

Odette Jankowitsch-Prevor, Quentin Michel,
Sylvain Paile-Calvo (eds.)

*Modelling Dual-Use
Trade Control Systems*

NON-PROLIFERATION
AND SECURITY



P.I.E. Peter Lang

The Chaudfontaine Group was established in 2010 as an annual two-day gathering of young Europeans with diverse academic backgrounds, including lawyers, economists and political scientists, from relevant national authorities, European institutions, scientific centres and industry. Its members are invited to discuss their respective viewpoints on the European trade of sensitive goods, focusing on the strategic issues confronting this sector in a rapidly evolving international context.

In December 2013, at its fourth conference, the Group met with African experts to debate the question of how African countries control the trade of dual-use items and the challenges they face in their search for effective regulations. The objective was to study whether international norms and experiences, pertaining both to states and to organisations, could be used as standardised models for African countries affected by unique security concerns.

This volume analyses and discusses those trade control systems which could be described as “models” and might therefore serve as a standard to be exported to the African countries in question. The debate is multi-levelled and studies the possibility of setting universal, regional or even-sub-regional norms.

The contributors to this book, who display a wide variety of expertise, call for the adoption of norms which they argue have the potential to reconcile freedom of trade with international security, without presuming that these norms should be universal.

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Disclaimer

The views and opinions expressed in this book do not represent those of the institutions the authors may be working for. The authors hereby present, discuss and express their views on the legislations and practices of States, international organisations and other entities only in their scientific capacities.

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May this raise new scientific interests and debates.

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INTRODUCTION

**Regional, Sub-Regional
and National Trade Control Regimes
Models: Choices for “Africa”?¹**

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Introduction

The growing importance attached to the “trade dimension”² of economic development and related industrial strategies in Africa may call for new approaches to national and possibly regional requirements for trade control regimes. This industrial evolution is essentially carried by trans- or multi-national corporations and characterised by international intra-industry transactions. Such developments are extremely relevant to States, though the individual State may not be the determinant actor in this worldwide development. Integration into the global market rather than within a regional market raises very different questions and concerns all actors: the individual State exporting industrial manufactured goods in addition to raw materials, the regional economic communities, and Africa as a whole. In the context of export control regimes this fast trend, if continued, might constitute a challenge for the individual State as well as for Africa’s sub-regional economic communities of neighbouring or likeminded States.

¹ Main sources consulted in addition to the chapters contributed to this publication by Algeria, the Democratic Republic of the Congo, Kenya Niger and Nigeria. Additional sources: seminar “Assessing Regional Integration in Africa V Towards an African Continental Free Trade Area” ECA; AU; African Development Bank, UNCA, Addis Ababa (Ethiopia), 2012. NTI, “Sub-Saharan Africa 1540 Reporting” 9 January 2014, CNS James Martin Centre for Non-proliferation Studies at the Monterey Institute of International Studies.

² Seminar: “Building Trade Capacities for Africa’s Transformation – A critical review of Aid for Trade”. UN ECA, AU, ADB, Addis Ababa (Ethiopia), 2012.

At the same time, the individual State is called upon to adhere to increasingly specific, strict and binding international regimes directed at preventing all forms of proliferation of nuclear chemical or biological weapons,³ sensitive trade and notably dual-use items; these amount to legal obligations that require the State to establish and implement *inter alia* “effective border controls, national export and trans-shipment controls and end-user controls”.⁴

The question arises whether this is a fundamental, unsolvable dilemma or whether States will be able to find satisfactory solutions individually, within their regional economic communities and with the support by the African Union?

Intergovernmental organisations and trade control

Any attempt to analyse Africa in terms of its trade should first look at existing sub-regional economic communities, their composition, purpose, policies and activities, in order to discern their possible roles in assisting their respective Member States regarding implementation of trade control of dual-use and sensitive items.⁵ This question requires some clarifications: what are the main concerns of these regional economic communities? How far are they comparable to the EU or to earlier cooperation and integration organisation in Europe, such as the European Free Trade Area? However, the contributions⁶ to this volume covering individual African States clearly demonstrate the need to keep in focus the specific geographical, economic and political realities of each individual State.

Africa is a continent as is Latin America. It was and sometimes continues to be divided in terms of geographical rather than economic and policy denominated domains. This continues to apply e.g. to the regional approach to trade analysis of the UNECA, the Economic Commission for Africa,⁷ considering the regions of North, East, West-Africa; Sub-Saharan Africa, the Sahel Zone. Another categorisation separates States

³ Document UNSC /Res/1540 (2004), Operative Paragraph 3.

⁴ UNSC Resolution 1540 (2004) Paragraph 3.(d).

⁵ This chapter uses the term “sensitive items”, “dual-use items”, or “related materials” as defined in UNSC.RES 1540 (2004) as “materials, equipment and technology covered by relevant multilateral treaties and arrangements or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.”

⁶ See chapters related to Algeria, the Democratic Republic of Congo, Kenya, Niger, Nigeria.

⁷ Seminar of the UNECA: “Building Trade Capacities for Africa’s Transformation – African review of Aid for Trade”, UNECA, WTO, OECD and AU, 2013.

according to (European) language groups which *per se* is not irrelevant as this reflects not only aspects of colonial history but what is more relevant today, common legal systems, national and societal rather than ethnic links and some durable trade patterns.

In the present context, attention is primarily on implementation of non-proliferation obligations – with reference to the NPT and more specifically to UNSC Resolution 1540 (2004) in the framework of the trade policies of States members of regional economic communities, as well as of the communities as a whole. Are States still acting mainly alone, or is there an existing or potential capacity of the Communities to establish elements of a common regulation and control of trade for their respective members? Is a regional trade – or sub-regional – control model possible, or is the more realistic policy of harmonising step-by-step national regulations preferable?

Considering the wider picture, there are domains where intergovernmental organisations cannot replace the obligations of the State: for example, legally binding obligations set forth by international treaties and conventions⁸ rest exclusively upon the sovereign State. Such obligations seen in the present context require the State to enact national laws and appropriate regulations which apply to ensure strict border control of (sensitive or dual-use) exported goods as well as of those imported. Examples are demonstrated by the case studies on the export control regimes of selected African States contained in this volume. The basic question is how similar are national export control regimes at present to allow – without establishing a comprehensive “model” – for harmonisation of “basic provisions” to which States could conform within the scope of respective sub-regional economic communities.

At the continental level there are two well established intergovernmental organisations open to all sovereign States of the continent: the African Union (AU) with 53 States,⁹ and the United Nations Economic Commission for Africa UNECA¹⁰ 54 States. These 54 States constitute the Africa Regional Group in the UN General Assembly.

The African Union (AU) functions since its inception with a highly complex structure is somewhat similar to that of the UN, with an Assembly,

⁸ This applies also to obligations set forth by the UNSC, under Chapter VII of the UN Charter, see UNSC Resolution 1540/(2004) paragraph 3.(c).

⁹ The OAU was the first African intergovernmental organisation: [http:// www.au.int](http://www.au.int): Note: Morocco left the AU on disagreement following the recognition by the AU of the “Spanish Sahara”/Western Sahara.

¹⁰ UNECA: UN Economic Commission for Africa. It has the same composition as the AU (plus Morocco) and seats in Addis Ababa (Ethiopia). See: [http:// www.uneca.org](http://www.uneca.org).

a Parliament, an Executive Council, technical committees and commissions as well as a separate Economic and Social Council. It covers a huge diversity of political, economic, and legal subjects and acts through specific subordinate organs as well as through the Assembly of all its Member States.

Of particular interest in the present context is a new, different type of Treaty based continental organisation, the African Commission on Nuclear Energy (AFCONE),¹¹ a mechanism for Treaty compliance provided for by the Treaty of Pelindaba establishing the African Nuclear Weapon Free Zone. The Entry into force of the Treaty, 2009, and more recently the start of the work of its Commission (AFCONE), comes at a time when control of CBNR weapons by States is a permanent topical issue on the agenda of the UN, the IAEA and the EU. In light of its broad mandate this new institution might become relevant beyond its statutory mandate of nuclear non-proliferation¹² as a model for the implementation by States of other legal obligations notably those set forth by UNSC Resolution 1540 (2004) and thereby corroborating the basic concerns and to a large extent, the *raison d'être* of the Resolution.¹³ Endowed with the necessary instrumentality for non-proliferation control, its powers as to verification of “peaceful uses”¹⁴ (though of nuclear material only) may carry with it a parallel concern for the prohibition and control of biological and chemical weapons and acquire institutional knowledge as to the export /import control of dual-use items.

Treaties and conventions

As regards relevant international treaties and conventions on security and anti-terrorism, most African States have signed them (facilitated by the fact that these treaties were opened for signature at the UN or

¹¹ Source: Treaty of Pelindaba adopted 11 April 1996 entered into force 15 July 2009: UNODA Treaties Data Base: Depositary African Union, (Article 12).

¹² Treaty of Pelindaba: Article 7 obliges to dispose radioactive wastes and other radioactive materials in accordance with IAEA standards, Article 5: to conclude Safeguards agreements with the IAEA for full-scope safeguards; Article 10: establishment of a Control system to verify compliance with the obligations of the Treaty. Article 13: A State Party has the right to request the Executive. Committee to send a fact-finding mission to another State Party to clarify a situation which might give rise to doubts about treaty compliance.

¹³ See NTI “Sub-Saharan Africa 1540 Reporting”. See “Conference Non-Paper to AU Commission: International Expert Workshop Establishing the Treaty of Pelindaba African Commission on Nuclear Energy”. Institute for Security Studies and James Martin Centre for Non-proliferation Studies, March 2010, p. 19. Source: <http://cns.miis.edu>.

¹⁴ Treaty of Pelindaba, Article 9.

IAEA Headquarters or other IGO). However, the process of ratification and entry into force has taken a very long time and in many cases is still outstanding.¹⁵ This needs not be considered as absence of political will by governments but can be well explained by the complex often technical nature of some conventions and the lack of their immediate relevance for the States e.g. the Convention on the Physical Protection of Nuclear Material (CPPNM) applies to the protection of “nuclear material in transport” which, except for uranium transported from a land-locked State¹⁶ to the sea, is not commonly shipped from a State of origin to a State of destination within the African continent.¹⁷ Moreover, the CPPNM and all UN “anti-terrorism instruments” adopted since 9/11 set forth detailed provisions defining criminal offenses, criminal procedure, international cooperation on criminal matters as e.g. extradition, which in any administration needs to be cleared or approved by several competent ministries and usually requires amendment of national laws and codes that are often difficult to transpose into national law due to different legal systems and concepts.

Moreover, after ratification of the instrument in accordance with the State’s constitutional provisions, and transposition of its binding provisions into domestic law, a major obstacle to its implementation is often the weakness of the competent governmental authorities: any State control requires institutions equipped to supervise the implementation of the provisions of the law. Weakness of government bodies is a common problem not limited to African States, often due to lack of adequate funding and staffing or to overburdened staff facing a diversity of tasks and competences. In many smaller African States weak governmental institutions may constitute the single major difficulty in fulfilling trade control functions.

This is more relevant as the competence of the institutions at the national level is the first prerequisite for any form of coordination of import controls at a higher regional level: control of trade – notably exports and imports of sensitive items or dual-use goods – must take place at the country level before being coordinated at a supranational level. As well demonstrated in all of the five African case studies¹⁸ the common comparable national competent authority is the national customs

¹⁵ The Amendment of the CPPNM adopted in 2005 is still not in force due to the large number of States required for its entry into force, requiring inter alia ratification by a number of African States.

¹⁶ See the chapter on Niger: export of uranium by land and sea via seaport of Benin.

¹⁷ Transport of yellow cake (uranium) from the mines of Niger to the Ocean but as in the case of e.g. uranium basically from the mine to the coast by States parties to the relevant Conventions.

¹⁸ Algeria, Democratic Republic of Congo, Kenya, Niger and Nigeria.

authority: this applies in terms of both its legal powers and its capacity for effective physical material border control. In this context the authors express general doubts as to the usefulness of defining a single model of an export control system that would be applicable to the hugely diverse economies and legal systems of the continent. Clear preference seems to be given to the elaboration of key common elements to be included in national trade control regimes as well as to national control practices.

Regional economic communities (REC)

The African Union recognises a number of intergovernmental “regional economic communities”, some newly established, others succeeding earlier regional groups. Again there is great diversity in the purpose and activities of the REC. Some were established as monetary and administrative rather than as free trade zones, in particular those dating back to colonial administrations e.g. the AOF¹⁹ and AEF and the East African Community. Today’s broad based “new” economic communities appear to have more in common aiming e.g. accelerating integration of the respective economies and improving intra-African trade. The REC are however still facing major challenges – including inadequate financial and manpower resources to support their integration activities: In addition to a lack of compatibility of national economic policies,²⁰ one of the major problems seen by many as a real obstacle to “integration” is the overlapping membership in the different REC.

Overview of the regional economic communities²¹

A brief overview of the main AU recognised REC intends only to map out the complex structure of sub-regional integration of the continent and both the diversity and the common ground of these communities of States. Six recognised regional communities are considered here:²² the main purpose common to all is to promote economic cooperation among

¹⁹ AOF and AEF (in French): Afrique Occidentale Française and Afrique Equatoriale Française.

²⁰ See notably the case of Niger Chapter and the author’s thoughts on these issues.

²¹ *Idem*.

²² *CEN-SAD: Community of Sahel-Saharan States* (28 States) works towards a free trade area among its Member countries with major development differences (e.g. by establishing technical studies to identify intra-community trade, including a specific scheme for least-developed members). “Assessing Regional Integration in Africa”. *op. cit.*, p. 13.

COMESA: Common Market for Eastern and Southern Africa (26 States): established and implemented a customs union. Concluded tripartite arrangements of COMESA, EAC/SADC in 2008 in view of a common free trade area. Further works

them, to aim at establishing a common trade area, a customs union or beyond, to create an economic union. This applies notably to the Southern African Development Community (SADC).

Some conclusions

Trade control notably of sensitive or dual-use items remains predominantly a separate matter from trade studies and strictly within national competence: major comprehensive studies on African integration and trade do not include references to trade control, sensitive items or dual-use goods, to CBRN, to security-related treaties and relevant UN obligations regarding the control of potential WMD or weapons material. Issues of trade, of individual States or of regional communities of States are usually analysed exclusively in economic and developmental terms. Security, and non-proliferation, export of dual-use items belongs apparently to another book!

Questions of “importing” or copying a trade control model do not appear to be anywhere on the agenda.²³ A more detailed inside knowledge and, if published, case studies or other material issued by the regional economic communities as e.g. SADC may demonstrate how control regulations enacted in one or several of REC Member States could be harmonised with others to meet a common objective.

on harmonising financial and fiscal policies. Aims at a monetary union and single trade and investment space. “Assessing Regional Integration in Africa”, *op. cit.*, p. 15.

ECOWAS: Economic Community of West African States (15 States): Aims at promoting cooperation and integration in economic, social etc. domains leading to a monetary union. Established a Bank for Investment and Development. Within ECOWAS 6 mostly Anglophone Members (Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone) are setting up a West African Monetary Zone (in view of future monetary union of the entire ECOWAS region). See: [http:// www.ecowas.int](http://www.ecowas.int).

EAC: East African Community (5 States) Mission: regional integration and development. Operational customs union, 2010. East African currency fully convertible. Jointly managed border points. See: <http:// www.eac.int>.

SADC: Southern Africa Development Community (15 States): customs union since 2012, accomplish a common market by 2015 and thereafter a monetary union and an economic union. *Inter alia*: promote intra-regional trade, productive investment and technological cooperation. Initiatives to harmonise customs procedures, instruments and a single customs administration document. Law on a customs model to facilitate harmonisation of national laws on customs. See: <http://www.sadc.int>.

UEMOA: West African Economic and Monetary Union (8 States): Commission; other political bodies includes: Court of Justice, Auditors, Inter parliamentary Committee. See: <http://www.uemoa.int>.

²³ See chapters on Algeria and Niger in particular.

As defined above, obligations ensuing from international instruments on non-proliferation and related dual-use and sensitive trade control rest entirely with the individual State. However, the prime competence of the State in matters of trade control need not prevent States Members of a same sub-regional community, to mutually adjust and coordinate their trade control systems.

Another relevant issue is whether – with certain exceptions – the present composition of goods and the volume of exports of the majority of African States require an advanced, sophisticated export control regime. Without studying detailed economic reports and statistical data (as published by the ECA) nor, on the other hand, oversimplifying the reality of trade flows, it is a fact that outward trade consists predominantly of minerals, other raw materials i.e. metals such as copper and gold, oil and gas, tropical wood and of some crops, e.g. cocoa and coffee beans – at more or less processed levels – fruit and vegetables grown in export-oriented agriculture and... Flowers.

In fact, trade of industrial manufactured products out of Africa (south-south) or intra Africa is still an exception. There are indeed very few cases: South Africa²⁴ and increasingly, the sub-regional community which South Africa leads: (SADC); Nigeria and Algeria. It is worth mentioning that many African States need to export a very specific category of sensitive goods i.e. potentially dual-use or material for dirty bombs, that is the re-export of – imported and spent – radioactive sources²⁵ which are commonly used in mining, geology, medical facilities and in industry.²⁶

Trade – both export and import appears to remain essentially carried out independently by individual States under agreements with a foreign importer. As noted above most exported items are not listed in any “sensitive trade list”. As regards the issue of security, a regional overview of the “Sub Saharan Africa 1540 Reporting” notes that “[T]he major regional and sub-regional organisations on the continent “play almost no role in promoting Resolution 1540”.²⁷

²⁴ The UN Register on annual imports and exports of major weapon systems, as submitted by national reports, lists as weapons exporters for the African continent only South Africa (and, to a lesser extent, Egypt). Source: <http://www.un-register.org/HeavyWeapons/Index.aspx>.

²⁵ Code of Conduct on the Safety and Security of Radioactive Sources, adopted in 2003. IAEA Doc. 2004.

²⁶ On this topic, see the chapter on Nigeria.

²⁷ NTI, “Regional Overview. Reporting on UNSC Resolution 1540(2004)”, Centre for Non-proliferation Studies, 9 January 2014. And J. du Preez, D. Dye, “Implementing Resolution 1540 in Africa, Balancing Competing Priorities”, in L. Scheinman (ed.), “Implementing Resolution 1540”, UNIDIR, 2008, p. 119.

None of the regional economic communities covers issues of trade control: as stressed by the African authors in this volume, it is difficult to conceive a trade control “model” that in view of the political and economic diversity of States would correspond to the needs – i.e. the economies and exports of the regional economic communities.

PART I

A SEARCH FOR HARMONISING TRADE CONTROLS...