INSTITUTE FOR SECURITY STUDIES

ISS PAPER 290 | FEBRUARY 2016

Taking back the seas

Prospects for Africa's blue economy

Oliver C Ruppel and David J Biam

Summary

International shipping is driven by fierce competition. The history of maritime trade within Africa's coastal waters has been characterised by foreign exploitation since the early colonial era. Today, the African Union (AU), through its 2050 Africa's Integrated Maritime Strategy, plans to implement new cabotage laws to finally liberate the continent's maritime transport industry from foreign dominance. However, certain barriers must first be overcome, including increasing the capacity and efficiency of Africa's maritime industry. This paper evaluates the AU's proposed introduction of pro-African cabotage laws focusing on their economic potential and regulatory implications. It also highlights core challenges posed by Africa's struggle for greater economic liberation of its coastal waters.

THE DISCUSSION OF Africa's so-called blue economy rose to the top of African leaders' agenda when African Union (AU) members started a campaign for a continent-wide renaissance[1] of the African maritime domain. This initiative began when the AU's Conference of Ministers Responsible for Maritime Transport (CMRMT) created a Transport Plan of Action in Nigeria in 2007, later adopting the 1994 African Maritime Transport Charter (AMTC), as well as the revised African Maritime Transport Charter (RAMTC) in 2010 at the AU headquarters in Addis Ababa. At the first African Cross-Sectoral Workshop of Maritime Experts in 2010, AU members' initial efforts led to the finalisation of its 2050 Africa's Integrated Maritime Strategy (AIMS 2050) in 2012, which, together with African maritime cabotage, is the main focus of this paper. The latest event to have addressed this topic was the 1st African Day of Seas and Oceans, hosted by the AU Commission in July 2015. Heads of state and government are scheduled to convene in Togo in 2016 for a summit on further maritime-security issues.

The main point is that these efforts aim for an 'Africanisation'[2] of the continent's maritime affairs and to promote an integrated maritime strategy for the continent. The maritime industry is one of the most technically and financially demanding of all industries. Cabotage, an element of the broader maritime industry, and a central aspect of this paper, is defined as the voyage of a vessel between two points within the borders of a single nation or within an economically unified region

(e.g. the European Union or North American Free Trade Agreement). More precisely, the term refers to a set of industry rules designed to protect a country's maritime trade by excluding foreign players from intra-state maritime transport services. AIMS 2050 is representative of other large-scale or long-term projects characterised by a unified engagement by members of the AU.

The recent emphasis on African maritime affairs has revived discussions – so far mainly within the continent – among all participants in the maritime industry. While some see scope for change and developmental opportunities others still oppose an African continental maritime cabotage regime – and, more broadly, an African blue economy – citing the following arguments:

- Low intra-African trade volumes of general cargo or bulk traffic
- Inadequate port infrastructure, and insufficient numbers of qualified seafarers and captains
- Largely unattractive economic and political environment for investors
- Opposing legal systems (common law, civil law)
- Inefficient financial and political structures

Whereas these arguments against a mega-project like a pan-African cabotage regime would seem to be based on sound analysis, its proponents on the other hand argue that, on the positive side, a continental cabotage regime would provide job creation, improved economic independence, foreign-currency-rate savings, an additional source of state revenue, and that it would reduce disproportionately high freight costs.[3]

> Some see scope for development opportunities while others still oppose a continental maritime cabotage regime and an African blue economy

One should bear in mind that the idea of a pan-African cabotage regime is part of a renaissance of the African maritime domain. The reason for this is that the spirit encapsulated in the objectives of AIMS 2050 recalls the aspirations of African nations in the post-independence era. A milestone marking the first major effort towards achieving more economic independence for the African maritime sector was the UN Code of Conduct for Liner Conferences (the UN Liner Code),[4] introduced by the UN Conference on Trade and Development (formerly the UN Conference on Trade)[5] in 1971 and adopted in 1974.

THE UN LINER CODE WAS A BREAKTHROUGH FOR AFRICAN TRADE

One also needs to bear in mind that the current AU members participating in the maritime events mentioned at the beginning of this paper witnessed the adoption of the Liner Code. That was a breakthrough for African trade, as was the involvement of African countries in the UN Convention on the Law of the Sea (UNCLOS) III. Back then, the strategy, which is in line with today's AIMS 2050, was called the new international maritime order, which formed part of African nations' bid for a new international economic order.[6] In West and Central Africa, the first pan-African conference on maritime affairs, the Ministerial Conference of West and Central African States on Maritime Transport, was held in Abidjan, Côte d'Ivoire, in 1975.

Against this background, the paper argues that the AU's AIMS 2050 – and its ambition for a renaissance of Africa's blue economy – is launched on the back of the earlier

efforts of UNCLOS III and the UN Liner Code, which marked a success story in global bargaining.

Indeed, current discussions among various interest groups, and especially the AU, leave the impression that these earlier breakthroughs in maritime trade are significant to today's broader fight for economic and political independence in African maritime affairs. Among those who have researched and written about the importance of these historic agreements are professors Iheduru and Ademuni-Odeke, who have provided extraordinary insight through their work on African maritime affairs, and especially the issue at hand – African maritime cabotage. The work of these authors is acknowledged and appreciated in this paper as an indispensable background to the current discussion.

African cabotage law as a means of promoting and protecting African economic interests is not a new one. It is one of an array of possible trade measures. Nor is it one that was originated by African nations, but by the European global maritime powers. In terms of international maritime transportation, this paper also includes information about the current and past state of the global maritime-transportation industry, which has always been composed of international and multinational participants. The discussion incorporates such issues as flags of convenience, declining levels of skilled personnel, ownership in dead weight tonnage, shifts in manufacturing locations, and the like.

As Iheduru and Ademuni-Odeke describe extensively in their works, African countries have tried to assert their right to protect their interests ever since their independence, but still find themselves in the same, if not a worse, position today.

Therefore, this paper addresses the following questions: have African countries evolved since achieving successful breakthroughs in the Liner Code and UNCLOS III? What exactly is the AU's 2050 AIM Strategy against this background? How substantial are the current proposals to introduce cabotage laws and the new wave of Africanisation in terms of maritime affairs? Do the aims of enhanced economic independence for the continent match with the means at hand (cabotage) and can this be legally justified in terms of international relations? And are African nations still hindered in taking their rightful place in global politics and trade relations as the world's leading suppliers of raw materials?

Cabotage in a historical context

Although the exact origin of the term 'cabotage' is unclear, it derives from the French word '*caboter*', meaning to sail along a coastline, or to coast. It is also etymologically linked to the Spanish term '*cabo*', meaning 'cape' or 'headland', denoting the navigation from cape to cape along a coast.[7]

Today, the meaning has been extended to include cabotage laws or so-called cabotage regimes.[8] These are protective intervention mechanisms whereby domestic markets protect their maritime trade by excluding foreign businesses and this paper uses the term 'cabotage' in that sense.

Although it has its origins in the naval domain, the term 'cabotage' also applies today to land and air transport. However, in this paper, the term 'cabotage' is used in its traditional context of maritime transport. Cabotage is also defined as the transportation of goods or passengers from one port or place within the same state.[9] The following definition, however, supports the key issue addressed in this paper: 'Cabotage restrictions represent an objective market access barrier, as they usually exclude all foreign providers. Cabotage restrictions therefore represent a formal difference in treatment on grounds of state nationality.'[10]

African countries have tried to assert their right to protect their interests ever since attaining independence

The term is also linked to various kinds of market access barriers traditionally designed within international trade relations, including flag discrimination, cargo reservation regimes, discriminative or favouring financial and fiscal regulations, as well as to Cost, Insurance and Freight (CIF) and Free On Board (FOB) trade agreements,[11] and central freight bureaux.[12]

Cabotage rules cannot be regulated under international law, since the process of cabotage is classified as a domestic affair – which is precisely why it was excluded from the Convention on the International Regime of Maritime Ports, adopted in 1923 in Geneva.[13] Therefore, as Milbradt[14] argues, the freedom of navigation does not extend to the coastal waters or the internal waters of a state, which means that the right to access port facilities cannot be deviated from the freedom of navigation.[15] The reasons for such legal restrictions have remained unchanged since they were first introduced by mercantile Europe in the 17th century nor have they lost any relevance to their legislators:

> Cabotage restrictions derive from protectionist trade policies, which aim to restrict the majority of the national volume of seaborne traffic to the national transport market, in order to avoid currency outflows, to secure income for the domestic fleet, to promote national shipyards and to retain sufficient transport capacities in times of need. Therefore, the main objective is to

> promote employment of the national merchant fleet, whereby national shippers are … favoured when applying for national transport or cargo bound [for] overseas. Consequently the motives to introduce cabotage restrictions can be of both [a] military and economic nature, however economic reasons mostly prevail.[16]

When one considers the lack of maritime infrastructure in many African countries, which is one reason for the low nationally owned tonnage figures in the continent, and the fact that global shipping is one of the most technically and financially demanding industries, one might get the impression that the challenges of the modern shipping industry have proved too big for African countries to overcome. Until today, Africa's intra-regional and international trade relations, and maritime-transport services have largely been dependent on non-African partners. This has made African countries vulnerable to external economic shocks and volatile ups and downs in the global economy, such as the global financial crisis of 2009.

Despite their sovereignty, African countries still don't have the same bargaining power as large developed economies

Throughout history, new world orders – examples are the Peace of Westphalia (1648), the Congress of Vienna (1815), the first and second world wars (1914–1918 and 1939–1945) – have had the effect of prohibiting African leadership and independent nation building for more than 300 years, until the period of independence in the 1960s. As a result of the violent and random establishment of imperial territories in Africa in the 19th century by the colonial powers,[17] many African countries still remain politically unstable and dependent on either former colonial or new economic powers.

Although a nation's right to self-determination (as stipulated in, for example, President Woodrow Wilson's 14 Point Agenda in 1918,[18] the UN Charter of 1945[19] and the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the UN General Assembly through Resolution 1514 (XV) in 1960)[20] has been established as a central principle of international law (*jus cogens*),[21] this has not prevented nation states from pursuing their bargaining powers competitively in the global economy. Therefore, given the nature of economics, there has never been a 'zero hour', or a new starting point, for historically disadvantaged countries when it comes to international law governing global economic competition – and this puts the concept of the right to self-determination into perspective. This ultimately means that despite self-determination, African countries still don't have the same bargaining power as large developed economies.

There has been international consensus to grant nations – which were historically hindered from achieving it – equal right to self-determination. However, by the time this right was formally introduced, African nations had already suffered huge economic setbacks. This economic disadvantage still prevents them from fully asserting this right[22] because of the forces of global economic competition. Therefore, one can conclude that the traditional cabotage regime, as it exists in its historical context and which favoured European participants, was one of the major stumbling blocks in Africa's endeavour to economically develop as a continent.

26 000

THE TOTAL DISTANCE IN NAUTICAL MILES OF THE DOMESTIC AFRICAN COASTLINE

A new African cabotage regime?

In light of this historical disadvantage, the AU Commission has started to consider establishing a new African cabotage regime as part of Africa's renaissance in an endeavour to address this historical imbalance. The aim of this initiative is to promote an integrated African maritime industry:[23]

> Seen as the 'new frontline of Africa's renaissance' as stressed by the 387th Peace and Security Council in its Final Communiqué on July 29, 2013, Blue Economy and Blue Growth constitute the essence of the 2050 AIM-Strategy, a very innovative, comprehensive and integrative vision that seeks to promote Africa's maritime resources and the […] economy around the continent's maritime industry.[24]

According to the AU, AIMS 2050, which was formally adopted in January 2014, plans to develop:

> … a tool to address Africa's maritime challenges for sustainable development and competitiveness, further aiming to foster more wealth creation from Africa's oceans, seas and inland water ways by developing a thriving maritime economy and realizing the full potential of sea-based activities in an environmentally sustainable manner.[25]

The strategy aims to foster overall development and improve independence for African countries:

> This strategy is dedicated to the memory of those who died at sea trying to earn a better quality of life, and of those who passed away on the oceans in the course of the slave trade, colonialism, and the fight for Africa's self-determination and independence.[26]

The experts responsible for maritime transportation in AIMS 2050 consider coastal shipping – in this context referred to as cabotage[27] – as a key element of intra-African trade promotion, one that would help make Africa a winning and game-changing player in the scramble for a new world economic order.

> Adopted in 2014, AIMS 2050 plans to develop a tool to address Africa's maritime challenges for sustainable development and competitiveness

If AIMS 2050 were to be successful in ushering in new pro-African cabotage laws, they would apply to the domestic waters of the entire African coastline – a total of 26 000 nautical miles and an estimated maritime industry value of US$1 trillion a year.[28] This means that foreign-flagged vessels, which currently dominate the intra-African trade market and have a global share of 95% of the cargo-carrying market, could be legally banned from involvement in the intra-African shipping trade.

To protect their domestic shipping industries, governments have developed a number of incentives and arrangements. Broadly speaking, 'domestic shipping regulation may be looked at through two lenses: (1) market access benefits like cabotage regulation or access to government cargoes; and (2) industry incentives like generous tax or crewing provisions'.[29]

THE VALUE OF THE MARITIME INDUSTRY IS ESTIMATED AT A $1 TRILLION A YEAR

The AU's latest plans for Africa's maritime development and security were drawn up during various conferences:

- January 2015: Agenda 2063 was adopted by the AU Assembly, incorporating the 2050 AIMS Strategy
- February 2015: Seychelles Summit on Maritime Security and Development
- July 2015: The launch of the decade of African Seas and Oceans (2015–2025)
- Scheduled for 2016: AU summit on maritime security and development in Togo

AIMS 2050 is considering introducing geostrategic cabotage laws on a continental level,[30] urging African nations to use their maritime resources more effectively and to take their 'rightful place in a multi-polar, inter-reliant and more equitable world'.[31]

This raises the question of whether there is a lack of coherence in the AU's agendas in terms of conflicts between Africa's long-term economic interests and its security interests. If so, does this reveal a weak point in the AU as a political institution, as there seem to be two distinct forces at play – one that pursues strict international cooperation, as imperative in today's globalised relations, and another that focuses on fighting for the economic independence African states?

Cabotage laws relate to the challenge that many emerging countries face – how to regulate competition and market access in favour of their long-term economic development.

> Do the AU's agendas fail to address conflicts between Africa's long-term economic interests and security interests?

Dominated by the shipping conference system, global merchant shipping during the colonial era was characterised either by state ownership or state subsidisation. The shipping conference system refers to 'shipping companies that have formed an association to agree on and set freight rates and passenger fares over different shipping routes'.[32] Shipping conferences also adopt various 'policies, such as allocation of customers, loyalty contracts and open-pricing contracts'.[33] In many jurisdictions, shipping conferences are exempt from competition laws 'but this position is being increasingly changed in order to promote greater competition and choice for shippers'.[34]

As Iheduru argues, the shipping conference system translates into 'state intervention in an industry that was supposedly operated on the basis of free enterprise. Yet, the conferences and the colonial government continued to preach free trade as the engine of economic growth …'[35] According to Iheduru, 'the market has not really been the driving force behind the growth of world shipping since the late 17th century …'[36] In fact, this had never been the case.[37]

The role of shipping conferences as cartels remains controversial today. In this description of their historic role within the international laissez-faire doctrine, Ademuni-Odeke emphasises what critics of the system say:

90%

THE PERCENTAGE OF AFRICA'S IMPORTS AND EXPORTS CONDUCTED BY SEA

> Liberalists soon tired of the results of the application of the doctrine while continuing to enjoy the intellectual pleasures of arguing in its support. Only 25 years after the British shipowners gained the freedom of competition, which they ardently craved for, they created the conference system to prevent the very competition they had supported … Even where competition is possible, competitors don't want it.[38]

This notion supports the idea of dependency theory of the 1960s, whereby less affluent states suffer while more affluent ones are enriched by the way less affluent states are integrated into the world system. Consequently, one could argue that, with maritime cabotage being proposed for Africa as part of AIMS 2050, the AU similarly favours a non-cooperational approach in its 'Africanisation' of the continent's maritime economy, and the pursuit of a closed market strategy.

However, as Iheduru has pointed out – and as the so-called tiger states (Taiwan, China, South Korea, Hong Kong and Singapore) have proven – there is the possibility of 'dependent-development':

> Although there is no doubt that structural constraints do affect the ability of weak international actors to change an existing regime, the possibility of 'dependent development' within this structure cannot be ignored … In fact, a number of DMNs [Developing Maritime Nations] (viz., Hong Kong, Singapore, South Korea, and Taiwan) eventually broke through this constraint and were able to establish respectable maritime industries and have since become serious competitors against their counterparts …[39]

Sletmo and Hoste identify four key historical stages in the development of the structure of the maritime industry that we have today:[40]

- 1st stage: Industrialisation (main goals were discovery and colonisation)
- 2nd stage: The quest for maritime power (generation of industrial know-how, control of shipping merchant fleets as instruments of economic and political power)
- 3rd stage: Flagging out (internationalisation of shipping; dismantling of old empires after World War II; combining capital from member countries of the Organization for Economic Cooperation and Development (OECD) with labour from developing countries; establishment of subsidiaries for foreign production)
- 4th stage: Globalisation of shipping (management as a distinct line of business separated from ownership)

The fourth stage describes the current structure of global shipping, whereby traditional maritime activities from ship owners to ship management companies can be compared to the transfer of manufacturing activities from the old industrialized world to the newly industrialized economies … A major contribution of ship management firms is their success in combining expertise and capital from OECD countries with less expensive labour from developing nations.[41]

Moreover 'flags of convenience describes the business practice of registering a merchant ship in a sovereign state different from that of the ship owner's, and flying that state's civil ensign on the ship. Ships are registered under flags of convenience to reduce operating costs or avoid the regulations of the owner's country.'[42] With flags of convenience being 'primarily owned and controlled by OECD shipping interests', the deflagging process 'accelerated the internationalization of shipping and combined capital from OECD countries with labour from developing countries' – which is the same thing as establishing subsidiaries for foreign production in a manufacturing context.[43]

> The AU similarly favours a non-cooperational approach in its Africanisation of the continent's maritime economy

This process is also characterised by the search for least-cost factor production, causing a substantial shift in the location of international ship-manufacturing industries, just like with many light manufacturing industries.[44]

The following statistics, taken from AIMS 2050, form the basis of the arguments put forward by proponents of African continental cabotage laws and reflect the sentiment of the AU members that support an Africanisation approach:[45]

- African-owned ships account for about 1.2% of world shipping by number and about 0.9% by gross tonnage.
- 90% of Africa's imports and exports are conducted by sea, therefore disruptions or inefficiencies in Africa's maritime supply-chain system can have a costly impact on African economies.
- Africa's share in world trade stands at about 3% on average, while intra-African trade averages around 10% of Africa's total trade.
- Vessels, ports, shipyards and support industries in the African maritime domain could create more jobs in ship building, marine equipment and port industries.

- Africa attracts only 2–3% of global foreign direct investment (FDI), and contributes 1% of world GDP.

Putting these statistics into context, the chief operating officer of the South African Maritime Safety Authority (SAMSA), Sobantu Tilayi, said that, for instance, in 2011/12 South Africa exported goods worth an all-time high and all of these goods were shipped by foreign-flagged vessels.[46]

Chika Ezeanya, an African researcher and proponent of African cabotage laws, argues for an African cabotage regime:

> The African Union is at the conclusive stages of fashioning an African cabotage regime that will ensure that only vessels owned by Africans will trade within the continent's coastal waters. The legislation when in force will be a much needed … significant step towards the march to a more unified continent.[47]

When one analyses such statements in the context of the impact that cabotage laws could have on the economic liberation of African coastal waters and in terms of the continent's improved economic independence, they underline the angle taken by Iheduru:

> … cargo control and flag discrimination are not necessarily effective in promoting national fleet development. … Successful national fleet development in West and Central Africa depends largely on the ability of both the public and the private sector to invest in the fleet. Furthermore, the merchant marine industry cannot develop as planned unless the industry is saved from the domestic bureaucratic politics that characterizes the shipping policy-making environment in most West African countries.[48]

Besides the fact that, according to Iheduru, the failure of fleet development, at least in West Africa, is a consequence of a decrease in the number and quality of vessels, inefficiency and long turnaround time of vessels, he also argues that none of the African shipping lines had the cargo space or tonnage to carry even 40% of their national export trade as part of the 40-40-20 principle of the UN Liner Code. The 40-40-20 formula means that 40% of sea trade is carried by liner vessels of the exporting country, 40% by liners of the importing country and 20% is left open to third-country carriers. This indicates that fleet development has not matched the initial positive response to the adoption of national shipping policies in Africa.[49]

Implementing a pro-African cabotage regime could become a major issue for African countries' external trade relations

Many developing countries, particularly those of West Africa, failed to change the liberal regime of shipping by setting an agenda for shipping law and politics in the 1970s.[50] This raises the question of whether shipping laws – in this case, maritime cabotage laws – may be a mere agenda-setting policy. It also prompts the question of whether the proposed shipping laws ignore the fact African nations have not enjoyed any ponderable success within global maritime bargaining, such as under the UN Liner Code or UNCLOS III. And if that were not the case, why is there still similar discussion in which little improvement is being observed?

AFRICA'S TOTAL INTRA-AFRICAN TRADE PEAKED AT 22.4% IN 1997, FALLING TO 11.3% IN 2011

This leads to the question of the barriers and constraints that hamper the development of the African maritime industry.

What are the barriers?

African countries' trade and revenue are highly sensitive to trade policies that are in place with their respective overseas trade partners. As natural resources still form the predominant part of many African countries' export trade – and provide their main sources of revenue – this makes African countries volatile to the trade terms with their non-African trade partners.

Implementing a pro-African cabotage regime could therefore become a major issue for African countries' external trade relations, as it could be seen as erecting a trade barrier, which could well lead to reciprocal strategies on the part of their non-African trading partners. And it is not only the private sector that might strongly oppose African cabotage: the national strategies of developed and emerging economies may also oppose it. The question will be whether African heads of state and private-sector participants are willing to stand together on this issue and whether they are able to implement a well-organised strategy to find an appropriate solution that brings about the determined aim of progress and increased independence for African economies.

> Intra-African trade volumes have grown much more slowly than the continent's non-African trade, even though total trade volumes have increased

The specific reasons for the new proposed African cabotage laws ultimately derive from major imbalances in maritime capacities. These are due to unsustainable African national trade policies, and long-standing traditions of state intervention and state-coordinated economies, which have relied excessively on trade and market-access agreements at the bilateral and multilateral levels, without paying equal attention to the need for greater economic autarky, both internationally and intra-continentally. Iheduru describes the status of the maritime industry in West and Central Africa during the post-independence era:

> … although little domestic input went into the making of the official shipping policies in West Africa (because they were modelled on the UN Code), their implementation was affected by the style of political management and the consequent responses of those segments of the civil society involved in shipping…[51]

Against this background, according to the UN Conference on Trade and Development (UNCTAD) 2013 *Report on economic development in Africa,* Africa's total intra-African trade increased from 19.3% in 1995 to a peak of 22.4% in 1997, falling to 11.3% in 2011.[52] This means that intra-African trade volumes have grown much more slowly than the continent's non-African trade, even though total trade volumes have significantly increased. What is the reason for this?

FDI inflows into Africa have increased dramatically in the last decade and a half. According to William Blackie, deputy head of investment banking in the Corporate and Investment Banking division of the Standard Bank Group,[53]

AFRICA CONTINUES TO ATTRACT MUCH ATTENTION FROM FOREIGN DIRECT INVESTORS

> Africa continues to be a bright spot on the global FDI landscape, even as investment in industrialised economies continues to struggle.[54]

With regard to constraints facing the African maritime transport sector, AIMS 2050 points out that, 'improving the connectivity and access constraints within and between African countries to internal and external market destinations would greatly strengthen the competitiveness of countries, regions and the continent'.[55] This argument is corroborated by Samuel Kamé-Domguia, convenor of the AIMS 2050 task force:[56]

> Liberalising the shipping market has already brought down deep-sea shipping costs; it should also facilitate the development of less costly feeder services for container shipping. As the major [African] traders attract the global operators, they may also develop a niche market in African feeder services, re-establishing African ownership of shipping companies.[57]

As mentioned earlier, the international shipping market shows strong oligopolistic tendencies, marked by the predominance of a few ship-owning countries and their international corporations. The power of these major players is evident, as companies and owner associations set freight rates and coverage of international routes through the liner conferences, which have carved up the market for a small number of operators and even fewer independent ship associations. Therefore, this 'niche market in African feeder services' would be seen as a way to make African countries less dependent on these oligopolistic structures. With regard to the proposed cabotage laws, these feeder services can be seen as part of a potentially revised continental cabotage regime, one that would liberate African coastal waters from the predominance of foreign companies in this market.

Liberalising the global shipping market has already brought down deep-sea shipping costs and should facilitate the development of less costly services

In 1994, when the AMTC was created, Salim Ahmed Salim, the secretary general of the then Organization of African Unity (OAU), stated the following:[58]

> The poor state of the maritime sector in Africa is clearly demonstrated by Africa's very low participation in the carriage of its seaborne trade, very slow turnaround of ships at African ports and very high tariffs for sea freight and port charges that are not commensurate with the poor services offered. At world-wide level, however, the Sector is undergoing institutional, structural and technological changes which are having a serious impact on this Sector in Africa …

Article 11 of the AMTC, adopted in Addis Ababa in June 1994, stipulated to 'promote cabotage at sub-regional, regional and continental levels.'[59] The RAMTC, adopted 16 years later on 26 July 2010, further specified a narrower definition of the AMTC's cabotage article, as African states shall also promote 'effective participation of private sector operators at national, regional and continental levels.' Article 15 of the RAMTC further specifies 'the establishment of national and regional maritime Cabotage shipping lines', which 'should be encouraged in order to to promote intra-African trade and facilitate the economic and socio-economic integration of the continent.'[60] The next section looks in more detail at the issue of governance of the continent's maritime transport industry.

ONLY SIX COUNTRIES HAVE RATIFIED THE REVISED AFRICAN MARITIME TRANSPORT CHARTER OF 2010

Governance of Africa's maritime transport industry

Whether African national governments will be able to transform their maritime industries in line with the plans for a continental cabotage regime remain to be seen. So far, however, African countries have been dependent on state power in order to transform and develop their maritime industries since colonial independence:

> Despite changes in the composition of international actors since the Second World War, the international system, particularly the maritime sector, continued to be ruled by norms and principles that were formulated two to three centuries ago, and which are often detrimental to the economic independence of the developing maritime nations.[61]

This international shipping system, driven by liberal theory and a long tradition of exclusiveness in the practice of international shipping, has so far been challenged only by the aspiration of developing countries to 'assert their independence and to control their maritime trades'.[62]

Many African countries first acquired a national flag shortly after their independence, and this process was boosted by the UN Liner Code, established in 1974.[63] Ever since it was established, the 1994 African Maritime Transport Charter has emphasised the importance of Africa's maritime domain. Yet South Africa, for example, adopted the Maritime Service Charter, but without any effect on legislation, as it has not ratified the UNCTAD Liner Codes provision number 66. The CMRMT, held in Abuja, Nigeria, in February 2007, created a first 'Transport Plan of Action for Africa'.[64] With its second conference, the CMRMT revised the 1994 African Maritime Transport Charter, which was adopted in 2010 by the AU Assembly.[65]

> African countries have depended on state power to transform and develop their maritime industries

Ultimately, AIMS 2050 was inspired by the African Maritime Transport Charter.[66] By focusing on illegal fishing, arms and drug trafficking, human trafficking, oil bunkering, piracy and armed robbery, and environmental crimes, including illegal dumping of toxic wastes on African coasts, AIMS 2050 also embraces the interdependence of security and economic development.[67] When the strategy was finalised, further responsibilities were transferred to the Conference of African Ministers Responsible for Maritime-Related Affairs, which took place in April 2012, and the fourth African Maritime Cross-Sectoral Experts Workshop on AIMS 2050, held at the AU headquarters.[68]

The AIMS 2050 task force may call upon further institutions for their expertise, such as the Heads of African Maritime Administrations and Ship Registrars, experts nominated by the regional economic communities, regional mechanisms and various specialised organs, such as the Sea Power for Africa Symposium, and departments and directorates at the AU Commission (i.e. peace and security; economic affairs; human resources; science and technology; infrastructure and energy; political affairs; rural economy and agriculture; social affairs; gender; trade and industry; information and communication; administration; and human-resources management).[69]

Governance support is also provided by the Association of African Maritime Administrations (AAMA) Conference, an umbrella body for five African maritime stakeholder groups:[70]

- The AAMA
- The African Ship Registrars' Forum
- The Association of African Shipowners
- The Africa Shippers' Council and all Cargo Interest
- The African Seafarers' Forum

As part of the expert pool behind AIMS 2050, the AAMA is committed to the 'establishment of Cabotage and effective participation of private sector operators; the establishment of national and regional maritime Cabotage shipping lines to promote intra-African trade; and the facilitation of economic and socio-economic integration of the continent'.[71]

However, what remains challenging in this process is the mobilisation of political will among AU members, which is arguably the largest obstacle for African integration as a whole.

As at 23 January 2014, the original AMTC has been ratified and deposited by 13 countries, whereas 39 have at least signed the treaty. During the four-year span between June 2010 and January 2014 no further signing or ratification has taken place concerning the AMTC, which might be an effect of the adoption of the RAMTC in July 2010.[72] Although the RAMTC foresees a much more integrated and up to date promotion of cabotage in Africa, as at 5 February 2014, it has only been ratified and deposited by six countries, namely Benin, the Republic of Congo, Ethiopia, Gabon, Mauritius and Togo, whereas only nine of the remaining 48 member states have signed the revised treaty.[73]

Even when comparing the pace of ratification of the AMTC, which had been ratified by two countries in a four-year time

span beginning from its adoption, the number of countries that have ratified and deposited the RAMTC in the same period of time is not much higher, even though it is not a completely new treaty. The slow pace of multilateral process and this lack of collective will points to serious concerns in relation to governance and leadership commitment by AU member states, creating a barrier to effective implementation of AIMS 2050.

At the 2013 inaugural Africa Maritime Indaba in Johannesburg, Nkosazana Dlamini-Zuma, chair of the AU Commission, emphasised that African nations need to agree that 'sovereignty must be shared before regional integration can work'.[74] And, according to Tsietsi Mokhele, chief executive officer of SAMSA, 'cabotage as a policy needs to be implemented regionally in order to ensure growth of coastal shipping'.[75] In that regard, no doubt, there remain many challenges facing African maritime transport governance.

Cabotage laws and World Trade Organization regulations

The World Trade Organization (WTO) provides a system of trade rules that govern multilateral trade. This international trading system is supposed to serve as a vehicle through which parties can attain higher living standards, achieve full employment, ensure a large and steadily growing level of real income and effective demand, and expand the production of and trade in, goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development. The main instruments to achieve the WTO's objectives include the reduction of tariff barriers and other barriers to trade, and the elimination of discriminatory treatment in international trade relations, and thus the rejection of the use of protectionism.

> While inadequate implementation of harmonised policies still impinges on regional markets in Africa, it also leads to a 'proximity gap'

However, while inadequate implementation of harmonised policies is still impinging on regional markets in Africa, it also leads to what has been called a 'proximity gap'. In this light, trade facilitation is imperative for boosting African trade capacity.[76] In December 2013, members of the WTO concluded negotiations on a Trade Facilitation Agreement. 'Since then, WTO members have undertaken a legal review of the text. WTO members adopted in November 2014 a Protocol of Amendment to insert the new agreement into Annex 1A of the WTO Agreement. The Trade Facilitation Agreement will enter into force once two-thirds of members have completed their domestic ratification process.'[77] The Trade Facilitation Agreement is expected to provide significant advantages for developing countries to couple intra-regional trade with infrastructure-development efforts and to boost considerable growth potential, which has so far largely remained untapped in Africa.[78]

THE WORLD TRADE ORGANIZATION PROVIDES A SYSTEM OF RULES THAT GOVERN MULTILATERAL TRADE

Apart from these aforementioned developments, at the level of international law cabotage laws still remain largely uncovered, however. The main reason for this is the fact that cabotage laws have been exempted from the General Agreement on Tariffs and Trade (GATT), which covers international trade in goods. This agreement was first signed in 1947 and was aimed at reducing tariffs and other trade barriers. GATT

developed rules for a multilateral trading system through a series of trade negotiations, or rounds. The last GATT negotiation round (known as the Uruguay Round) lasted from 1986 to 1994 and led to the establishment of the WTO in 1995. Although GATT in its 1947 structure has disappeared, most of the 1947 GATT rules and disciplines were retained and incorporated into GATT 1994. Part II of GATT 1994, as agreed upon in the Marrakesh Declaration of 1994, makes direct reference to cabotage rules:[79]

> (3) (a) The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. This exemption applies to:
>
> *(a)* the continuation or prompt renewal of a non-conforming provision of such legislation; and
>
> *(b)* the amendment to a non-conforming provision of such legislation to the extent that the amendment does not decrease the conformity of the provision with Part II of GATT 1947.
>
> This exemption is limited to measures taken under legislation described above that is notified and specified prior to the date of entry into force of the WTO Agreement. If such legislation is subsequently modified to decrease its conformity with Part II of GATT 1994, it will no longer qualify for coverage.
>
> (3) (b) The Ministerial Conference shall review this exemption not later than five years after the date of entry into force of the WTO Agreement and thereafter every two years for as long as the exemption is in force for the purpose of examining whether the conditions, which created the need for the exemption still prevail.
>
> (c) A Member whose measures are covered by this exemption shall annually submit a detailed statistical notification consisting of a five-year moving average of actual and expected deliveries of relevant vessels as well as additional information on the use, sale, lease or repair of relevant vessels covered by this exemption.
>
> (d) A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference.
>
> (e) This exemption is without prejudice to solutions concerning specific aspects of the legislation covered by this exemption negotiated in sectoral agreements or in other fora.[80]

Interestingly, Article 3 (d) stipulates that there is a possibility to justify a reciprocal and proportionate limitation on some cabotage rules, yet they are not named by the term 'cabotage'.

The International Maritime Organization is the multilateral agency mandated to deal with technical issues in the industry. It has left the issue of conditions applicable to trade in maritime transport services to the WTO and the General Agreement on Trade in Services (GATS) negotiations.[81] Regarding GATS, there was broad agreement at the

THE INTERNATIONAL MARITIME ORGANIZATION IS MANDATED TO DEAL WITH TECHNICAL ISSUES IN THE INDUSTRY

Uruguay Round Negotiations in the 1990s 'to remove cabotage in maritime transport services from that round of negotiations, postponing it to the Doha Round'.[82]

In June 1996, WTO member governments agreed to suspend market-access negotiations for maritime transport services.[83] This decision suspended non-discrimination provisions, known as most favoured nation (MFN) treatment, from GATS in terms of maritime transport.[84] Normally, countries would have to declare publicly which categories of service trade they exempt from MFN treatment. This decision meant that, for maritime transport, no public announcements have to be made, leading to today's situation concerning cabotage regimes, in which the WTO officially assumes that countries are discriminating 'until the negotiations are completed'.[85]

The Bali Package[86] is aimed at lowering global trade barriers, forming part of the Doha Development Round, which started in 2001 with the objective of improving the trading prospects of developing countries. Moreover, the WTO Trade Facilitation Agreement[87] stipulates the freedom of transit in Article 11 as follows:

(1) Any regulations or formalities in connection with traffic in transit imposed by a Member shall not:

(a) be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available less trade-restrictive manner;

(b) be applied in a manner that would constitute a disguised restriction on traffic in transit;

(2) Members shall not seek, take or maintain any voluntary restraints or any other similar measures on traffic in transit. This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport consistent with WTO rules;

(3) Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member.

Arguably, then, the points above – particularly subsections (2) and (3) – conflict with proposed African cabotage laws in terms of transshipments and feeder services conducted by foreign ships in African coastal waters. Pre-shipment inspections, as well as an increased number of documents required for intercontinental liner ships needed to control and secure an African cabotage regime, could severely hamper international trade in the form of delays and artificial trade barriers. With this prospect, non-discriminative patterns under the world trade regime of the WTO also seem to hold further external barriers for African cabotage.

INTERNATIONAL SHIPPING IS A GLOBAL INDUSTRY DRIVEN BY FIERCE COMPETITION

Conclusion

Over the past decade the global trading and investment environment has increasingly shifted from industrialised to emerging economies. Lately, African countries have been able to attract investment flows in various sectors – financial, telecomms, electricity, retail trade and transportation.[88]

Nevertheless, Sir Walter Raleigh's words hold true today: 'For whosoever commands the sea commands the trade; whosoever commands the trade of the world

commands the riches of the world, and consequently the world itself.' And the burning question that remains today is, how can the future global trading environment undo the global trade imbalances of the past?[89]

International shipping is a global industry that is driven by fierce competition. Trade restrictions imposed by coastal states on the international market can function as protective instruments. Africa intends to take legal action to 'liberate African coastal waters from age-old foreign dominance, and take a significant step towards a more unified continent', thereby taking another significant step away from the remnants of Africa's colonial past.[90]

Some argue that each maritime nation needs to devise its own cabotage policy depending on its strategic geographical location, trade requirements, merchant fleet size, coastal cargo movements, and so on. Such a policy is a protectionist measure for which even the WTO makes room by keeping cabotage laws out of the negotiations arena.

> Most importantly, African countries need to develop their maritime industries by advancing the role of the private sector and regional integration

Others argue that to generate significant growth in maritime industries by applying cabotage laws will have limited success, as the shipping industry is international by nature and needs to operate in a liberal business environment. Hence, they argue, cabotage laws, which require participants to be nationals of one country or continent, will fail because they operate in conflict with the current structure of international shipping.

The AU has developed both the AMTC and the RAMTC, neither of which have come into force,[91] and is about to conclude plans to establish an African cabotage regime, which is intended to allow only African vessels to move cargo along the coast of the continent and prevent non-African mother vessels in African waters from using smaller vessels to move products back and forth in African waters. The AU's aim is to support the African shipping industry by only allowing African-owned vessels to trade along Africa's coast.

Despite the potential advantages of a unified African cabotage law for the continent's shipping industry, there are several barriers that pose challenges to establishing such a regime.

Firstly, Africa would need to improve the effectiveness of its maritime sector and recruit skilled maritime professionals. By doing so, African countries could engage in greater cooperation through the pooling of human and material resources to enforce maritime laws, and simultaneously protect against piracy, terrorism and illegal fishing. And human-rights abuses suffered by African nationals who work on foreign vessels could be reduced. Cabotage laws could also boost coastal shipping.[92]

Secondly, it is unlikely that the ambitious expectations of such a cabotage regime as a means of development and wealth creation for Africa could be realistically met in the near future: such a regime would require a well-developed maritime industry,

THE AU'S AFRICAN MARITIME TRANSPORT CHARTER HAS YET TO COME INTO FORCE

which is a prerequisite to achieving the intended sustainable economic effects of cabotage. This precondition, a well-developed maritime industry, is not present in most African countries. Consequently, the AU's 2050 AIM-Strategy does not yet seem to be fully feasible, as developing a maritime industry – with skilled seafaring capacity, efficient fleets and modern port infrastructure – will take time, development and funding.

Thirdly, if African cabotage laws were to be introduced at an intra-continental level, it may have an adverse effect on African economies, as the deterrent effect on the foreign-dominated shipping industry could hamper African exports, which constitute the main source of income for many African countries.

> Greater economic liberalisation of Africa's coastal waters means balancing long-standing government intervention practices with good governance

Finally, the AU's limited supra-national powers pose a strong political barrier, which makes the successful implementation of projects like AIMS 2050 hard to predict, even for the AU itself, as the AU has not yet reached the level of securing agreement from members on binding and common inter-governmental decisions. Introducing strict cabotage laws, leaving out important intermediate steps, would therefore be unsustainable – if not detrimental – to the African maritime industry.

Having said that, cabotage – and, generally, developing an efficient maritime industry – can play a significant role in terms of wealth and job creation in Africa. The key to overcoming the obstacles to developing a merchant fleet in Africa lies in the involvement of the private sector, as a means for ship financing.[93] There has to be a shift of focus, so that participants in the African shipping industry understand that the financial sector plays a central role:

> No amount of legislation will support national flag shipping if the economic situation prevents capital investment. This means that the success of cargo control measures [is] tied to the financial strength of a country's private sector, its capital markets, or its government's fiscal priorities.[94]

In light of existing WTO agreements (and related shortcomings), cabotage as an industrial intervention mechanism requires more appropriate legislation on the African context.[95] Moreover, and perhaps most importantly, African countries need to develop their maritime industries by advancing the role of the private sector and regional integration. For now, the planned introduction of cabotage laws on a continental level seems to be ahead of schedule, given the preconditions needed to introduce it in the African maritime sector and governance issues facing the AU.

THE PLANNED INTRODUCTION OF CABOTAGE LAWS IN AFRICA SEEMS TO BE AHEAD OF SCHEDULE

African countries' struggle for greater economic liberalisation of their coastal waters is inherently linked to the question of finding a balance between long-standing government intervention practices and good governance in order to empower their private sectors. AIMS 2050 will achieve its objectives of offering an economic opportunity and an enabling policy environment for Africa's maritime sector only if the sector is significantly improved and the necessary preconditions are in place first.

Notes

The authors would like to thank Professor Patrick HG Vrancken for his valuable input during the preparation of this article. Vrancken holds the South African Research Chair in the Law of the Sea and Development in Africa at Nelson Mandela Metropolitan University.

The authors would also like to express their deep gratitude to Simone Smith-Godfrey for her valuable and direct input. Smith-Godfrey is a senior researcher for the Transport and Freight Logistics Department at the Council for Scientific and Industrial Research.

1 One of the values that guides and governs the functioning and operations of the AU Commission is to 'think Africa above all'. See the vision of the AU, www.au.int/en/about/vision, last accessed on 20 April 2014.

2 In this paper, the term 'Africanisation' means autarky-driven policies and/or actions, which are characterised by a mentality to put indigenous forces first when thinking about social and economic development, as opposed to foreign dependence.

3 According to the 2015 UNCTAD *Review on Maritime Transport*, developing countries, especially in Africa and Oceania, pay 40% to 70% more on average for the international transport of their imports than developed countries, mainly because of 'trade imbalances, pending port and trade facilitation reforms, as well as lower trade volumes and shipping connectivity'. This can be seen as a result of the vicious circle of development impediments. The report states that developed countries paid an average of only 6.8% of their total import value in transport costs, whereas African countries paid an average of 11.4%, the highest proportion worldwide. See UNCTAD/RMT/2015, United Nations Publication, sales no. E. 15.II.D.6, ISBN 978-92-1-112892-5, 47–54 ff., http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf, last accessed on 17 November 2015.

4 See UN Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, held in Geneva, 12–15 December 1973 (first part) and from 11 March to 6 April 1974 (second part), published in the UNCTAD Publications Library, sales no. E.75.II.D.II, New York 1975, http://unctad.org/en/PublicationsLibrary/tdcode13add.1_en.pdf, last accessed on 17 November 2015.

5 The independence of African countries marked the need for a new strategy on the part of the former colonialists towards their former dominions. Against the background of their aim for continuous trade and political relations with the former dominions, former colonialists incorporated the former dominions into the world system, the UN, by combining trade policies with aid policies.

6 'The adoption of the UN Code and the subsequent establishment of national merchant fleets by developing countries must therefore be seen as a subset of the larger demand for a new international economic order (NIEO) by developing countries from the mid-1960s to the late 1970s under the guidance of the UNCTAD … This effort to change the existing liberal shipping regime to allow developing countries' participation, particularly the development of indigenous merchant fleets, is often referred to as the quest for a new international maritime order (NIMO) …' O Iheduru, *The political economy of international shipping in developing countries,* University of Delaware Press, 1996, 23–24. See also Ademuni-Odeke, *Protectionism and the future of international shipping: The nature, development and role of flag discriminations and preferences, cargo reservations and cabotage restrictions, state intervention and maritime subsidies,* Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1984, 316 ff.

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9 See Oxford Dictionaries, www.oxforddictionaries.com/de/definition/englisch/cabotage, last accessed on 11 December 2014.

10 Ibid.

11 CIF is a trade term requiring the seller to deliver goods on board a vessel designated by the buyer. The seller fulfils its obligations to deliver once the goods have passed over the ship's rail, whereas FOB is a trade term requiring the seller to deliver goods on board a vessel designated by the buyer. The seller fulfils its obligations to deliver once the goods have passed over the ship's rail. In trade terms, the word 'free' here means the seller has an obligation to deliver goods to a named place for transfer to a carrier.

12 O Iheduru, *The political economy of international shipping in developing countries,* University of Delaware Press, 1996, 57 ff.

13 C Milbradt, *Liberalisierung der Seekabotage unter völkerrechtlichen und europarechtlichen Aspekten,* Bd. 5, Hamburg: LIT Publishing, 1998.

14 Ibid.

15 Ibid., 8.

16 Ibid.

17 See S Michalopoulos and E Papaioannou, *The long-run effects of the scramble for Africa,* Cambridge USA: National Bureau of Economic Research, 2011, 7: '… the random design of colonial borders that endured after African independence allows us to identify the causal effect of partitioning. Moreover, besides reporting reduced-form estimates linking partitioning to under-development, we uncover the detrimental role of the border design in fomenting civil conflict.'

18 Woodrow Wilson's '14 point' speech, www.ourdocuments.gov/document_ data/pdf/doc_062.pdf and www.ourdocuments.gov/document_data/pdf/doc_062b.pdf, last accessed on 21 April 2014.

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20 Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by General Assembly Resolution 1514 (XV) of 14 December 1960, www.un.org/en/decolonization/declaration.shtml, last accessed on 21 April 2014.

21 Stipulated as general international law (*jus cogens*) in Article 53 for the purposes of the Vienna Convention on the Law of Treaties since 1969: 'A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character', www.worldtradelaw.net/misc/viennaconvention.pdf.download, last accessed on 10 December 2014, Article 53, 17. As put by Hilary Charlesworth and Christine Chinkin: 'The freedom of states to enter into treaties is … limited by fundamental values of the international community.' See The gender of *jus cogens*, *Human Rights Quarterly,* 15:1, February 1993, 63–76. Although the application of *jus cogens* is controversial, it is not in cases of 'aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture'. See M Cherif Bassiouni, International crimes: 'Jus Cogens' and 'Obligatio Erga Omnes', *Law and Contemporary Problems,* 59:4, 1996, 68.

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www.peaceau.org/uploads/psc-387-com-yaounde-summit29-07-2013.pdf, last accessed on 13 April 2014.

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37 Ibid., 36.

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55 AIMS 2050, http://pages.au.int/sites/default/files/2050%20AIM%20Strategy %20%28Eng%29_0.pdf, Nr. 85, 27, last accessed on 15 April 2014.

56 *CBC Africa infrastructure investment report 2013,* www.cbcglobal.org/images/ uploads/docs/The_CBC_Africa_Infrastructure_Investment_Report_2013.pdf, last accessed on 25 May 2014.

57 Ibid., 138.

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62 Ibid.

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by conference shipping lines of the importing country, 40% is reserved for conference lines of the exporting country and 20% is reserved for cross-traders or non-conference operators. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-6&chapter=12&lang=en, last accessed on 22 April 2014.

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About the authors

Professor Oliver Christian Ruppel is the director of the Development and Rule of Law Programme and a professor of law at the Faculty of Law of the University of Stellenbosch. Until 2010 he held one of the first academic chairs of the WTO, Geneva, which he established at the University of Namibia, Windhoek, where he had previously also served as director of the Human Rights and Documentation Centre. He is an international arbitrator with the Association of Arbitrators of Southern Africa and the Swiss Chamber for Commercial Mediation.

David Julian Biam is a postgraduate student of political science at the Bavarian School of Public Policy, Munich, an associated institute of the Ludwig Maximilian University. In 2014 he was an affiliate student at the Faculty of Law of the University of Stellenbosch, working with Professor Ruppel at the Development and Rule of Law Programme, where he conducted interdisciplinary research on international law and the role of Africa's economic relations in international relations.

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The Institute for Security Studies is an African organisation that aims to enhance human security on the continent. It does independent and authoritative research, provides expert policy analysis and advice, and delivers practical training and technical assistance.

Acknowledgements

This paper was made possible with support from the Government of the Netherlands. The Institute for Security Studies is also grateful for support from the other members of the ISS Partnership Forum: the governments of Australia, Canada, Denmark, Finland, Japan, Norway, Sweden and the USA.

ISS Pretoria
Block C, Brooklyn Court
361 Veale Street
New Muckleneuk
Pretoria, South Africa
Tel: +27 12 346 9500
Fax: +27 12 460 0998

ISS Addis Ababa
5th Floor, Get House
Building, Africa Avenue
Addis Ababa, Ethiopia
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Fax: +251 11 515 6449

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Route de Ouakam
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Fax: +221 33 860 3343

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ISS Paper 290

ISSN 1026-0404

9 771026 040004