Bénin - Burkina Faso - Niger - Togo

Government of Togo

Grand-Duché de Luxembourg

UNIDROIT / Africarail Colloquium

The Cape Town Convention and its Rail Protocol
A new driving force for rail investments in Africa

Lomé, 17 November 2006

- Summary Report -

Background

The Convention on International Interests in Mobile Equipment was adopted in Cape Town, South Africa on 16 November 2001. The Convention aims primarily at facilitating the financing of mobile equipment operated in the territories of more than one State by means of international rules for the creation, registration and enforcement of "international interests" held in such equipment.

The same day, a first protocol dealing with aircraft equipment was adopted alongside the Convention under the joint auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization (I.C.A.O.). Its implementation has already revealed its economic impact, some companies actually finding that ratification of the Aircraft Protocol constitutes the key to access to new civil aircraft, essential equipment for the development and consolidation of their markets.

A new sectoral protocol dealing with railway rolling stock will be submitted for adoption by States at a Diplomatic Conference to be held in Luxembourg from 12 to 23 February 2007. In the run-up to these negotiations, and in follow-up to two other such regional symposia held in Europe (Warsaw, Poland) and Latin America (Mexico), respectively, Africarail and UNIDROIT took the opportunity, on the occasion of the Convention's fifth anniversary Convention, to invite actors involved in railway infrastructure projects in Africa to a meeting intended to illustrate the economic benefits that would accrue both to States and investors from the application of the future Rail Protocol.

The UNIDROIT/Africarail Conference was organised in Lomé (Togo) in the wake of two other such regional seminars held in Latin America (Mexico) and Europe (Warsaw, Poland) to prepare States for the Diplomatic Conference which is to be convened in Luxembourg from 12 to 23 February 2007 to adopt a Protocol on Matters specific to Railway Rolling Stock to the Convention on International Interests in Mobile Equipment adopted in Cape Town on 16 November 2001.

The unique characteristics of the African situation, in particular the acknowledged lack of appropriate railway infrastructure in this continent, were felt amply to justify a presentation of the positive impact of the Cape Town Convention and its Rail Protocol on investment financing in the railway sector. The possibility of creating reliable interests in railway rolling stock will be a formidable tool both in modernising existing railway infrastructure and building new facilities.

The UNIDROIT/Africarail Colloquium was opened by the Minister of Mining of Togo, Professor Léopold Messan Gnininvi, who thanked the organisers and the audience [1] for coming to Lomé and stressed the vital importance of proper railway infrastructure for regional development. He pointed out, in particular, that coastal States such Togo and Benin had a duty to-day to deploy the necessary initiative to bring existing infrastructure up to date and to create new infrastructure to inter-connect and open up land-locked States such as Niger and Burkina Faso. In his view, the Africarail project to build regional interconnecting rail links was the only, and indispensable, alternative to road transport in opening up and promoting the economic development of such States. Nevertheless, the matter of financing such projects was crucial and while there was the political will, money was short. In this respect, the instruments prepared by UNIDROIT were designed to facilitate this type of project and the States concerned would be well-advised to take due notice. The Minister of Mining also reminded his audience that the scope of the Cape Town Convention now also extended to mining and agricultural equipment since national experts had now started work under UNIDROIT auspices on the preparation of a new sectoral protocol. UNIDROIT's efforts to smooth the path of high-value mobile equipment financing and the impact of its work on the development of States should be warmly welcomed.

After further introductory addresses by the representatives of other leading participants in the Colloquium, especially those of the Grand-Duchy of Luxembourg, UNIDROIT, the International Union of Railways (UIC) and Africarail, the first Round Table discussion of the Colloquium looked at the state and role of railway infrastructures in Africa. The President of Africarail, Mr Bosio, introduced the regional interconnection railway project involving Togo, Benin, Burkina Faso and Niger and sketched the difficulties involved in establishing a railway policy in Africa alongside the much-needed, and on-going, modernisation of inadequate road infrastructures, which had enjoyed long-standing priority even amongst international investors. And yet it was quite obvious that the solution lay in a mix of rail and road infrastructures. One thing to remember, for example, was that railway infrastructure lasted far longer than a road surface, which was more often than not incapable of coping with the extreme climate conditions prevailing in many African regions.

In their presentations, Ms Camara Morel, representative of the Transport Ministry of Guinea, and Mr Dogbe, representative of Togorail, confirmed the vicious circle into which the infrastructures of many African States find themselves locked. Heavy traffic and climate combined to accelerate the damage to roads and confirm the need for priority investment for their upkeep and, particularly, their rehabilitation. This obviously left little money for railway projects, and also showed that the existing infrastructures barely sufficed to operate a network given over primarily to the carriage of freight and, more specifically, ores and other natural resources. The question consequently arose

[1] The Colloquium was attended by participants from the Grand-Duchy of Luxembourg, Guinea, Italy, Niger, Nigeria, Senegal, South Africa, Togo and the United States of America, and of the development services of Luxembourg and France (AFD), Africarail, UNIDROIT, the Rail Working Group, the International Union of Railways (UIC), the African Union of Railways, ECOWAS, the ECOWAS Investment and Development Bank, the Atlantic Bank, the GARI fund, MIGA, private investors (MAERSK, MIB project), port authorities (Autonomous Port of Lomé) and railway companies (Togorail).

of whether the development of the rail sector in Africa would always have to be justified on sectoral grounds or be linked to mining operations. Mr Lehman, representing the UIC, made a point of recalling that even in Europe and the United States, early infrastructure projects were invariably linked to the need to open up industrial sites and areas rich in natural resources. Of course, the development of passenger transport in Africa should remain on the agenda with a view to offering low-cost mobility to large numbers of people, but this could be done in the framework of global economic development projects.

The second Round Table set out to assess the means available to finance railway infrastructure projects. The discussion took off with a presentation by Mr Akakpo on the involvement and role of development banks in this type of project. The current Africarail project was a convincing example of such involvement, the development banks being clearly committed to the undertaking. This showed at two levels. First of all, the development banks needed to give voice to a political and economic choice and to affirm their support to a project of this kind. Second, by implication, giving priority to the project means providing financial backing for its achievement. By providing the funding for the overall feasibility study, which is being carried out by an ECOWAS follow-up committee, the African Development Bank (ADB) played its supporting role in the preparatory stages of the project to perfection. Even more decisively, perhaps, the development banks play a much-needed role in the realisation of the project. It is at that stage that the project has the greatest need of capital. The development banks' contribution at this point is crucial not in providing direct funding but in facilitating the mobilisation of private capital. They will also vouch for good governance as the project progresses by imposing strict criteria to attract investment or by drawing up an appropriate investment plan.

Mr Protopsaltis for his part outlined the terms imposed by the Multilateral Investment Guarantee Agency (MIGA), a political risk mitigating body already operating in the region. MIGA has participated in a wide variety of projects such as (to mention only the area of transport) ECOMARINE, a company recently set up to develop maritime transport and freight in the ECOWAS countries. Clearly, political risk is highly relevant to any railway interconnection project. One need only think of the devastating impact that a unilateral decision by one of the transit States to withdraw support would have for the economic viability of a project. Such risk must be insured against, that is to say, the risk must, if possible, be transferred to a specialised body, such as MIGA. Mr Protopsaltis went to describe the eligibility criteria to provide adequate cover for a regional railway interconnection project involving several States, such as Africarail. The first hurdle in this case had been that, while Togo, Benin and Burkina Faso were usually eligible for a MIGA guarantee since all three States are Parties to the 1985 Convention establishing MIGA, Niger, on whose territory a considerable part of the project would have to be carried out, did not yet meet all the conditions for accession to the mechanism. In fact, this was the only black mark since as a rule, the admissibility of a project applying for MIGA cover depends on its economic justification, on its contribution to development and on its compatibility with the development objectives and priorities established by the host country at the time when the guarantee is sought. In respect of all those points, the Africarail project was *a priori* eminently eligible, with all the States and regional organisations involved having repeatedly acknowledged its priority status.

MIGA's eligibility criteria as described by Mr Protopsaltis formed a suitable backdrop to the report delivered by Mr Poulain, who highlighted the decisive role played by States in carrying out railway infrastructure projects. Their involvement is not so much financial as political and legal. The States concerned need to give very clear signals as to their intentions and priorities, not least where the leading investors are concerned. In this connection, Mr Poulain drew attention to a particular risk, in the sense that, while the regional railway interconnection project fell within the purview of NEPAD and had formed the subject of declarations of priority within the African Union, ECOWAS, the West African Monetary Union (WAMU) as well as within the States themselves, these declarations now had to be followed by action. To take one concrete example, Mr Poulain pointed out the European Union was currently scheduling the tenth European Development Fund (EDF). This meant that the States concerned in the Africarail project should apply for its inclusion in the Fund without delay. In fact, however, although the project has been declared a priority at all levels, no steps have yet been taken to ensure its formal inclusion, so that Africail might have to do without an invaluable, not to say potentially decisive, source of funding and assistance. Mr Poulain stressed what a pity that would be, not least in view of the special efforts made by the European Commission and the European Investment Bank (EIB) to help Africa close the infrastructure gap. The regional railway interconnection project has all the hallmarks of a "model" project as referred to in the recent Partnership Agreement for Infrastructure concluded between the European Union and the African Union. The States involved in the project now have the ball in their own courts and the choices ultimately made by their potential partners depend only on themselves.

At a strictly legal level, Mr Poulain went on to describe the role played by States in implementing a satisfactory legal infrastructure capable of attracting the private investment needed to carry out such a project. He pointed out, first of all, as did Mr Protopsaltis before him, that the fact that Niger is not eligible for a MIGA guarantee was certainly a matter for concern. The States involved in the project should also, he added, be particularly vigilant as concerns the protection of foreign investment by guaranteeing efficient recourse in the event of interference by the public sector part of the project. In this respect, the inclusion of jurisdiction clauses referring the settlement of disputes between investors and States to international tribunals set up under the aegis of the World Bank (1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States - ICSID) in contracts for the realisation of the project would undoubtedly be helpful. On top of such "classic" instruments to promote and protect investment, thought should also be given to such "intelligent" UNIDROIT instruments as the Cape Town Convention and the future Rail Protocol. That these were meant to be applied to a regional railway interconnection project was obvious if only to guarantee the application of workable uniform law to the secured financing of equipment intended for use in the territories of more than one State. The States involved would therefore do well to adopt as concerted a stand as possible with regard to these new instruments, especially designed to facilitate a project such as theirs, and to show the political will to ensure their early adoption. It had to be kept in mind, however, that alongside its primary objective asset-backed financing would also bring down credit cost for purely domestic operations.

The second Round Table also afforded an opportunity for an exchange of views between the representatives of Africarail, ECOWAS and the Grand-Duchy of Luxembourg on the question of how States could, at this late date, take advantage of the opportunities afforded both by the tenth EDF and by the Partnership Agreement for Infrastructure initiated by the European Union and the African Union. Mr Tall, representing ECOWAS, described his own experience and the conduct of several large regional projects such as the gas pipeline that now runs through the sub-region. Clearly, the key to success of a project lay in the States involved making clear and simultaneous statements as to their will to bring it to fruition. The rest, and in particular the action that needed to be taken where ECOWAS and the UEMOA were concerned, would follow.

The third Round Table was devoted to a presentation of the UNIDROIT instruments. Professor Herbert Kronke, Secretary-General of UNIDROIT, talked about the underlying principles of the Convention on International Interests in Mobile Equipment, the only instrument so far to deal with international interests in mobile equipment, and about its economic impact which so far concerned the aviation industry alone. Asset-backed equipment financing was a particularly efficient form of credit extension. It permitted the granting of credit to borrowers unable or unwilling to finance solely on terms reflecting their commercial capacity to repay. The Convention starts from the premise that lenders who make it possible to purchase or make available high-value mobile equipment should be able to continue to exercise a measure of control over the asset they have financed and, in the event of failure of the debtor and the user to pay back the loan, should be able to resume control of the asset at short notice so as to enable it to continue to be used. The Cape Town Convention gives broad powers to the holder of an “international interest” registered against the asset with an “international registry” which ensures its priority, in particular in the debtor’s insolvency. These rights conferred on the holder of the “international interest” are offset by economic benefits for the user. Those airline companies, particularly African airlines, located in States that have ratified the Cape Town Convention and the Aircraft Protocol have made great savings when purchasing large civilian aircraft and, even more importantly in an African context, have been able to buy new aircraft. In other words, the Cape Town Convention and the Aircraft Protocol are “winning tickets” in that, by strengthening the quality and predictability of the legal framework within which the financing operation takes place, economic benefits accrue both to the airline manufacturers, who are able to boost their sales in markets hitherto closed to them owing to excessive risk, and to the airline companies who can save a great deal money. Professor Kronke gave the example of the Ethiopian national airline company, Ethiopian Airlines, which took delivery of several brand-new Boeing aircraft just after the UNIDROIT instruments were ratified and are now cited among the best airlines not only in Africa, but in the world.

Mr Rosen, President of the *Rail Working Group*, for his part highlighted the potential of the future Rail Protocol. To begin with, he said, the Cape Town Convention and its protocols set great store by flexibility and to this end allow a wide range of declarations to be made. This ensures that no State need be excluded from the Convention system and to take different legal realities into account. To take just one example, the draft Railway Protocol made provision for a declaration on public service obligations, so as to enable States to exclude certain types of rolling stock from the scope of the Protocol where such equipment is used in the public service. Of course, such a clause made sense for some States, but not for others where the Railway Protocol would be used to finance equipment for use in infrastructures yet to be constructed and where by definition there was (as yet) no public service aspect involved. Another important element, particularly from an African point of view, was that the draft Railway Protocol gave holders of an registered “international interest” a say in the management and upkeep of the equipment. There is no doubt that such equipment tends to survive longer if the user rents it from a private lender - i.e. where the user may be required to return it in certain circumstances and in a particular state - than if it is placed at the disposal of the user or licensee by a State without any conditions as to its return. Mr Rosen ended on a note of encouragement intended for the regional railway interconnection project which he described as both ambitious and exciting. *In fine*, he said that ratification of the Cape Town Convention and the Rail Protocol by the States concerned might well be a decisive factor in completing the project.

The fourth and final Round Table was devoted to the involvement of African States in UNIDROIT’s work. As to the Institute’s work in general, Professor Kronke explained how African nations had participated in and benefited from instruments drafted by the Institute. In the realm, specifically, of business law and the financing of mobile equipment, Ethiopia, Angola, Nigeria, Senegal and Kenya had assessed the impact of the Cape Town instruments on investment in this type of equipment and duly ratified them. Obviously, other States should be encouraged to follow suit. The Secretary-General also mentioned UNIDROIT’s involvement in the drafting of an OHADA Uniform Act on contracts, together with experts from the OHADA member countries. There could be no doubt that it was important for the African nations to keep themselves informed of the Institute’s work, which was instrumental in improving the legal environment and thus promoting their economic development.

Mr Biever, representing the Foreign Ministry of Luxembourg, then took the floor to invite the African States to participate in the forthcoming Diplomatic Conference in Luxembourg next February. Invitations had already gone out through the usual diplomatic channels, but Mr Biever urged prospective representatives of these States at this international meeting, in particular

Transport Ministers, to settle the question of their participation at the very earliest opportunity, given its potential impact on the development of transport infrastructure in Africa.

Mr Biever also stressed that the Luxembourg development authorities set great store by the success of the regional railway interconnection project. He recalled that Burkina Faso and Niger were among the States targeted by Luxembourg development cooperation, both of which States had every reason to see the Africarail project completed, given their geographical position. Mr Biever reiterated that the project had the full support of Luxembourg, since it represented a type of regional integration which Luxembourg's own historical experience had shown to be essential to economic development. He recalled that it was the integration of the Luxembourg national railways into a larger regional network that had, in its time, enabled the Luxembourg steel industry to take off and so lay the groundwork for his country's current prosperity. This was why the Luxembourg Foreign Ministry had extended full support to the Colloquium organised by UNIDROIT and Africarail. Mr Biever then went on to give particulars of the practical arrangements made for delegations to the Diplomatic Conference in Luxembourg next February, which showed the full extent of the importance of this meeting and of the Grand-Duchy's commitment to keeping prospective participants fully informed of the practical, cultural and social events being planned around the Conference.

At the end of the Colloquium, participants adopted a declaration inviting the African States to take an active part in the work of UNIDROIT and, more specifically, to consider ratification of the Cape Town Convention, of its Aircraft Protocol and, in due course, of the Railway Protocol after its adoption by the Diplomatic Conference to be held in Luxembourg from 12 to 23 February 2007.