Seychelles. France acceded to it in Port Louis (Mauritius) on January 10, 1986. The Repub-

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<sup>73</sup> As a source of information on implementation of sub-regional agreements, conventions and other instruments regarding transport and facilitation, see *Review of progress in the development of transit transport systems in Eastern and Southern Africa*, by InterAfrica (Pty) Ltd, UNCTAD Consultants (UNCTAD /LDC/115, July 20, 2001).

<sup>74</sup> **BIBLIOGRAPHY** S. Belahouane-Gherari and H. Gherari, *Les organisations régionales africaines*, La Documentation française, Paris, 1988, Bibliography on South Africa, (in French) p. 324-336. M. Aicardi de Saint Paul, *Interdépendance économique en Afrique australe*, Le Mois en Afrique, No 217/218, 2.1984, p. 38-62. M. R.A. Heiman, *The Drive towards Rationalization in Southern Africa: Fictional Reality*, 9 AJICL, (1997), 640-665.

<sup>75</sup> Hence a total of five member States. But de Wiktor, *Multilateral Treaty Calendar* (op. cit.), p. 910, mentions nine members.

lic of Comoros joined later. Depository of the Accord is the Seychelles, but the seat of the Commission is in Port Louis, Mauritius. Details on the Accord and on the *Commission de l'Océan indien* are in **Section C** herein below. The text of the Accord général de coopération is attached to this review as **Annex VI-2**<sup>76</sup>

- (3) The Treaty of Arusha (Tanzania, 1990) established the **Organization for Indian Ocean Maritime Affairs Cooperation**. Details on the Organization are in **Section C** herein below.
- (4) The **Lusaka Treaty for the establishment of a Preferential Trade Area** (PTA) for Eastern and Southern Africa was concluded in Lusaka (Zambia) on December 21, 1981 by the Heads of State of Burundi, Kenya, Rwanda and Uganda. Details on the PTA are in **Section D** herein below.
- (5) The Windhoek Treaty for the creation of the **Southern African Development Community** (SADC or the Community) was concluded at Windhoek (Namibia) on August 17, 1992. The Community has twelve members: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Details on **SADC** are in **Section E** herein below.
- (6) The Kampala Treaty establishing the **Common Market for Eastern and Southern Africa** (COMESA) was concluded in Kampala (Uganda) on November 5, 1993. The Common Market comprises (a) Angola, Burundi, the Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, the Seychelles, Somalia, Sudan and Uganda as members that are not also members of the SADC; and (b) Lesotho, Malawi, Mozambique, Mauritius, Namibia, Rwanda, South Africa, Swaziland, Tanzania (which quitted COMESA in 2001), Zambia and Zimbabwe are also members of the Community. Total membership is therefore 20 countries. The Treaty itself is a massive instrument of thirty-six chapters and 196 articles. Details on **COMESA** are in **Section F** herein below.
- (7) The **Walvis Bay Corridor Group** is, to date, the only institution and related agreement specific to transport facilities identified in South Western Africa. The Walvis Bay Corridor Group (the Group) is an association of three Namibia Government agencies (Customs, Ministry of Trade and Industry and Ministry of Transport and Communications), the Namibian Port Authority, NamRail (the Namibian national railway company), the Offshore Development Company and five trade associations (Walvis Bay Port Users Association, Namibian

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<sup>76</sup> See details in Yearbook of International Organizations, 1995/1996, vol. 1, p. 699.

Association of Freight Forwarders, Namibian Road Carriers Association, Namibian Chamber of Commerce and Industry, the Federation of Namibian Tourism Association). The Group aims at developing:

- (i) The Trans Kalahari Corridor to Botswana and South Africa;
- (ii) The Transcaprivi Highway and Walvis Bay-Crotonfontein north Namibia and to Zimbabwe and Zambia; and
- (iii) The Northern Route to Southern Angola.

Details on the **Walvis Bay Corridor Group** are in **Section G** herein below.

In addition, Burundi, Rwanda and RDC, COMESA members, are also members of the Economic Community of Central African States (see para. 195 and sq *supra*).

**260.** Two earlier instruments demonstrate that solving the issue of access to the sea of landlocked States of the sub-region was a concern before independence:

- (i) The June 17, 1950 Convention between the United Kingdom and Portugal guaranteed unimpeded movement of goods between the Portuguese colony of Mozambique and the landlocked British colonial territories of Rhodesia.
- (ii) An agreement between the United Kingdom and Portugal guaranteed Swaziland's access to the port of Lourenço Marques.

## **B. SOUTHERN AFRICAN CUSTOMS UNION (SACU)**

### *a. General*

**261. History<sup>77</sup>.** The Southern African Customs Union can be traced back to a 1903 (revised in 1910) Customs Agreement between the British Empire territories of Southern Africa. A new agreement updating the 1910 Agreement (then still in force) was enacted in 1969 and concluded between the Governments of Botswana, Lesotho, Namibia (by accession in 1990 at independence), South Africa and Swaziland. The 1969 Agreement had as one of its main objectives to encourage *the economic development of the less advanced countries of the Customs Union and the diversification of their economies* (Preamble). It has been described as a traditional Customs arrangements by which Customs duties between the coastal and the land-

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<sup>77</sup> S.O. Ettinger, *The Economics of the Customs Union between Botswana, Lesotho, Swaziland and South Africa*, University of Michigan, Ann Arbor, Mi, 1974.

locked States are removed and a common external tariff regime is implemented vis-à-vis goods from third countries: *initially, the 1969 Agreement was considered a satisfactory deal by all signatories. It kept the Botswana-Lesotho-Swaziland markets opened for South African products and provided a guaranteed source of revenue for the smaller member countries, enabling them to eliminate their dependence on income transfers from the United Kingdom for balancing their budget.*<sup>78</sup> However, the Agreement was later criticized, mainly because of (a) an absence of joint decision-making between South Africa and other Union members; (b) the asymmetry of decision-making which caused trade policies to be biased towards the protection or promotion of South Africa industries; and (c) an unsatisfactory implementation by South Africa. Negotiations of a new agreement started at the end of 1994. Those negotiations culminated with the signing of the Agreement in October 2002, yet to be fully ratified (see below) and filed with the United Nations General Secretariat. In what follows and since to date the 1969 Agreement is still in effect, the contents of the 2002 Agreement are compared below to those of the 1969 instruments.

The text of the 1969 **Southern African Customs Union Agreement** is attached to this Review as **Annex VI-1a**. The 2002 **Southern African Customs Union Agreement** was ratified by Botswana, Lesotho and Namibia. It was submitted to the Parliament of the Republic of South Africa in November 2003. The text is attached to this Review as **Annex VI-1b**.

*b. Objectives*

**262.** The following stated objectives of the Agreement are broad and extend beyond the domain of standard customs unions:

- (a) The promotion of integration of SACU members in the global economy with development of common policies;
- (b) The facilitation of cross-border movements of goods;
- (c) The establishment of democratic, effective and transparent public institutions; and
- (d) The promotion of fair competition and fair sharing of revenue from customs and other dues.

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<sup>78</sup> R. Kirk and M. Stern, *The New Southern African Customs Union Agreement*, African Region Working Paper Series No 57, The World Bank, Washington D.C. June 2003.

c. *Institutions*

**263.** While Article 20 of the 1969 SACU Agreement provided for the establishment of Customs Union Commission formed of representatives of the partner States and whose functions were to discuss any matter related to the implementation of the agreement, the 2002 Agreement provides for a more complete set of institutions:

- (a) *(Article 8)* A Council of Ministers meeting each quarter of the year as supreme decision making authority in SACU.
- (b) *(Article 9)* A Customs Union Commission made up of officials from member States to ensure the implementation of decisions of the Council of Ministers and to supervise the functioning of the Union and the Common Revenue Pool.
- (c) *(Article 10)* A Secretariat responsible for day-to-day operations to be located in Namibia.
- (d) *(Article 11)* A Tariff Board consisting of experts from member States making recommendations on the level and changes of Customs dues and other charges.
- (e) *(Article 12)* Four Technical Liaison Committees to assist and advise the Commission, one of them being the Transport Committee.
- (f) *(Article 13)* A SACU Tribunal to arbitrate disputes that cannot be settled amicably.
- (g) *(Article 14)* National bodies shall be established for receiving and examining requests and changes in tariffs and other SACU related measures and provisions.

d. *Trade Liberalization*

**264. Free movements of domestic products.** The Articles 18 to 31 of the Agreement deal with trade liberalization. The movement of domestic products is free of customs duties and quantitative restrictions on importation from the territory of one member State to that of another member State. However, member States may impose restrictions on imports and exports in accordance with national laws for a number of enumerated motives of public health, security, protection of the environment or other non trade-protection motives.

**265. Trade restrictions.** Article 11 of the 1969 Agreement recognized the right for each contracting State to impose restrictions on import or export for the purpose of protecting its industries. Article 25 of the 2002 Agreement has a more restrictive approach. Each member has the right to prohibit or restrict the importation or exportation of any goods for economic, social, cultural or other reasons *as may be agreed upon by the Council*. This, however, does not permit the prohibition or restriction of the importation by any member State into its area of goods

grown, produced or manufactured in other areas of the Common Customs Area for the purpose of protecting its own industries producing such goods. Member States shall co-operate in the application of import restrictions with a view to ensuring that the economic objectives of any import control legislation in any State in the Common Customs Area are attained.

**266. Rail and road transport.** The 1969 SACU Agreement stipulated that no transport rate discrimination should apply for goods in transit imported from outside the Customs area or exported to outside such area. Each contracting party was to ensure that tariffs applicable by publicly owned transport to and from the other area would be no less favorable than tariffs applicable to similar goods for carriage inside the area. The same equal (*no less favorable*) treatment was to be granted to motor transport operators registered in a contracting State by the authorities of another contracting State. These provisions, in a different wording, are to be found in Article 27 of the 2002 Agreement. Tariff freedom appears to be the rule for private transport operators, as they are not mentioned in the Agreement.

**267. Transit.** In Article 16, the 1969 Agreement stipulated freedom of transit. It was guaranteed to the parties through each other's territory. But such freedom of transit could be limited by a member State for motives of public morals, public health, security or in pursuance of the provisions of a multilateral international treaty to which the State is a party. Article 24 of the 2002 Agreement also stipulates freedom of transit in more detailed terms: *without discrimination to goods consigned to and from the areas of other member States, provided that a member State may impose such conditions upon such transit as it deems necessary to protect its legitimate interests in respect of goods of a kind of which the importation into its area is prohibited on grounds of public morals, public health or security, or as a precaution against animal or plant diseases, parasites and insects, or in pursuance of the provisions of a multilateral international agreement to which it is a party; and provided further that a member State shall not be precluded from refusing transit, or from taking any measures deemed necessary by it in connection with such transit, for the purpose of protecting its security interests.* In addition, technical standards and regulations ought not to be an obstacle to trade (Article 28). Despite that Article 28 refers to product standards, the rule seems to have a broader area of enforcement.

*e. Tariff Provisions*

**268.** Provisions of the Treaty relating to Customs tariffs are as follows:

- (a) (**Article 19 and 20**) In the 1969 Agreement, Customs duties and sales taxes in force in South Africa and applicable to imported goods were applicable in all the States of the Customs area. Article 7(2) of the Agreement only stipulated that the South African Government, when setting the tariffs, must give *sympathetic consideration* to proposals by other member countries to increase any Customs tariffs applicable to certain goods. The 2002 Agreement transfers juris-

diction to SACU's Council of Ministers, which on recommendation by the Tariff Board shall set the common customs duties. A member State shall not impose any duties on goods imported in the Common Customs Area on importation of such goods from any other member State. Rebates and drawbacks granted by different SACU States must be identical for all member States but special rebates may be granted in enumerated cases. These provisions are less restrictive than the 1969 provisions stipulating that any rebate, refund or drawback granted by the Governments of Botswana, Lesotho and Swaziland ought to be identical to any rebate, refund or drawback granted by South Africa.

- (b) *(Article 21)* The Ministers responsible for Finance in all member States shall meet and agree on the rates of excise duties and specific Customs duties to be applied to goods grown, produced or manufactured in or imported into the Common Customs Area. States shall apply identical rebates, refunds or drawbacks. These shall be determined by the Ministers responsible for Finance in the member States through consultation.
- (c) *(Article 26)* The Governments of the four member States other than South Africa may as a temporary measure levy additional duties to protect their infant industries, industries established less than eight years.

#### 269. Pooling of revenue

- (a) *(Articles 32 and 33)* All collected Customs, excise and other duties are paid in a Common Revenue Pool (Consolidated Fund of South Africa in the 1969 Agreement), managed by the SACU institutions and then allocated to each of the partner States.
- (b) *(Article 34-1 to 3.)* In the 1969 Agreement, the formula for determining allocation was the Customs-wide collections to the pool as a percentage of the dutiable goods on which they were collected. This overall rate was then enhanced by a factor at present of 1.42 to compensate for the loss of sovereignty of the States parties to the Agreement and for the higher price of goods imported from third countries resulting from high South African tariffs. The new formula has a Customs and an Excise component, from which is extracted a Development Component. Each component consists of the gross amount of duties collected less costs of operating the SACU institutions, and does not include any duties rebated or refunded.

#### 270. Revenue sharing. *(Article 34-4 and 5 and Annex A)*

- (a) **Customs component.** Each member State's share of the Customs component shall be calculated (i) from the CIF value at frontier of goods imported from all



other member States in a specific year and (ii) as a percentage of total CIF value of intra-SACU imports in such year.

- (b) **Excise component.** The Excise component shall consist of the gross amount of excise duties collected on goods produced in the Common Customs Area less an amount set aside to fund the Development component. The share of each member shall be calculated from the value of its GDP in a specific year as a percentage of total SACU's GDP.
- (c) **Development component.** Each Member State shall receive a share of the development component and the distribution of this component shall be weighted in favour of the less developed member States, according to the inverse of each country's GDP per capita.

## C. INDIAN OCEAN COOPERATION AGREEMENTS

### a. *General*<sup>79</sup>

**271. Instruments.** Four instruments were identified and are of interest regarding cooperation in facilitation and transport.

- (1) The 1984 *Accord général de coopération entre les États membres de la Commission de l'Océan indien* was concluded in Victoria (Seychelles) on January 10, 1984. This agreement is reviewed in **sub-section b**.
- (2) The 1989 *Protocole additionnel*, signed in Victoria on April 24, 1989. This Protocol sets forth the rules of procedures and general administration of the Commission.
- (3) An Agreement on the *Organization for Indian Ocean Maritime Affairs* was concluded at Arusha (Tanzania) on September 7, 1990 (see **sub-section c**).
- (4) The *Charter of the Indian Ocean Rim Association* for regional cooperation concluded in Port Louis (Mauritius) on March 7, 1997. Details on this agreement appear in **sub-section d**.

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<sup>79</sup> See J. Verdier, *La Commission de l'Océan Indien de la coopération à l'intégration économique*, 48 *Marchés tropicaux*, Paris (25.11.1994).

*b. Accord général de coopération entre les États membres de la Commission de l'Océan indien*

**272. Objectives.** The *1984 Accord général* seeks cooperation between the partner States in economic matters (*Article 1*). Treaties, conventions, agreements by one of the partner States “*whatever their form or nature*” may not be an obstacle to the enforcement of the Accord or of any of its protocols (*Article 2*).

The text in French of the *Accord général de coopération (Océan indien)* is attached to this Review as **Annex VI-2** (RGDIP. T. 91, p. 1990)<sup>80</sup>.

**273. Institutions.** Institutions of the *Commission de l'Océan Indien* (the Commission) are:

- a) the **Council** formed at ministerial level with an equal number of representatives of each member State (Article 3). Members of Parliament of the partner States may participate as observers to the meetings of the Commission;
- b) the **Committee of *officiers permanents de liaison*** (OPL Committee) composed of the permanent representatives of the Commission in each Member State. The Committee prepares the work of the Commission and follows the implementation of its decisions; and
- c) The **General Secretary**.

Ad hoc committees of experts may be established for the examination of technical, sectoral or specific issues. Details on the functioning of the Commission are in a *Protocole additionnel* signed in Victoria on April 14, 1989.

The text in French of the *Protocole additionnel* is attached to this Review as **Annex VI-3**.

*c. Organization for Indian Ocean Maritime Affairs*

**274.** On September 7, 1990 the Agreement creating the Organization for Indian Ocean Maritime Affairs was signed in Arusha (Tanzania). This instrument was the follow-up of the first Conference for economic, scientific and technical cooperation in maritime matters, held in Colombo (Sri Lanka) in 1987. Tanzania, Sri Lanka and other unidentified States signed the Agreement. Sri Lanka is the Depository.

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<sup>80</sup> See details in Yearbook of International Organizations, 1995/1996, vol.1, p. 699.

275. Although the agreement deals mainly with integrated oceanographic management, it refers indirectly to facilitation.

- (a) The economic and social development of land-locked countries is one of the general policy objectives of the Agreement (*Article 3*);
- (b) The rule according to which *all consideration will be given to the rights and needs of land-locked or geographically disadvantaged States* is one of the principles of cooperation between member States and maritime transport being one area of cooperation (*Article 4*);
- (c) The Committee or executive body of the Organization includes members originating from landlocked or geographically disadvantaged States (*Article 8*).

276. The Agreement was to be in force after ratification by eight signatories. This Review has not evaluated the status of its implementation. It does not appear to have been filed with the United Nations General Secretariat under the UN Treaty Series. It was published in the United Nations Law of the Sea Bulletin No 16. It is not attached here, since the above details are sufficient for the purpose of this Review.

*d. Charter of the Indian Ocean Rim Association*<sup>81</sup>

277. **Partner States.** The 1997 **Charter of the Indian Ocean Rim Association for Regional Cooperation** was signed by fourteen Indian Ocean States; among them were Kenya, Madagascar, Mauritius, Mozambique, South Africa and Tanzania. The Association is open to all sovereign States of the Indian Ocean Rim subscribing to the principles and objectives of the Charter.

The text of the **Charter of the Indian Ocean Rim Association** is attached to this Review as **Annex VI-4**.

278. **Principles of policy.** The Association will facilitate and promote economic cooperation, bringing together representatives of government, business and academia. Decisions on all matters and at all levels are to be taken on the basis of consensus. Bilateral and other issues likely to generate controversy and be an impediment to regional cooperative efforts are to be excluded from deliberations. Cooperation within the Association will not be a substitute, but seek to reinforce and be consistent with their bilateral and multilateral obligations.

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<sup>81</sup> G. Campbell, Ed., *The Indian Ocean Rim Southern Africa and Regional Cooperation*, Routledge Curzon, New York, 2002.

**279. Objectives.** The following objectives of the Association are significant in terms of transit and traffic facilitation:

- a) Formulation and implementation of projects for economic cooperation relating to trade facilitation, promotion and liberalization; and
- b) Lower barriers towards freer and enhanced flow of goods, services and investments.

**280. Institutions.** Institutions of the Association are (a) a Council of Ministers meeting every two years, and in charge of formulation of policies and review of progress; (b) a Committee of Senior Officials composed of government officials of partner States; and (c) a Secretariat to coordinate, monitor and service the implementation of policies.

#### **D. PREFERENTIAL TRADE AREA FOR EASTERN AND SOUTHERN AFRICA (PTA)**

*a. The 1981 PTA Treaty*<sup>82</sup>

**281. General.** The Treaty for the establishment of a Preferential Trade Area (PTA) for Eastern and Southern Africa was signed in Lusaka (Zambia) on December 21, 1981 by the Heads of State of Angola, Botswana, Burundi, the Comoros, Djibouti, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Rwanda, Seychelles, Somalia, Swaziland, Tanzania, Uganda, Zaire, Zambia, and Zimbabwe.

**282. Instruments.** The instruments comprise:

- (1) The Treaty itself; and
- (2) Eleven protocols of which four, dealing respectively with Customs Cooperation (II), Transit Trade (V), Transport and Communications (VII) and Simplification of Trade Documents and Procedures (X) are reviewed in this Review, after the review of the Treaty itself.

The text of the **1981 Lusaka Preferential Trade Area Treaty** is attached to this Review as **Annex VI-5**. This Treaty does not appear to have been filed with the UN Secretariat and cannot be located in the UN Treaty Series.

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<sup>82</sup> **BIBLIOGRAPHY** R. Davies, *Creating and appropriate institutional framework for progress*, (1994), 6-9 in M. Venner, Ed. *Projects for Progress*. G. Maasdorp, *Models of Cooperation in Southern Africa*, same source, 22. M.N. Mulikita, *The PTA and Subregional Integration in Eastern and Southern Africa, A comparative Evolution* Harting Gorre, Konstanz (1993), 167.

**283. Objectives.** The preamble of the Lusaka Treaty refers to the 1973 Declaration of Addis Ababa on economic cooperation, development and independence and to the 1980 Lagos Declaration on the development of economic relations between African States with a view to establish an African common market, of which the PTA would be the first step. Indeed, in its January 1992 summit, the PTA sets a goal of establishing a Common Market for East and Southern Africa, which resulted in the Kampala Treaty of 1993 (see below at para. 319).

The PTA Treaty is therefore considered as somewhat *passé* and superseded by the Common Market. But Botswana and the Democratic Republic of Congo (ex-Zaire) do not appear to have joined the Common Market Treaty and the PTA Treaty is therefore still in force as far as they are concerned.

**284. Institutions.** Institutions of the Preferential Trade Area are:

- (1) The Conference of the Heads of State, setting up the general policy of the PTA;
- (2) The Council of Ministers being the executive branch of the PTA and formulating recommendations to the Conference;
- (3) The Secretariat in charge of general administration and finance;
- (4) The Tribunal; and
- (5) The Finance Commission and other specialized Commission created as needed.

**285. Customs** (*Articles 12 and sq.*) Partner States agree to:

- (i) A step-by-step reduction and later elimination of Customs dues;
- (ii) Establish a common tariff on imports from third countries;
- (iii) Prohibit the recourse to dumping; and
- (iv) Eliminate non-tariff barriers.

**286. Transit traffic.** Article 19 of the PTA Treaty, together with the Protocol on transit trade and facilities in Annex V to the Treaty paved the way for the Northern Corridor Agreement by stipulating that each member State shall grant freedom of transit of goods proceeding to or from another member State. PTA signatories who are also signatories of the Northern Corridor Transit Agreement (NCTA, see below) hold therefore their right to transit from two different instruments. The Protocol prohibits in particular discrimination in the treatment of means of transport and the setting of tariffs, a provision that is repeated in Article 26 of the NCTA.

**287. Transport.** Article 23 of the PTA Treaty deals with transport and communications; partner States commit themselves to establishing complementary transportation and communications policies and systems within the framework of the Transport and Communications Commission for East and South African States. They also commit themselves to develop their

existing connections, and new ones to increase integration and increase movements of persons, goods and services.

*b. Protocol relating to Customs Cooperation*

**288.** This is Annex II to the PTA Treaty issued as per Articles 3 and 20 of the Treaty. In the Preamble to the Protocol, the Contracting Parties acknowledge that divergences between national laws and regulations hamper trade between their countries. The Preamble refers also to a number of international conventions on facilitation, which, as noted above, have not all been ratified by Contracting States and are not therefore in force.

The text of the **1981 Preferential Trade Area Protocol relating to Customs Cooperation** is attached to this Review as **Annex VI-6**.

**289. Provisions.** Main provisions of the Protocol are:

- (1) **(Article 3) Preferential treatment of goods.** Partner States undertake to cooperate in the implementation of treaty provisions regarding the preferential treatment of goods, especially as regards the development of uniform legislations and procedures and the reduction of Customs duties.
- (2) **(Article 4) Simplification and harmonization.** Partner States undertake the adoption of uniform rules, systems of valuation of goods, common terms and conditions governing admission procedures, common procedures for the creation and functioning of free zones, free ports, etc.
- (3) **(Article 5) Communication.** Partner States agree on communication of information and edition of Customs tariff schedules in the form of loose-leaf volumes.
- (4) **(Article 6) Customs offences.** Partner States are to cooperate in the prevention, investigation and repression of Customs offences.

*c. Protocol on Transit Trade and Transit Facilities*

**290.** This is Annex V to the PTA Treaty. It refers to Article 3 and is accompanied by five appendices (i) describing the PTA Carnet and the forms to be used by transport operators, and (ii) setting forth the technical conditions applicable to means of transport such as vehicles and containers, for the purpose of intra-area trade. The Protocol gives extensive detail on transit procedures and the regime of sureties. These provisions are generally similar to those applicable for the enforcement of the TIR Carnet Convention (see para. 113 and sq. *supra*).

The text of the **1981 Preferential Trade Area Protocol relating to Transit Trade and Transit Facilities** is attached to this Review as **Annex VI-7**. It can be found in 21 ILM 479 (1981) and 3 DJI 284.

**291. Provisions.** Main provisions of the Protocol are as follows:

- (1) **(Article 2) Basic rules.** Partner States undertake to grant freedom to transit traffic to traverse partner States or third countries. But any member State may prohibit or restrict transit for reason of public safety, health, etc. or *in the public interest*. No levy for import or export shall be charged. There will be no discrimination in the treatment of persons or goods, including unfavorable discrimination as regards rates and tariffs.
- (2) **(Articles 3 to 5) Scope of application.** The above rules apply to carriage by licensed carriers using approved means of transport guaranteed by a surety in accordance with conditions set forth by the same protocol, and undertaken under a PTA Carnet.
- (3) **(Article 6) Bonds and sureties.** Vehicles and goods from and bound for other partner States may be covered by agreements between partner States. Vehicles and goods bound for third countries necessitate to be covered by bonds issued by banks or other approved institutions.
- (4) **(Article 8) Exemption.** Provided the provisions of the protocol are satisfied, goods carried in sealed means of transport shall not be subject to the payment of import or export duties or deposit thereof at Customs offices en route and, as a general rule, shall not be submitted to Customs examination.

*d. Protocol on Transport and Communications*

**292. General.** This is Annex VII to the PTA Treaty issued as per Articles 23 of the Treaty. In the Preamble to the Protocol refers to Resolutions of the African Ministers concerning the Trans African Highways and the Transport and Communications Decade for Africa.

**293. Objectives.** The objectives of the partner States are to evolve coordinated and complementary transport networks and policies and to promote a greater movement of goods, persons and services in the Preferential Trade Area (*Article 2*).

The text of the **1981 Preferential Trade Area Protocol on Transport and Communications** is attached to this Review as **Annex VI-8**.

294. **Provisions.** Main provisions of the protocol are:

- (1) **(Article 3) Road transport.** Partner States shall harmonize their legislations, regulations, standards documents or procedures. They will adopt similar speed limits and safety regulations. They will construct inter-State trunk roads to common standards of design. They will agree on toll and levies. And they will generally enforce rules of equal treatment between road operators of the different partner States.
- (2) **(Article 4) Railway transport.** Partner States will unify their safety requirements and regulations and harmonize their legal, administrative and procedural requirements with respect to transport, packaging, marking, loading, etc. of goods to be transported by rail in their respective territories. They will facilitate the transfer and deployment of rolling stock.
- (3) **(Article 6) Maritime transport and ports.** Partner States shall standardize port services and harmonize documents and procedures. They will try to make maximum use of the opportunities offered by the Code of Conduct for Liner Conferences where they find advantageous to do so. Coastal States will cooperate with landlocked States to facilitate their trade. They agree to charge the same tariffs in respect of goods from their territories and other partner States, and apply the same maritime regulations between themselves without discrimination. Equal treatment will also, whenever possible, be the rule for allocation of space in vessels and in port sheds. A provision in Article 9 is for the undertaking to reduce the dependency on liner conferences by developing national coastal shipping services and the preferred recourse to shipping lines of the partner States for external trade.
- (4) **(Article 7) Inland waterways.** The same effort of harmonization and simplification shall be deployed here as for other modes, with a similar enforcement of rules of equal treatment and non-discrimination. Joint ventures of river or lake transport shall be encouraged.
- (5) **(Article 9) Freight booking centers.** Partner States shall endeavor to undertake to establish national freight booking centers.
- (6) **(Article 10) Multimodal transport.** The partner States shall harmonize, simplify and make uniform their rules and regulations regarding multimodal transport and shall provide, whenever possible, facilities for direct transshipment of goods at main transshipment points.



*e. Protocol on Simplification and Harmonization of Trade Documents*

**295. General.** This is Annex X to the PTA Treaty issued as per Article 3.

**296. Provisions.** Main provisions of the Protocol are:

- (1) **(Article 2) Scope and application.** Partner States undertake
  - (i) To reduce to a minimum the number of trade documents and copies thereof;
  - (ii) To also reduce to a minimum the number of institutions required to handle these documents; and
  - (iii) To harmonize the information to be contained in these documents.
- (2) **(Article 3) Trade facilitation.** Member State undertake
  - (i) To reduce the cost of documents and the volume of paper work;
  - (ii) To ensure that the volume of documentation will not affect the development of trade;
  - (iii) To standardize their procedures; and
  - (iv) To promote the development of common solutions to problems of trade facilitation between partner States.

The text of the **1981 Preferential Trade Area Protocol on simplification and harmonization of trade documents** is annexed as **Annex VI-9** of this Review.

*f. Protocol for the Establishment of a Third Party Motor Vehicle Insurance Scheme*

**297. General.** The Protocol for the establishment of a Third Party Motor Vehicle Insurance Scheme (the Protocol) was concluded in Addis Ababa on December 3, 1986 as an implementation of Article 3 to the Protocol on Transport and Communications and as Annex XIV to the PTA Treaty.

The **1981 Preferential Trade Area Protocol on Third Party Vehicle Insurance** is attached as **Annex VI-10** to this Review. The text of this Protocol also appears in 33 ILM 1067 (1994).

Main provisions of the Protocol are as follows:

- (i) **(Articles 3 and 7)** The scheme has, as its legal, technical and financial basis, the guarantees afforded to motorists by taking out an insurance policy on the usual terms.
- (ii) The scheme will be based on a PTA Yellow Card, valid for no more than one year, issued by National Bureaus, composed of insurers, through these insurers. A Council of Bureaus coordinates and supervises the scheme.
- (iii) **(Articles 4 and 5)** Parties to the Protocol shall participate as Principal Participants. Insurers, provided they are members of the National Bureau, shall participate as subsidiary participants. The Principal Participants shall ensure that National Bureaus are established in their country and will guarantee their solvency, by the way of deposit of a letter of credit with the Central Bank or another designated bank, as security. Subsidiary participants reimburse the National Bureau for any compensation of damages and contribute to the operating expenses of the Bureaus.
- (iv) **(Article 18)** The main duty of the Council of Bureaus is to issue an inter-Bureaus contract to be signed by all Bureaus. The contract, in particular, determines the maximum amount for the delegation of powers of settlement by one Bureau to another, and the minimum-handling fee payable for each case handled by them.

## E. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)<sup>83</sup>

### a. *General*

**298. History.** SADC originated from the political movement of the Front Line States (FLS) in opposition to South Africa apartheid policy. FLS countries were Angola, Botswana, Mozambique, Tanzania and Zambia. The foreign ministers of these countries met in Gaborone in May 1979 for discussing mechanisms to achieve cooperation. The following year, the leaders of FLS, accompanied by leaders from Lesotho, Malawi, Swaziland and Zimbabwe, and inspired by the Final Act of Lagos of April 1980 (see *supra* at para. 137), decided to pursue economic integration. On April 1, 1980 the Lusaka Declaration was issued on “Southern Africa: towards economic liberation” by the independent States of South Africa. The Southern African Development Coordination Committee was created, placing an emphasis on infrastructural development as a means of lessening dependence on South Africa as a transit country and on helping regional integration. The political evolution in South Africa and the movement towards African economic integration illustrated by the June 1991 Abuja Treaty establishing the African Economic Community (see *supra* at para. 138) led to a broader approach. The Southern African Development Community was therefore founded at Windhoek (Namibia) on August 17, 1992. The seat of SADC is at Gaborone (Botswana). The fourteen members are: Angola, Botswana, the Democratic Republic of Congo (joined in 1998), Lesotho, Malawi, Mauritius (joined in 1995), Mozambique, Namibia, South Africa (joined in 1994), Swaziland, Seychelles (joined in 1998), Tanzania, Zambia and Zimbabwe.

The **Southern African Development Community Treaty** is attached as **Annex VI-11** to this Review. The treaty does not appear to have been filed with the UN Secretariat. It cannot be traced in the UN Treaty Series, but can be found in 32 ILM 116 (1993).

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<sup>83</sup> **BIBLIOGRAPHY** *SADC in the 1990s. Development on the front line*, The Economic Intelligence Unit, London, Special Report No 1158 (1989). SADC Annual Reports. Report of the SADC Council of Ministers on the Review of the Operations of SADC, Gaborone, 2000. A.B. Shankango, *20 years of development in South Africa. A sectoral review of regional integration of SADC*, Harare, 2001. H. Labayle, *La SADC ou les difficultés d'une coopération économique régionale en Afrique australe*, L'Année africaine, Paris, 1981, p. 254-280. M.O. Blanc. *La SADC, la SACU et l'Afrique du Sud*, in P. Hugon, Ed. *Analyse comparative des processus d'intégration économique régionale*, Ministère des Affaires étrangères, Paris, 2000, 124-141. R. Mtengen-Migiro, *Institutional Arrangements for Economic Integration in Southern Africa, A Study of SADC and the PTA with Experience from the EEC*, Harting Gorre, Konstanz, 1992. A.M. Mawanzu, ed. *Structural Adjustment Programs in SADC. Experience and lessons from Malawi, Tanzania, Zambia and Zimbabwe*, SAGES, Harare, 1992. M. Ndulo, *The need for the harmonization of trade laws in the Southern African Development Community*, 4 AYIL (1996) 195-225. M.B. Gleave, *The Dar es Salam Corridor: an Appraisal*, African Affairs, London, 1992, No 91, 249-267.

**299.** SADC may seem to be overlapping with the Common Market for Eastern and Southern Africa (COMESA, see para. 319 and sq) created in 1993, one year after the treaty establishing SADC. So far, SADC has resisted the efforts deployed to convince its members to merge the two institutions. Furthermore, unlike other regional and sub-regional organizations, the SADC Treaty (Article 23) envisages a role for and cooperation with non-governmental organizations.

*b. Objectives*

**300.** SADC's arrangement is more ambitious than a Customs Union but is less than an economic union. Harmonization is the master word rather than unification. Each member State keeps its autonomy and decisions at the top are reached by consensus. Objectives as regards economics are to:

- (i) Achieve development and economic growth;
- (ii) Promote self-sustaining development;
- (iii) Achieve complementarity between national and regional strategies and programs;
- (iv) Develop policies aimed at the progressive elimination of obstacles to the free movement of capital, labor, goods and services among Partner States;
- (v) Coordinate, harmonize and rationalize their sector strategies, policies, programs and projects in the areas of cooperation, especially as regards infrastructure and services.

*c. Institutions and structure*

**301.** SADC original institutions were:

- (i) The Summit of Heads of State or Government responsible for the overall policy direction and control of the SADC (Article 10);
- (ii) The Council of Ministers responsible for overseeing the functioning of the SADC, and for approving policies, strategies and work programs (Article 11);
- (iii) Sector Commissions and coordinating units, constituted to guide and coordinate cooperation and integration policies and programs (Article 12);
- (iv) The Standing Committee of Officials, a technical advisory committee to the Council (Article 13);
- (v) The Secretariat, principal executive institution of SADC (Article 14) located in Gaborone; and

- (vi) The Tribunal (Article 16).

**302. Allocation of responsibilities between partner States.** Each member State was allocated the responsibility for coordinating one or more of the 21 sectors identified by SADC. Transport was allocated to Mozambique and trade to Tanzania. Sectoral Commissions are assisted by a Commissions secretariat and funded by all partner States. The sector coordinating units are national institutions established in the appropriate line ministry by the member country responsible for coordinating the particular sector and staffed by civil servants of that particular country.

**303. August 2001 Amendment to the Treaty.** Following a consultants' report issued in 1997, the SADC Treaty was amended at a Council of Ministers Meeting in Blantyre in August 2001. The SADC will now :

- (i) Lead the Summit by a troika composed of the Chairperson, the Incoming Chairperson and the Outgoing Chairperson.
- (ii) Create an Integrated Committee of Ministers to oversee the implementation of the core area of integration, and provide policy guidance to the Secretariat.
- (iii) Close down the Country Sector coordinating units and commissions and transfer of their jurisdiction to the Secretariat, in four Directorates (Directorate 1 will take Trade and Directorate 3 Infrastructure and Services, i.e. Transport).
- (iv) Create national committees consisting of key stakeholders from government, the civil society, non-governmental organizations, workers and employers organizations.

*d. SADC Protocol on Transport, Communications and Meteorology<sup>84</sup>*

**304. Protocols.** Protocols are legal instruments that commit partner States to cooperate, coordinate, harmonize and integrate policies and strategies in one or more sector. Sectoral coordinators in collaboration with SADC agencies develop protocols. They are reviewed by SADC's legal sector (Namibia is the coordinator for legal affairs), and submitted by the Council of Ministers for approval. They need to be ratified by two-thirds of the partner States before coming into force. Of interest to trade and transport are the 1995 Shared Watercourse Systems Protocol, the 1996 Transport, Communications and Meteorology Protocol and the 1996 Trade Protocol. The 2000 Revised Protocols on Watercourses and on Trade have not been ratified yet.

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<sup>84</sup> See H. Sano and K. Mizuno, *Regional Transport Infrastructure in Southern Africa*, Japan Bank for International Cooperation Review No 2, Tokyo, 11.2000, 116-133.

The **SADC Protocol on Transport, Communications and Meteorology** is attached to this Review as **Annex VI-12**.

**305. General.** The SADC Protocol on Transport, Communications and Meteorology signed by the Heads of State and Governments in August 1996 has entered into force. It states as a main strategic goal *Integration of transport, communications and meteorology networks to be facilitated by the implementation of compatible policies, legislation, rules, standards and procedures, elimination or reduction of hindrances and impediments to the movements of persons, goods, equipment and services... the right of freedom of transit for persons and goods, the right of land-locked States to unimpeded access to and from the sea... the development of simplified and harmonized documentation which supports the movement of cargoes along the length of the logistical chain, including the use of a harmonized nomenclature*. This Protocol was reviewed in detail in a Protocol Implementation Workshop held in January 1997.

**306. The Corridor concept.** At an early stage, SADC developed the transport corridor concept in order to compete with South Africa. These corridors originated therefore as politically motivated policies to which sources of international finance were in fact associated. According to the Protocol, a Corridor is *a major regional transportation route along which a significant proportion of partner States or non partner States regional and international imports and exports are carried by various transport modes* (Art. 1.1). Seven such corridors are identified and were agreed to conform to the definition of the Protocol, as presented below in Table 3.

**307.** Over time and after policy changes in South Africa modified the regional background, a Development Corridor concept emerged from the Transport Corridor concept, encompassing a wider scope than transportation. South Africa, besides, proposed the Spatial Development Initiative (SDI), which overlaps with the Development Corridor concept.

**308. (Article 3) Objectives.** The aim of the Protocol is to establish transport systems that provide efficient, cost-effective and fully integrated transport infrastructure, policy and operations. Main aspects of the policy are:

- (1) Development of complementarity between modes and encouragement to multimodal service provision;
- (2) Establishment of infrastructure, logistical, institutional and legal frameworks including the right of transit and the right of land-locked countries<sup>85</sup> to unim-

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<sup>85</sup> **BIBLIOGRAPHY** J. Baloro, *Rights of Access to the Sea, International legal Aspects of Land-locked SADC States dependency on the Republic of South Africa*, University of Swaziland, ca 1980. T. Maluwa, *Southern Africa Landlocked States and Rights of Access under the New Law of the Sea*, *The International Journal of Marine and Coastal Law* (1995), 529-542. R.K. Sizani, *The Law of the Sea Convention and the Rights of Neighboring African Land-locked States to Fish in the South African Fishing*

peded access to the sea and equal treatment of nationals from different member countries; and

- (3) Establishment of cross-border multimodal Corridor Planning Committees comprising public and private participants.

**Table 3**

**SADC Transport Corridors**

| Corridor          | Origin-Destination                           | Mode  |
|-------------------|--|---|
| Southern Corridor | South Africa -Botswana-Zimbabwe-Zambia-Congo | Rail and road   |
| Maputo Corridor   | Maputo to Johannesburg, Harare and Manzini   | Rail for Harare. Rail and road for Johannesburg and Manzini |
| Trans Kalahari    | Walvis Bay-Pretoria and Johannesburg         | Road  |
| Trans Caprivi     | Walvis Bay-Lusaka                            | Road  |
| Beira Corridor    | Beira-Lusaka<br>Beira-Lilongwe and Blantyre  | Road and rail for Lusaka<br>Road for Lilongwe and Blantyre  |
| Nacala Corridor   | Nacala-Lilongwe and Blantyre                 | Rail  |
| Tazara Corridor   | Dar es Salam-Lusaka and Lilongwe             | Road and rail to Lusaka<br>Road to Lilongwe                 |
| Lobito Corridor   | Lobito-Shaba-Zambia                          | At present closed   |

**309. (Article 4) Road Infrastructure.** Partner States agree to

- (1) Ensure and sustain the development of an adequate road network;
- (2) Adopt a common definition of Regional Trunk Road Network serving as a basis for a coordinated plan for the construction and development of roads;
- (3) Establish autonomous road authorities representative of the public and private sector for overseeing, regulating and managing the roads and the effective utilization of funding of roads;

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*Zone*, 3 AJICL (1991) 597. S. Marks, *Transit Rights of Lesotho*, Commonwealth Law Bulletin, 1990, p.329-348.

- (4) Develop a policy of funding resources ensuring that road users contribute to the full cost of maintaining and providing the roads; and
- (5) Harmonize technical standards.

**310. (Article 5) Road Transport.** Partner States agree to

- (1) Facilitate the flow of goods and passengers by promoting the development of a strong and competitive commercial road transport industry;
- (2) Liberalize their market access policies in respect to the cross-border carriage of goods with the objective of all reaching the same degree of liberalization, through bilateral and multilateral agreements between States addressing the need for single SADC carrier permits or licenses, quota systems, establishment of bilateral or multilateral Road Transport Route Management Groups;
- (3) Develop harmonized transport law enforcement, harmonized safety standards, third party insurance, training and testing of drivers, etc.;
- (4) Cooperate to develop and implement a coordinated regional traffic quality management plan to improve road traffic safety, protect the road infrastructure, exchange and transfer technology with the establishment of a regional coordinating body comprising representatives of all executive law enforcement authorities responsible for roads, traffic management and control for implementing and managing a harmonized road traffic quality management plan;
- (5) Conduct environmental control; and
- (6) Develop road traffic information systems.

**311. (Article 6) Railways.** Partner States agree to

- (1) Facilitate the provision of efficient railways;
- (2) Formulate a policy for institutional restructuring of the railways, granting autonomy to their management and increasing private sector involvement in railway investment;
- (3) Create an integrated regional network of railway corridors with common standards for customer service and promotion of data information exchange;
- (4) Develop harmonized and simplified procedures and documents as well as a common freight nomenclature to establish a single railway invoicing system;
- (5) Design compatible technical and equipment standards; and
- (6) Establish Railway Route Management Groups to support the activities of regional railways and the Corridor Planning Committees.



**312. Maritime and Inland Waterway Transport (Chapter 8)** In the area of maritime and inland waterways, the objective is to formulate a harmonized policy and collectively develop a common understanding on the net benefits of common shipping and ports policy with possible redistribution effects amongst partner States. Cooperation and development of common standards in the areas of hydrographic works, chart making, ship standards, seamen's conditions, environmental protection, marine communications and training of personnel are also considered.

**313. Civil aviation (Chapter 9)** While in maritime affairs, the accent is placed exclusively on the public administration aspects of shipping and marine activities, the approach as regards civil aviation is double. On the one hand, the commercial and competitive position of the airlines is to be reinforced. On the other hand, new efforts are to be developed in the area of civil aviation administration. Main aspects of this policy are reviewed herein after.

**314. Business development in civil aviation.** In the area of business development, partner States intend to:

- (1) Liberalize the air transport market for the SADC airlines;
- (2) Develop regionally owned airlines;
- (3) Restructuring existing airlines by commercialization, human resources development, opening of capital of government-owned airlines to outside investors;
- (4) Expand and strengthen government capacity to provide policy framework and develop supportive regulatory and investor-friendly legislation, with a view to attract capital from national or foreign investors;
- (5) Develop competent airline management and encourage joint venture operations with possible integration of existing airlines with a view to establishing regionally owned airlines;
- (6) Possibly standardize equipment; and
- (7) Develop human resources.

**315.** SADC is currently finalizing a joint air transport competition rules together with COMESA and the EAC, based on the implementation of the 1999 Yamoussoukro Decision. This Decision taken at the AU level liberalized access to the African air transport market to all companies designated by the member States. It became enforced in July 2002 after a two-year preparation, but lacks today enforcement tools to settle disputes, one of the matters of the joint EAC-COMESA-SADC competition policy project.

**316. Civil aviation public administration.** In the area of civil aviation administration, the partner States commit themselves to the observance of the International Civil Aviation Organization (ICAO) standards and recommended practices. They agree to:

- (1) Recognize each other's licenses and certificates of airworthiness, provided they comply with ICAO standards and recognized practices (SARP); and
- (2) Coordinate their representation in the ICAO and develop a common position in that respect.
- (3) Member States tentatively seek to integrate actions in some areas of civil aviation public administration, especially as regard safety, but these actions have not led to the elaboration of specific instruments for that purpose so far.

*e. Watercourses and Lakes*

**317. Protocol on shared watercourses.** On August 25, 1995, the SADC partner States, including South Africa but excluding Angola, concluded a **Protocol on Shared Watercourses Systems in the Southern Africa Development Community**. It entered into force in 1998. A revised Protocol was concluded on August 7, 2000. All SADC members signed that protocol, apart from the RDC. The Protocol is based on the so-called Helsinki Rules and on the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, which embodies the concept of *equitable and reasonable utilization of the watercourses*. The Protocol exists in printed form in 40 ILM 317 (2001).

The text of the protocol is not attached as an annex since it does not deal with the navigational uses of the watercourses.

**318. Lake Shipping and Port Services Agreement.** Malawi and Tanzania signed in 1995 the Lake Shipping and Port Services Agreement covering, *inter alia*, cooperation in the operation of lake and port services, adoption of a uniform system of coastal surveys, navigational charts and the erection of navigational aids. The Agreement provides for sharing information on the occurrences of pollution<sup>86</sup>. The text of this agreement has not been located yet. A comparison of its provisions with the provisions of the 1921 Statute of International Rivers (see para. 97 *supra*.) inherited from the British Empire by most sub-Saharan Anglophone States will be of interest.

The text of the **Lake Shipping and Port services Agreement** will be inserted as **Annex VI-13** when available.

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<sup>86</sup> Source: UNCTAD Document LDC 115, July 20, 2001.

## F. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA<sup>87</sup> (COMESA)

### a. *General*

**319. History<sup>88</sup>.** In the Preamble to the 1993 Kampala Treaty, the Contracting Parties refer to a January 30-31 1992 decision of the Authority to transform the PTA in a Common Market. They also make reference to Article 18(1) of the Abuja Treaty for the establishment of the African Economic Community (see para. 138 above). The Common Market is therefore the ultimate stage of a process of economic and social integration, which started with other more limited instruments. Members are Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tanzania (until 2001), Uganda, Zambia, and Zimbabwe. South Africa, a member of SADC, an organization somewhat competing with COMESA, is not a COMESA member.

As indicated in paragraph above, the Common Market was established by the Treaty concluded at Kampala (Uganda) on November 3, 1993.

The text of the **1993 Kampala Treaty establishing an Eastern and Southern Africa Common Market** is attached as **Annex VI-14**. The Treaty seems not to have been filed with the UN Secretariat. It does not appear in the UN Treaty Series but was published in 33 ILM 1067 (1994).

### b. *Objectives*

**320.** The objectives of the Common Market (Article 3) are generally to attain sustainable growth and development of partner States in an overall system of economic cooperation. As a

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<sup>87</sup> **BIBLIOGRAPHY** M. Gondwe, *From PTA to COMESA*. The quest for sub-regional economic integration in East and South Africa, AYIL (1998), 3-22. S. Karangizi and M.J. Musonda, *The institutional framework of COMESA*, in V. Murende, ed, *The Free Trade Area of the Common Market for Eastern and Southern Africa*, Ashgate, Aldershot, G.B. 2001. O. Abegunrin, *Economic Dependence and Regional Cooperation in Southern Africa*, 1990. M. Lundahl and L. Petersson, *The Dependent Economy, Lesotho and the Southern African Customs Union*, 1991. Namibian Economic Policy Research Unit, *Namibia and the Southern African Customs Union*, 1992. M.O. Blanc. *Le devenir du COMESA*, in Ph. Hugon, *Analyse comparative des processus d'intégration économique régionale*, ministère des Affaires étrangères, Paris, 2000, 137.

<sup>88</sup> See S.G. Mwale, *An historical background of the formation of COMESA*, in V. Murende, ed, *The Free Trade Area of the Common Market for Eastern and Southern Africa*, Ashgate, Aldershot, G.B. 2001.

consequence, aims and objectives, here limited to cooperation in trade and transport, are as follows.

- (a) Establish a **Customs Union** and abolish all non-tariff barriers to trade; simplify and harmonize procedures and documentation;
- (b) Facilitate **trade** in goods and services and the movement of persons;
- (c) Facilitate **transit trade** within the Common Market; and
- (d) Adopt a Third Party Motor Vehicle Insurance Scheme.

The COMESA Vision and Strategy into the 21<sup>st</sup> Century states that *Facilitation of both road and air transport is to ensure more efficient movement of goods and people, thus not only enhancing extra-COMESA trade, but also maximizing the use of existing infrastructure. Transport facilitation programs also try to create stable, competitive and cost-efficient transit system.*

*c. Institutions*

**321.** The Common Market institutions are:

- (i) **(Article 8)** The Authority, composed of the Heads of State or Government of the partner States, to provide for general policy, direction and control;
- (ii) **(Article 10)** The Council of Ministers, formed by one Minister of each member State, to ensure the proper functioning of the Common Market (Article 9); the Council makes regulations, directives, takes decisions, makes recommendations and provides opinions. Regulations, decisions and directives shall be binding.
- (iii) **(Chapter 5)** The Court of Justice to ensure the adherence to law in the interpretation and application of the Treaty (Chapter 5); decisions of the Court will take precedence over the decisions of the national courts.
- (iv) **(Article 13)** The Committee of Governors of Central Banks, responsible for financial and monetary cooperation.
- (v) **(Article 14)** The Intergovernmental Committee consisting of Permanent or Principal Secretaries designated by partner States, to be responsible for cooperation in all sectors except monetary and finance.
- (vi) **(Article 15)** The Technical Committees to be responsible for the preparation and monitoring of cooperation programs. Two of these Committees shall be for Trade and Customs and Transport and Communications respectively.
- (vii) **(Article 17)** The Secretariat as the executive branch of the Common Market, with a Secretary General.

- (viii) *(Article 18)* The Consultative Committee of the Business Community and Other Interest Groups.

*d. Trade liberalization*

322. The stipulations are summarized as follows:

- (i) *(Articles 45 to 50)* Within ten years of the entry in force of the Treaty, a Customs Union shall be established. By the year 2000, Customs duties and other similar charges shall be eliminated. A common external tariff shall be established as regards imports from third countries. Quantitative barriers shall also be eliminated.
- (ii) *(Articles 51 to 55)* Dumping, as defined by the Treaty, shall be prohibited as well as any practice negating the objective of free and liberalized trade.
- (iii) *(Articles 63 to 71)* Customs cooperation shall be organized by simplification of documents, harmonization of procedures and regulations, communication of Customs information, cooperation in the prevention, investigation and suppression of Customs offence.

A Protocol dealing with rules of origin was adopted and entered in force in December 1994.

*e. Transport*

323. Common policies are to be applicable to all modes of transport.

- (i) *(Article 84)* The adequate **maintenance** of roads, ports, airports and other facilities, the security of transport systems, the grant of special treatment to landlocked States, the development of intermodal systems are the main objectives of the common policy.
- (ii) *(Article 85)* As regards **roads**, partner States must accede to international conventions on road traffic, road signals, etc., harmonize the provisions of their laws, standards, formalities, regulations, transit traffic, and ensure equal treatment of common carriers and road operators in all countries of the Common Market.
- (iii) *(Article 86)* As regards **railways**, the objectives are efficiency and coordination. Priorities are common policies for the development of railways and railway transport, with common safety rules, procedures, regulations, non-discriminatory tariffs and standards of equipment.

- (iv) *(Article 90)* As regards **aviation**, the objective is the provision of better and more efficient air transport. Joint air services should be developed as steps towards the establishment of a Common Market airline. Common policies would involve the liberalization of granting traffic rights and coordinating flight schedules.
- (v) *(Article 91)* As regards **multimodal transport**, partner States shall harmonize and simplify regulations and procedures, and apply uniform rules. They will take measures to ratify the international conventions on multimodal transport.
- (vi) *(Articles 91 and 92)* As regards **freight** in general, the partner States shall install freight booking centers. They will develop c.i.f. exports and f.o.b. imports. Licensing of freight forwarders, shipping agents and Customs clearing agents shall be at equal conditions for all citizens of the partner States.
- (vii) *(Article 88)* **Maritime transport and ports** will also be coordinated and harmonized. Ports services should be *efficient and profitable*. Coastal States should facilitate the trade of landlocked States. International conventions on maritime transport ought to be ratified. Non-discriminatory tariffs are to be applied.
- (viii) *(Article 89)* **Inland waterway transport**. Administrative procedures, rules, regulations will be harmonized and simplified. Tariffs structure shall be harmonized. They will be the same for cargoes from the different partner States. Joint ventures should be developed.
- (ix) *(Article 90)* Partner States shall cooperate in the development of pipeline transport.

*f. Protocol on Transit Trade and Transit Facilities*

**324. General.** Based on Article 4 of the Treaty, and by which the partner States were to make regulations for facilitating transit trade, the **Protocol on Transit Trade and Transit Facilities** was issued like the Treaty on November 5, 1993, as Annex 1.

The Protocol comprises:

- (a) The Protocol itself;
- (b) Appendix I, Notes for the use of the Common Market Transit document;
- (c) Appendix II, Regulations relating to technical conditions applicable to means of transport other than porters and pack animals which may be accepted for transport of goods within the Common Market under Customs seal.

The **COMESA Protocol on Transit Trade and Transit Facilities** and Appendices are attached to this Review as **Annex VI-15**.

**325. Provisions.** Main provisions of the Protocol are:

- (i) *(Articles 2-1 and 3)* Until a common external tariff is established, all transitors and transit traffic have freedom to cross the territories of the Common Market whether from or to partner States or from and to third countries, subject to any restriction imposed by a partner State for the purpose of safety, public health, etc., and generally the public interest.
- (ii) *(Articles 2-3)* No import or export duty is to be levied on transit trade; rates and tariffs applicable shall be applied without discrimination. Administrative charges may be levied.
- (iii) *(Articles 4 and 5)* All carriers engaged in transit traffic shall be licensed. Satisfaction of technical conditions of the carriage shall be a condition of licensing.
- (iv) *(Articles 6 to 9)* Standard Common Market Transit Documents will be used to accompany goods in transit. See Appendix 1 to Protocol as regards procedures for the use of the Document and Annex (Completion Guide for COMESA Customs Document). Transit goods will be transported under seal. Unless there is suspicion of abuse, goods in transit
  - (a) shall be exempt of import or export duties; and
  - (b) shall not be subject to Customs examination at Customs offices. All transit traffic shall be covered by Customs bonds and sureties arrangements.
- (v) *(Articles 10 and 11)* Partner States undertake to facilitate the transfer to other partner States of the funds necessary for payment of premiums, penalties, bonds, etc. related to transit operations.

*g. Protocol on Third Party Motor Vehicle Insurance Scheme*

**326. General.** This Protocol constitutes the Annex II of the Treaty. It was concluded on March 5, 1993 in Kampala. It implements Article 85 of the Treaty stipulating that partner States shall adopt minimum requirements for the insurance of goods and vehicles. The scheme provides at least minimum guarantees as those required by the laws in force in the partner States when the insured vehicle is transiting the territories of other partner States (Article 2). It is based on the PTA Third Party Insurance scheme. The only difference is that the Parties are less involved as guarantors in the National Bureaus.

The **COMESA Protocol on Third Party Motor Vehicle Insurance Scheme** is attached to this Review as **Annex VI-16**.

**327. Provisions.** Main provisions of the Protocol are as follows:

- (i) *(Article 3)* The Scheme is based on a Common Market Yellow Card issued by a National Bureau and handed over to motorists on the usual terms by an insurer authorized to undertake this type of business. National Bureaus, composed of insurers, will settle on behalf of the insurers the claims arising from accidents caused abroad by holders of cards that they have issued and claims arising from accidents caused in its country by holders of card issued by other National Bureaus.
- (ii) *(Articles 6 and 7)* Yellow Cards, proof of the existence of an insurance policy, are issued for a maximum of one year and for a specific vehicle. Notwithstanding the insurance policy under which it is issued, the Yellow Card provides all the guarantees required by law governing motor vehicle insurance in the country in which the accident occurred.
- (iii) *(Article 18)* A Council of Bureaus, meeting at least once a year, is composed of representatives of all the Bureaus of the Common Market. The Council shall orientate, coordinate and supervise the insurance scheme established by the Protocol together with the legal, technical and financial operations of the National Bureaus. It settles disputes between Bureaus. An Inter-Bureaus Agreement determines the maximum amount for the delegation of the powers of settlement by one National Bureau to another, and the minimum handling fee payable for each case handled by them.

*h. Completion Guide for COMESA Customs Document*

**328. General.** In August 1997, COMESA issued a Completion Guide for Customs Declarations to replace the Customs declaration forms currently in use. The new form is intended to handle all Customs regimes, whether import, export, transit or warehousing.

The **COMESA Guide for Customs documents**, which is self-explanatory, is attached to this Review as **Annex VI-17**.



## G. WALVIS BAY CORRIDOR GROUP INSTRUMENTS

### a. *General*

**329. Trans-Kalahari Corridor Management Committee.** The Walvis Bay Corridor Group (the Group), described in paragraph 259 [7] above was established in 1998 as a private sector initiative to expedite the utilization of:

- (i) The Trans Kalahari Corridor from Walvis Bay to Botswana and South Africa;
- (ii) The Transcaprivi Highway and associated railway to DRC, Zambia and Zimbabwe; and
- (iii) The Northern Route to Southern Angola to serve as a central entry structure that can coordinate international trade with SADC countries through the port of Walvis Bay.

On October 21, 2001, the Group was elected Secretariat of the Trans-Kalahari Corridor Management Committee (TK CMC) set up under the SADC Transport Protocol as a trilateral transport facility committee. TK CMC members include representatives from both Government and transport industry of the three Trans-Kalahari member countries (South Africa, Botswana and Namibia).

### b. *Memorandum of Understanding on the Development and Management of the Trans-Kalahari Corridor*

**330.** In the summer 2001, a Memorandum of Understanding (MoU) was drafted for an agreement between the Governments of Botswana, Namibia and South Africa (the Contracting Parties). The MoU was initiated in the framework of the so-called *Regional Activity to Promote Integration through Dialogue and Policy Implementation* or RAPID Program, financed by USAID.

The **Memorandum of Understanding on the Trans-Kalahari Corridor** is attached to this Review as **Annex VI-18**.

**331. Preamble.** The preamble of the MoU states that the Contracting Parties shall:

- (i) Make all laws, regulations, etc. applicable on the Corridor readily available;
- (ii) Endeavor to harmonize and simplify all laws, regulations, etc.
- (iii) Ensure the efficient and effective administration of transit traffic and to practice a consistent application of such laws, regulations and procedures; and
- (iv) Ensure mutual cooperation and assistance between themselves;

being understood that the Contracting Parties are mindful of their obligations and commitments under other agreements, such as the SADC Protocol on Transport, the Protocol on Trade, and the MoU on Road Transport in the SACU Memorandum of Understanding on Road Transportation.

**332. Main provisions.** According to the MoU, the Contracting Parties shall:

- (i) *(Article 1.4)* Develop strategic partnerships between themselves and the private sector.
- (ii) *(Article 2.1)* Simplify and harmonize their Customs procedures, adopt a common transit procedure and introduce joint Customs control at border points.
- (iii) *(Article 2.2)* Establish consultative committees composed of public and private sector stakeholders on the subject of joint Customs control.
- (iv) *(Article 3.1)* Ensure that revenue obtained from road users under road users charges are dedicated for the maintenance and operation of roads.
- (v) *(Article 3.2)* Offer equal access to each other transport markets.
- (vi) *(Article 4.1)* Adopt and implement harmonized standard in respect of vehicle characteristics, vehicle fitness, road signs, axle loads, etc.
- (vii) *(Articles 4.2. to 4.6)* Improve traffic safety by law enforcement and driver training and testing.

**333. Institutions.** Institutions are:

- (i) The Trans-Kahalari Corridor Management Committee composed of representatives of modal operators, of transport infrastructure and transport authorities, of port and Customs authorities, of freight forwarders, and generally of all business and agencies interested in the corridor (Article 6.1).
- (ii) The Secretariat supporting the Contracting Parties, and providing administrative support (Article 6.2).



## VII. SUB-REGIONAL INSTRUMENTS – WEST AFRICA

### A. BASIC SUB-REGIONAL INSTRUMENTS<sup>89</sup>

**334. Presentation.** Like East Africa, West Africa has a long experience in inter-State cooperation in transport. Agreements were signed either between States of each of the Francophone and Anglophone groups, or between States of either group. Two sub-regional groupings stand at present, the Economic Community for West African States (ECOWAS) and the *Union économique et monétaire de l'Afrique de l'Ouest* (UEMOA).

**335. West African Customs Union (1959) and Economic Community of West African States (1973).** On June 9, 1959 was established the West African Customs Union between six Francophone States of West Africa. The objectives and results of the Union were limited despite a revision of the original agreement on June 3, 1966 and a tentative broadening of the institution to include Anglophone States in 1967. The Heads of States decided at the Bamako meeting of May 1970 to create a new grouping of States for increased economic cooperation. On April 17, 1973, a Treaty was concluded in Abidjan between the same States, Côte d'Ivoire, Burkina Faso, Mali, Mauritania, Niger and Senegal, to form the *Communauté économique de l'Afrique de l'Ouest* (CEAO), Economic Community of West Africa. The same full name of the Community had been used in 1967 to designate stillborn regional grouping of Francophone and Anglophone States. The CEAO (1973) was intended to encourage the harmonious and balanced development of the economies of partner States (Treaty, at Article 3). For that purpose, an active policy of economic integration was to be conducted at regional level in particular with respect to transportation (Treaty, at Article 4). A unified Customs zone was created, where goods originating within the Community were to circulate without quantitative restrictions (Treaty, at Art. 5). Tariffs were common in relations with third countries and special Customs regime existed for intra-community trade. Chapter VII of the Abidjan Treaty and Protocol F Annexed to the Treaty and an integral part of it provided for *the principles and main procedures of imple-*

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<sup>89</sup> **BIBLIOGRAPHY** On the subject matter as a whole, see S. Belaouane Gherari et H. Gherari, *Les organisations régionales africaines*, La Documentation française, Paris, 1988, bibliography (in French), p. 221-227. G.C. Abangwe, *Systems Approach to Regional integration in West Africa*, 13 JCMS, Oxford, No 1-2, (1975), 113-135. R.O. Akeju, *The political economy of prosperity: possibilities and problems of functional integration in West Africa*, Howard University, Washington, D.C., U.S.A. 1977. R.O. Akeju, *The political economy of prosperity: possibilities and problems of a functional integration in West Africa*, Howard University, Washington, D.C., U.S.A. 1977. J.P. Renninger, *ECOWAS and other West African regional organizations, multilateral cooperation for development in West Africa*, New York, Oxford, Toronto, Pergamon Press, 1979. R.E. Ubogu et al. *Development planning priorities and strategies in the economic community of West African States*, Heinemann Educational Books, Ibadan, Nig. 1983.

*mentation of a common policy of transport and communications coordination and development.* Protocol F also provided for:

- (i) A study of the transportation system (infrastructure and operations) of the community of States; and
- (ii) The setting up of freight bureaus and shippers' councils to facilitate foreign trade.

A Committee for cooperation in transportation, created in the Secretariat General, comprised of experts appointed by the partner States, was to study the creation of a common transportation service. The Abidjan Treaty is no longer enforceable, as CEAO was dissolved in 1994 and replaced by UEMOA (see para. 389).

**336. Economic Community of West Africa<sup>90</sup>.** A protocol was concluded in Accra on May 4, 1967 for the establishment of the Economic Community of West Africa (CEAO) between fourteen States, nine Francophone and five Anglophone. The CEAO Articles of Association aimed, *inter alia*, at eliminating Customs and other obstacles to trade within the Community and to *contribute to an orderly expansion of trade* between the partner States and the rest of the world. The Accra Protocol registered with the United Nations (No 8623, May 4, 1967) was apparently not ratified. The successive creation of the Francophone CEAO in 1973 and of ECOWAS in 1975 indicate that it made little progress.

**337. Economic Community of West African States – ECOWAS.** ECOWAS was established by the Treaty concluded at Lagos (Nigeria) on May 28, 1975 (the Lagos or ECOWAS Treaty). Sixteen countries are members. It was revised on July 24, 1993, by a new Treaty concluded in Cotonou. ECOWAS is the guardian of the Treaty in Lagos. It inherited, in an enlarged form, the model drafted with the creation of CEAO, a bilingual institution. Developments on ECOWAS are to be found in **Section C** below.

**338. Union économique et monétaire ouest africaine (UEMOA).** UEMOA replaced the Francophone CEAO as an enlarged non-English speaking group. It was established by a treaty concluded in Dakar on January 10, 1994 (modified on January 29, 2003) by Francophone States of West Africa, all members of the CFA zone. It also replaced the monetary institution (*Union monétaire ouest-africaine*) established by these States as members of the CFA Franc zone. UEMOA organizational structure, scope and norms appear clearly to have been inspired by the Treaty of Rome establishing the European Economic Community. (See **Section D** on UEMOA).

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<sup>90</sup> S. Belahouane-Gherari and S. Gherari, op. cit. 138-147. J.C. Gautron, *La Communauté économique de l'Afrique de l'Ouest, antécédents et perspectives*, XXI AFDI (1975), 196-215.

339. At present dormant, the **Mano River Declaration** dated October 3, 1973, concluded at Amalena, established a Customs Union between Liberia and Sierra Leone. See **Section E** on Mano River.

340. Just as in Eastern and Southern Africa, there is overlapping between sub-regional institutions, some West African States may belong to groupings centered on other geographical zones, such as OHADA. **Table 4** summarizes the participation to the different groupings.

**Table 4. Membership of sub-regional organizations – West and Central Africa**

|                   | ECOWAS | UEMOA | CEMAC | OHADA |
|-------------------|--------|-------|-------|-------|
| Benin             | x      | x     |       | x     |
| Burkina Faso      | x      | x     |       | x     |
| Cameroon          |        |       | x     | x     |
| Cape Verde        | x      |       |       |       |
| CAR               |        |       | x     | x     |
| Chad              |        |       | x     | x     |
| Comoros           |        |       |       | x     |
| Congo             |        |       | x     | x     |
| Côte d'Ivoire     | x      | x     |       | x     |
| Equatorial Guinea |        |       | x     | x     |
| Gabon             |        |       | x     | x     |
| Gambia            | x      |       |       |       |
| Ghana             | x      |       |       |       |
| Guinea            | x      |       |       | x     |
| Guinea Bissau     | x      | x     |       | x     |
| Liberia           | x      |       |       |       |
| Mali              | x      | x     |       | x     |
| Mauritania        |        |       |       |       |
| Mauritius         |        |       |       |       |
| Niger             | x      | x     |       | x     |
| Nigeria           | x      |       |       |       |
| Rwanda            |        |       |       |       |
| Sao Tome          |        |       |       |       |
| Senegal           | x      | x     |       | x     |
| Sierra Leone      | x      |       |       |       |
| Togo              | x      | x     |       | x     |

## B. SPECIFIC TRANSPORT AND FACILITATION AGREEMENTS

**341. 1970 Niamey Convention on road transport.** On December 9, 1970 was concluded in Niamey (Niger) between Burkina Faso, Benin, Côte d'Ivoire, Niger and Togo a **Convention regulating road transport**. The Convention came into force in 1978 because of a belated ratification by Burkina Faso. International routes were designated in the Convention. The maximum dimensions and weight of vehicles, signs, markings, etc. were set forth. Vehicles were to (i) load in one state only for foreign destination; (ii) operate through freight offices (*bureaux de fret*); and (iii) comply with Customs and police regulations for border crossing. A bilingual transit card was to be delivered to each vehicle in a format set forth in an annex to the Convention. ECOWAS rules have now rendered obsolete this instrument.

The text of the Convention is not attached as an annex, as the above is sufficient for the purpose of this Review.

**342. 1975 Abidjan Protocol on inter-State Road Transport.** On February 18, 1975, and based on the 1970 Niamey Convention not yet in force, Togo and Niger concluded in Abidjan a Protocol on road transport (*Protocole d'accord de transports routiers*). The Protocol regulates inter-State transport. Its provisions are mainly:

- (i) Freight is distributed between the two countries, 2/3 for Niger, 1/3 for Togo for goods carried through ports and 50/50 for other goods. Passenger traffic is distributed 50/50. Mixed traffic (goods and passengers) is prohibited.
- (ii) Axle load is limited to 11 tons. Maximum weight of vehicles is 22 tons and 30 tons for truck plus trailer.
- (iii) Rules regarding licenses, TIR card, insurance, etc.
- (iv) Freight forwarders and other shipping agents shall adhere to the distribution key in (i) above.
- (v) Transit routes are stipulated.
- (vi) Vehicles of each country may only operate transit traffic in the other country. They are not authorized to engage into domestic traffic operations.

The text of the Protocol is not attached as an annex, as the above is sufficient for the purpose of this Review.

**343.** Both the 1970 Convention and the 1975 Protocol are significant by their orientation towards a non-market approach of traffic distribution, with quota systems administered by freight bureaus. It is likely that other bilateral agreements, similar to the Abidjan Niger-Togo agreement, were concluded and are still in force, but they remain to be identified.

**344. River and sea navigation.** Three river navigation instruments are in force relating to the Senegal and Niger Rivers. These are reviewed in **Section F** herein below.

**345. Maritime transport instruments.** Based on the initial work of the Inter-State Ministerial Conference on Maritime Transport, the **Maritime Transport Charter for West and Central Africa** was concluded at Abidjan on May 7, 1975 by twenty-three West and Central Africa States: Angola, Benin, Cameroon, Central African Republic, Cape Verde, Chad, Congo, Côte d'Ivoire, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Nigeria, Niger, Senegal, Sierra Leone, Togo, Upper Volta (Burkina Faso) and Zaire. (See **Section F** on Maritime Transport Charter and associated instruments).

## C. ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)<sup>91</sup>

### a. History

**346. Original 1975 Lagos Treaty.** The 1975 ECOWAS Treaty was supposed to be associated to the dawn of the New International Economic Order, which had been the subject of a Declaration by the General Assembly of the United Nations in New York on May 1, 1974 (13 ILM 715, 1974). It was also inspired by the development of the European Common Market. Basically the aim of the Treaty was to promote cooperation and development for the purpose of raising the standard of living and fostering closer relations among its members. For that purpose, the ECOWAS was by stages to:

- (i) Eliminate Customs duties between partner States;
- (ii) Eliminate quantitative and administrative restrictions on trade between partner States;

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<sup>91</sup> **BIBLIOGRAPHIE** S. Belahouane-Gherari et S. Gherari, *Les institutions régionales africaines*, La Documentation française, Paris, 1988, Bibliographie sur la CEDEAO et autres institutions d'Afrique de l'Ouest, p. 152-167. M. Irele, *The ECOWAS, a bibliography and sourcebook*, Lagos, 1990. U. Ezenwe, *ECOWAS and the economic integration of West Africa*. C. Huirst, London, 1983. Babalola Ajulo, *Temporal scope of ECOWAS and AEC Treaties: a Case for African economic integration*, 8 AJICL (1996) 111-138. K.O. Kufor, *Law, Power, Politics. Critical issues arising out of the new ECOWAS Treaty*, 6 AJICL (1994), 429-448. I.A. Gambari, *Political and comparative dimensions of regional integration. The case of ECOWAS*. Atlantic Highlands, N.J. 1991. I.E. Okolo, *The development and structure of ECOWAS*, cited in *West African Regional Cooperation and Development*, West View Press, 1990. A. Ovwah, *Harmonisation of laws within the Economic Community of West African States*, 6 AJICL (1994), 76-92. K.O. Kufor, *Securing compliances with the judgments of the ECOWAS Court of Justice*, 8 AJICL, (1996), 1-11. A. Akanni-Honvo, *L'UEMOA et la CEDEAO*, in Ph. Hugon, ed. *Analyse comparative des processus d'intégration économique régionale*, Ministère des Affaires étrangères, Paris, 2000, 142-163.



- (iii) Establish a common tariff towards third countries;
- (iv) Abolish obstacles to free movement of capital and services;
- (v) Conduct joint development of transport infrastructure; and
- (vi) Harmonize their economic, agricultural, industrial and monetary policies.

The central objective was therefore to establish a Customs Union, but there were clear objectives of harmonization if not of integration.

**347. Membership.** ECOWAS members are Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Guinea, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Guinea-Bissau acceded in 1975 and Cap Verde in 1979. Mauritania was a member but has since left.

**348. Revision of 1975 Treaty.** The 1993 revision of the 1975 Treaty was prepared by a Committee of eminent persons (CEP) appointed for that purpose in 1991 so that *the Community could adjust itself to the dramatic changes taking place in West Africa and other parts of the world*. The CEP identified a number of legal problems related to the 1975 Treaty. These were mainly:

- (i) The powers of the Authority of Heads of State and Government (AHSO) and of the Council of Ministers were too vaguely defined;
- (ii) AHSO decisions were not binding on the partner States;
- (iii) Protocols were not ratified by partner States;
- (iv) There was no authority to interpret the Treaty and the ECOWAS Tribunal that may have conducted such an interpretation was never actually constituted.

The CEP therefore recommended to move beyond the limited level of a Customs Union and to reinforce the position of the ECOWAS in its relations with the partner States.

**349. New 1993 Cotonou Treaty.** The 1993 Treaty substitutes economic and monetary integration and union to the Customs Union. The founders desire to increase the economic mass and therefore the bargaining base of African economies through a pooling of economic sovereignty. According to this new treaty, main ECOWAS objectives are (Article 3):

- (i) The harmonization and coordination of policies and the promotion of integration programs, particularly in transport;
- (ii) The establishment of a common market with the abolition of inter-community tariffs, a common external tariff and the abolition of non-tariff barriers;
- (iii) The creation of an economic union; and
- (iv) The promotion of joint ventures in trade, transport and industry.

ECOWAS objectives make a special mention of landlocked States to the problems of which special attention should be given (Article 3 at k).

The **1975 ECOWAS Treaty** was filed with the UN Secretariat under N° 14843. The text is attached to this Review as **Annex VII-1**.

The **1993 ECOWAS Cotonou Treaty** does not appear to have been filed with the UN Secretariat and does not appear in the UN Treaty Series. It is available in English in 35 ILM 660 (1996) and in 8 AJICL 187. The text is attached as **Annex VII-2**<sup>92</sup>.

*b. Institutions*

**350.** Institutions of the Community are:

- (i) The Authority of Heads of State and Government, responsible for the general direction and control of the Community, issuing guidelines in that respect. Decisions are taken either by consensus, unanimously or at a two-third majority, in accordance with a protocol on the subject matter;
- (ii) The Council of Ministers responsible for the functioning of the community, making recommendations, issuing directives on matters concerning coordination and harmonization and making regulations binding on institutions under its authority;
- (iii) The Community Parliament;
- (iv) The Economic and Social Council;
- (v) The Court of Justice and the Arbitration Tribunal;
- (vi) The Executive Secretariat of the Community;
- (vii) The Community Central Bank, and
- (viii) Commissions, mainly the Transport, Communications and Tourism Commission.

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<sup>92</sup> However surprising, given that the instrument is bilingual and both languages have equal legal force, ECOWAS website delivers only the English language version.

c. *ECOWAS Transport Policy*<sup>93</sup>

**351.** The ECOWAS Transport Policy is stated in Chapter VIII of the Lagos Treaty, at *Article 40 to 44* and in Chapter VII of the Cotonou Treaty, at *Article 32*. There are differences of formulation between the two treaties as shown by the next two paragraphs.

**352. 1975 Lagos Treaty.** The objective of the policy is to *further the physical cohesion of the partner States and the promotion of greater movement of persons, goods and services within the Community* (Art. 40). The stated policy is ambitious and strongly oriented towards sub-regional integration. Plans of a comprehensive network of all weather roads within the Community are to be formulated by the Transport, Communications and Energy Commission of the ECOWAS, together with plans for the reorganization and improvement of the railways, in view of their future connection (Art. 41 and 42). Policies in the matter of shipping and international waterways transport are to be harmonized and rationalized (Art. 43). National airlines should be merged in order to promote efficiency and profitability; training of nationals and standardization of equipment will be sought for (Art. 44). However, *Articles 40 to 44* make no specific reference to the problems of the land-locked countries of the sub-region. Altogether, the policy as formulated in the Treaty was strongly oriented towards the physical development of the transport system and may appear more as an investment program than a declaration of policy.

**353. 1993 Cotonou Treaty.** The partner States undertake to evolve common transport policies, laws and regulations. Plans are to be formulated for the integration of road and railway as well as road networks of the region. Programs are to be formulated for harmonization of policies on maritime transport and positions in international negotiations in the area of maritime transport should be coordinated. The partner States also undertake the effort to bring about the merger of their national airlines in order to promote their efficiency and profitability.

**354. Transport Institutions.** Among the ECOWAS institutions are an Executive Secretariat and a Higher Committee for Land Transport that was transferred by Decision C/DEC/7/12/88, on December 6, 1988 to the Executive Secretariat and became a special Consultation Committee within the Transport, Communications and Energy Commission.

**355. Transport Instruments.** From 1975 to 1992, thirty instruments were recorded reflecting the ECOWAS transport policy and its implementation: one treaty, four conventions, three protocols, four directives, ten resolutions, and seven decisions. These instruments were published in English and in French in brochures issued in 1992 by the ECOWAS Executive Secretariat. Few instruments and no new convention or protocol appear to have been issued from

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<sup>93</sup> *Protocols, decisions, resolutions and directives relative to ECOWAS Transport Program*, Lagos, ECOWAS Executive Secretariat, 1993.

1992 to 2002 and, for the period 1975-1991, judging from references to the preambles of the published instruments, these brochures appear to be incomplete<sup>94</sup>. While the earlier instruments (1975-1980) are significant of a construction period in the area of institution building, the later (1990-1994) rather reflect delays in ratification and incomplete enforcement of the instruments of the earlier period. Details on the instruments issued to 1991 and published in the Official Gazette of the Community or in brochures. Some but not all post-1991 are also identified and described but data is at present incomplete and additional research and identification is necessary.

**356. Monitoring of implementation and enforcement.** The follow-up of the implementation and enforcement of the different conventions, protocols and other instruments made necessary to establish national committees for that purpose. On August 6, 1994, the Conference of Heads of States and Governments issued in Abuja a *Decision A/DEC.3/8/94 regarding the creation of National Committees for the monitoring and effective implementation of decisions and protocols* in the matter of transportation. The Preamble to the Decision refers especially to the issue of the proliferation of (official or abusive) checkpoints on inter-state roads of the sub-region (see below at para. 361). Each national committee will be composed of heads of government departments with one representative of the road transport industry (Article 2). The Committees will follow up the implementation of ECOWAS transport instrument *with view to facilitate the free movement of persons and goods in the sub-region* (Article 3).

The text of *Decision A/DEC.3/8/94* is attached to this Review as **Annex VII-3**.

*d. ECOWAS Transport Program*

**357. The decision on Transport Programs.** On May 28, 1980, the ECOWAS Heads of State issued the Decision A/20/5/1980 directing the ECOWAS Executive Secretary to carry out a short and a long-term transport program.

The text of *Decision A/20/5/1980* is attached to this Review as **Annex VII-4**.

**358. The Short-Term Program** included institutional action such as the study and adoption of international transport Conventions, harmonization of legislation, regulations and of road control systems within the Community, and the simplification of airport formalities. As regards investments, studies were to be conducted on a number of road and rail links.<sup>95</sup> The possibility

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<sup>94</sup> For example, the Preamble of Resolution C/RES 1/12/88 on the implementation of the program of the Higher Committee on Land Transport makes reference to Decision A/DEC 20/5/88 on the Community Transport Program, a copy of which has not been located yet.

<sup>95</sup> On interconnection of railways networks in West Africa, see United Nations Economic Commission for Africa, Study on the interconnection of the railway networks in West Africa, Addis Abeba, 1993-

of establishing an ECOWAS air transport company and an ECOWAS shipping company was also to be reviewed. Two subsequent directives issued eight years later may be significant of the incomplete implementation of items in the program. Directive C/DIR 1/12/88 indicated measures to be taken by the Executive Secretariat to ensure better cooperation and coordination in the area of air transport, in fact a policy measure rather than a program item. The same day, Directive C/DIR. 2/12/88 specified measures for the determination of means of establishing an ECOWAS Coastal Shipping Line. Lastly, in the area of air transport, Resolution C/RES 8/7/91 relating to route network and flight schedules, issued in Abuja on July 3, 1991, requested Partner States to conclude between themselves bilateral air transport agreements in order to facilitate economic and political integration; and requested them to negotiate Fifth Freedom traffic rights<sup>96</sup>. This again was in fact a policy recommendation rather than a program item.

Copies of the above Directives are not attached to this Review as the above information is sufficient for its purpose.

**359.** The **Long-Term Program** was for the realization of some of the projects reviewed in the Short Term Program, mainly railway projects. By Decision A/Dec 4/11/84 issued at Lomé, making reference to the 1980 Transport Program, the ECOWAS Heads of State decided the principle of establishing an ECOWAS coastal shipping line. Again making reference to the Program, Decision C/Dec 8/12/88 issued in Banjul on December 6, 1988 sets forth the Second Phase of ECOWAS Road Projects relating to the interconnecting roads for the opening up of the landlocked countries<sup>97</sup>, and also makes reference to the 1980 Program.

The **Program Decision C/Dec 8/12/88** is attached to this Review as **Annex VII-5**.

**360.** The physical execution of the program was the subject of Resolution C/RES 6/5/90 issued in Banjul on May 27, 1990 by which the Council of Ministers urged the partner States concerned to initiate action towards completion of the Trans-West African Highway Lagos-Nouakchott-Dakar-N'djamena.

The text of **Resolution C/RES 6/5/90** is attached to this Review as **Annex VII-6**.

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1996. The study had been one recommended by UNCTAD in their report in the Second Africa Transport Decade, ca 1985-1990.

<sup>96</sup> First Freedom is the right to fly over a country without landing. Second Freedom is right to land for non-commercial motives. Third Freedom is right to disembark passengers and freight from the State under which flag the aircraft is registered. Fourth Freedom is the right to pick up passengers and freight for a destination in the State under which flag the aircraft is registered. Fifth Freedom is the right to disembark or to pick up passengers and freight from and to any contracting State. In fact, interpretation and content of the Fifth Freedom concept has been the source of considerable difficulties.

<sup>97</sup> No instrument relating to a First Phase has been identified yet.

e. *Convention on Interstate Road Transport*

**361.** The Cotonou Convention A/P 2/5/1982 regulating Interstate Road Transport between ECOWAS partner States (Cotonou, May 29, 1982) aims at defining the conditions under which transportation by road shall be carried out between the partner States. The Convention concentrates in fact on vehicles rather than on transportation operations, the regime of which is left to domestic law (especially rules laid down by the offices in charge of freight) and/or to contract law between shipper and carrier.

The text of the **Cotonou Convention A/P 2/5/1982 on Inter-State Road Transport** is attached to this Review as **Annex VII-7**.

- (1) The Convention identifies one hundred and two routes in fifteen countries as Community road axes. It sets forth axle load (11.5 tons), dimensions of vehicles, maximum number of passengers and minimum periods for mechanical examination of vehicles (three months for goods vehicles and six for passenger vehicles). Vehicles will be issued licenses valid for one year. Conditions of delivery of the licenses shall be defined by bilateral or multilateral agreements between States. The agreements shall also stipulate for each State the number and category of vehicles authorized to operate in the other State or States, based on tonnage and authorized number of passengers. Waybills are to be used as evidence of the carriage contract; carriage of passengers and goods in the same vehicle is prohibited; third party liability insurance is compulsory (see below at para. 374 and sq.).
- (2) Complementary to the Convention is Resolution C/RES/ 3/5/90 issued at Banjul on May 27, 1990 by which the Council of Ministers urges partner States to computerize their vehicle registration system along lines proposed by the Resolution.

The text of the **Resolution C/RES/3/5/90 on vehicle registration** is attached to this Review as **Annex VII-8**.

**362. Additional instruments.** Two additional and complementary instruments are significant:

- (1) Resolution C/RES 5/5/90 issued at Banjul on May 27, 1990 urged partner States to introduce weighbridge and axle scales to monitor tonnage transported and axle load.

The text of **Resolution C/RES 5/5/90 on axle road** is attached as **Annex VII-9**.

- (2) By Decision C/DEC 7/7/91 issued at Abuja on July 3, 1991, the Council of Ministers decided the adoption of road traffic regulations based on the 11.5 tons axle load.

The text of **Decision C/DEC 7/7/91 on axle load** is attached to this Review as **Annex VII-10**.

*f. Harmonization of Highway Legislation*

**363.** Related to the Convention on road transport is Decision A/Dec 2/5/81 (the 1981 Decision) relating to the harmonization of highway legislation in the Community. This is in fact only a recommendation to partner States.

The text of **Decision A/Dec 2/5/81** is attached to this Review as **Annex VII-11**.

According to the instrument, the partner States are to:

- (a) Set up adequate administrative machinery for road transport;
- (b) Ratify and adhere to the 1968 Vienna Convention and Protocols on Road Traffic and Road Signs (see Annex II-21);
- (c) Introduce the practice of right hand driving; and
- (d) Adopt standardized vehicle equipment, driving licenses and vehicle documents.

**364.** The matter was the subject of a second instrument, **Resolution C/RES 7/5/90 on the Establishment of an Appropriate Administrative Framework** and as a reminder of the above 1981 Decision. The Resolution was issued at Banjul on May 27, 1990. It requested the partner States to establish an appropriate framework such as a Directorate of Road Transport and to accelerate the implementation of ECOWAS decisions relating to the transport sector.

The text of **Resolution C/RES 7/5/90** is attached to this Review as **Annex VII-12**.

The issue of harmonization of road charges, an aspect of harmonization of highway legislation, is covered in paragraphs 384 and sq. below.

*g. Convention and other instruments on Inter-State Road Transit of Goods*

Three instruments were identified and are detailed below.

**365. 1982 Inter-State Transit Convention (Lomé).** The **Convention A/P 4/5/1982** relating to interstate road transit between ECOWAS partner States signed in Lomé on May 29, 1982 aimed at facilitating the movement of goods in the sub-region. Goods are to be covered by the Interstate Road Transit Declaration in standard ECOWAS **Interstate Road Transit Log-Book (ISRT)**,

but partner States may impose additional documents. Goods shall be transported in means of transport satisfying conditions set forth by the Convention in terms of markings, sealing, etc. Transit offices at border points are not to carry out checks unless *irregularities that may give rise to foul play* (Article 18) are suspected.

The text of the **Inter-State Transit Convention** A/P 4/5/1982 is attached as **Annex VII-13**.

The text of the ECOWAS **ISRT Log-Book** is attached to this Review as **Annex VII-14**.

**366. 1988 Resolution on Implementation of Program.** The Resolution C/RES. 1/12/88 on the implementation of the program of the Higher Committee on Land Transport was issued at Banjul December 6, 1988. In the instrument, the ECOWAS Council of Ministers resolved that:

- (a) Transit transport shall not, within the territory of the transit State, be subject to any Customs duties, import or export duties, or any special transit taxes levied by the said state, this in reference to the 1965 International (New York) Convention on transit trade for landlocked countries, and despite the fact that a few ECOWAS member countries did not ratify the said Convention;
- (b) Partner States shall reduce the number of road check points;
- (c) Inter-State Road Transport and Transit Conventions shall be ratified by all partner States;
- (d) Partner States shall enforce the agreed upon axle load limitation of 11.5 tons and implement the ECOWAS international waybill also agreed upon.

The **Resolution C/RES. 1/12/88 on the Program** is attached to this Review as **Annex VII-15**.

**367.** A third instrument, the **Resolution C/RES 4/5/90 on the Reduction of the Number of Check-Points in ECOWAS Partner States** issued in Banjul on May 27, 1990, raised again the issue of check-points by urging the partner States to reduce their number<sup>98</sup>.

The **Resolution C/RES. 4/5/90** is attached to this Review as **Annex VII-16**.

Again, these Resolutions are significant of both delays by partner States in ratifying the different conventions and of an inadequate enforcement of the stipulations of the conventions.

**368.** The issue of landlocked countries was also raised in **Resolution C/RES 6/5/90** in which the Council of Ministers urged the partner States concerned to give priority in their investment programs to interconnecting roads facilitating access to such countries.

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<sup>98</sup> On the perennial issue of checkpoints, see N'Guessan N'Guessan, *Problématique de la gestion intégrée des corridors en Afrique subsaharienne*, SSATP Document d'analyse SSATP N° 3F, Banque mondiale, Washington, 2001.



**369. 2003 Facilitation Program.** Insufficient progress being made in facilitation, the Conference of Heads of States and Governments, which met in Dakar in January 2003, issued Decision A/DEC/13/01/03 dated January 31, 2003, *relating to the establishment of a Regional road transport and transit facilitation program in support of intra-community trade and cross-border movements.*

The program is for (i) the establishment of joint border posts; (ii) the creation of observatories to identify bad practices; and (iii) an awareness campaign for the implementation of the Inter-State Road Transit of Goods Convention (para. 342). The Trans-Coastal Lagos/Nouakchott and the Trans-Sahelian Dakar/Ndjamena corridors are selected for the implementation of the program. Member States shall within twelve months implement a series of measures at national level to support the program, such as the identification of sites for establishing joint checkpoints, establishing monitoring committees and road safety units, developing the Brown Card system, etc. The ECOWAS Secretariat is in charge of monitoring the implementation and of requesting multinational grants from development partners for the financing of the desired and necessary actions.

The text of **Decision A/DEC/13/01/03 on Facilitation** is attached as **Annex VII-17**.

*h. Supplementary Convention on guarantee mechanism for inter-state road transit*

**370.** According to the **1982 A/P 4/5/1982 Convention on Road Transit**, security for payment of Customs dues was to be provided by a guarantee from a reputable financial institution affiliated to the West African Clearing House or any government-approved institution of a member State.

**371.** A second instrument in that respect has been **Directive C/DIR 3/12/88 on the Implementation of the Land Transport Program**. Among other issues, the Council of Ministers directed that the Executive Secretariat should accelerate the setting-up of a single guarantee system for goods in transit.

The text of **Directive C/DIR 3/12/88** is attached to this Review as **Annex VII-18**.

**372.** In 1990, the "urgent necessity" to establish a satisfactory mechanism led to the signing in Banjul of the **A/SP 1/5/90 Supplementary Convention**. According to the Supplementary Convention, the mechanism consists of a chain of national bodies responsible for the guarantee, each national body being designated by each member State.

The text of the **A/SP 1/5/90 Supplementary Convention** is attached as **Annex VII-19**.

*i. Convention on the temporary importation of passenger vehicles into partner States)*

**373.** This convention, known as **Convention A/P 1/7/85** and concluded in Lomé on July 6, 1985, is the logical follow-up of the Protocol for free movement of persons to which it refers. The basic rule (Article 2) is that each member State shall grant temporary admission free of import duties and without prohibitions or restrictions, but subject to re-exportation, to passenger vehicles being imported for private or commercial use during a visit either by owners of these vehicles or by other persons normally resident outside its territory. Temporary import permits known as Customs Clearance Booklets valid for one year maximum will be issued. The maximum duration of temporary importation shall be ninety days for private vehicles and fifteen for commercial vehicles. Associations and bodies, especially those associated to an international organization (auto-clubs) may be authorized by Governments to issue the Booklets and act as guarantors of the payment of any Customs or other dues payable in case of no re-export of the vehicle.

The **Convention A/P 1/7/85 on Temporary Admission of Passenger Vehicles** is attached to this Review as **Annex VII-20**.

*j. Protocol establishing an insurance Brown Card*

**374.** The **Protocol A/P 1/5/82 on the establishment of an ECOWAS Brown Card** relating to motor vehicle third party liability insurance was concluded in Cotonou on May 29, 1982. Its objective was to facilitate payment of damages in case of accidents and to harmonize the settlement of claims between countries of the Community. The Brown Card was to be issued by National Bureaus of insurers, which would settle claims on behalf of the insurers. Partner States were to recognize the Brown Card and to enact the necessary legislation for the establishment of the card scheme and to guarantee the solvency of their National Bureaus by depositing in their National Banks the necessary Letter of Credit. Local insurers were designated as subsidiary participants to the scheme; they would issue the cards to their policyholders on behalf of the National Bureau and compensate this Bureau for any payment to their clients.

The **Protocol A/P 1/5/82 establishing the Insurance Brown Card** is attached as **Annex VII-21**.

**375.** Attached to the Protocol is a model of Inter-Bureau Agreement for the implementation of the scheme.

The text of the **Agreement on the implementation of the Brown Card Scheme** is attached as **Annex VII-22**.

**376.** **C/DEC 2/5/83 Decision relating to the implementation of the ECOWAS Insurance Brown Card.** A Council of Bureaus shall consist of a representative of each National Bureau (see

Art. 6 of Protocol). The Council has a general function of orientation, coordination and supervision over the whole of the ECOWAS insurance scheme. It coordinates the operations of the National Bureaus and for that purpose issues a Standard Inter-Bureaus contract, which determines the maximum amount of owners of settlement by one National Bureau to another. Disputes between Bureaus shall be settled by the Council and its decision final. The Council may, on its own initiative or on the initiative of a Government party to the Protocol, propose changes in laws and regulations of partner States in the matter of third party car insurance and related road traffic matters<sup>99</sup>.

The text of **Decision C/DEC 2/5/83** is attached to this Review as **Annex VII-23**.

*k. Instruments on Road Safety and Accident Prevention*

**377.** The issue of road safety seems to have been identified at a later stage, but information is still incomplete. The following instruments were issued:

- (i) Directive C/DIR 1/7/92 issued in July 1992 decided the preparation of a Community Program on road safety and road accident prevention (document not located);
- (ii) Resolution C/RES 8/7/92 issued in July 1992 relative to the creation of national road safety agencies in all ECOWAS partner States (document not located);
- (iii) Resolution C/RES 5/7/94 issued in Abuja on July 27, 1994 (document not located).
- (iv) Decision A/DEC. 2/8/94 on the Community Program for road safety and road accident prevention in the ECOWAS States issued in Abuja on August 6, 1994. The Decision states that two series of measures at Community and at national level "*are adopted*". These are detailed in the two following paragraphs.

The text of **Decision A/DEC. 2/8/94 on road safety** is attached to this Review as **Annex VII-24**.

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<sup>99</sup> For an example of a domestic legislation on Brown Card see Togo (i) Decree No 85-13 creating the national bureau in charge of implementing in Togo the ECOWAS system Brown Card regarding third party car insurance, *Journal officiel de la République togolaise*, 7 mars 1985, and (ii) By-law No 127/MEF/DA setting forth the procedures of the ECOWAS Brown Card National Bureau, March 8, 1985.

**378. Community level.** At Community level, the following measures are to be taken:

- (i) Implementation and enforcement of conventions, protocols and regulations relative to facilitation and road transport, referring to the earlier 1981 Decision on harmonization of road legislation and to the 1982 Protocol relative to the Brown Card;
- (ii) Elaboration of a policy for the financing of road safety programs;
- (iii) Road safety education and awareness programs, including the organization of an annual ECOWAS Road Safety and Accident Prevention Enlightenment Week;
- (iv) Creation of a data bank on road accidents;
- (v) Adoption of a standard regional format for accident recording; and
- (vi) Creation of a West African Union of Road Safety Commissions (see below).

**379. National level.** At national level, the following measures and actions are to be taken:

- (i) Creation of National Road Safety Commissions;
- (ii) Compulsory technical control of vehicles;
- (iii) Public relations programs, awareness and training of drivers, students and the public in general;
- (iv) Regulatory measures for vehicle, driver and passenger safety; and
- (v) Creation of a data bank on road accidents.

**380. Decision A/DEC.5/8/94** (Abuja, August 6, 1994) grants the African Group on International Road Safety (AGIRS) the status of observer within ECOWAS institutions.

The text of **Decision A/DEC.5/8/94 on the Admission of AGIRS** is attached as **Annex VII-25**.

*1. Protocol relating to Free Movement of Persons, Residence and Establishment*<sup>100</sup>

**381. Substance.** The **Dakar Protocol A/P 1/5/79** was concluded in Dakar on May 29, 1979. It stipulates the right of citizens of the Community to enter, reside and establish themselves in the territory of partner States. The Protocol was to be implemented in three phases.

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<sup>100</sup> See M. V. Gasiokwu, *ECOWAS Problems of citizenship and free movement*, Nigeria, 1998. *A compendium of protocols, conventions and decisions relative to the free movement of persons and goods*, ECOWAS Executive Secretariat, Lagos, 1998.

- (i) Right of entry and abolition of visa;
- (ii) Right of residence, and
- (iii) Right of establishment.

Within five years of the entry into force of the Protocol (June 5, 1980) and based on the experience gained from the implementation of the first phase, proposals were to be made to the Council of Ministers for further liberalization.

**382. Rules regarding vehicles.** Part IV of the Dakar Protocol sets forth the rules applicable to vehicles:

- (i) Private vehicles are admitted in a member State for a period not exceeding ninety days on presentation of documents listed in the Protocol (valid driving license, etc.), and
- (ii) Commercial vehicles are admitted for a period of fifteen days on presentation of similar documents. The right of access of vehicles was the subject of a subsequent convention on the temporary import of such vehicles.

The **Dakar Protocol A/P 1/5/79 on Right of Establishment** is attached as **Annex VII-26**.

**383. Residence.** The Second Phase (Right of Residence) was the subject of a **Supplementary Protocol A/SP 1/7/86** concluded in Abuja (Nigeria) on July 1, 1986. It creates the right of residence in member countries to nationals of other member countries; such right includes the right to seek and carry out income earning employment. A Residence Card or residence permit is necessary, of which the Protocol sets forth the conditions and procedure of delivery.

The text of the **Supplementary Protocol A/SP 1/7/86 on Right of Residence** is attached to this Review as **Annex VII-27**.

*m. Directive on Road Charges*

**384.** Road charges do not seem to have been a matter of concern at the early stages of implementation of the ECOWAS transport program. On December 6, 1988, the Council of Ministers issued **Directive C/DIR 3/12/88**, quoted above (see para. 371 on guarantee mechanism) in which it directed the executive secretariat to prepare an inventory of existing road taxes *in view of their harmonization at sub-regional level*.

*n. Convention for Mutual Assistance in Customs Matters*

**385. General.** Concluded in Cotonou on May 29, 1982, this Convention has been in force since April 1995 between ECOWAS members, except Liberia, Mauritania and Sierra Leone, which do not seem to have acceded to it.

The text of the **1982 Cotonou Convention on Mutual Assistance in Customs Matters** is attached to this Review as **Annex VII-28**.

**386. Provisions.** Main provisions of the Convention are:

- (1) **(Article 2) Application.** Partner States may request the assistance of any judicial or administrative agency of another Party in the course of an inquiry in relation with the Convention. Assistance, however, does not include assistance to perform arrest or to recover dues, fines or other monies.
- (2) **(Articles 5 and 6) Communication.** Communication takes place directly between the competent authorities and normally in writing.
- (3) **(Articles 9 and 10) Obligatory assistance.** Competent authorities of the member States will communicate to the competent authorities of the other States any significant information collected during the course of informal activities, which leads to suspect a serious Customs or trade infringement. Any relevant document, record or proceedings will also be communicated. Information shall also be communicated regarding origin and value of goods imported or exported.
- (4) **(Articles 11 and 12) Assistance.** Assistance shall be provided during monitoring and as regards surveillance.
- (5) **(Article 14)** Statements of representatives of competent authorities may, if a member State requests it, take place before foreign tribunals and courts.
- (6) **(Article 15) Presence on the territory of another member State.** Competent authorities of one State may be present on the territory of another member State on a written request of a member State to gain access to papers, records and other documents.
- (7) **(Article 19) Centralization of information.** Partner States shall cooperate in the establishment and maintenance of an index of information on Customs fraud involving persons and vehicles, under the responsibility of the executive secretariat.

*o. Training and Professional Organizations*

**387.** On December 6, 1988, ECOWAS Council of Ministers issued the Directive C/DIR 3/12/88 on the implementation of the land transport program instructing the Executive Secretariat to (1) prepare a detailed inventory of transport training centers in the fields of road transport and maintenance; and (2) examine the means of developing a Community Union Professional Association of Road Transport Owners.

The text of Directive **C/DIR 3/12/88 on Transport Training** is attached as **Annex VII-29**.

**388.** As regards training centers in the field of maintenance, mention should be made of the *Centre régional de formation pour l'entretien routier (CERFER)*, established in Lomé (Togo) by the Convention concluded in Abidjan on May 18, 1970 by Côte d'Ivoire, Dahomey (now Benin), Haute Volta (now Burkina Faso), Niger and Togo. The center was a non-profit institution supported by contributions of the partner States. It was established to *train staff in public works* (Article 2).

The text in French of **the CERFER Convention** is attached to this Review, as **Annex VII-30**.

**D. WEST AFRICAN ECONOMIC AND MONETARY UNION (UEMOA)<sup>101</sup>**

*a. General*

**389.** The **2003 Dakar Treaty** modifying the 1994 Treaty establishing UEMOA (see para. 338 above)

- (i) Makes specific reference to the ECOWAS Treaty and confirms the adherence of the member countries to ECOWAS objectives;
- (ii) Declares the partner States determination to adhere to an open and competitive market economy, favoring the optimal allocation of resources;
- (iii) Declares the objective to complete the West Africa Monetary Union by an economic union.

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<sup>101</sup> *L'Union économique et monétaire ouest africaine, un traité pour l'avenir*, A.D.E. Louvain la Neuve, Belgique, 1995. L.M. Ebriga, *L'UEMOA, une nouvelle approche de l'intégration économique régionale*, 6 AYIL (1998), 23-64.

The text of the *Union économique et monétaire ouest africaine* revised Treaty is attached as **Annex VII-31** to this Review. The Treaty does not seem to have been filed with the UN Secretariat. It does not appear in the UN Treaty Series.

**390. Membership.** UEMOA members are Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.

**391. Coherence of UEMOA international law instruments.** Mains provisions in that respect are as follows:

- (1) *(Article 6)* Instruments resulting from the Union or issued by the Union take precedence over any past, present or future national legislation.
- (2) *(Article 14)* Partner States shall, by mutual consultation, seek to take all necessary measures to eliminate contradictions or overlapping of prior instruments, commitments or conventions entered into or acceded at, with third parties.
- (3) *(Article 42)* Regulations issued by UEMOA are directly enforceable in partner States.
- (4) *(Article 43)* Directives indicate which results ought to be obtained and as such are binding obligations for partner States.

All instruments, except recommendations, are to be issued with their motives. Writs of execution are issued and enforceable in accordance with domestic rules of civil procedure.

*b. Objectives*

**392. (Article 4)** In addition to the monetary union and cooperation objectives, UEMOA objectives are to:

- (i) Reinforce the competitiveness of partner States economies in the framework of a competitive market and a rationalized and harmonized legal environment;
- (ii) Ensure convergence of the performances of the economic policies of partner States;
- (iii) Establish a common market between partner States;
- (iv) Coordinate sectoral policies, *inter alia* transport; and to
- (v) Harmonize partner States legislation, especially as regards taxation.



*c. Institutions*

**393.** UEMOA institutions are:

- (i) The Heads of State Conference (Articles 17 and sq.), that defines the major orientations of UEMEOA policies;
- (ii) The Council of Ministers (Articles 20 and sq.) assisted by a Committee of experts, is in charge of implementing UEMEOA policies; the Council issues regulations, directives and decisions and may formulate recommendations (Article 42);
- (iii) The Commission (Articles 26 and sq.) which includes the Governor of the *Banque centrale des États de l'Afrique de l'Ouest* (BCEAO) is the executive branch and takes care of its day-to-day administration; the Commission issues regulations for the implementation of decisions of the Council of Ministers and stipulates decisions; it may also formulate recommendations (Article 43);
- (iv) The Court of Justice (See Additional protocol No 1);
- (v) The Audit Court (same);
- (vi) The Interparliamentary Committee (Articles 35 and sq.), appointed by the Parliament of each member State, contributes to integration efforts and debates, formulates resolutions and issues Reviews; it is to participate to the drafting of a treaty establishing a Parliament of UEMOA.
- (vii) Consultative entities (Article 40), among which the *Chambre consultative régionale*, formed by the chambers of commerce and other *chambres consulaires* of the partner States is specifically mentioned in the Treaty; and
- (viii) Specialized institutions such as the BCEAO and the *Banque ouest africaine de développement* (BOAD), which "contribute in full independence to the reaching of the UEMEOA objectives" (Article 41).

*d. Trade and transport*

**394. Trade.** The following measures are to be taken (Articles 76 and sq.) in full compliance with the provisions of the General Agreement of Tariffs and Trade (Articles 77 and 83):

- (i) Elimination of Customs duties between partner States, quotas, other taxes and measures of similar impact;

- (ii) Creation of a common external tariff;
- (iii) Issuance of common rules regarding competition (private and public enterprises) and subsidies;
- (iv) Freedom of movement of goods and persons; and
- (v) Harmonization of technical standards.

**395. Transport.** Protocol No II outlines UEMOA sector policies. For the transport sector, the only policy orientations stipulated are:

- (i) The establishment of a transport infrastructure and transport systems improvement scheme to be prepared by the Commission; and
- (ii) Regarding the enforcement of Article 91 to 93 of the Treaty on freedom of residence, work, business, etc., the implementation shall be gradual to permit the adaptation of the domestic industry; facilitation of transport and transit shall be given priority.

## E. MANO RIVER UNION<sup>102</sup>

**396. General.** The **Mano River Declaration** was concluded in Malema on October 3, 1973 by the Presidents of Liberia and Sierra Leone, as a follow-up on two statements issued March 16, 1971 and January 28, 1972 to accelerate economic growth, social progress and cultural advancement of the two countries. Guinea joined the Union on October 25, 1980. According to the Declaration:

- (i) A Customs Union called the Mano River Union is created;
- (ii) Mutual trade between Mano Union members will be liberalized through elimination of tariff and non-tariff barriers;
- (iii) Rates of import duties applicable to goods of local origin shall be harmonized; and
- (iv) The Secretariat of the Union shall be in Freetown and a Customs Training School will open in Monrovia.

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<sup>102</sup> P. Pennetta; *The Mano River Union*, 8 AJICL, (1996) 403-427 (comprehensive bibliography on the subject matter).

The **Mano River Declaration** was filed with the UN Secretariat under N°16308 and its reference is 952 UN Treaty Series 264. A copy is attached to this Review as **Annex VII-32**.

**397. Transport.** Additional agreements were concluded in the form of successive protocols on which information is missing. The **Consolidated Fourth Protocol** (1980) identified a series of instrumental activities or common policies, such as a common program for the development of transport. The **Consolidated Thirteenth Protocol** established a Union Technical Commission for Transport and Communications in the Secretariat.

Circumstances make the Mano Union at present dormant.

## F. RIVER TRANSPORT INSTRUMENTS<sup>103</sup>

### a. General

**398.** Four instruments are in effect:

- (1) Two 1972 instruments related to the **Senegal River**, the *Convention relative au statut du Fleuve Sénégal*, and the *Convention portant création de l'Organisation pour la mise en valeur du fleuve Sénégal*.
- (2) Two 1964 and 1980 instruments related to the **Niger River**.

The 1972 instruments on the Senegal River were preceded by a first agreement concluded on February 17, 1968, and establishing the *Organisation des États riverains du Fleuve Sénégal* (OERS). Partner States were Guinea, Mali, Mauritania and Senegal. (672 UN Treaty Series 251). OERS was dissolved on November 17, 1971, following difficulties in relations between Guinea and Senegal.

**399.** In addition, the *Convention et Statuts relatifs à la mise en valeur du bassin du Lac Tchad*, concluded between Cameroon, Niger, Nigeria and Chad on May 22, 1964 includes an Article 7 by which the partner States *shall establish common regulations to facilitate to a*

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<sup>103</sup> **BIBLIOGRAPHY** L. Calffisch, *Règles générales du droit des cours d'eau internationaux*, Recueil des cours de l'Académie de droit international de La Haye, vol. 219, 1989-III, 20. T. Malewa, *The development of international fluvial law in post-colonial Africa, The Senegal regime*. 67 *Revue de droit international, de sciences diplomatiques et politiques*, Lausanne, (1989) 23. K. Rowny, *West Africa contribution to the law of international watercourses*, University of Ife Press, 1974. M. Mubuala, *Le régionalisme africain en droit international fluvial*, 6 *AJICL* (1994), 449-470. M. Mubala, *La théorie du riverain léonin*, 8 *AJICL* (1996) 307-313.

*maximum navigation and transport on the lake.* These regulations are to be drafted by the Chad Basin Commission created by the same Convention and seated in N'djamena.

*b. The 1972 Nouakchott Convention relating to the Senegal River*

**400.** The *Convention relative au statut du fleuve Sénégal* was concluded in Nouakchott (Mauritania) on 11 May, 1972. Signatories were Mali, Mauritania and Senegal. The preamble refers to the rational economic use of the Senegal River and the use of the river for navigation. Only this aspect will be reviewed here.

The text in French of the *Convention relative au statut du fleuve Sénégal* is attached to this Review as **Annex VII-33**. The convention does not appear to have been filed with the UN Secretariat. It cannot be traced in the UN Treaty Series.

**401. Principles.** The Convention refers in its Preamble to the United Nations Charter and to the Charter of Africa Unity, but not to the 1921 Convention on international rivers (see para. 97), may be because these States, then French colonies, did not benefit from the French ratification of the 1921 Convention. The main principles are:

- (a) *(Article 1)* The Senegal River is designated as an international river (*fleuve international*), including its tributaries. There is, however, no definition of an international river and, as noted above, the Convention does not refer to the 1921 instrument that could have provided such a definition.
- (b) *(Article 2)* The partner States *solemnly affirm their will to guarantee equal treatment of users.*

**402. Provisions regarding transport.** This is Title II of the Convention. Main provisions are:

- (a) *(Article 6)* Navigation is *entirely free and open to the citizens [of the partner States], to boats and goods from the partner States, to boats chartered by one or more partner States, on an equal footing as regards port and navigation dues.* Specific regulations, to be issued later, will apply to foreign boats.
- (b) *(Article 7)* Partner States commit themselves to the maintenance and conservancy of the Senegal River. Separate conventions shall set forth rules and procedures of financing.
- (c) *(Article 8)* Dues and rates shall not be discriminatory and shall be levied only for the compensation of costs of services to shipping and navigation.
- (d) *(Article 9)* Roads, railways and canals that may be constructed for the special purpose of avoiding the non-navigable portions of the river shall be considered

as integral part of the River and shall be equally open to international traffic. The same regime shall apply to lakes. On the roads, railways and canals, tolls shall be computed on the basis of and limited to the compensation of construction, conservancy and administration of facilities and services.

- (e) **(Article 10)** A joint agency shall be established for the safety and control of navigation, in order to facilitate traffic as much as possible.

*c. The 1972 Nouakchott Convention portant création de l'Organisation pour la mise en valeur du fleuve Sénégal*

**403.** The *Convention portant création de l'Organisation pour la mise en valeur du fleuve Sénégal* was concluded in Nouakchott (Mauritania) on May 11, 1972 and amended on April 15, 1973 by Resolution No 4/CCEG CD. Signatories were Mali, Mauritania and Senegal.

The text in French of the *Convention portant création de l'Organisation pour la mise en valeur du fleuve Sénégal* is attached to this Review as **Annex VII-34**. The Convention does not appear to have been filed with the UN Secretariat. It cannot be traced in the UN Treaty Series

**404. Scope and objectives.** The Convention creates a “joint cooperation agency for the development of the resources of the Senegal River, named the *Organisation pour la mise en valeur du fleuve Sénégal* (OMVS)”. The agency is to implement the 1972 Convention, to coordinate studies and research and any assignment that the partner States may assign to it” (Art.1).

**405. Institutions.** Institutions of the agency comprise:

- (1) The **Conference of Heads of State** in charge of policy definition and decisions (**Articles 3 to 6**).
- (2) The **Council of Ministers**, *organ of policy definition and supervision of the agency* (Article 8). It defines the general policy, approves the budget and takes financial decisions, especially as regards the financial contributions of each member State (Articles 8 to 11).
- (3) The **General Secretariat**, a permanent body in charge of the day-to-day administration, studies, reviews, statistics, etc. (Article 12 to 16).

*d. The 1964 Niamey Agreement concerning the Niger River Commission and Navigation and Transport on the River Niger*

**406.** The Niamey Agreement concerning the Niger River Commission and navigation and transport on the River Niger was concluded at Niamey on November 25, 1964, between Benin

(then Dahomey), Burkina Faso (then Haute Volta), Cameroon, Chad, Côte d'Ivoire, Guinea, Mali, Niger and Nigeria. It was revised in Niamey on February 2, 1968 and June 15, 1973, in Lagos on January 26, 1979, and lastly by the Faranah Convention on November 21, 1980 (see para. 411 and sq.).

**407.** The Niamey Agreement on the River Niger Commission is enforceable since all partner States ratified it in 1965-1966. It was adopted at the Conference of the Riparian States of the River Niger, its tributaries and sub-tributaries, held in Niamey in October 1963, which adopted the Act of Niamey setting forth the principles of cooperation between riparian States. However, the Niamey Agreement, according to its Article 12, is integral part of the Act of Niamey.

The **1964 Niamey Agreement on the River Niger and the Navigation and Transport on the River** was filed in the United Nations General Secretariat under No 8507 (587 UNTS 362). The text is attached to this Review as **Annex VII-35**.

**408. Enforceability of 1921 Statute.** The Niamey Agreement makes no reference to the *1921 Statut des rivières internationales*. The partner States therefore do not consider themselves bound by the provisions of this Statute. It should be noted, however, that Nigeria may be a party to it, since it inherited the ratification operated by the United Kingdom on its account, when the country was part of the British Empire. Anyway, the rules set in the Agreement are in line with the spirit of the 1921 Statute, especially as regards opening to international traffic, equal treatment and the reasonableness of tariffs and rates.

**409. Institutions.** Main provisions of the Agreement are:

- (1) *(Article 1)* A Niger River Commission is established in Niamey.
- (2) *(Article 2)* The Commission shall prepare General Regulations for the full application of the principles set forth in the Act of Niamey. Such Regulations shall be binding on the riparian States after their approval and a time limit set by the Commission. The Commission will ensure liaison with the partner States, collect all information on the River Niger and its basin, follow the progress of studies and works in the basin, and draw up navigation regulations.
- (3) *(Articles 3 to 8)* Each riparian State shall appoint a Commissioner. Commissioners will meet once a year. An Administrative Secretary will conduct with staff the affairs of the Commission.
- (4) *(Article 11)* The Commission shall have the status of an international organization.

The Niger River Commission appears to have met six times between 1964 and 1980 and was replaced that year by the Niger Basin Authority (see para. 411).

**410. Transport.** Provisions of the Agreement regarding transport are as follows:

- (1) *(Article 13)* Taxes and duties payable by vessels and goods using the River and facilities thereof shall be in proportion to services rendered to navigation and shall in no way be discriminatory.
- (2) *(Article 14)* Roads, railways and canals that may be constructed for the special purpose of avoiding the non-navigable portions of the River shall be considered as integral part of the River and shall be equally open to international traffic.

On these facilities, only such tolls shall be collected as calculated on their cost of construction, maintenance and management. As regards such tolls, the nationals of all States shall be treated on the basis of complete equality.

*e. The 1980 Faranah Convention creating the Niger Basin Authority with Protocol relative to the Development Fund of the Niger Basin*

**411. General.** The above-captioned convention was concluded in Faranah (Guinea) on November 21, 1980 between the signatories of the 1965 Niamey Agreement, of which it is according to its Article 21 a revision. Based on the 1964 Act of Niamey (see para 406), it originates in a will to give new energy to the River Niger Commission, as decided in a meeting of the Heads of State and Governments held at Lagos in January 1979. The final objective is a promotion of economic development through an integrated development of the River Niger Basin (see Preamble of Convention).

The **1980 Faranah Convention creating the River Niger Authority and attached Protocol** came in force on December 2, 1982. It was filed with the United Nations Secretariat and is registered under No 22675 and published in the UN Treaty Series. The text is attached as **Annex VII-36**.

**412. Institutions**

- (1) *(Article 1)* The River Niger Commission becomes the Niger Basin Authority
- (2) *(Article 5 to 7)* The institutions of the Authority are the Summit of Heads of State and Governments, the Council of Ministers, the Technical Committee of Experts, the Executive Secretariat and its Specialized Agencies. The Summit of Heads of States meets every two years and defines the general orientation of the policy of the Authority. The Council of Ministers meets annually and monitors the activities of the secretariat, the executive branch of the Authority. Each member State is represented in both bodies and has one vote.

- (3) *(Article 10 to 14)* The operating budget of the Authority is financed by contributions of member States, paid in convertible currency. Accounts are kept in special drawing rights.
- (4) *(Article 16)* The Authority is incorporated as an intergovernmental institution. The Executive Secretary and his deputy are granted diplomatic immunity.

**413. Transport.** The responsibilities of the Authority are much broader than those of the Commission. It is in charge of all integrated development policies in the Niger Basin, including transport. Specific duties as regard transport are described in Article 4-2(b) as:

- (a) Design, study and construction of works, plants and projects in the field of transport;
- (b) Improvement and maintenance of navigable waterways;
- (c) Development of river transport and promotion of an integrated multimodal transport system (sea-river-rail-road) as a factor of integration and for opening up the land-locked Sahelian member States.

As the 1980 Convention is only a revision of the 1964 Agreement, it is likely that the financial provisions (tolls and dues) stipulated in 1975 are still in effect.

## G. MARITIME TRANSPORT CHARTER FOR WEST AND CENTRAL AFRICA AND SUBSEQUENT INSTRUMENTS

**414.** There are three levels of instruments:

- (1) The **1975 Maritime Transport Charter** setting forth basic policy objectives;
- (2) The **1977 Convention on the institutionalization of the Ministerial Conference** of the Ministers in charge of maritime transport in partner States;
- (3) The **Annexes to Convention (2)** being themselves Conventions establishing:
  - (i) The Association of National Shipping Lines;
  - (ii) The Union of National Shippers' Councils;
  - (iii) The Ports Management Association, and
  - (iv) a framework of regionalization of the Nungua/Accra and Abidjan Maritime Training Centers.



None of these instruments was filed with the UN Secretariat. They are not inserted in the UN Treaty Series.

*a. The 1975 Abidjan Maritime Charter*

**415. General.** The Maritime Charter concluded in Abidjan (Côte d'Ivoire) on May 7, 1975 was ratified or acceded to by Angola, Benin, Cameroon, the Central African Republic (then Empire), Cape Verde, Chad, Congo, Côte d'Ivoire, Gabon, Gambia, Ghana, Liberia, Mauritania, Nigeria, Niger, Senegal, Togo, Zaire, Guinea, Guinea-Bissau, Mali and Sierra Leone.

The **1975 Abidjan Maritime Charter** is attached as **Annex VII-37** to this Review.

**416. Issues and policy decisions.** The Preamble of the Maritime Charter (the Charter) states (i) that shipping conferences are taking arbitrary decisions in the area of freight rate increases and (ii) that the interested African States need to take advantage of the favorable provisions of the April 6, 1974 Code of Conduct Conference for Liner that distribute traffic on the 40/40/20 basis. As a consequence, these States agree to take a number of policy decisions in the areas of maritime affairs, development of shipping companies, ports, landlocked countries and training. See the following paragraphs for details.

The text of the **1974 Code of Conduct for Liner Conferences** registered under No 22830 with the United Nations General Secretariat (1334 UNTS 15) is attached as **Annex VII-38** of this Review.

**417. Maritime affairs.** The decisions on maritime affairs taken during the conference and formulated in the Charter were to:

- (i) Set up a permanent coordinating body on maritime transport and institutionalize the Conference of Ministers in charge of Maritime Affairs (Ministerial Conference);
- (ii) Establish shippers' councils and regroup them within the framework of a cooperating body;
- (iii) Set up national and regional facilitation committees;
- (iv) Organize state intervention in the area of ancillary services such as stevedoring, cargo handling, freight forwarding, etc.;
- (v) Encourage grouping of freight and the development of FOB imports and CIF exports; and
- (vi) Develop local maritime insurance entities.

**418. Shipping companies.** Objectives selected were to:

- (i) Develop local shipping lines;
- (ii) Take the majority of shares when developing a shipping company with foreign participation;
- (iii) Set up an African Conference for West and Central Africa;
- (iv) Ensure rapid africanization of the representatives in Africa of foreign maritime conferences serving Africa; and
- (v) Undertake a study on the feasibility of setting up international shipping companies.

**419. Ports.** Decisions were to:

- (i) Develop management structures with wide port management autonomy to increase efficiency;
- (ii) Encourage the management association of the ports of West and Central Africa; and
- (iii) Undertake development studies for the accommodation of container vessels and bulk carriers.

**420. Landlocked States.** As regards these States, it was decided to:

- (i) Institutionalize the participation of land-locked States in the management of ports serving the hinterland; and
- (ii) Grant preferential tariffs to hinterland-bound or export cargo from land-locked States.

**421. Training.** The decision was taken to develop regional training centers and schools.

*b. 1977 Accra Convention of the institutionalization of the Ministerial Conference*

**422. Objectives.** On February 27, 1977, the signatories of the above Maritime Charter signed the **Accra Convention on the institutionalization of the Ministerial Conference**. The objectives of the Conference are (Articles 1 to 5):

- (i) The setting up of national and regional merchant fleets, shippers councils, and regional training centers; and

- (ii) The adoption of measures to improve and develop port management and operation and to give preferential and adequate treatment to the need of land-locked countries for access to the sea.

The **Accra Convention on the Ministerial Conference** is attached as **Annex VII-39**.

**423. Institutions.** The Ministerial Conference is composed of:

- (i) A General Assembly composed of the Ministers in charge of merchant shipping (Articles 6 to 10)
- (ii) A Permanent General Secretariat as the executive branch of the Conference (Articles 11 and 12)
- (iii) Specialized agencies whose statutes are attached to the Statutes of the Conference; National Shipping Lines Association; Union of National Shippers' Councils; Ports Management Association; and Côte d'Ivoire and Ghana Maritime Training Schools.

The seat of the Conference is in Lagos (Nigeria).

*c. National Shipping Lines Association*

The text of the Agreement on the creation of an **Association of National Shipping Lines** (Annex A to Charter) is attached as **Annex VII-40** to this Review.

**424. Status and Objectives.** The Convention for the establishment of the National Shipping Lines Association is attached as Annex A to the Accra Convention and is an integral part to it. The Preamble makes explicit reference to the Code of Conduct of Conferences adopted in Geneva on April 7, 1974 and to the need for the parties to the Convention to create national shipping lines. The objectives of the Association are mainly the harmonization and coordination of the activities and trade policies of the national lines, with a view to making an optimum and economic use of their transport capacity.

**425. Institutions.** The institutions of the Association are:

- (i) A Council made up of the top executives of the national shipping lines of Partner States;
- (ii) An Operations Committee made up of the Directors of Operations of each of the shipping lines members of the Association, and
- (iii) A Permanent Secretariat.

*d. Union of National Shippers' Councils*<sup>104</sup>

**426.** The Convention for the establishment of the Union of National Shippers' Council is attached as Annex B to the Accra Convention and is an integral part to it. The preamble refers to the 1973 Code of Conduct for Liner Conferences (see para. 416) and to a necessary close co-operation between National Shippers Councils to strengthen their power of consultation and negotiation with the Conferences. Objectives are the reinforcement of negotiation mechanisms, measures to be taken against unreasonable freight rates increases, rationalization of traffic and the implementation of the Code of Conduct<sup>105</sup> (Article 3).

The text of the agreement on the creation of a **Union of National Shippers' Councils** (Annex B to Charter) is attached as **Annex VII-41** to this Review.

**427. Institutions.** The institutions of the Union are:

- (i) A Council made up of the heads of the National Shippers' Councils;
- (ii) A Negotiation Committee designated by the Council; and
- (iii) A Permanent Secretariat.

*e. Port Management Association*

**428. Constitution and membership.** The Constitution of the Port Management Association of West and Central African States is attached as Annex C to the Accra Convention. It is an agreement between the heads of the port authorities who were represented by the signatories of the Accra Convention. But Article 11 of the Constitution states that the signature of five port authorities is necessary for the Constitution to come into force to establish the Association as a corporate entity (Article 5), in accordance with the statutes of the country where the Association filed for incorporation (Nigeria). Statutory members of the Association are port authorities. Associate members are:

- (i) Port operators from States not within the jurisdiction of the United Nations Economic Commission for Africa (ECA), or

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<sup>104</sup> See K.C. Nubukpo. *Les conseils nationaux des chargeurs des pays en voie de développement*. L'exemple du Niger, XLI RJP-IC (1987) 168-184.

<sup>105</sup> See L. Nojambou, *Le destin des conférences maritimes sur la COA dans le contexte des indépendances nationales et de la libéralisation des échanges*, Cahiers d'Outre-Mer, Paris, No 178, 4.6.1997, 137-150.

- (ii) Private economic operators from States within the jurisdiction of the ECA, not providing port services, provided however that port services in these States are government controlled and financed.

Clearly the spirit of the Constitution was that the African or expatriate port private sector was unwelcome in the Association.

The text of the agreement on the creation of a **Port Management Association of West and Central African States** (Annex C to Charter) is attached as **Annex VII-42** to this Review.

**429. Objectives.** The Association aims at:

- (i) the improvement, coordination and standardization of port operations equipment and services;
- (ii) establishing relationship with transportation institutions, undertakings, international organizations and others; and
- (iii) providing a forum for members.

**430. Institutions.** The institutions of the Association are:

- (i) the Council, in which each member may appoint two representatives
- (ii) A Secretariat

*f. Training Schools*

**431.** The Convention on the regionalization of the Nungua Accra and Abidjan Nautical Institutes (*Académie régionale des sciences et techniques de la mer - ARSTM*) is attached as Annex D to the Accra Convention and is an integral part to it.

A copy of the **Agreement on the training institutions** (Annex D to Charter) is attached as **Annex VII-43** to this Review.

## VIII. CONCLUSION

The above review is certainly still incomplete particularly as bilateral agreements are concerned, although some multilateral agreements are also missing. While, for instance, the instruments relating to shipping and ports are well identified and known concerning West Africa, they are not as regards Eastern and Southern Africa. It is hoped that the consultation of this document will encourage readers to send to the SSATP the text or references of any instrument that may still be missing.

This review has also revealed that access to and ratification of basic worldwide agreements on trade, transit, facilitation and transport is uneven. The fact that some regional or sub-regional instruments make explicit references to conventions that have not been ratified by the signatories of the instrument is in itself a positive indication. It shows that the signatories are well informed of the superior international instrument; they are anxious that their own instruments should be in line with the basic corpus of international law accepted and operated by the international community. Yet, a more careful follow-up of the necessary accession to and ratification of the major conventions would be of order. It is the responsibility of Ministries in charge of foreign affairs. But, the matter being special and often quite technical, it belongs to the agencies in charge of transport, ports, facilitation, customs and the like to bring to the attention of the Ministry of foreign affairs the importance of having the set of international instruments in good order.

Furthermore, the review appears to indicate a conflict of jurisdiction between regional organizations such as the OAU (AU's predecessor) and the General Secretariat of the United Nations. Too many regional and sub-regional agreements were not filed with the General Secretariat, despite the provisions to that effect stipulated in Article 14 of the United Nations Charter. These agreements were most probably filed with the OAU or the AU, which in addition is the depository of a number of conventions. Nevertheless and although this is not certain, a regional institution is not a substitute of the United Nations. A random selection of non-African regional or sub-regional conventions or agreements has shown that a similar negligence may be observed, somewhat to a lesser degree, in other regions or sub-regions of the world. This is a modest consolation however, and an effort may also be recommended in that area to put the house in order.

This may be an opportunity for the denunciation of obviously obsolete agreements, particularly bilateral or executed agreements between a limited number of States. These agreements either overlap with or are contradictory to more recent and broader ones.

However desirable may be the above recommended measures of clarification of the international law corpus, this is not the main issue. How this corpus is translated in domestic legislation and regulations, and how these are implemented or enforced still need to be better known.

The magnitude of litigation and its outcome have not been evaluated. Except for South Africa, OHADA' s effort of dissemination of jurisprudence is next to unique and calls for a similar action to be initiated and, most importantly, maintained elsewhere in the region. Whether court decisions have an impact on legislation and practice is unknown. So is the status and state of arbitration. So is the degree of confidence that operators may have in the legal set-up and the amount of safety they can derive from it. A review of international instruments would be of modest value if it would not measure the gap between their provisions and their actual enforcement – or the lack of it.