A Review of International Legal Instruments

Facilitation of Transport and Trade in Africa

Second Edition

CHAPTER II

Jean Grosdidier de Matons

TREATIES

CONVENTIONS

PROTOCOLS

DECISIONS

DIRECTIVES

SSATP
Africa Transport Policy Program

II. Worldwide Conventions

24. **History**. Facilitation and the freedom of movement of vessels, vehicles, and goods are not new. The centuries-old movement for such freedom, inaugurated by Grotius for the sea in the early seventeenth century, developed especially after the creation of the League of Nations in the early 1920s in reaction to the nineteenth 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 toward a worldwide free trade system that is now nearly 100 years old.

25. **Presentation.** This chapter presents the worldwide conventions that African countries have used as a basis for drafting their own regional and subregional instruments. Section A deals with the 1947 General Agreement on Tariffs and Trade (GATT) and the 1994 World Trade Organization Agreement. Section B addresses the issue of transit rights. Although it begins by describing the 1921 Barcelona Convention and Statute on Freedom of Transit, it is centered on the 1965 New York Convention on Transit Trade of Landlocked Countries. It refers as well to various maritime conventions that include provisions on facilitation. Section C focuses on Customs conventions, starting with the 1950 Brussels Convention. It includes a number of technical conventions on the Customs regimes of trucks, cars in transit, palletes, and containers, among other things. Section D deals with maritime conventions, notably the liability of sea carriers and related conventions. It includes the important 1965 London Convention on the Facilitation of International Maritime Traffic. Section E identifies rail transport conventions, which seem to play a limited role in Africa. Section F introduces the 1921 Barcelona Convention and Statute on Freedom of Transit, which applies to the navigable waterways of international concern. Section G reports on conventions on road transport. These conventions deal with issues of public law, such as road traffic or road signals, and issues of private law, such as relations between carriers and their clients. In that respect, it introduces the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR). Section H gives information on conventions and rules on multimodal transport, including the 2008 New

York Convention on the matter. It includes presentation of the International Chamber of Commerce Rules for Combined Transport Document, 1975 and 1992. Finally, section I identifies the main conventions on air transport, especially the 1944 Chicago Convention.

A. General Agreement on Tariffs and Trade

26. **General.** Signed in 1947 by the industrial States, the General Agreement on Tariffs and Trade was the basis for the development of free trade and the general, systematic reduction of Customs duties that followed its ratification. This agreement was ratified or adhered to by all African States. There was therefore no issue of enforceability.[18] The agreement was later broadened and completed by international negotiations known as the Kennedy Round, Uruguay Round, and Tokyo Round, among others. The objectives of these Rounds were to further open international trade and, in particular, to reduce or eliminate Customs and administrative restrictions to trade and extend enforcement of the most favored nation clause, while providing for some derogations and protective measures when necessary. After the Uruguay Round (1986-94) in which 153 Member States participated, including many developing countries, the World Trade Organization was created. However, the 1947 GATT remained applicable, completed by the provisions of the 1994 GATT.

The text of GATT, filed as No. 814 with the UN Secretariat (reference 35 UN Treaty Series 194), appears in **Annex II-1** of this review. The Agreement Establishing the World Trade Organization, dated April 15, 1994, appears in **Annex II-2.** It was registered with the UN Secretariat as No. I-814.

27. **World Trade Organization (WTO).** The World Trade Organization was established for the development and monitoring of free trade in an open market economy. It is intended to provide "the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments" pertinent to free trade. Most of the African States became members between 1995 and 1997, with the exception of Cabo Verde, which became a member in 2008. The following African countries are WTO members: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, the Central African Republic, Chad, Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Arab Republic of Egypt,

Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. Algeria, the Comoros, Equatorial Guinea, Ethiopia, Liberia, Libya, São Tomé and Principe, the Seychelles, and Sudan are observers at the WTO. With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers.

28. **Overview of the WTO.** This wide adhesion probably stems from the expansion of the activities pursued by the WTO as opposed to GATT, but also from the need of the developing countries to open up to the new world trade game and benefit from the aid that could be available to develop their infrastructures, especially in transport and trade facilitation. The WTO agreement covers a wide range of activities involved in trade, thereby adapting the 50 years of GATT organization to the requirements of the modern world. The WTO covers trade in goods, but also in services (including financial services), inventions, intellectual property, and telecommunications. In 2001 the WTO added to its work program, at the request of developing countries, agriculture, trade facilitation, and the environment.

29. **Institutions of the WTO.** The highest body of the WTO is the Ministerial Conference, which meets once every two years. The General Council, just below the Ministerial Conference, is composed of ambassadors or other members of Governments. It meets several times a year at the WTO headquarters in Geneva. At the third level are committees and the Council for Trade in Goods, Council for Trade in Services, and Council for Trade-Related Aspects of Intellectual Property Rights, which report to the General Council. A variety of specialized working groups and parties work on specific subjects, such as regional trade agreements and technical barriers to trade. Many international institutions—such as the International Monetary Fund, the World Bank, the Food and Agriculture Organization, the African Union, and the Economic Community of West African States (ECOWAS)—are granted observer status (a new development since the GATT days), which enables them to follow discussions of direct interest to their members.

30. **Developments post-1995.** In 2001 at the meeting of the Fourth Ministerial Conference in Doha, the WTO Goods Council was asked to carry out a specific program to review, clarify, and improve some articles of GATT, as well as to

> identify trade facilitation needs, especially for the developing and least-developed countries. Many countries supported the idea of creating new binding rules on transparency, due process, simplification, and nondiscrimination regarding the cross-border movement, release, and clearance of goods, in conformity with the GATT rules. However, developing countries may be reluctant to support new rules as they are not ready to make new commitments and because some of them have limited resources and technical knowledge. African countries are willing to modernize their transit and transport facilitation policies, but they wish to do so through their regional or subregional integration organizations. For this purpose, the WTO has developed a technical assistance and support program for developing countries, especially in Africa.

On December 6, 2013 in their meeting in Bali, the members of the World Trade Organization issued a draft Agreement on Trade Facilitation. According to the Agreement, members should publish all legislation, regulation and information relating to facilitation of foreign trade in a non-discriminatory manner for the benefit of traders and other interested parties. Internet is to be used for that purpose. Inquiry points should be established to answer questions by traders and other interested parties. Advanced ruling should be issued to traders when necessary. Administrative appeal of decision relating to trade and customs should be permitted and impartiality, non-discrimination and transparency should be the rule. Fees should be published. All operations of clearance and delivery of goods should be facilitated and electronic procedures widely used. Agencies in charge of border control should cooperate and coordinate their action. Movement of goods and transit of cargo should be facilitated. Single windows should be established. All regulations should be maintained only when necessary and should be discarded when circumstances make them no longer justified. The WTO shall establish a committee on trade facilitation to follow up the implementation of the agreement. Each member shall establish a similar national committee on trade facilitation.

Special and differential treatment provisions for developing country members and least developed countries shall facilitate the implementation of the provisions of the agreement in these countries, with the objective to develop their implementing capacity. The Agreement remains to be registered and ratified by member governments. It is not therefore attached as an annex to this review. However, it can be viewed under the WTO website.

B. RIGHTS OF TRANSIT AND LANDLOCKED COUNTRIES

a. *1921 Barcelona Convention and Statute on Freedom of Transit*[19]

31. **History**. Freedom of transit is essential for landlocked countries. A landlocked country has no seacoast and 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 to Article 23(e) of the Covenant of the League of Nations, this Convention was important for its States, many of them being landlocked. It was necessary to obtain from coastal States some recognition of the right of landlocked States to have access to the sea. This right was once included in the 1815 Act of Vienna on the regime of the Rhine and in other nineteenth-century conventions on international rivers. One of the objectives of the 1921 Convention was therefore to provide a mean of enforcing the right of free transit without prejudice to the rights of sovereignty of transit States over the routes available for transit.

32. **Enforceability**. The 1921 Convention is still in force with 42 parties who largely were members of the League of Nations in 1921.[20] Hong Kong SAR, not a member in 1921, signed and ratified the Convention in 1997. The United Kingdom ratified for its colonies and protectorates except South Africa, which as a dominion had the right to sign separately. Former British colonies and protectorates in Africa may therefore be bound by the Convention, unless the clean slate or the Nyerere doctrine is invoked. Nigeria, which is not a landlocked country, ratified the Convention in 1967, but Rwanda (1965), Lesotho (1973), Swaziland (1969), and Zimbabwe (1998) formally acceded to it after their independence. It is possible that these landlocked States saw accession as 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 Democratic Republic of the Congo makes express reference to it. 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 as it sets forth the basic principles of any transit policy, especially the transit policies that will be developed and implemented for the benefit of landlocked States.

33. **Provisions.** The main provisions of the Statute are as follows:

- *Definition of transit (Article 1).* Transit is defined as the passage of persons, goods, means of transport, etc. through a territory that 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 the next paragraph, this is in fact a very narrow definition.
- *Sovereignty (Article 2).* This article recognizes the freedom of sovereign governments to make transit arrangements within their territories.
- *Facilitation (Article 2).* Measures taken by Contracting States for regulating and forwarding traffic shall facilitate free transit.
- *Equal treatment (Article 2).* No distinction shall be made based on the nationality of persons, flag of vessel, etc., or any circumstance related to the origin of goods or of means of transport.
- *Dues and tariffs (Articles 3 and 4).* 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 in both their rates and methods of application. They shall be fixed in order to facilitate international traffic. No charges, facilities, or restrictions shall depend, directly or indirectly, on the nationality or ownership of the means of transportation.

The 1921 Barcelona Convention and Statute on Freedom of Transit (reference 7 League of Nations Treaty Series 11) appears in **Annex II-3** of this review.

34. **Definition of right of transit.** For transit, GATT borrowed from the principles of, and at times reproduced verbatim, the provisions of the 1921 Barcelona Convention and Statute on Freedom of Transit. Article V of GATT deals with the 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." For landlocked countries in Africa, this is a very restrictive definition. 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. And yet the cargo interests in Bamako believe that transit takes place in Côte d'Ivoire as well as in Burkina; after all, under Côte d'Ivoire Customs statutes the goods loaded on the truck are in transit since their final destination is outside Côte d'Ivoire. The definition of transit adopted by GATT and in the 1921 Barcelona Convention did not satisfy the needs of landlocked countries. Encouraged by the United Nations Conference on Trade and Development (UNCTAD), they lobbied for a conference and a convention that would recognize without ambiguity their right of access to the sea. This resulted in the 1965 New York Convention on Transit Trade of Landlocked Countries.

35. **Exercise of right of transit—fairness.** After stating that no distinction shall be made in transit based on the flag of vessels, the place of origin or destination, or the ownership of goods and means of transport, GATT 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-3 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, except charges for transportation or . . . administrative expenses." Such charges must be reasonable and in relation to the actual administrative costs of service rendered.

36. **Exercise of right of transit—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 the fact that the paragraph of Article V on equal treatment mentions only products (i.e., goods) and not vehicles, it is generally understood that it also applies to trucks and other means of land transport. A State may prohibit or limit traffic of certain heavy vehicles for valid reasons (e.g., night or weekend traffic), provided the restriction is applicable to trucks of all national origins.

37. **Evaluation.** As for 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 said, GATT is not ignored. Significantly, Article 77[b] of the Treaty for the WAEMU makes specific reference to it and to the rights and obligations deriving from it. Furthermore, in Article 41 of the 2000 Cotonou Agreement between the European Union (EU) and the African, Caribbean, and Pacific (ACP) States, the Parties reaffirmed their respective commitment to the provisions of GATT. By contrast, WTO trade facilitation-related Article V, which underscores the need "to allow transit traffic to move via the most convenient route; exempt it from Customs or transit duties, and ensure that it is free from delays or restrictions" was for the first time articulated in August 2005 in a common platform of the landlocked developing countries in the WTO negotiations. The goal was to clarify and improve the relevant aspects of terms such as the "most convenient route" as applied to landlocked countries. Later, in December 2005, the Landlocked Developing Countries Ministerial Declaration at the Sixth WTO Ministerial Conference in Hong Kong SAR urged WTO members to address the special problems encountered by the landlocked countries.[21]

b. *Transit trade of landlocked countries—1958 Geneva Convention on the High Seas and 1965 New York Convention on Transit Trade of Landlocked Countries*

38. **Natural right or privilege?**[22] The issue of the right of access of landlocked States under international law deserves some consideration and developments. Whether customary international law permits a landlocked State to have access to the sea has generated considerable academic debate among lawyers. For some authors, it is a natural right, for others, only a privilege that has to be authorized by a special treaty. 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 in *how* this right can be exercised:

- 1921 Barcelona Convention and Statute on Freedom of Transit
- 1958 Geneva Convention on the High Seas
- 1965 New York Convention on Transit Trade of Landlocked Countries.

The 1958 and 1965 Conventions are reviewed here. The 1982 United Nations Convention on the Law of the Sea also deals with the issue. It generally considers the right

of landlocked States to participate in exploitation of the surplus of the living resources of the exclusive economic zones of coastal States—a subject not reviewed here.

39. **1958 Geneva Convention on the High Seas—general.** [23] 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 would be 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), the Central African Republic (1962), Kenya (1969), Lesotho (1973), Madagascar (1962), Malawi (1965), Mauritius (1970), Nigeria (1961), Senegal (1961), Sierra Leone (1962), South Africa (1963), Swaziland (1970), and Uganda (1964). It was signed but not ratified by Ghana (1958), Liberia (1958), and Tunisia (1958). A fair number of African coastal States have therefore not recognized the rights of the landlocked States through this Convention. Conversely, some landlocked States have not seized the opportunity offered here to see their right of access to the sea given recognition.

The relevant extracts of the 1958 Geneva Convention on the High Seas, filed as No. 6465 with the UN Secretariat (reference 450 UN Treaty Series 82) appear in **Annex II-4** of this review.

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

- 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."
- To this end, access to the sea shall be provided "by common agreement… in conformity with existing international conventions, on a basis of reciprocity."
- In ports of the coastal State, equal treatment should be granted to vessels flying the flag of the landlocked State.
- 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.

41. **Evaluation.** The Convention on the High Seas was probably clumsy in stating that sea access is "free," as this could 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 those 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 or imperative force. It creates an obligation to negotiate and execute an agreement ("access…shall be provided…by…agreement"), but no deadline is set for an agreement to be concluded, or any sanction if no agreement is concluded. The Convention was not norm creating.

42. **1965 New York Convention on Transit Trade of Landlocked Countries.** The Convention was concluded in New York on July 8, 1965, together with the Final Act of the United Nations Conference on the subject. In force since June 9, 1967, the Convention was ratified or acceded to by Burkina Faso (1987), Burundi (1968), the Central African Republic (1989), Chad (1967), Lesotho (1969), Malawi (1966), Mali (1967), Niger (1966), Nigeria (1966), Rwanda (1968), Senegal (1985), Swaziland (1969), and Zambia (1966). Cameroon, Sudan, 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 elected to leave the matter to bilateral agreements rather than recognize a fundamental right of landlocked States through a multilateral convention. However, the 1994 Maritime Transport Charter contains commitments by all signatory states on the rights of landlocked States of the region. A State not bound by the 1965 New York Convention may be bound by the Maritime Transport Charter, which was not, however, filed with the UN Secretariat and apparently is not self-enforcing.

43. **Provisions of the 1965 New York Convention.** This Convention went a step further than earlier instruments by recognizing in its preamble that "the transit trade of landlocked countries, comprising one fifth of the nations of the world, is of the utmost importance to economic co-operation and expansion of international trade" and stipulating in its Principle IV that in order to promote fully the economic development of the landlocked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and International trade in all circumstances and for every type of goods. Goods in transit should not be subject to any customs duty. Means of transport in transit should not be

subject to special taxes or charges higher than those levied for the use of means of transport of the transit country.

Principle III of the Convention stipulates that States having no sea coast should have free access to the sea, based on common agreement with the transit State, which would grant ships flying the flag of the landlocked State treatment equal to that accorded to their own ships or to the ships of any other State as regards access to sea ports and the use of such ports. This formulation is less than originally requested by a group of landlocked States from all continents (including Mali and Zambia) that wanted right of access to be not dependent on bilateral agreements with coastal States; they would have preferred a self-enforcing instrument. The Organization of African Unity (OAU) itself stated in a declaration prior to the opening of negotiations on the treaty that "African States endorse the right of access to and from the sea by landlocked countries." Still, Nigeria, a coastal State, insisted on the need for bilateral or regional conventions setting forth the conditions for exercise of such a 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.

44. **Incomplete ratification or accession.** Significantly, all African countries that ratified the Convention on Transit Trade to Landlocked Countries or acceded to it were landlocked except Senegal and Nigeria. Despite their formal commitments in favor of landlocked countries in regional and subregional treaties and protocols, all the other coastal States ignored the 1965 New York Convention, again perhaps 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 stance may indicate suspicion toward multilateral worldwide treaties and a preference for regional agreements. Also significant, in 1968 Chad and the Central African Republic, both landlocked, denounced the 1964 Brazzaville Treaty on the Economic and Customs Union of Central Africa since no agreement could be obtained on compensation from the coastal States for limitations suffered by the landlocked countries of the subregion. Over the years, the situation has improved; regional and subregional instruments reflect acceptance of the special rights of landlocked States. For example, Article 378 of the CEMAC (Central African Economic and Monetary Community) Shipping Code expressly refers to specific agreements to be executed between landlocked and coastal States in accordance with the 1965 New York Convention on the Transit Trade of Landlocked States. Finally, non-ratifying States of the Convention are parties to the 2000 Cotonou

Agreement, which acknowledges the limitations suffered by the landlocked States and their right to specific corrective measures. Thus coastal States are not bound by one convention, but bound by the other.

45. **Rights of transit** States**.** Principle V in the preamble of the 1965 New York Convention states 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 Convention *do not infringe on their legitimate interests*. It has been pointed out that it is, however, silent on the question of who is entitled to determine, and using which criteria, the existence and nature of such legitimate interests.

The 1965 New York Convention on Transit Trade of Landlocked Countries, filed as No. 8641 with the UN Secretariat (reference597 UN Treaty Series 3), appears in **Annex II-5** of this review.

46. **United Nations Convention on the Law of the Sea (also known as the Montego Bay Convention).** This UN Convention defines the rights and responsibilities of nations in their use of the oceans. It replaced the four treaties ratified in 1958 after the first Conference on the Law of the Seas held in Geneva in 1956. The Convention came into force in 1994.

47. As of November 2013, 166 countries and the European Union have joined the Convention, including most African countries. Many have joined with reservations about several of its provisions. The following landlocked African countries signed or ratified the Convention: (1) ratified: Botswana (1990), Burkina Faso (2005), Chad (2009), Lesotho (2007), Malawi (2010), Mali (1985), Uganda (1990), Zambia (1983), and Zimbabwe (1993); (2) signed but did not ratify: Burundi (1982), Central African Republic (1984), Ethiopia (1982), Niger and Rwanda (1982), and Swaziland (1984). Almost all the coastal and island countries ratified the Convention: Algeria (1996), Angola (1990), Benin (1997), Cameroon (1985), Cabo Verde (1987), the Comoros (1994), Democratic Republic of the Congo (1989), Congo (2008), Côte d'Ivoire (1984), Djibouti (1991), Egypt (1983), Equatorial Guinea (1997), Gabon (1998), The Gambia (1984), Ghana (1983), Guinea (1985), Guinea-Bissau (1986), Kenya (1989), Liberia (2008), Madagascar (2001), Mauritania (1996), Mauritius (1994), Morocco (2007), Mozambique (1997), Namibia (1983), Nigeria (1986), São Tomé and Principe (1987), Senegal (1984), the Seychelles (1991), Sierra Leone (1994), Somalia (1989), South Africa (1997), Sudan (1985), Togo

(1985), Tanzania (1985), and Tunisia (1985). Libya signed in 1984 but did not ratify the Convention.

48. **Specific provisions.** This Convention devotes an entire chapter to landlocked States. Part X of the Convention deals with the right of access of landlocked States to and from the sea and freedom of transit.

Article 125 states:

> Landlocked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention, including those relating to the freedom of the high seas and the common heritage of mankind. To this end, landlocked States shall enjoy freedom of transit through the territory of transit States by all means of transport.
>
> The terms and modalities for exercising freedom of transit shall be agreed between the landlocked States and transit States concerned through bilateral, subregional or regional agreements.

Article 127 (2) on Customs duties, taxes and other charges goes further and establishes the principle of equality: "Means of transport in transit and other facilities provided for and used by landlocked States shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit State."

The formulation of Article 125 (1) and (2) looks similar to that of the 1965 New York Convention. However, it goes further as it establishes the right of access to the sea as a natural right. The emphasis on exercising this natural right through bilateral or regional agreements only encourages the Parties to acknowledge the existence of this right through cooperation and initiates the development of regional integration tools. Going back to 1965, the rules related to regional or subregional laws were not well developed. In 1982, the Sub-Saharan African countries were more comfortable with each other and had confidence in their respective capacities to create and manage regional organizations. For this purpose, the landlocked States in Africa are all members of regional or subregional organizations or Regional Economic Communities.

The formulation of Article 127 (2) goes beyond what was offered by the 1965 New York Convention on Transit Trade of Landlocked Countries. The principle of equality between the landlocked State and the transit State is affirmed. This affirmation is totally in line with the international trend of treating all countries fairly to promote the rule of law and justice.

49. **Evaluation**. This Convention has been ratified by almost all African countries, whether landlocked or coastal. The reason is probably the tendency of the Convention to erect the right of access as a natural right without infringing on the right of the coastal State to participate in the implementation of the exercise of this right. This Convention has reached a compromise by satisfying all the concerned parties. The reason for its large adhesion can also be found in the opportunity for members to resolve disputes before the International Court of Justice. It can be viewed as a guarantee, especially for landlocked States, that those States will see their right protected by a neutral and objective tribunal. Indeed, the provisions of Article 287 (1) (b) give the Parties to the Convention the possibility of opting for the International Court to resolve their dispute.

The Convention appears in **Annex II-6** of this review.

50. **Almaty Programme of Action**. The "Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries" was adopted in 2003. The overarching goal of the Almaty Programme of Action is to forge partnerships to overcome the specific problems of the landlocked developing countries that result from their lack of territorial access to the sea and their remoteness and isolation from world markets. That situation has contributed to their relative poverty, substantially inflating transportation costs and lowering their effective participation in international trade.

51. **Objective**. The objective of the Programme is to establish a new global framework for developing efficient transit transport systems in landlocked and transit developing countries, taking into account the interests of both categories of countries. The Program aims to (1) secure access to and from the sea by all means of transport; (2) reduce costs and improve services as to increase the competitiveness of countries' exports; (3) reduce the delivered costs of imports; (4) address problems of delays and uncertainties in trade routes; (5) develop adequate national networks; (6) reduce loss, damage, and deterioration en route; (7) open the way for export expansion; and (8) improve the safety of road transport and the security of people along corridors.

52. **Evaluation**. The transport and transit facilitation issues of landlocked countries have become one of the main focuses of international organizations. A

comprehensive 10-year review of the implementation of the Almaty Programme of Action is planned for 2014. A series of preparatory meetings are preceding this review, and the general conclusion is that significant achievements have been made in meeting the targets of the initial program, but that much remains to be done to connect landlocked countries to global markets. It is likely that the Programme of Action will be continued after 2014, perhaps in an updated form that will reflect the developments to date.

The Almaty Programme of Action appears in **Annex II-7** of this review.

C. CUSTOMS CONVENTIONS

53. **History**. The Convention Establishing a Customs Cooperation Council was concluded in Brussels on December 15, 1950, by 13 European States, together with a protocol on the Study Group for the European Customs Union. The Convention was opened for accession by any State as of April 1955. As of November 2013, 179 States had acceded to the Convention. The Customs Cooperation Council is now known as the World Customs Organization. The African States members are Algeria (1983), Angola (1990), Benin (1998), Botswana (1978), Burkina Faso (1966), Burundi (1964), Cameroon (1965), Cabo Verde (1992), Central African Republic (1986), Chad (2005), Côte d'Ivoire (1963), Democratic Republic of the Congo (1972), Djibouti (2008), Egypt (1983), Eritrea (1995), Ethiopia (1973), Gabon (1965), Ghana (1968), Guinea (1991), Guinea-Bissau (2010), Kenya (1965), Lesotho (1978), Liberia (1975), Libya (1983), Madagascar (1964), Malawi (1966), Mali (1987), Mauritania (1979), Mauritius (1973), Morocco (1998), Mozambique (1987), Namibia (1992), Niger (1981), Nigeria (1963), Congo (1975), Rwanda (1964), Sao Tome & Principe (2009), Senegal (1976), Seychelles (2000), Sierra Leone (1975) Somalia (2012), South Africa (1964), South Sudan (2012), Sudan (1998), Swaziland (1981), Tanzania (1964), The Comoros (1993), The Gambia (1987), Togo (1995), Tunisia (1998), Uganda (1964), Zambia (1978), Zimbabwe (1981).

54. The 1950 Brussels Convention establishing the Customs Cooperation Council was registered as No. 2052 by the UN Secretariat. It was published in the UN Treaty Series (vol. 171, no. 305). The protocol related to the Study Group is registered as No. 2111 and is also in the UN Treaty Series (vol. 160, no. 267).

55. **Objectives**. The objectives of the Convention are (1) to secure the highest degree of harmony and uniformity in Customs systems; (2) to study the problems inherent to the development and improvement of Customs techniques and legislation; and (3) to develop cooperation in Customs matters.

56. **Provisions**. The Convention creates a Customs Cooperation Council in Brussels (Article I); all signatories or States acceding to the Convention are members. Each State has one representative on the Council (Article II), which has the following main functions (Article III):

- To study all matters related to Customs cooperation
- To examine the technical aspects of and economic factors related to Customs systems and operations
- To prepare draft Customs conventions
- To make recommendations to governments to ensure a uniform interpretation of Customs conventions
- To issue and circulate information on regulations and procedures.

57. **Organization (Article VI).** The Council elects its chairperson and vice-chair for a one-year term. The Council has a Nomenclature Committee, Valuation Committee, Permanent Technical Committee, and General Secretary (Article IX). The Council establishes with the United Nations and any of its organs or agencies relations that best ensure collaboration in the achievement of their respective tasks. It also establishes relations with nongovernmental organizations interested in matters within its competence. An annex to the Convention sets forth provisions on the Council's legal statute, privileges, and immunities.

The text appears in **Annex II-8** of this review.

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

58. **1923 Geneva Convention.** In its effort to pursue significant international cooperation over the decade of the 1920s, 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 procedures. The Convention was concluded in Geneva on November 8, 1923. This Convention

is still in existence as it has been acceded to by Niger (1966), a State that has not yet ratified the 1973 Kyoto Convention, which superseded the 1923 Geneva Convention.

The 1923 Geneva Convention based the Customs regime on fairness (Article 2). But for its authors, fairness 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. Its Article 3 therefore deplored the obstacles to international trade represented 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, and thus its text is not annexed to this review.[24]

59. **1973 Kyoto Convention on the Simplification and Harmonization of Customs Procedures.** This Convention entered into force in September 1974. As of June 30, 2012, the African Parties to it were Burundi (1974), Cameroon (1977), Côte d'Ivoire (1978), The Gambia (1974), and Malawi (1993).

60. **Scope.** The Convention was drafted under the auspices of the World Customs Organization formerly the Customs Cooperation Council). However, the word *procedures* as used in the Convention should not be interpreted narrowly as applying only to Customs formalities. It means all processes of foreign trade. Significantly, although the English text uses the word *procedures*, the French text uses the word *régime*, implying that the objective of simplification and harmonization is located well beyond the limited domain of procedures.

61. **Structure and contents**. The Convention proposes definitions of Customs terms, standards, and recommended practices. It 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 and not the others, or refrain from enforcing a procedure recommended in one, provided that they formulate the necessary reservation(s) at the time of ratifying the annex. States should notify the World Customs Organization of 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 annexes; it also

provides the Secretariat of the WCO 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.

The 1973 Kyoto Convention was filed as No. 13561 with the UN Secretariat (reference 950 UN Treaty Series 269).

62. **Revision.** The revised version of the Kyoto Convention was adopted in 1999[25] and entered into force on February 3, 2006. The Protocol of Amendment to the Convention on the Simplification and Harmonization of Customs Procedures is registered with the UN Secretariat as No. A-13561. The revised Kyoto Convention appears in **Annex II-9** of this review. It elaborates several key governing principles, chief among them the following:

- Transparency and predictability of Customs actions
- Standardization and simplification of the goods declaration and supporting documents
- Simplified procedures for authorized persons
- Maximum use of information technology
- Minimum necessary Customs control to ensure compliance
- Use of risk management and audit-based controls
- Coordinated interventions with other border agencies
- Partnership with the trade

The revised Kyoto Convention promotes trade facilitation and effective controls through its legal provisions that detail the application of simple yet efficient procedures. The revised Convention contains new and obligatory rules for its application, which all Contracting Parties must accept without reservation. The African States that are Contracting Parties are Algeria (1999), Botswana (2006), Egypt (2008), Kenya (2010), Lesotho (2000), Madagascar (2007), Mali (2010), Mauritius (2008), Morocco (2000), Namibia (2006), Nigeria (2012), Rwanda (2011), Senegal (2006), South Africa (2004), Sudan (2009), Uganda (2002), Zambia (2006), and Zimbabwe (2003). The Democratic Republic of the Congo signed the Convention in 2000 but did not ratify it. Although the ratification situation is rather good, the 25 annexes and chapters to the Convention—paramount for its proper implementation, have been meagerly

accepted by the Parties, with the notable exceptions of Algeria (24 annexes), Egypt (all 25), Madagascar (23), Mauritius (19), Uganda (all 25), and Zimbabwe (all 25).

b. *1982 Geneva International Convention on the Harmonization of Frontier Control of Goods*

63. **General.** This Convention is a useful complement to the Kyoto Convention. It was concluded on October 21, 1982, and, unhappily for the facilitation of trade in Africa, has been ratified only by South Africa (1987), Lesotho (1988), Liberia (2005), Tunisia (2009), and Morocco (2012). The other Parties are mainly European States.[26] Its aim is to reduce "the requirements for completing formalities as well as the number and duration of controls, in particular by national and international co-ordination of control procedures and of their methods of application"[27].

64. **Sources of harmonization** (**Articles 4 to 9**). Harmonization of control and procedures is ensured by (1) a sufficient number of qualified personnel consistent with traffic requirements; (2) adequate equipment and facilities; and (3) official instructions to Customs officers. Opening and controlling hours should be harmonized between adjacent countries, and information shall be exchanged. The Contracting Parties shall endeavor to use documents aligned with 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.

65. **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 in which they are warranted by the actual circumstances or risks. The situation of landlocked countries shall especially be taken in consideration. The transit of goods in containers or other load units affording adequate security shall be facilitated to the utmost.

66. **Annexes.** Nine annexes to the Convention deal with implementation:

- *Annex 1.* Harmonization of Customs controls and other controls
- *Annex 2.* Medico-sanitary inspections, with special provisions for goods in transit

- *Annex 3.* Veterinary inspections, with special provisions for goods in transit
- *Annex 4.* Phytosanitary inspections
- *Annex 5.* Control of compliance with technical standards
- *Annex 6.* Quality control
- *Annex 7.* Rules of procedure of the Administrative Committee to be established for amending the Convention if needed
- *Annex 8.* Facilitation of border crossing procedures for international road transport (introducing a mutually recognized International Technical Inspection Certificate and International Vehicle Weight Certificate)
- *Annex 9.* Facilitation of border crossing procedures for international rail freight (allowing the use of a joint CIM/SMGS railway consignment note, which at the same time could be a Customs document instead of the other shipping documents)

The 1982 Geneva International Convention on the Harmonization of Frontier Control of Goods, filed as No. 23583 with the UN Secretariat (reference 1409 UN Treaty Series 3), appears in **Annex II-10** of this review.

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

67. **Scope and structure.** This Convention is a follow-up to the 1950 Brussels Convention establishing the Customs Cooperation Council and organizing Customs cooperation. Its objectives are to establish effective cooperation between the Customs entities of States in order to prevent and repress Customs offenses detrimental to the interests of trade and the economic and financial interests of States. The Convention is composed of the main text and 10 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 related to controls and inquiries
- Appearance of Customs officials at a court abroad
- Presence of Customs officials in the territory of another party
- Pooling of information

- Participation in investigation abroad
- Assistance related 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 approach may hamper cooperation, but it eliminates or reduces the chances of conflicts of laws or frontier incidents. Niger, for example, accepted six annexes out of 10; it did not accept assistance related to surveillance.

68. **Enforceability.** The Convention came into force on May 21, 1980. It was ratified or acceded to by Algeria (1988), Côte d'Ivoire (1983), Kenya (1983), Malawi (1978), Mauritius (1985), Morocco (1980), Niger (1989), Nigeria (1984), Senegal (1992), the Seychelles (2012), South Africa (1993), Swaziland (2000), Togo (1991), Tunisia (1983), Uganda (1989), Zambia (1984), and Zimbabwe (1982). The inadequate rate of ratification in West Africa has been partially offset by the signing of the 1982 Cotonou Convention for Mutual Administrative Assistance in Customs Matters (see **Annex VII-28** of this review).

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

- 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 a Customs administration may be tempted to either invade the turf of other agencies or act *ultra vires,* thereby infringing on legitimate public or private interests, the individual rights of citizens or foreigners, or others.
- Mutual assistance does not extend to the arrest of persons or to the collection of duties, fines, or other monies.
- 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.

- The capacity of assistance is to be reciprocal. If the Customs department of a Contracting Party requests assistance that it could not give if it were asked to do so, it must inform the other party, who may or may not provide the requested assistance.

The 1977 Nairobi Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences was filed as No. 19805 with the UN Secretariat (reference 1226 UN Treaty Series 143) and appears in **Annex II-11** of this review.

d. *1972 Geneva Customs Convention on Containers and related conventions*

70. **Scope and objectives.** Three conventions are considered:

- The 1972 Customs Convention on Containers , concluded in Geneva on December 2, 1972 under the auspices of the United Nations/International Maritime Organization. Its objective is to permit the fast, easy movement of containers and their temporary admission to countries open to international trade. This Convention superseded the first Customs Convention on Containers, dated May 28, 1956.
- The 1994 (January 21) Convention on Customs Treatment of Pool Containers Used in International Transport, concluded under the auspices of UNECE. Its objectives are also to facilitate the Customs treatment of that category of containers.
- The 1960 (October 6) Customs Convention on the Temporary Importation of Packings, concluded under the auspices of the World Customs Organization with a similar objective and similar provisions.

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

- The 1972 Customs Convention on Containers was ratified by Algeria (1978), Burundi (1998), Liberia (2005), Morocco (1990), and Tunisia (2009). Kenya, Malawi, Uganda, and The Gambia acceded to the earlier and now obsolete 1956 Customs Convention on Containers.
- The following African countries ratified the 1962 Convention on the Temporary Importation of Packings: Algeria (1988), the Central African Republic (1962), Egypt (1963), Kenya (1983), Lesotho (1982), South Africa (1973), Uganda (1970), and Zimbabwe (1987).

- The 1994 Convention on Customs Treatment of Pool Containers Used in International Transport was signed by Uganda (1994) but not ratified; Liberia ratified the Convention in 2005. The Convention has been in force since 1998, mainly in European countries.

The number of African States that ratified the conventions just listed is not significant. However, Annex III to Protocol No. 3 attached to the Northern Corridor Transit & Transport Agreement (NCTTA) of 2007 between Burundi, Democratic Republic of the Congo, Kenya, Rwanda, and Uganda stipulates that the Parties to the Agreement undertake to accept transport units (containers) approved in accordance with the 1972 Customs Convention on Containers and its predecessor of 1956. The result is that, for the Corridor, all the countries are bound by the NCTTA, whereas for the rest of their territories Kenya and Uganda are bound by the 1956 Convention and Burundi is bound by the 1972 Convention.

The 1956 Geneva Customs Convention on Containers is filed as No. 4834 with the UN Secretariat (reference 338 UN Treaty Series 103) and appears in **Annex II-12** of this review.

The 1972 Geneva Customs Convention on Containers is filed as No. 14449 with the UN Secretariat (reference 988 UN Treaty Series 43) and appears in **Annex II-13** of this review.

The 1960 Brussels Convention on the Temporary Importation of Packings, filed as No. 6861 with the UN Secretariat (reference 473 UN Treaty Series 131), appears in **Annex II-14** of this review.

The 1994 Convention on Customs Treatment of Pool Containers Used in International Transport was filed as No. 34301 and is published in the UN Treaty Series (vol. 2000, no. 289).

72. **Containers.** The annexes to the 1972 Customs Convention on Containers set forth in detail the technical characteristics of containers and of their markings. According to the Convention:

- 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.

- Containers may be re-exported through any competent Customs office, even if that office is different from the office of temporary admission.

- Containers under temporary admission may be used one single time for domestic traffic.
- To qualify for approval for goods transport under Customs seal, containers must comply with regulations set out as an annex to the Convention. However, 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 defects found in a container are of minor importance and do not involve any risk of smuggling.

73. **Application to Africa.** African countries should be encouraged to request accession to this Convention. Significantly, the Customs Convention on the International Transport of Goods under Cover of TIR Carnets, 1975 (TIR stands for *Transports Internationaux Routiers* or International Road Transport) stipulates that containers approved for the transport of goods under the 1972 convention shall be considered as complying with the provisions of the 1975 TIR Convention.

74. **Pallets and packings.** These two Conventions contain similar provisions. Pallets and packings may be imported temporarily for 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.

e. *Customs conventions dealing with the temporary importation of goods*

75. These instruments are as follows:

- The main and central instrument in this respect is the 1961 Customs Convention on the ATA Carnet for Temporary Admission of Goods, reviewed in this section. The three other instruments listed here were drawn along the same lines. They are not analyzed in detail here.
- The Customs Convention on the Temporary Importation of Professional Equipment (Brussels, June 8, 1961) had been, as of July 2006, ratified by Algeria, the Central African Republic, Egypt, Kenya, Lesotho, Madagascar, Niger, South Africa, Tunisia, Uganda, and Zimbabwe (filed with UN Secretariat as No. 6862; UN Treaty Series, vol. 473, no. 153).

- The Customs Convention on the Temporary Admission of Scientific Equipment (Brussels, June 11, 1968) was ratified as of July 2006 by Benin, Chad, Cameroon, Gabon, Ghana, Kenya, Lesotho, Mali, Niger, Nigeria, Senegal, South Africa, Uganda, and Zimbabwe (filed with UN Secretariat as No. 5667; UN Treaty Series, vol. 690, no. 97).
- The Customs Convention on the Temporary Admission of Pedagogic Material (Brussels, June 8, 1970) was ratified as of July 2006 by Cameroon, Lesotho, Mali, Niger, Rwanda, Senegal, Somalia, South Africa, Uganda, Togo, and Zimbabwe (filed with UN Secretariat as No. 11650; UN Treaty Series, vol. 817, no. 313).

76. **ATA Convention**. The Customs Convention on the ATA Carnet for Temporary Admission of Goods was signed in Brussels on December 6, 1961. According to UN records, it was ratified or acceded to by Algeria (1973), Côte d'Ivoire (1962), Egypt (1968), Lesotho (1983), Mauritius (1982), Morocco (1996), Niger (1978), Nigeria (1973), Senegal (1977), South Africa (1975), and Tunisia (1971). The ATA Convention was filed with the UN Secretariat as No. 6864 and appears in the UN Treaty Series (vol. 473, no. 219).

77. **Provisions**. The ATA (temporary admission) system of temporary admission of goods is based on a system of guarantee of payment for Customs dues by agreed-on professional associations such as chambers of commerce. These associations issue ATA carnets valid for a maximum of one year that describe the goods for temporary admission and indicate 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 the case of noncompliance 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 10 percent of the Customs dues (Article 5). Importers are jointly and severally liable for payment (same). It is up to the association issuing the carnets to provide evidence of the re-export of goods (Article 6). As 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 annexed to this review.

D. MARITIME CONVENTIONS

78. **Scope.** Maritime conventions are numerous and fall into two categories: public law or private law.

79. **Public law conventions**. The High Seas Convention (Geneva, 1958), setting forth the basic principles of freedom of the seas and coastal States' control of the waters adjacent to their shores, opens the way. A first subcategory then deals with the safety of ships and shipping. Examples are the 1955 London Convention on Load Lines and the 1910 Brussels Convention on Unification of Rules of Law with Respect to Collisions between Vessels. A second subcategory 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.

- 1923 Geneva Convention and Statute on the International Regime of Maritime Ports
- 1965 London Convention on Facilitation of International Maritime Traffic.

80. **Private law conventions.** The second category deals with the commercial aspects of shipping, like (1) liability for sea carriage (Brussels/Visby and Hamburg Rules) and (2) shipowner's liability. Instruments in these categories have an indirect relationship with facilitation since adherence to their rules develops uniformity of commercial practice, makes shippers and carriers feel safer, and therefore have an impact on freight rates and insurance premiums. These conventions and their status of ratification or accession are reviewed briefly:

- 1924 Brussels Convention on the unification of certain rules of law relating to bills of lading (later amended as Visby Rules)
- 1978 (Hamburg Rules) Convention on the Carriage of Goods by Sea
- 1991 Vienna Convention on the Liability of Terminal Operators
- Conventions on the unification of rules relating to the limitation of liability of owners of seagoing vessels.

a. *1923 Geneva Convention and Statute on the International Regime of Maritime Ports*

81. **General.** This Convention is one of those from the years 1921–29 by which, after the signing of the Treaty of Versailles, the League of Nations engaged in an effort to encourage States to open their economies and cooperate in an overall facilitation of international trade. It is well in line with the 1921 Barcelona Convention and Statute on Freedom of Transit. The Convention is binding to not only governments and their port authorities but also all concessionaires and terminals "of any kind." It is clearly a norm-creating and self-executing instrument.

82. **Enforceability.** This Convention was adhered to by the United Kingdom on September 2, 1925, for Cameroon (as British Mandate of Cameroon), The Gambia, Ghana (as Gold Coast), Kenya, Mauritius, Nigeria, Sierra Leone, Somaliland, Tanganyika, and Zanzibar. By contrast, France specifically excluded from its adhesion (December 1, 1924) all of its colonies, protectorates, and other dependencies. As a result, the Convention was acceded to by Burkina Faso (1966), Côte d'Ivoire (1966), and Madagascar (1967) after their independence, as well as by Mauritius (1969), Morocco (1972), Nigeria (1967), and Zimbabwe (1998).

83. **Issue.** Whether foreign vessels have a basic right of access to a port is the subject of dispute in international law.[28] International custom does not recognize such a right. English law does, however, and the Dangerous Vessels Act of 1995 in the United Kingdom gives port authorities the powers needed to prohibit the entry of such vessels. French law submits any entry to authorization issued by the sole harbormaster, and the courts grant that official total freedom of appreciation. The problem has become more acute, however, with the risk of pollution of port waters, and there is a trend toward prohibition rather than recognition of the right to entry. But in all legal systems any refusal of entry must be justified by a valid reason.

84. **The Convention.** It does not stipulate explicitly an automatic right of entry, but it does set forth a rule of equal treatment between national and foreign vessels for "freedom of entry, utilization and the complete use of port facilities." There is 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 as follows:

- *Definition (Article 1).* A maritime port is a port normally frequented by seagoing vessels and used for foreign trade.
- *Equal treatment of vessels (Article 2).* Equal treatment of all vessels, either national or foreign, in ports of the States Party to the Convention in berthing, loading and unloading, port dues, rates and services in general.
- *Publication of tariffs (Article 4).* All schedules of port dues and charges should be published before being applicable.
- *Equal treatment in dues (Articles 5 to 7).* Equal treatment of all cargoes in Customs and other duties and rates whatever the flag of the vessel on which such cargoes are imported or exported. Exception to the rule based on special economic or other conditions shall not be used as a means of discriminating unfairly.
- *Pilotage and towage (Article 11).* Each State may organize port towage and pilotage services as it considers fit, subject to conditions of equal treatment.

The Convention admits the right of 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 vessel, origin or destination of cargo, etc. The Convention does not apply to coastal traffic and to fishing vessels and their catches.

85. **Application to goods carried by rail.** The provisions of Article 6 of the Convention are of special interest. They apply the provisions of Articles 4 and 20 to 22 of the 1923 Geneva Convention and Statute on the International Regime of Railways to parties, whether or not the State Party to the Convention on the regime of ports is a Party to the Convention on railways. None of the Francophone States is a Party to the 1923 Geneva Railways Convention. However, they are bound by some of its articles through the *renvoi* operated in the Convention on ports. In Article 6, State Parties agree to abstain from any discrimination in railway operations against other States. In Articles 20 and 21, they commit to avoiding any abuse and any hostile discrimination in the area of railway tariffs. Article 22 extends application of the provisions of the preceding articles to cargo stored into ports. However, the 1923 Geneva Ports Convention makes no reference to carriage by road trucks, which indicates the domi-

nation of railways in land transport when the Convention was signed. As a result, goods carried by rail are protected, and others are not.

86. **Enforcement.** Whether this Convention is actually enforced is uncertain. Indeed, it is suspected that African States are not aware of their obligations under the Convention, or are not eager to enforce it because they tend to grant special regimes, more favorable, to their vessels in their ports. Significantly, the Parties to the 2000 Cotonou Agreement—among them 30 African States, 15 of which are coastal—committed themselves to grant to vessels of any other party a treatment no less favorable than that accorded to their 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. These provisions were unnecessary for the State Party to the 1923 Geneva Ports Convention. They are obliged to extend equal treatment to all vessels, whether flying the flag of a State Party to the 2000 Cotonou Agreement or not. Also and at an earlier stage, the basic principles of the 1965 New York Convention on Transit Trade of Landlocked Countries mentions the rights to be granted in ports of coastal States to vessels flying the flag of a landlocked State. These rights were in fact already granted by the 1923 Geneva Ports Convention, and the States Parties to that Convention were bound by its provisions. All vessels, whether or not they were flying the flag of a State party to the 2000 Cotonou Agreement, were entitled to equal treatment.

The Convention and Statute on the International Regime of Maritime Ports was filed with the League of Nations as No. 1379 (reference 58 League of Nations Treaty Series 285). The text appears in **Annex II-15** of this review.

b. *London Convention on Facilitation of International Maritime Traffic*

87. **Objective.** The Convention aims at facilitating maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements, and procedures related to the arrival, stay or departure of ships engaged in international trade.

88. **Enforceability.** This Convention was concluded under the auspices of the International Maritime Organization (IMO). There were 114 Contracting States as of April 30, 2010. To date, it was ratified or acceded to by Algeria, Benin, Burundi, Cameroon, Cabo Verde, Congo, Côte d'Ivoire, Egypt, Gabon,

The Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Madagascar, Mali, Mauritius, Nigeria, Senegal, the Seychelles, Sierra Leone, Tanzania, Tunisia, and Zambia. The CEMAC Shipping Code contains an explicit reference to This Convention.

89. **Scope and structure.** The Convention was adopted to prevent unnecessary delays in maritime traffic, to develop cooperation 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 through the use of excessive formalities in ports. The Convention reduces to a minimum the number and types of documents requested from a ship's captain. An annex to the Convention lists the eight documents that, unless special and exceptional circumstances justify additional requests, should allow port and other authorities to perform their regulatory duties in dealing with a vessel. The format of the Convention is similar to the one of the 1973 Kyoto Convention on the Simplification and Harmonization of Customs Procedures. The annex contains implementation details on "Standards" and the "Recommended Practices" for formalities:

- The Convention defines *standards* as the internationally agreed-on measures necessary and practicable to facilitate international maritime traffic.
- *Recommended practices* are those measures that permit the application of what is *desirable*. For example, simplified procedures should be applicable to passengers from cruise ships visiting the country. Port offices should be open for standard working hours, and no additional charge should be enforced when government staff has to work overtime. The International Maritime Organization has also developed eight standardized forms covering the 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. The 2005 amendment to the Convention added the following non-exhaustive provisions: (1) recommended that authorities use pre-arrival and pre-departure information to facilitate the processing of information to expedite the release of cargo and persons; (2) encouraged the electronic transmission of information. This provision suggests that all Members modernize their ports and offices with information technology features.

The Convention on Facilitation of the International Maritime Traffic, known as the FAL Convention, is filed as No. 8564 with the UN Secretariat (reference 591 UN

Treaty Series 265) and appears in **Annex II-16** of this review. Several amendments have been made to the original convention to modernize it, thereby enhancing the facilitation of international maritime traffic. The most recent amendment was in July 2005, and was entered into force in November 2006 (see **Annex II-17** of this review).

c. *1924 Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*

90. **General.** This instrument is about sea carrier liability. The original Convention, signed in Brussels in 1924, was modified in 1968 by a protocol setting forth the so-called Visby Rules, which increased the limits of liability and widened the scope of the Convention.[29]

91. **Enforceability.** The 1924 Brussels Convention was ratified or adhered to by Algeria, Angola, Cameroon, Cabo Verde, Côte d'Ivoire, Democratic Republic of the Congo (as Zaire), Egypt (which denounced the Convention in 1997), The Gambia, Ghana, Guinea-Bissau, Kenya, Madagascar, Mauritius, Mozambique, Nigeria, São Tomé & Principe, Senegal, the Seychelles, Sierra Leone, Somalia, and Tanzania. Egypt is the only African country that ratified the 1968 protocol (Visby Rules), with a reservation on Article 8. The Convention has been denounced by Denmark, Finland, Italy, the Netherlands, Norway, Sweden, and the United Kingdom as a result of a movement developed for the elaboration of a new convention, the Hamburg Rules, which are reviewed shortly. Besides, a number of States, such as France in Europe and the Economic Community of Central African States (ECCAS) in Africa have imposed 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. The Congo and Cameroon, for example, are both signatories of the 1924 Brussels Convention and members of ECCAS, whose Shipping Code, issued in 2001, sets forth rules different from those of the 1924 Brussels Convention. There is ground here for a conflict of laws.

92. **Scope.** The Convention stipulates rules on 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 a charter party. It is therefore the standard source of rules of law on the 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 unload-

ing, even if cargo is in the hands of the sea carrier. It is therefore not applicable to terminal operations, even if these are under the carrier's control. Other liability regimes then apply. The Convention applies when the bill of lading has been issued in a State that is Party to the Convention, when carriage starts in a Contracting State, and when the bill of lading specifically refers to the Convention (*paramount clause*). Although the 1924 Brussels Convention, within the narrow limits of its enforceability, is generally applicable to international traffic between industrialized countries and African countries, it may not apply in cases of intra-African 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 1924 Brussels Convention is attached as an **Annex II-18** to this review.

d. *1978 (Hamburg Rules) Convention on the Carriage of Goods by Sea*[30]

93. **Enforceability.** The so-called Hamburg Rules, adopted on March 31, 1978, have been in force since November 1, 1992. The Convention stipulating the rules was neither signed nor ratified by most maritime States. The following African States ratified or acceded to the Convention: Botswana, Burkina Faso, Burundi, Cameroon, Democratic Republic of the Congo, Egypt, The Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Morocco, Nigeria, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda, and Zambia. It is therefore enforceable for carriage between these States and under their law.

94. **Attractiveness.** The limited attractiveness of the Hamburg Rules is illustrated by the failure of the signature and ratification process of the draft 1980 Convention on Multimodal Transport of Goods. This draft Convention used the Hamburg Rules as a basis for its liability regime and was therefore not acceptable to those States that did not accept the Hamburg Rules. The 2001 Shipping Code of CEMAC incorporates the Hamburg Rules and makes specific reference to the Hamburg Convention.

95. **Scope.** The United Nations Conference on Trade and Development (UNCTAD) prepared the Hamburg Rules in response to developing countries' pursuit of an instrument more favorable to cargo interests than the 1924 Brus-

sels Convention. These rules are also said to have been inspired by the 1966 French Maritime Transport Act, which updated the Commercial Code in a way more protective of cargo interests. Under 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:

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

96. **Evaluation.** There is little chance that the shipping world will accept the Hamburg Rules 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 Africa and evaluate their impact on transport costs and facilitation.

The text of the Hamburg Rules is not attached as an annex to this review.

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

97. **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 toward eliminating legal obstacles to the interests of shippers and consignees of cargo from developing countries. The Convention is aimed at establishing uniform rules on liability for loss, damage, delivery delays, etc. for goods while they are in the charge of operators of transport and are not covered by the laws of carriage arising from conventions applicable to the various modes of transport. The

1991 Vienna Convention has not yet entered into force, and there are few prospects that it will collect the necessary number of ratifications or acceptances. Its provisions may be of interest in drafting a regional or subregional convention on the subject; however, no African State has seemed 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. Egypt and Gabon are the only African countries to have ratified the Convention as of July 2013.

98. **Provisions.** The main provisions of the Convention are as follows:

- *Definition of operator (Article 1).* The operator of a transport terminal is defined as a person who, in the course of its business, takes 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.
- *Applicability (Article 2).* 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.
- *Onus of proof (Article 5).* 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 his action or negligence.
- *Limitation of liability (Articles 6 to 9).* The operator may limit his liability. Right of limitation of liability is not granted when loss, damage, delay, etc. originates in an act of omission of the operator himself or one of his servants or agents.
- *Convention as a compulsory instrument (Article 13).* 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.

The Convention on the Liability of Operators of Transport Terminals in International Trade appears in **Annex II-19** of this review.

f. *Convention for the Unification of Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels (Brussels, 10 October 1957)*

99. **History.** Since 1885, conflicts between English law and continental law have led to a series of conferences and draft instruments on rules on limiting the liability of ship-owners. The first Convention dealing with this subject concluded in 1924 is no longer in effect. It was replaced on October 10, 1957, by a Convention ratified by Congo, Ghana, Madagascar, and Mauritius. This Convention permitted the vessel owner to limit his liability for damages, including the death of a passenger and damages to cargo, provided there was no fault on his part or his agent. This Convention was replaced by yet another convention (reference 1412 UN Treaty Series 73) in 1976, reviewed hereafter.

100. **1976 London Convention on Limitations of Liability for Maritime Claims.** Signed on November 10, 1976 in London, this Convention sets forth the rules applicable to a ship-owner's liability. It defines and enumerates the cases in which a liability limitation applies, which include 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 (SDRs).

101. **Enforceability.** Benin was one of the first 12 States to ratify the Convention, which became effective between signatories in 1996. Sierra Leone ratified in 2002. On February 2004, the Protocol of 1996 to amend the Convention entered into force. However, for Central Africa the provisions of the Convention are incorporated in CEMAC 2001 Shipping Code (Title V at Articles 100 to 113) and are therefore enforceable in the CEMAC States and for its traffic.

102. **1961 Brussels Convention on Carriage of Passengers by Sea.** Signed on April 29, 1961, this Convention was ratified or acceded to by Algeria, Congo, Democratic Republic of the Congo, Liberia, Madagascar, Morocco, and Tunisia. Articles 419 to 426 of the CEMAC Merchant Shipping Code are a transcript of the provisions of the 1961 Brussels Convention, which makes it de facto enforceable in and by CEMAC States. The Convention, which applies only to passengers and not to luggage, stipulates a contractual due diligence obligation for the carrier. It is up to the passenger to provide evidence of the carrier's lack of due diligence, except when damage is caused by fire, explosion, grounding,

wreck, or other total losses. The Convention also provides for a ceiling in monetary damages.

103. **1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (modified by a Protocol of 1976)**. This Convention has been in effect since 1987. It stipulates that a carrier is liable if damage is suffered on board the vessel or in the case of negligence. Negligence is presumed if there is a fire, grounding, or a collision. The ceilings for carrier liability are set higher than in the 1961 Brussels Convention. The only African States that ratified this Convention are Egypt, Equatorial Guinea, Liberia, Libya, Malawi, and Nigeria. An additional protocol was issued in 2002, thereby improving the guarantees offered to passengers, especially about a carrier's liability and compulsory insurance. No African state ratified the protocol. The European Union ratified the protocol on behalf of all of its Member States and then issued a European Regulation to be implemented and enforced by all these States since the protocol is not self-enforcing. This procedure might be an example to be followed by regional and subregional organizations, provided, of course, that individual States agree to release their treaty-related powers to the organization.

104. **1974 UNCTAD Code of Conduct for Liner Conference**. This UN Convention was initiated by the United Nations Commission on Trade and Development (UNCTAD), which strongly supported its adoption by developing countries. The opinion was that conferences of sea carriers were "closed shops", providing little information to shippers, not accepting membership of carriers from developing countries, and arbitrarily fixing their transport tariffs. The objective was therefore, in a spirit of cooperation, that conferences be open to all carriers. Information should be widely provided to shippers. In addition, shippers themselves and governments should have the capacity to intervene in the system. Shippers' councils should specially be established to support the interest of shippers and control the distribution of traffic between carrier members of the Conference. Other provisions are the following:

- According to Article 2 of the code, traffic is to be distributed equally between shipping lines of the country of origin and the country of destination. Third-party countries will be allocated traffic not allocated to those shipping lines; this is formulated as the 40/40/20 rule.
- Decision-making procedures will be based on principles of equality between Conference Members (Article 3). Rules of conduct will be drafted and enforced, with penalties in case of breach or disregard of these rules

(Articles 4 and 5). All conference agreements will be made available upon request to interested Governments (Article 6).

- Loyalty agreements will be concluded with shippers. These agreements will, among other things, set freight tariffs applicable to the loyal shippers. They will also set the other rights and obligations of the Parties (Article 7).
- All tariffs shall be made available to shippers and other interested parties (Article 9).
- Freight rates will be "as low as possible" while permitting a "reasonable profit" for ship-owners. Promotional and other rates for specific goods shall take into consideration the interests of the developing and land-locked countries (Article 12). No unfair difference will be applied to shippers similarly situated.
- The conference will inform shippers of any proposed increase in a tariff 150 days prior to the proposed date of enforcement of the new tariff. Consultations will be held, and in case of disagreement the matter will be submitted to conciliation (Article 14).
- Shippers may propose promotional freight rates for nontraditional exports. These rates are valid for 12 months. They should not create "substantial competitive distortions in the export of a similar produce from another country served by the conference" (Article 15).

The 1974 Code of Conduct for Liner Conferences is registered as No. 22830 with the UN Secretariat (1334 UN Treaty Series 15) and appears in **Annex II-20** of this review.

E. RAIL TRANSPORT CONVENTIONS

105. The 1923 Geneva Convention and Statute 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. Because they had a monopoly as long-distance carriers in the nineteenth century, the railways lent themselves easily to abuses of dominant positions. The first Convention on the international regime of railways, the 1890 Bern Convention, stemmed in part from the abuses of German railways enforcing tariffs detrimental to the Austrian port of Trieste and the Dutch port of Rotterdam, but artificially attract-

ing traffic to Bremen and Hamburg.[31] The 1890 Convention was amended by the 1923 Convention.

106. **Enforceability.** The 1923 Geneva Convention is, like the 1923 Geneva Convention and Statute on the International Regime of Maritime Ports, significant among conventions concluded after the Treaty of Versailles. Like all successive conventions on rail transport, it did not penetrate Africa, except through its ratification by the United Kingdom in 1925 for most of its possessions or protectorates: Cameroon under British mandate, The Gambia, Gold Coast (today, Ghana), Nigeria, Northern and Southern Rhodesia (today, Zimbabwe), Nyasaland (today, Malawi), Sierra Leone, and Tanganyika (today, Tanzania). The Convention is certainly well alive, as it was formally adhered to by Malawi and Zimbabwe in 1969 and 1989, respectively. Tanzania, by enforcing the clean slate doctrine, does not consider itself bound by it.

107. **Provisions.** Provisions of the Statute fall in two categories: (1) commitments of Contracting Parties regarding the development and facilitation of international traffic and (2) rules of law on relations between railways and their users.

The main facilitation provisions are as follows:

- *Articles 1 to 3.* Existing lines of the different national networks should be connected. Common frontier stations should be established whenever possible. The State in whose territory these stations will be located should offer every assistance to railway staff of the other State.
- *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.
- *Article 8.* Customs, police, and immigration formalities should be regulated so as not to be a hindrance for international traffic.
- *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 in 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 a through contract.

The 1923 Convention and Statute on the International Regime of Railways were filed in the League of Nations (reference 75 League of Nations Treaty Series 55) and appears in **Annex II-21** of this review.

108. **1980 Bern Convention on International Carriage by Rail.** The 1923 Geneva Convention has since been replaced by other conventions and protocols dated February 7, 1970, and filed with the UN Secretariat as No. 16900 (reference 1100 UN Treaty Series 164), which were themselves 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 carriage by rail (*Convention relative aux transports internationaux ferroviaires*, COTIF) was concluded in Bern.[32] The Convention (1) defines the role and jurisdiction of the Intergovernmental Organization for International Carriage by Rail (OTIF) and of its General Secretariat, and (2) sets forth the standards applicable to international rail transport, or Uniform Rules. 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 to which the Uniform Rules apply. On the other lines, the law of the State where the carriage contract was concluded applies. Algeria, Morocco, and Tunisia are the only African members of OTIF and Contracting Parties to the 1980 Convention. But if projects in connection with African railways networks develop, governments may revise their positions and seek to accede to the 1980 Convention.[33] In the same vein but concluded under the auspices of the United Nations Economic Commission for Europe (UNECE) is the Convention on International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes, adopted in Geneva on February 9, 2006. It is not yet in force.

F. CONVENTIONS ON RIVER TRANSPORT

109. **1921 Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concerns.**[34] The United Kingdom ratified in 1922, for the British Empire with the exception of the Dominions (South Africa), the April 20, 1921, Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern. As a result, and subject to the clean slate doctrine, some African States are Parties to the Convention they inherited.

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

- *Free navigation (Article 3)*. Vessels flying the flag of a Contracting State have free passage on these parts of navigable waterways under the sovereignty of another Contracting State.
- *Equal treatment (Articles 4 and 5)*. Property and flags of the Contracting States are to be treated "on a footing of perfect equality." No distinction shall be made between the nationals and flags of non-riparian States. The exception to the rule is for traffic between one port under the sovereignty of a Contracting State and another of its ports, or reservation of traffic between two riparian States to vessels and operators of these States.
- *Dues (Article 7)*. 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."
- *Transit (Article 8)*. Transit shall be governed by the rules of the Statute of Barcelona on Freedom of Transit.
- *Equal treatment on Customs, dues, or other duties (Article 9)*. Customs duties should not be higher "than those levied on the other Customs frontiers of the State interested."
- *Costs to be shared (Article 10).* 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.

The Convention and Statute on the Regime of Navigable Waterways of International Concern (reference 7 League of Nations Treaty Series 35) appears in **Annex II-22** of this review.

G. CONVENTIONS ON ROAD TRANSPORT

111. **History.** Carriage by road developed considerably during the last century and has 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 98 percent 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, and Customs procedures, or of private law, dealing with carriage, insurance, and other contracts.

112. **Presentation**. These matters and the conventions on these subjects are reviewed here in the following order:

- Traffic and vehicles, with the objective of safety and harmonization of standards between states and jurisdictions. Pertinent here are the Geneva and Vienna Conventions on road traffic and road signs and signals.
- The regulation of Customs aspects affecting transport. Here the Customs Convention on the International Transport of Goods under Cover of TIR Carnets is of special interest.
- The regime applicable to commercial road vehicles temporarily imported or used in international transport.
- The carriage contract itself, establishing the liabilities of the carrier. The Convention on the Contract for the International Carriage of Goods by Road (CMR), provides a good model. It has an impact on subregional conventions and codes.

a. *1949 Geneva Convention on Road Traffic and 1968 Vienna Convention on Road Signs and Signals*

113. **1949 Geneva Convention on Road Traffic.** The first Convention was concluded in Geneva on September 19, 1949, following the UN Conference on Road and Motor Transport. It entered into force in 1952. As of May 2010, in Africa it was adhered to or ratified by Algeria (1963), Benin (1961), Botswana (1967), Burkina Faso (2009), the Central African Republic (1962), Congo (1962), Côte d'Ivoire (1961), Democratic Republic of the Congo (1961), Ghana (1959), Egypt (1957), Lesotho (1973), Madagascar (1962), Malawi (1965), Mali (1962), Morocco (1956), Namibia (1993), Niger (1961), Rwanda (1964), Senegal (1962), Sierra Leone (1962), South Africa (1952), Togo (1962), Tunisia (1957), Uganda (1965), and Zimbabwe (1998).

The 1949 Geneva Convention was filed as No. 1671 with the UN Secretariat (reference 125 UN Treaty Series 22), and appears in **Annex II-23** of this review.

114. **Protocol on Road Signs and Signals.** A protocol on road signs and signals was adopted at the same time as the convention. It came into force on December 20, 1953. Burkina Faso (2009), Niger (1968), Rwanda (1964), Senegal (1962), Tunisia (1957), and Uganda (1965) are Contracting Parties to this Protocol.

The **Protocol on Road Signs and Signals** was filed with the Convention as No. 1671 with the UN Secretariat (reference 182 UN Treaty Series 224). The text is attached as **Annex II-24** of this review.

115. **International traffic objectives and scope of the 1949 Geneva Convention.** The objective of the Convention was to promote the development of international road traffic by establishing uniform rules for it. According to Chapter I of the Convention, the basic applicable principles were as follows:

- 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.
- International traffic is traffic by vehicles owned by nonresidents, not registered in the State, and temporarily imported. No Contracting State would 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.
- Measures that the Contracting States may agree to with a view toward facilitating international road traffic by simplifying Customs, police, health, or other requirements would be regarded as in conformity with the object of the Convention.
- A bond or other form of security guaranteeing payment of import duties or other taxes may be required by any Contracting State, but the State shall accept for that purpose the guarantee issued by an organization established in its own territory and issuing a valid Customs pass.
- The Convention is not self-enforcing, and it is up to the Contracting States to take the appropriate measures for the observance of the rules set in it.

116. **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.

117. **1968 Vienna Convention on Road Traffic.** A second Convention was concluded on November 8, 1968, in Vienna and came into force in 1977. It was the final act of the 1968 UN Conference on Road Traffic, attended by Government delegations, seven intergovernmental organizations, and 19 nongovernmental organizations. No specific African organization attended the conference.

118. **Status.** The 1968 Vienna Convention was signed, ratified, or adhered to as of June 2013 by the Central African Republic (1988), Côte d'Ivoire (1985), Democratic Republic of the Congo (1977), Ghana (signature only, 1969), Kenya (2009), Liberia (2005), Morocco (1982), Niger (1985), Senegal (1972), the Seychelles (1977), South Africa (1977), Tunisia (2004), and Zimbabwe (1981).

119. **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 Africa:

- The 1949 Convention regime in the States that ratified the 1949 Geneva Convention but did not ratify the 1968 Vienna Convention.
- The 1968 Vienna Convention on Road Traffic in the countries whose Governments ratified the Convention. All of these States, except the Seychelles, had ratified or adhered to the 1949 Convention.
- The States that ratified neither the 1949 nor the 1968 Conventions enforce the domestic legislation or are bound by the provisions of regional or subregional instruments on the subject, such as CEMAC's Road Traffic Code covering Cameroon, the 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 1968 Conventions has yet to be explored.

120. **Objectives and scope of the 1968 Vienna Convention.** This Convention proposes "to facilitate international road traffic and increase road safety through the adoption of uniform traffic rules." At the same time, the Convention is an effective facilitation tool by means of its provisions on mutual recognition and admission in international traffic of vehicles and drivers in possession of certificates issued in conformity with the Convention. The definition of vehicles in international traffic is similar to that used in the 1949 Convention.

121. **Provisions.** The main provisions of the Convention are:

- *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.
- *Chapter II.* This chapter stipulates a number of rules related 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.
- *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.
- *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.
- *Chapter V.* Provisions of this chapter deal with cycles and mopeds.

The 1968 Vienna Convention was filed with the UN Secretariat as No. 15705 (reference 1091 UN Treaty Series 3), and appears in **Annex II-25** of this review.

122. Annexes to the 1968 Vienna Convention on Road Traffic. Seven annexes are attached to this Convention and are an integral part of it:

- *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 and plate of motor vehicles and trailers in international traffic.
- *Annex 3.* Distinguishing signs of vehicles and trailers in international traffic.
- *Annex 4.* Identification marks of vehicles and trailers in international traffic.
- *Annex 5.* Technical conditions concerning vehicles and trailers. This very detailed set of standards, characteristics, and equipment, which, once complied with, should allow the acceptance of vehicles by the Contracting Parties on their territories.
- *Annex 6.* Domestic driving permit. Rules and format of permit.
- *Annex 7.* International driving permit.

123. **1968 Vienna Convention on Road Signs and Signals.** On November 8, 1968, the Convention on Road Signs and Signals was also concluded in Vienna; it was intended to replace the 1949 Protocol. The Convention was ratified or adhered to as of June 2013 by the Central African Republic (1988), Côte d'Ivoire (1985), Democratic Republic of the Congo (1977), Ghana (signature only, 1969), Liberia (2005), Morocco (1982), Nigeria (2011), Senegal (1972), the Seychelles (1977), and Tunisia (2004).

Like the Convention on road traffic, the small number of ratifications resulted in three regimes in two categories of countries: those enforcing the 1968 Convention, and those enforcing neither or enforcing the subregional rules on signs and signals.

The 1968 Vienna Convention on Signs and Signals was filed with the UN Secretariat as No. 16743 (reference 1091 UN Treaty Series 3). The text as appears in **Annex II-26** of this review.

124. **1958 Geneva Agreement on Uniform Technical Prescriptions.** An Agreement on the adoption of uniform technical prescriptions for wheeled vehicle equipment and parts that can be fitted or 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. It came into force on June 20, 1959. The Agreement was filed with the UN Secretariat as No. 1789 (reference 335 UN Treaty Series 215). It was followed by the issuance of 110 regulations on standards of mechanical and other equipment for wheeled vehicles. The name of the instrument was changed on August 18, 1994, to 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. On June 25, 1998, the Agreement Concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which Can Be Fitted and/or Be Used on Wheeled Vehicles was concluded in Geneva. It entered into force in 2000. South Africa is the only African country that has ratified the Agreement.

The Agreement on Technical Prescriptions was filed with the UN Secretariat as No. 1789 (reference 335 UN Treaty Series 215). The text is not attached as an annex to this review.

b. *1975 Geneva Customs Convention on the International Transport of Goods under Cover of TIR Carnets*

125. **Objective.** The objective of the TIR Convention has been to both improve transport operations and simplify and harmonize administrative formalities in the field of international transport, particularly at frontiers. Its objective is definitively facilitation.

126. **Enforceability.** The Convention has been enforced since 1960 and amended several times. Largely enforced in Europe, the Maghreb, and the Middle East, including Iran, and ratified in North America, even in Chile, Republic of Korea, and Indonesia, it has remained almost foreign to Africa and as of June 2013, only Algeria (1989), Liberia (2005), Morocco (1983), and Tunisia (1977) have ratified the Agreement. However, its principles have not been ignored as, like the 1956 Convention on the Contract for the International Carriage of Goods by Road, it has been used as a model for subregional instruments establishing transit regimes. For example, Annex III to Protocol No. 3 attached to the Northern Corridor Transit & Transport Agreement (NCTTA) between Burundi, Democratic Republic of the Congo, Kenya, Rwanda, and Uganda states that the Parties to the Agreement undertake to accept transport units approved in accordance with the 1956 Convention.

127. **Provisions.** The main provisions of the Convention are as follows.

- Goods carried under the TIR procedures in sealed road vehicles are not as a general rule submitted to examination by Customs offices en route. But they may be inspected when an irregularity is suspected. Customs authorities shall not require vehicles to be escorted at the carrier's expense on the territory of their country.
- Contracting Parties authorize agreed-on professional associations to issue TIR carnets. These associations guarantee they will pay the Customs duties and taxes, including penalty interest in case of irregularities. For the purpose of identifying the goods on which duties are 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.
- Irregularities render the offender liable to penalties of the country where the offense was committed. In case of doubt, the offense is deemed to have been committed in the country where it was detected. Any person guilty of irregularities may be in the future excluded from the operation of the Convention.

Details of procedures appear in the annexes to the Convention.

The TIR Convention was filed as No. 16510 with the UN Secretariat (reference 1679 UN Treaty Series 89) and appears as **Annex II-27** of this review.

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

The three conventions of interest were unevenly ratified or adhered to by some of the Sub-Saharan States.

128. **1954 New York Customs Convention on the Temporary Importation of Private Road Vehicles**. This Convention entered into force on December 15, 1957. It was ratified or acceded to as of June 2013 by Algeria (1963), Central African Republic (1962), Egypt (1957), Ghana (1958), Liberia (2005), Mali (1974), Mauritius (1969), Morocco (1957), Nigeria (1961), Rwanda (1964), Senegal (1972), Sierra Leone (1962), Sudan (2003), Tanzania (1962), Tunisia (1974), and Uganda (1965).

129. Provisions. The main provisions of the 1954 New York Convention are:

- *Articles 2 to 5.* Contracting States shall grant temporary admission without payment of import duties and taxes, 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.
- *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 the vehicles.
- *Articles 12 to 19.* Regarding vehicles that need to be re-exported, badly damaged ones may not be re-exported, but, as the Customs authorities will decide, they may be (1) subjected to import duties, (2) abandoned to the treasury, or (3) destroyed under Customs supervision.

The 1954 New York Customs Convention on the Temporary Importation of Private Road Vehicles was filed with the UN Secretariat as No. 4101 (reference 176 UN Treaty Series 192) and appears in **Annex II-28** of this review.

130. 1956 Geneva Customs 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 and Algeria in 1963. 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 with 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 treasury.

The Customs Convention on the Temporary Importation of Commercial Road Vehicles was filed with the UN Secretariat as No. 4721 (reference 327 UN Treaty Series 123) and appears in **Annex II-29** of this review.

131. 1956 Geneva 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 as No. 6292 (reference 339 UN Treaty Series 3). The text appears in **Annex II-30** of this review.

d. *1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR, Contrat [de transport] de marchandises par la route)*[35]

132. **Presentation of the CMR.** The CMR aim is "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. The Convention originated in the joint efforts, starting in 1948, of the International Institute for the Unification of Private Law (UNIDROIT), International Road Transport Union (Geneva), International Chamber of Commerce (Paris), and other professional institutions. The United Nations Economic Commission for Europe (UNECE) then associated itself with the work, and an international convention was drafted. According to Article 42 of the Convention, it is open for signature and accession by country members of the UNECE 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 accede or not to an international convention. The CMR was signed in Geneva on May 19, 1956. No Sub-Saharan countries ratified the original Convention; however, Morocco and Tunisia did so. A Protocol to the Convention dated July 5, 1978, entered into force in December 1980, setting the special drawing right as the account unit for a carrier's liability. An additional Protocol allowing the use of an electronic consignment note was signed in Geneva on May 27, 2008, and entered into force on June 5. 2011.

133. **Success of the CMR.** The Convention as an international transport framework has been so successful 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 related to the 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 transports routier de marchandises diverses*) of the Customs and Economic Union of Central Africa (UDEAC)—see **Annex IV-2** of this review. The 1996 UDEAC Convention reproduces verbatim the main provisions of the CMR and makes their enforcement compulsory. The CMR seems also to have been used as a model for the 2003 OHADA Uniform Act Relative to the Contracts for Road Transport of Goods.

The Convention on the Contract for the International Carriage of Goods by Road (CMR) was filed with the UN Secretariat as No. 5742 (reference 399 UN Treaty Series 189). The text appears in **Annex II-31** of this review.

134. Provisions of the CMR. The main provisions of the CMR Convention are:

- *Scope (Article 1).* The Convention covers any 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.
- *Government agencies (Article 1).* The Convention also applies when carriage is conducted by States or governmental organizations or institutions.
- *Exclusivity (Article 1).* No contract provision different and adverse to the CMR is valid in any carriage contract under the CMR.
- *Consignment note (Articles 4 to 7).* 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.
- *Duties of shipper and carrier (Articles 8 to 16).* 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 the accuracy of statements whenever possible. Reservations thereof are mentioned 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 on the location of the delivery, the delivery to a

consignee other than the original consignee. All expenses pursuant to changes in instructions, requests for instructions are charged to the shipper.

- *Liability (Articles 17 to 29).* 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 listed causes rests with the carrier. The shipper is liable for any damage caused by inadequate information given to the carrier.
- *Venue and jurisdiction (Articles 30 and seq.).* The CMR specifies which courts have jurisdiction for hearing cases between carriers and shippers in order to prevent any abusive clause giving jurisdiction only to courts selected for that purpose by one of the Parties to the carriage contract. However, although the carrier and the shipper are parties to the CMR, the receiver or consignee of cargo is not. The clause is inoperative in this respect. In Francophone States that have retained Articles 14 and 15 of the French Civil Code, any citizen may select to see his or her case judged by a local court when he or she is a defendant or counterclaimant. Despite that, the CMR is an international agreement superseding municipal law. Courts tend to consider Articles 14 and 15 of the Civil Code as paramount. They therefore prevail.

H. Conventions and Rules on Multimodal Transport

a. *1980 Geneva Convention on International Multimodal Transport*

135. **Definitions.** Multimodal or combined[36] transport entails two or more different modes of transport, such as rail and road, or road, sea, and road. The 1980 Convention offers rules 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.[37]

136. **History.** As early as 1975, rules for combined transport were set forth by the International Chamber of Commerce (ICC). They were based, among other things, on the traditional rules of sea carrier liability (1924 Brussels Convention and Visby Rules). The 1980 TMI Convention reviewed here aimed, in cooperation with UNCTAD, to replace these privately issued rules and formulate new rules applicable to this type of carriage.

137. **Elaboration.** The Convention was prepared during two conferences on the subject that 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 sets forth the concerns of the Parties to its elaboration: (1) desirability to facilitate international trade and concern for the problems of transit countries; (2) need for equitable rules of liability for multimodal transport operators; (3) need to take into consideration the special problems of developing countries; and (4) need to facilitate Customs procedures. The basic principles of the Convention are:

- Establish a fair balance of interests between developed and developing countries, with an equitable distribution of activities in international multimodal transport between these two groups.
- Hold consultations between the multimodal transport operator, shippers, shippers' organizations, and appropriate national authorities on the terms and conditions of service before and after the introduction of any new technology in the multimodal transport of goods.

138. **A package approach.** The principles set forth indicate that the proponents of the convention may have elected to go beyond the strict operational approach of the earlier international instruments. The approach seems to reflect the doctrine of the New International Economic Order of the 1970s and 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 factors in the reluctance of the industrialized States to sign and ratify the Convention. A more neutral convention might have been more successful.

139. **Enforceability.** The Convention is not yet in force because of an insufficient number of signatures and ratifications. Article 36 of this Convention requires the signatures of 30 States before it enters into force. As of March 2014, it was signed, ratified, accepted, or approved by eleven States on different continents. In Africa, it was acceded to by Burundi (1998), Liberia (2005), Malawi (1984), Morocco (1993), Rwanda (1987), Senegal (1984), and Zambia (1991).[38] In view of 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. The States of the Customs and Economic Union of Central Africa (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 Transit & Transport Agreement (NCTTA) in East Africa makes reference to the multimodal Convention, although it is not in force.

The 1980 UN Convention on International Multimodal Transport of Goods appears in **Annex II-32** of this review.

140. **Lack of legal safety.** The Geneva Convention, like the CMR Convention, is norm creating. When adopted and ratified by the States party 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 related to consultation, especially before the introduction of new technologies. The multimodal transport operator, on the other hand, has to comply with all of its provisions. The consequence is that operators derive no legal safety from the Convention. They are bound by its provisions, but the State Party retains considerable freedom of action. This, again, may explain the reluctance to sign and ratify.

141. **Liability regime and other provisions.** The liability regime is set by the Hamburg Rules, yet to be accepted by most trading countries, especially maritime ones. The onus for producing evidence that the multimodal transport operator or its agents are not guilty of fault or negligence and have taken all the necessary measures that could be reasonably required is on the operator. There are monetary ceilings on liability, but they are not applicable in cases of gross negligence. Other provisions of the Convention on International Multimodal Transport set forth the format of consignments or bills of lading, statutes of limitation, jurisdiction, etc., and a number of those provisions are similar to those contained in the CMR.

b. *2008 New York Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea or the "Rotterdam Rules"*[39]

142. **Overview.** This Convention was signed in New York on December 2008. It was intended to create a modern and uniform law on the international car-

riage of goods. It provides a legal framework that takes into account recent technological and commercial developments that have occurred in maritime transport. The Convention is not limited to tackling port-to-port movements, but also extends to multimodal contracts of carriage where there is a sea leg contemplated under the contract of carriage. To become a binding international law, it has to be signed and ratified by at least 20 UN Member States. Thus far, 24 States have signed, but only two have ratified the Convention. Among the African countries, the following signed in 2009: Cameroon, Congo, Gabon, Ghana, Guinea, Madagascar, Mali, Niger, Nigeria, Senegal, and Togo. The Democratic Republic of the Congo signed in September 2010. Togo ratified the Convention on July 17, 2012. The Convention provides that upon its entry into force for a country, that country should denounce all conventions governing the Hague-Visby Rules as well as the Hamburg Rules, as the Convention does not come into effect without such denouncements.

143. **Provisions and scope of application**. The Convention provides shippers and carriers with binding and balanced rules to support the operation of maritime contracts of carriage that may involve several modes of transports. Chapter 2, Article 5 lists the following requirements that apply to the Convention: (1) the place of receipt and of delivery are in different States; (2) the port of loading and the port of discharge of the same sea carriage are in different States; and (3) any one of the mentioned places is located in a Contracting State. The provisions of the Convention apply irrespective of the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, and any other interested parties. The Convention is not applicable to the following contracts in liner transportation: charter parties and other contracts for the use of a ship or of any space. Chapter 3 deals with electronic commerce: the Convention states that an "electronic record" of a contract of carriage or other information in electronic form has the same effect as a "transport document" or its paper equivalent such as a bill of lading. Most important, it innovates in extending the obligations and liabilities of the carrier (Chapter 5). First, the obligation to deliver is expressed and not implied, and the due diligence obligation is not restricted to the period before and at the beginning of the voyage, but it continues throughout the voyage. Second, the carrier's liability for loss, damage, or delays is more extensive than that under the Hague-Visby Rules regime because of the combination of the loss of the nautical fault exception and the extension of the obligation to exercise due diligence to make the ship seaworthy throughout the voyage. And, finally, it also introduces (in Chapter 5, Article

19) the concept of a "maritime performing party," who are subcontractors. Such a party is subject to the same liabilities and responsibilities as the carrier but essentially only while it has custody of the cargo. The carrier remains liable for the performance of the entire carriage contract.

144. **Possible impact on African transit and transport facilitation.** The impact of this Convention could be positive if African States modernize their infrastructure and address the capacity-building issues. Modern technological tools will have to be installed, and roads, ports, trains, and airports will need to be upgraded. Human resources will have to be enhanced by means of training and education. However, this Convention is widely criticized by professional carriers, who are well organized. Many obstacles still must be overcome before its entry into force.

This Convention is not attached to this review since it has not been ratified by a relevant number of African States.

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

145. **History.** The failure of the adoption of the International Multimodal Transport Convention created the risk of too much diversity in multimodal carriage contracts. But, as noted earlier, as early as 1975 the International Chamber of Commerce (ICC) in Paris had issued, on the basis of work by the International Maritime Committee, a major professional body, rules for drafting 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.[40] 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,[41] the ICC is a brilliant example of the capacity of a profession to establish universally accepted rules of law without the intervention of Govern-

ments and their agents. UNCTAD, while waiting for possible ratification and enforcement of the TMI Convention, approached the ICC for a modernization of the 1975 rules on the basis of applicable liability rules and due account being taken of acquired experience. This resulted in the 1992 UNCTAD/ICC[42] Rules for Combined Transport Document.

146. Details of rules. The main rules governing the combined transport document and referring to the Hague-Visby Rules are the following:

- *Rule 1.* The rules apply only when incorporated into a contract of carriage, regardless of whether there is a multimodal transport document (MTD). By referring to the rules, parties 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.
- *Rule 2.*[43] A multimodal transport document may be issued as a negotiable or a nonnegotiable document, either to order or to the bearer. It may be issued as a paper or as an electronic document.
- *Rules 4 and 5.* By issuing the document, a multimodal transport operator, undertakes to perform the transport or to have it performed and accepts responsibility and assumes liability for his acts and the acts of his agents and servants.
- *Rules 6 and 7.* The operator may limit his liability, except in the case of a personal act or omission, acting with intent to cause damage and with knowledge that damage would probably result (Hague-Visby Rules).
- *Rule 13.* These rules may take effect only 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*).

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

The UNCTAD/ICC Rules for Combined Transport Document appear in **Annex II-33** of this review.

I. CONVENTIONS ON AIR TRANSPORT

The increasing role of air transport in Africa makes it necessary to review the international conventions relating to air transport.

a. *1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air*

147. **Objectives.** The Convention applies to all international carriage of persons, luggage, or goods performed by commercial aircraft.

148. **Main provisions.** These provisions are stated in chapter 2 of the Convention. The passenger and luggage tickets are documents of carriage; as such, they must provide the particulars mentioned in the Convention. For the carriage of goods, an air consignment note is handed to the air carrier by the consignor, and it must contain the following particulars mentioned in Article 8 such as the date and place of its execution and the place of departure and destination. Chapter 3 provides the carrier liability rules. The carrier is liable for death or wounding of the passenger if the act took place onboard the aircraft or in the course of any of the operations of embarking or disembarking (Article 17). The carrier is liable for damage of goods if it occurred during the carriage by air or when the goods are under the control of the carrier (Article 18). The following articles limit the carrier liability to a fixed amount for damage to a person or to goods.

149. **Evaluation.** The Warsaw Convention established an air carrier's strict liability for passengers. The carrier can be exonerated only if it proves that the damages suffered were beyond its control. Damages suffered by goods are also limited to the amount declared during the carriage, unless the real value of the goods was clearly mentioned. The Warsaw Convention has set the law on modern carrier liability, which is applicable today. All African countries ratified the Warsaw Convention.

The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air appears in **Annex II-34** of this review.

b. *The International Air Transport Association (IATA)*

150. **General.** The International Air Transport Association (IATA) was set up in 1945 in Havana (Cuba) It is the trade association for the world's airlines, representing some 240 airlines from 113 countries (or 84 percent of total air traffic) including 29 African airlines. Based both in Geneva (Executive Office) and Montreal (Head Office), the IATA organs are the Permanent Executive Committee and the Annual General Assembly.

151. **Mission.** Its mission is to represent, lead, and serve the airline industry. More specifically, the organization strives to improve understanding of the air transport industry among decision makers and increase awareness of the benefits that aviation brings to national and global economies. Since its creation IATA developed global commercial standards upon which the air transport industry is built. Most and above all, IATA helped airlines to operate safely, securely, efficiently, and economically under clearly defined rules.

IATA has launched, in partnership with ICAO, the IATA Operational Safety Audit (IOSA) program, an internationally recognized and accepted evaluation system designed to assess the operational management and control systems of an airline. It is a must for any airline to gain IOSA certification in order to remain an IATA member and the *sine qua non* condition to avoid being included in the "black list".

At the African level, IATA has been contributing financially to the implementation of the IOSA programme and the AFI Safety Enhancement Team (ASET Project) with a view to enhancing the air transport safety level.

c. *1944 Convention on International Civil Aviation (Chicago Convention)*

152. **Historical background**. The Convention on International Civil Aviation, known as the Chicago Convention, was concluded on December 7, 1944, and came into effect on April 4, 1947. The Convention has been revised several times: in 1959, 1963, 1969, 1975, 1980, 1997, 2000, and 2006.

153. **Main provisions**. In general, the Convention establishes rules of airspace, aircraft registration, and safety and details the rights of the signatories relevant to air travel. The Convention exempts air fuels from tax. Article 1 stipulates the complete and exclusive sovereignty of each State over the airspace above its territory. Article 29 defines the duties of the pilot in command and the docu-

ments required to fly. Article 33 stipulates the recognition of certificates and licenses. Articles 5, 6, 10, 12, and 13 regulate nonscheduled flights over a State's territory, air services, landing at Customs airports, and entry and clearance regulations. The Convention defines the so-called freedoms under which commercial air traffic is organized.

The First Freedom is the right to fly over a country without landing. The Second Freedom is the right to land for non-commercial purposes. The Third Freedom is the right to disembark passengers and freight from the state under whose flag the aircraft is registered. The Fourth Freedom is the right to pick up passengers and freight for a destination in the state under whose flag the aircraft is registered. And the Fifth Freedom is the right to disembark or to pick up passengers and freight from and to any Contracting State. The content and interpretation of the Fifth Freedom concept has been a source of considerable difficulties.

As a result of the Chicago Convention, air traffic is much more regulated than sea traffic, which is based on the sixteenth-century doctrines of the freedom of the seas developed by Grotius.

154. **Institutional arrangements**. The Chicago Convention established the International Civil Aviation Organization (ICAO), which is a specialized agency of the United Nations. Its main responsibilities are (1) the codification of rules and techniques pertaining to international air navigation; (2) the planning and development of international air transport; and (3) the promotion of safety issues and orderly growth. More specifically, ICAO adopts standards and recommended practices on air navigation and its infrastructure, flight inspection, prevention of unlawful interference, and facilitation of border crossing procedures for international civil aviation. Finally, the Convention defines the protocols for air accident investigations to be followed by transport safety authorities in Member States.

155. **Evaluation**. The Chicago Convention is a successful convention because it has led to the development of many other institutions since it came into existence. The International Air Transport Association (IATA), for example, is an international trade group of airlines whose mission is to represent, lead, and serve the airline industry. IATA represents more than 200 airlines that make up 93 percent of scheduled international air traffic, and it is present in more than 150 countries.

The text of the 1944 Chicago Convention on International Civil Aviation appears in **Annex II-35** of this review.

d. *1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air*

156. **Historical backgroun**d. The 1999 Montreal Convention was adopted by the International Civil Aviation Organization (ICAO) Member States in 1999. It replaces and modernizes important provisions of the 1929 Warsaw Convention previously amended by the 1955 Hague Protocol regarding compensation for the victims of air accidents, notably by introducing a two-tier liability system and by facilitating the recovery of proven damages without the need for lengthy, time-consuming litigation. The Convention establishes uniformity and predictability of rules relevant to the international carriage of passengers, baggage, and cargo. The African signatories are Benin, Botswana, Cameroon, Cabo Verde, Egypt, The Gambia, Kenya, Madagascar, Mali, Morocco, Namibia, Nigeria, South Africa, and Tanzania.

157. **Main provisions**. The 1999 Montreal Convention establishes carriers' strict liability for proven damages. An airline may avoid liability only by proving that the accident that caused the injury or death was not due to its negligence or was the fault of a third party. The Montreal Convention also amended the Warsaw jurisdictional provisions as it allows victims or their families to sue foreign carriers in their principal residence. The Convention requires air carriers to subscribe to liability insurance. It also increased the maximum liability of airlines for lost baggage to a fixed amount, whereas in the Warsaw Convention the amount was based on the weight of the baggage.

158. **Evaluation**. The Convention establishes uniformity and predictability of the rules on the international carriage of passengers, luggage, and cargo. The liability limits are set in special drawing rights (SDRs). From the perspective of the African signatories, the Convention is less successful than the Chicago Convention. Fewer African States signed the Montreal Convention, and many reasons could be cited to justify their reluctance: (1) the little likelihood that African nationals would start a litigation procedure; (2) distrust of the legal system and the effectiveness of the Convention in securing payment of damages to victims (African nationals may be reluctant to trust their own judicial system because the rule of law is not always applied effectively; and (3) lack of

financial and human resources to commence litigation to claim compensation. On the positive side, several conventions have been established since 1999 (although they are not yet in force yet) on the protection of passengers in air traffic. One example is the Convention on Compensation for Damage Caused by Aircraft to Third Parties, concluded in Montreal on May 2, 2009. As of December 2009, among the 10 signatories, 7 are African countries: Congo, Côte d'Ivoire, Ghana, Nigeria, South Africa, Uganda, and Zambia.

The text of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage appears in **Annex II-36** of this review. The text of the 2009 Montreal Convention on Compensation for Damage Caused by Aircraft to Third Parties appears in **Annex II-37**.

e. *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Protocol on Aeronautic Mobile Equipment*

159. The Cape Town Convention on International Interests in Mobile Equipment is an international treaty intended to standardize transactions involving mobile property. The treaty sets international standards for registration of contracts of sale (including dedicated registration agencies), security interests (liens), leases and conditional sales contracts, and various legal remedies for default in financing agreements, including repossession and the effect of bankruptcy laws. The treaty has three protocols, each of them specific to a type of mobile equipment: aircraft Equipment (aircraft and aircraft engines; signed in 2001), railway equipment (signed in 2007) and space assets (signed in 2012). As of February 2014, the Convention was ratified by 59 States as well as the European Union. The aircraft Protocol (officially: Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment) was signed in 2001 and is the only protocol entered into force. It applies to aircraft which can carry at least eight people or 2750 kilograms of cargo, aircraft engines with thrust exceeding 1,750 pounds-force (7,800 N) or 550 horsepower (410 kW), and helicopters carrying 5 or more passengers. The International Registry of Mobile Assets established to record international property interests in the aircraft equipment covered by the treaty is located in Ireland. Mediation cases for leasing disputes are to be heard in the High Court of Ireland. As of March 2012, the Protocol has 46 Contracting Parties including 11 African States.

The texts of the Cape Town Convention on International Interests in Mobile Equipment and its Protocols are not attached to this review.

f. *The 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*

160. The Beijing September 10, 2010, Convention on the Suppression of Unlawful Acts relating to International Civil Aviation aiming at promoting the safety and security of persons and property was concluded to respond to new types of threats jeopardizing air transport. Among the 25 signatories, eight are African States: Chad, The Gambia, Mali, Nigeria, Senegal, Cameroon, Zambia, and Uganda. This Convention has not yet been ratified.

The text of the Beijing Convention appears in **Annex II-38**.

g. *2011 Ninth Edition on Safeguarding International Civil Aviation against Acts of Unlawful Interference (Annex 17 to the Convention on International Civil Aviation)*

161. **Objectives**. According to Article 38 of this instrument, the practices recommended are to be applied by all ICAO Member States. The Contracting States are required to notify the Organization of any differences between their national regulations and practices and the international standards contained in this Annex. In Chapter 1, the text provides definitions of what qualifies as "unlawful interference." The main objective of the text in Chapter 2 is to ensure the safety of the crew, passengers, personnel on the ground, and public in general in all matters regarding civil aviation. The text also recommends facilitation of international cooperation, asking Member States to be diligent in providing additional safety measures if required by another Member State.

162. **Institutional arrangements.** Each Contracting Party is asked to (1) establish a national civil aviation security program in compliance with the international standards defined by the recommended practices, and (2) create a national authority responsible for the development, implementation, and maintenance of the national civil aviation security program. ICAO must be notified by the Contracting Party of the existence of that national authority.

163. **Provisions.** This instrument includes mainly preventive security measures: (1) measures to prevent unauthorized entry to airside areas; (2) appropriate aircraft security checks; (3) screening of passengers and their cabin baggage prior

to boarding an aircraft; (4) hold baggage protected from interference until departure of the aircraft; (5) cargo, mail, and other goods protected from interference before boarding an aircraft; (6) special categories of passengers such as law enforcement officers or passengers subject to judicial or administrative proceedings clearly controlled; and (7) information and communication technologies regarding civil aviation well protected.

164. **Evaluation**. The air transport carriers of countries in Sub-Saharan Africa not complying with these rules are blacklisted. In practice, many national authorities responsible for the civil aviation security are unable to fulfill their commitments because their personnel are not well trained in security and safety matters; there is no transparency in hiring these personnel, and no consistent budget for their operations.

The 2011 Ninth Edition on Safeguarding International Civil Aviation against Acts of Unlawful Interference appears in **Annex II-39** of this review.