



Fall 1988

## Legal Aspects of the Niger River under the Niamey Treaties

Tiyanjana Maluwa

### Recommended Citation

Tiyanjana Maluwa, *Legal Aspects of the Niger River under the Niamey Treaties*, 28 Nat. Resources J. 671 (1988).

Available at: <https://digitalrepository.unm.edu/nrj/vol28/iss4/3>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact [amywinter@unm.edu](mailto:amywinter@unm.edu), [lsloane@salud.unm.edu](mailto:lsloane@salud.unm.edu), [sarahrk@unm.edu](mailto:sarahrk@unm.edu).

TIYANJANA MALUWA\*

# Legal Aspects of the Niger River Under the Niamey Treaties

## ABSTRACT

*The international legal regime of the Niger River in West Africa is now governed by two treaties concluded at Niamey, Niger, by some nine newly emergent States on October 26, 1963 and November 25, 1964 respectively. The philosophy regarding the regulation and exploitation of international watercourses in post-independent West Africa places as much emphasis on the twin concepts of freedom of navigation and freedom of commerce as on the other uses such as irrigation, energy production, mining and manufacturing. At least that is the theoretical position articulated in the various international legal instruments and, in particular, the Niamey Treaties. An analysis of these treaties shows that while the legal concepts adopted by the West African States to a large extent simply reflect the modern trends in international fluvial law in general, there are also sufficiently unique features in these treaties as to be suggestive of an original West African contribution to the growth of this branch of international law. It is argued in this paper that taken as a whole, the post-independent international legal regime of the Niger instituted by the new riparian States in 1963-64 must be viewed as a progressive development upon the legal regime initiated by the former European powers with the conclusion of the General Act of Berlin in 1885.*

## INTRODUCTION

It has been observed that the General Act of Berlin of 1885 marked the first attempt to regulate African rivers according to the conventional rules of international law embodied in the Final Act of the Congress of Vienna of 1815.<sup>1</sup> The Berlin Act, which provided, *inter alia*, for the regulation of the legal regime of international navigation on the Congo and Niger Rivers, as well as the two treaties which superseded it, the General Act and Declaration of Brussels (1890) and the Convention of St. Germain-en-Laye (1919), were all abrogated by Article 1 of the Act Relating to Navigation and Economic Co-operation between the States

---

\*Lecturer, University of Botswana, LL.B. (Mlw.), LL.M. (Sheff), PH.D (Cantab).

1. See T. Maluwa, *The Origins and Development of International Fluvial Law in Africa: A Study of the International Legal Regimes of the Congo and Niger Rivers from 1885 to 1960*, 29 *Netherlands Int'l L. Rev.* 368, 370 (1982).

of the Niger Basin concluded at Niamey, Niger, on 26 October, 1963.<sup>2</sup> This article provides as follows:

The General Act of Berlin of 26 February, 1885, the General Act and Declaration of Brussels of 2 July, 1890 and the Convention of St. Germain-en-Laye of 10 September, 1919 are and remain abrogated as far as they concern the River Niger, its tributaries and sub-tributaries.

The Act of Niamey was subsequently complemented by another treaty, also concluded by the same newly emergent States riparian to the Niger, its tributaries and sub-tributaries. This treaty, signed on November 25, 1964, was entitled: "the Agreement concerning the Niger River Commission and the Navigation and Transport on the River Niger." The 1963 treaty laid down the principles of international law to be observed by the riparian States in their management and utilization of the watercourse, both in navigational and non-navigational matters. The latter accord established the inter-governmental organ charged with the multilateral regulation of the river and its resources.

Neither of the Niamey Treaties—as the Act of 1963 and the Agreement of 1964 may collectively be called—has ever been superseded by any other treaty.<sup>3</sup> Quite clearly, therefore, the development of international fluvial law in the Niger Basin—indeed, over the West African sub-region—over the last one hundred years falls squarely into two distinct regimes: the Berlin/St. Germain regime of 1885–1963, and the post-independence Niamey regime dating from 1963. While copious scholarship has been devoted to the former period, full-scale systematic legal studies with respect to the latter have been somewhat limited.<sup>4</sup>

---

2. An Act regarding navigation and economic cooperation between the states of the Niger Basin, at Niamey Oct. 24-26, 1963, 587 United Nations Treaty Series, at 9 [U.N.T.S.]. The Act was concluded by 9 newly independent States, all riparian to either the Niger or its tributaries and subtributaries: Cameroon, Ivory Coast, Dahomey (now Benin), Guinea, Upper Volta (Bourkina Fasso), Mali, Niger, Nigeria, and Chad. For the sake of convenience, the new names "Benin" and "Bourkina Fasso" will be used in the rest of this paper even when referring to events which occurred before these names were adopted.

3. At a summit meeting of all the signatories held at Faranah, Guinea, from Nov. 20-22, 1980, a proposal was adopted, admitting 4 non-riparian states (Ghana, Liberia, Sierra Leone and Togo) in an enlarged riparian organization to be known as the "Niger Basin Authority." As far as the present writer is aware, the formal machinery (such as the necessary amendment to the Niamey Treaties to reflect these changes) has not been effected as yet. In this essay, the designation "Commission," rather than "Authority," will be employed when referring to the Inter-Governmental Organ set up the Agreement of 1964.

4. Some of the few scholarly writings in this regard are:

J.C. Andre, *L'Evolution du Statut des Fleuves Internationaux d'Afrique Noire*, 19 Rev. Jur et Pol. Ind. et Coop 285 (1965); T.O. Ellias, *The Berlin Treaty and the Niger River Commission*, 57 Am. J. Int'l L. 873 (1963); M. Schreiber, *Vers un Nouveau Regime International du Fleuve Niger*, 9 A.F.D.I. 866 (1963); M. Valliat, *Le Regime International du Fleuve Niger*, 49 Rev. Droit Int'l Sci. Dipl. et Pol. 31 (1971).

A study of the 1885–1963 period reveals that the General Act of Berlin not only represented the first instance of the wholesale application of the conventional rules of international law set up by a congress of European States to the African continent, but it also provided an opportune occasion for the most liberal interpretation of the principles enunciated at the Congress of Vienna already referred to above. Furthermore, one may also conclude from such a study that the evolution of the legal regime of international navigation on African watercourses during this period was one of paradoxical, retrogressive development: moving, by and large, from an absolute and liberal regime, on the eve of the territorial partition of the continent, to a narrower and more protectionist one after the definitive establishment of colonial footholds by the major European powers and, more particularly, following the hostilities of the First World War between some of these powers.

The question that might now be posed is: to what extent did the new post-independence legal regime ushered in by the Niamey Treaties represent a positive or, perhaps, a retrogressive development upon the pre-1963 position in relation to the regulation and management of the Niger watercourse system, in particular, and to the evolution of international fluvial law in Africa in general? It is this question which this essay proposes to examine.

To do so, it is necessary to analyze the central aspects of the Niamey accords so as to determine the international legal principles that they enunciate and to assess their import and content against the foundation provided by the earlier treaties of 1885, 1890 and 1919 as well as the relevant provisions of the Final Act of the Congress of Vienna itself. It is hoped that such an exercise will, in its limited scope, shed some light on the role played by some of the newly emergent African states in the continuing development of international fluvial law, in both its navigational and non-navigational aspects.

As a watercourse system that has, in theory at least, been the subject of an internationalized regime more or less continuously for over a century—longer than any other international watercourse on the African continent—the Niger quite easily commends itself to the type of study envisaged here. Attention will first and foremost be directed at an examination of those provisions relating to navigational use. For although, as has been argued elsewhere, the post-independence trend in international fluvial law among African States reveals a shift in emphasis away from navigational to non-navigational uses, navigation still remains a very important use and is recognized as such by the new riparian States. This is as true of the Niger as it is of those international watercourses which have also been placed under internationalized regimes. In fact, in the case of the Niger, it will be shown that the legal principles prescribed by

the Niamey Treaties are, for the most part, concerned more with navigational use than with those non-navigational uses that one might envisage in the coordinated, multilateral exploitation of such an international watercourse and its resources, such as agricultural and industrial utilization.

### NAVIGATIONAL USE

#### **Freedom of Navigation: Meaning of the Term Under the Niamey Treaties**

The navigation of the Niger, its tributaries and sub-tributaries is governed by Article 3 of the Act of 1963 and Articles 13 and 15 of the Agreement of 1964. The Act of Niamey maintains the dual character of the concept of navigation which had been embodied in Articles 13 and 26 of the General Act of Berlin and which was adopted in Article 5 of the Convention of St. Germain. The navigation of the Niger is intended to embrace both the nautical and commercial aspects. Here, the Act of Niamey makes reference to merchant vessels as well as those meant for the transportation or mere recreation of passengers. This provision states:

Navigation on the River Niger, its tributaries and sub-tributaries, shall be entirely free for merchant vessels and pleasure craft and for the transportation of goods and passengers. The ships and boats of all nations shall be treated in all respects on a basis of complete equality.<sup>5</sup>

This provision is of singular importance since it in fact attempts to define the principle of freedom of navigation itself. Such a clear definition is necessary because, as will be shown in this essay, the principle of freedom of navigation is one that has not always been clearly elucidated by scholars and other legal experts, nor indeed in the provisions of most treaties relating to this subject. Some of the pertinent questions that arise are: whether freedom of navigation means navigation *without* payment; or whether it entails freedom from regulation by the riparian State; and if not, what regulations are permissible? These questions will be examined a little later. For the moment, an important preliminary question relating to the provision in Article 3 is: what was intended by the expression "all nations?" Was the deliberate intention to open up the Niger to all States at large or must the expression be construed as really referring to all the *riparian* States? The issue is not as self-evident as it might seem for it has been concluded, for example, after an examination of various treaty arrangements that:

*[The] non-riparian beneficiaries of free navigation on a pluriteritorial watercourse are, as a rule, specified precisely, either by uni-*

---

5. See art. 3 of the Act of Niamey (cited in note 2).

*lateral acts of individual riparian States or in special conventions.* Consequently, a merchant vessel flying the flag of a State not belonging to those authorized to navigate on the river in question is not entitled to the exercise of shipping trade on that watercourse. It does not, however, necessarily follow that such a vessel would have to be denied passage or occasional carriage on the river in question. (Author's emphasis)<sup>6</sup>

Vitanyi's conclusion above tallies with the observations of a number of other leading scholars on the subject, and with the comment of the International Law Association on Article 13 of its Resolution adopted at the Helsinki Conference in 1966:

Although some have advocated the extension of the principle of freedom of navigation to non-riparian States, the present state of the applicable law has not gone that far. This is not to say that free navigation for all would not be desirable in a trade-oriented world.<sup>7</sup>

Indeed, it may be said that the trade-oriented participants at the conference of Berlin in 1885 did precisely this, namely opening up the Congo and Niger rivers to the navigation of all nations whether or not they were parties to the Act.

This liberal regulation was reversed by Article 5 of the Convention of St. Germain which granted the freedom of navigation only to the merchant vessels of the signatory States and States members of the League of Nations which adhered to it. The plenipotentiaries that gathered at Niamey must have been aware of the different implications of the 1885 and 1919 regimes, and by opting for the formula employed in the former treaty, they can only be presumed to have intended to grant the freedom of navigation on the Niger, its tributaries and sub-tributaries in the widest, most liberal sense. The expressions "all nations" or "nationals of all States" must therefore be construed as referring to signatory as well as non-signatory parties, riparian and non-riparian States.

It was remarked by an Assistant Under-Secretary of State in the British Foreign Office almost a century ago that the term 'freedom of navigation' "[seems] to be open to many interpretations, excepting, perhaps, that one which is popularly given to it."<sup>8</sup> This observation may be just as apt today for, as has just been pointed out above, the real meaning of the term has not always been properly explained by the majority of scholars

---

6. B. Vitanyi, *The International Regime of River Navigation*, 143 (1979).

7. International Law Association ("I.L.A."), Report of the Fifty-Second Conference Helsinki, Aug. 14-20, 1966, R. Baxter, *Helsinki Rules on the Uses of the Waters of International Rivers*, 507 (London 1967). See also A. Lederle, *Liberté des Voies de Communication*, 2 *Hague Recueil* 128, at 259-61 (1924); B. Winiarski, *Principes Généraux de Droit Fluvial International*, 45 *Hague Recueil* 79, at 159 (1933); R. Baxter, *The Law of International Waterways* 185-86 (1964).

8. F.O. Conf. Print 5970 (No. 124, 1890), Letter from Lister to Lord Salisbury (May 9, 1889).

in this area of international law. Most treaties and international Navigation Acts are rarely very specific upon this matter.

The question has already been posed above as to whether freedom of navigation means the right to navigate without payment or freedom from regulation by the riparian State. It is argued that to properly analyze the content and meaning of the principle of freedom of navigation granted by the Niamey accords, one must consider the interests of the grantee, on the one hand, and, on the other, the rights over the vessels of the grantee which the grantor State may exercise.

The first point to be borne in mind is that the creation of a regime of free navigation involves the removal of two categories of obstacles: on the one hand, the abolition of legal and administrative restrictions; and on the other hand, the removal of natural and technical impediments to navigation.

## Extent of the Rights Granted

### Freedom of Traffic

The Congress of Vienna of 1815 was, among other things, concerned with the abolition of the legal and administrative obstacles to the free movement of vessels which prevented boatmen from carrying out navigation along the whole course or on any section of an international river. This necessitated the abolition of the practice—which existed on some European rivers—of requiring boats to call at a given port and break bulk there or to transship their cargoes into vessels of local boatmen—rights which were commonly known as “*droits de relâche, d’échelle, d’étape ou de rompre charge*.”<sup>9</sup> Thus, Article 2 of Annex XVIC of the Final Act of Vienna stated:

The rights of forced call and transshipment on the Neckar and the Main are and shall continue abolished, and it shall be entirely free for all qualified boatmen to navigate along the whole extent of these rivers, in the same manner that such liberty has been established, by Article 19, on the Rhine.<sup>10</sup>

Practically all navigation treaties concluded after 1815 incorporated the idea expressed in the article just quoted above. For instance, the General Act of Berlin declared navigation on the Congo and Niger entirely free for merchant vessels, whether carrying cargo or ballast, for the transportation of both passengers and goods. This freedom was intended to apply both to direct navigation from the open sea to the inland ports of

---

9. Also known as “rights of forced call and transshipment.” The towns of Mainz and Cologne for example, indulged in this practice on the Rhine until its abolition in 1815.

10. The reference here is to Congress of Vienna, Final Act, June 9, 1815, art. 19 of Annex XVIB, 2 British Foreign and State Papers (“Brit. & For. State Papers”) at 52, which was concerned with the navigation of the Rhine.

the two rivers and vice-versa, and to carrying goods and passengers between ports situated on this river. Furthermore, navigation was not to be subject to any obligation of forced call or transshipment or that of breaking bulk (Articles 13, 14, 26 and 27). These provisions were consolidated in the relevant rules of the Peace Treaties of 1919–20 (Articles 321–326, 334 of the Treaty of Versailles; 284–289, 295 of the Treaty of St. Germain; 212–217, 223 of the Treaty of Neuilly; and 268–273 and 279 of the Treaty of Trianon),<sup>11</sup> as well as the Statute of Barcelona of 1921.<sup>12</sup>

The idea that freedom of traffic forms an essential element of the freedom of navigation was clearly accepted by the Permanent Court of International Justice [P.C.I.J.]. The Court observed, in the *European Commission of the Danube Case*, that the conception of navigation “includes, primarily and essentially, the conception of the movement of vessels with a view to the accomplishment of voyages.”<sup>13</sup> It was subsequently held in the *Oscar Chinn Case*: “According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels.”<sup>14</sup> The idea of freedom of traffic in the regime of free navigation established for the Niger is implicit in Article 3 of the Act of 1963 as cited above. So, although the formulation employed here is a clear departure from that of earlier European treaties, the obvious intent of the Niamey Treaties is that no legal or administrative obstacles may be put in the way of the free movement of merchant vessels and pleasure craft, whether for the transportation of goods or passengers.

### Entry into Ports and Freedom of Commerce

The concept of freedom of navigation means much more than the exercise of passing and repassing. It embraces the act of sailing itself, the right to call on the banks and to throw anchor, and the right to embark and disembark goods, passengers and members of crew.

That the freedom of navigation also means the “freedom to transport goods and passengers” is rather obvious and undeniable, as the Permanent

---

11. Treaty of Versailles, June 28, 1919, 112 Brit. & For. State Papers at 1. See also Legislative Texts and Treaty Provisions concerning the utilization of international rivers for other purposes than navigation, U.N. Leg. Ser., ST/LEG/SER.B/12 at 408.

Convention of St. Germain-en-Laye, Sept. 10, 1919, 8 League of Nations Treaty Series 25 (“L.N.T.S.”).

Treaty of Trianon, 12 N.R.G., at 423; also in Brit. & For. State Papers at 486.

12. Statute of Barcelona, Apr. 20, 1921, 7 L.N.T.S. at 35; 18 N.R.G., Ser. 3 at 709.

13. Jurisdiction of the European Commission of the Danube, 2 Permanent International Court of Justice (“P.C.I.J.”) (ser. B), Advisory Opinion No. 14, at 64, Between Galatz and Braila, Dec. 8, 1927, Vol. 3 (ser. A/B).

14. Oscar Chinn, United Kingdom and Belgium, Dec. 12, 1934, P.C.I.J., (ser. A/B) No. 63 at 83.



Court of International Justice indicated in one of the leading cases in this area, the *Oscar Chinn Case*.<sup>15</sup> But there is a second idea, less obvious, that it also implies access to, and free use of, ports and the freedom to engage in commerce. Again, in another important pronouncement, the Permanent Court of International Justice had stated that:

The freedom of navigation therefore covers not only shipping passing through a sector of the river corresponding to a port, but also shipping arriving in or leaving a port. [Freedom] of navigation is incomplete unless shipping can actually reach the ports under the same conditions.<sup>16</sup>

One may conclude that the Court regarded freedom of navigation as including "the freedom to enter ports, and to make use of plants and docks, to load and unload goods." None of these ideas has been expressly stipulated in the Niamey Treaties, nor is the idea of freedom of commerce. The majority of treaties on this subject do not in fact carry any express provisions in this respect. None of the post-independence African treaties have adopted the example of the General Act of Berlin in providing for a specific linkage between the freedom of navigation and the freedom of commerce. But this can be implied into the treaties, for, as the Court once again observed in the *Oscar Chinn* judgment:

According to the conception universally accepted, the freedom of navigation referred to by the Convention [of St. Germain] comprises freedom to enter ports, and to make use of plants and docks, to load and unload goods and to transport goods and passengers.

From this point of view, freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also . . .<sup>17</sup>

It is significant that even the dissenting judges did not dispute this view. Indeed, Judge Anzilotti acknowledged that it is in this sense that freedom of navigation has always been understood in international treaties concerned with the question.<sup>18</sup> A number of leading jurists and scholars—such as Guggenheim, Van Eysinga and Vitanyi—have also arrived at this conclusion. Guggenheim's view was that "freedom of navigation on international rivers, as it is understood in international conventions, includes freedom of trade."<sup>19</sup>

The freedom of fluvial commerce in this sense is implicit in the Bar-

---

15. Oscar Chinn, P.C.I.J. (ser. A/B) No. 63 (cited in note 14).

16. European Commission of the Danube, P.C.I.J. (ser. B.) No. 14 at 65 (cited in note 13).

17. Oscar Chinn, P.C.I.J. (ser. A/B) No. 63, at 83 (cited in note 14).

18. *Id.* at 111 (cited in note 14).

19. P. Guggenheim, *1 Traité de Droit International Public*, 415 (1953); see also B. Vitanyi at chs. 7-9 (cited in note 6).

celona Statute and also in the views of some learned bodies. The most significant of these is the I.L.A.'s Helsinki Rules of 1966 which, although in no sense binding, represent an important attempt to state the law in this area of international intercourse.<sup>20</sup> It is thus a valid conclusion that despite the absence of any express provisions in the Niamey Treaties, it may be assumed that the granting of freedom of navigation to the nationals and vessels of foreign States also implies the freedom to enter into the ports of the grantor State and to undertake commercial activity therein.

### Non-discrimination

It is now the established practice that freedom of navigation and equality of treatment must go together as complementary elements of each other. This stands to reason since to legislate for freedom of navigation without guaranteeing the non-discrimination between the vessels, merchandise and nationals of the different States would render the concept of freedom of navigation hollow. Accordingly, all modern navigation treaties have invariably stipulated that the vessels of all nations shall be treated on a footing of perfect equality; that taxes and duties payable by the vessels and goods shall in no way be discriminatory and that where any tolls are charged on roads, railways and canals constructed to avoid the non-navigable portions of a river, the nationals of the various States shall be treated on the basis of complete equality. For the Niger regime, all this is embodied in Article 3 of the Act of 1963 and Articles 13 and 14 of the Agreement of 1964. The notion of equality of treatment is based on the idea of the community of interests of the riparian States. For as the P.C.I.J. observed in the *International Commission of the Oder Case*:

This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privileges of any one riparian State in relation to the others.<sup>21</sup>

One permissible exception to the rule of non-discrimination is "cabotage." There are two types: "*petit cabotage*," which concerns the transportation of goods and passengers from port to port in the same State; and "*grand cabotage*," which refers to navigation from any two places on the same waterway. The essence of cabotage is that the riparians are permitted to reserve the carriage of persons and goods between the ports under their sovereignty to their nationals—thus occasioning a limitation

20. See in particular art. XIV, Report of the Fifty-Second Conference at 507 (cited in note 7).

21. Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, Judgement of Sept. 10, 1929, Ser. A, Vol. 3, No. 23. The parties were: Germany, Denmark, France, Great Britain, Sweden, Czechoslovakia, and Poland.

on the freedom of navigation on an international river. The first international treaty to have provided for this was the Additional Elbe Act of 1844, whose Article 3 stated:

Each State may reserve inland navigation on the Elbe to its own nationals, that is, the right to carry persons and goods from one Elbe port in its territory to another Elbe port within the same territory.<sup>22</sup>

Express provisions of this nature became standard practice in navigation treaties, but Article 5 of the Barcelona Statute provided rather the opposite. Article 5 allowed each State to reserve cabotage in the absence of any convention or obligation to the contrary. The Niamey Treaties are silent upon this matter. This is also the case with the other African treaties relating to this subject. The conclusion to be drawn here seems to be that the rule regarding cabotage has developed differently in Africa from the European practice. In Europe, in the absence of a special treaty provision expressly authorizing riparians to reserve local transport, the freedom of all the parties accorded the right of navigation to undertake such transport applies as a general rule.<sup>23</sup> In Africa, on the contrary, the reservation of cabotage may be generally assumed and is, in fact, generally accepted.

### Exemption from Dues and Tolls

We now revert to the question posed at the beginning of this study, namely: whether freedom of navigation implies navigation without payment of any kind. Traditionally one can distinguish three types of charges. First, those tolls and transit dues—which were also known as “*droits de péage, de transit, de reconnaissance*,”<sup>24</sup>—charged by the territorial sovereign for the use of the river, for the sole fact of navigation, as seigniorial rights. Secondly, there are dues charged on goods carried on vessels navigating the waterway in the form of customs duties. And, finally, there are those charges levied upon shipping for the purpose of advancing navigation upon the river, that is, as reimbursement for services actually rendered to vessels, or for the improvement and maintenance of navigability.

The first type of tolls were first brought into question by the ideology of the French Revolution, which advocated the gratuitous use of inland

---

22. Additional Elbe Act, Apr. 13, 1844. The parties were: Austria, Prussia, Saxony, Hanover, Denmark, the Grand Duchy of Mecklenburg-Schwerin, the duchies of Anhalt-Coethen, Anhalt-Dessau, and Anhalt-Bernbourg, and the free Hansa cities of Hamburg and Lubeck. 6 N.R.G. at 386.

23. See B. Vitanyi at 287 (cited in note 6).

24. Or, “toll, transit and service dues.” The “service” dues were those paid in acknowledgment of services rendered, as a mark of gratitude. L. A. Teclaff, *The River Basin in History and Law* at 56-58 (1967).

waterways and roads.<sup>25</sup> Equally, the free-trade ideas of the mid-nineteenth century envisaged the complete abolition of such seigniorial duties. As Winiarski rightly pointed out: "*Vers le milieu du XIX<sup>e</sup> siècle furent supprimés définitivement les péages.*"<sup>26</sup> Thus, practically all the major treaties of navigation and commerce concluded during this period and thereafter included more or less standard provisions relating to the abolition of all tolls and dues except for those levied so as to cover the expenses incurred in the process of maintaining or improving navigability. A good example is afforded by the General Act of Berlin of 1885 which provided, in part:

No maritime or river toll shall be levied based on the sole fact of navigation, nor any tax on goods on board of ships. There shall only be collected taxes or duties which shall be equivalent for services rendered to navigation itself.<sup>27</sup>

Article 14 of the same treaty (relating to the Congo river) had gone even further, enumerating the taxes and duties envisaged in this respect as follows:

- (a) Harbour dues on certain local installations, such as wharves, warehouses and so on, if actually used;
- (b) Pilotage dues;
- (c) Charges raised to cover technical and administrative expenses incurred in the general interest of navigation, including light-house, beacon and buoy duties.

The enumeration was subsequently adopted in the International Law Institute's important Resolution of 1887 and, even more significantly, in the Barcelona Statute, among other international agreements.<sup>28</sup>

The Niamey Treaties have incorporated this principle, although not in exactly the same terms as the relevant provisions of the General Act of Berlin cited above. Originally it had been proposed that the wording in Article 6 of the Convention of St. Germain be followed in this respect.

---

25. For instance, at the Congress of Rastatt of 1798, held to restore peace between France and the German Empire, France demanded the total abolition of all navigation tolls on the Rhine. France's proposal alluded only to the section between Switzerland and Holland, which formed the frontier between France and the German Empire in those days.

Id.

26. B. Winiarski at 189 (cited in note 7).

27. See General Act of the Berlin Conference, Feb. 26, 1885, art. 27, 76 Brit. & For. State Papers at 4.

28. Treaty provisions in this regard prior to the Statute of Barcelona see, e.g., art. 20, of the Peace Treaty of Tilsit of 1807, 2 Brit. & For. State Papers at 126; See also, various provisions of the Act of Mainz of 1831, 9 N.R.G. at 252, art. 111 of the Final Act of Vienna, (cited in note 10), 2 Brit. & For. State Papers at 52, Martens Nouveau Recueil; art. 18 of the Treaty of 1842, Belgium and Netherlands, 3 N.R.G. at 613, Martens Nouveau Recueil; arts. 19-21 of the Act of Navigation of the Danube of 1857, 16 N.R.G. part 2 at 75, Martens Nouveau Recueil; the Peace Treaty of Guadalupe-Hidalgo of 1848, Feb. 2, 1848, United States and Mexico, 14 N.R.G. at 7 (esp. art. 7), Martens Nouveau Recueil.

Consequently, Article 7 of the draft statute for the Niger had provided as follows:

No tolls, either maritime or fluvial, shall be levied on the sole fact of navigation, nor any duty on the goods on board vessels. Only such taxes or duties may be levied as have the character of a *quid pro quo* for services rendered. The rate of these taxes and duties shall not imply any differential treatment.<sup>29</sup>

But this proposed provision was never incorporated into either the Niamey Act of October 26, 1963 nor the Agreement of November 25, 1964 (although in his otherwise excellent work, Vitanyi wrongly cites this as an existing Article 7 of the Act of 1963).<sup>30</sup> Instead, the Niger riparian States opted for the following formulation, which appears in the Agreement of 1964:

The taxes and duties payable by the vessels and goods using the River, its tributaries and sub-tributaries, and facilities thereof, shall be in proportion to the services rendered to navigation and shall in no way be discriminatory.<sup>31</sup>

In addition, Article 14 provides that on the roads, railways and lateral canals constructed for the purpose of avoiding non-navigable sections of the river, only such tolls shall be collected as are calculated on the cost of construction, maintenance and management.

Two things may be noted here. First, unlike the General Act of Berlin, the Niamey Treaties make no attempt to define or enumerate the various taxes and duties envisaged on the Niger. This is not unusual as such for the enumeration in Article 14 of the Berlin Act itself was not a practice that was invariably followed in every treaty concluded after 1885. On the other hand, however, the provision in Article 13 of the Agreement of Niamey is not at all clear on the question of customs duties on goods on board the vessels.

A distinction needs to be drawn between goods which are imported into the riparian State in question and goods which are not destined for

---

29. The conclusion of the Niamey Treaties had been preceded by two conferences. The first conference, held in Niamey, Feb. 15-18, 1963, adopted a Draft Treaty consisting of a convention of 10 articles and an accompanying statute of 18 articles. This Draft Treaty was considered at the second conference, also held in Niamey, from Oct. 24-26, 1963 alongside a Draft Convention which had in the meantime been submitted by Mali. It was these subsequent deliberations which led to the conclusion of the Act of Oct. 26, 1963. Schreiber, *Vers un Nouveau Regime International du Fleuve Niger*, 9 Ann. Francais de Droit Int'l 887 (1963). Statute of Niamey, Feb. 18, 1963, text in Schreiber, *Vers un Nouveau Regime International du Fleuve Niger*, 9 Ann. Francais de Droit Int'l 885, at 886 (1963); see also 587 U.N.T.S. at 11.

30. In fact, art. 7 of the Act of Niamey of 1963 is concerned with the settlement of disputes between the riparian states regarding the interpretation or application of the Act itself.

31. Agreement of Niamey of 1964, art. 13., 587 U.N.T.S. at 11.

the riparian State but are only in transit to another State. The rule is that the levying of customs or other dues is not to be allowed on the second category of goods, whereas the imposition of customs charges on goods destined for the riparian State is not regarded as a denial or an infringement of the freedom of navigation, so long as they are not charged on a discriminatory basis (for instance, depending on the origin or destination of the goods). In this regard, it may be pointed out that in determining this question guidance may usefully be sought in the provision of Article 1 of the Barcelona Statute which defines "transit" as taking place when passage across a State's territory with or without transshipment, warehousing, breaking bulk or change in the mode of transport is only a portion of the complete journey which begins and ends beyond the frontier of the State in whose territory passage takes place.<sup>32</sup>

### **Types of Vessels: Warships**

As has been seen above, Article 3 of the Act of Niamey provides for three types of vessels, namely: merchant vessels, pleasure craft and transport fleet, whether for goods or passengers. The most striking feature of this provision is the absence of any stipulation regarding war vessels. An examination of the earlier European navigation treaties would appear to suggest that in the absence of specific treaty provisions a right of access with respect to warships cannot be presumed. Thus the position is that unless warships are expressly mentioned as sharing the right, they are not to be included. The General Act of Berlin legislated differently for the Congo and the Niger in this respect. Article 22 expressly granted the warships of the signatory States the right to navigate the former, but there was no corresponding stipulation for the latter. The Convention of St. Germain did not change this position. Although the wording of Article 5(2), "vessels of all types" (*bateaux de toute nature*), might have been thought to include war-vessels, such interpretation is precluded by the wording of the first paragraph of the same Article: navigation [of the Niger] was to be free for commercial vessels and for the transportation of goods and passengers.

In the absence of specific provisions, might similar presumptions be made in respect of the Niamey accords? What would the legal position be if, for instance, one riparian State called for military assistance from another State, but this involved some military vessels navigating through that portion of the river lying within the territory of a third State?

This question cannot be dismissed as of little or no practical significance. It is the view here that the navigation of the Niger is not open to military vessels. As a matter of legal interpretation, where a treaty opens

---

32. See note 12.

up an international waterway for the purposes of commerce, passage by warships is excluded. For it would seem that if the general content of the "freedom of navigation" is construed as implying the "freedom of commerce," then inclusion of military vessels would be inconsistent.

Finally there remains the question of non-military vessels which are neither commercial vessels nor pleasure craft nor those intended for transportation. Neither the General Act of Berlin nor the Convention of St. Germain carried any stipulation in this regard. However, it may be noted that Article 17 of the Barcelona Statute (1921) and Article 19 of the Helsinki Rules, already referred to above, state that the rules on navigation: "[Are] not applicable to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any other form of public authority."<sup>33</sup> As the comment on the latter article states, this is so because "the principal purpose of freedom of navigation is to facilitate commerce."<sup>34</sup> The Niamey Treaties contain no provisions bearing on this issue. Perhaps much would depend on the circumstances of each particular case. For example, it cannot be supposed that vessels charged with a humanitarian, scientific or educational mission would be denied permission to navigate the Niger, its tributaries and sub-tributaries, in spite of the absence of a specific stipulation in Article 3 of the Act or Articles 13 to 15 of the Agreement.

### **Territorial Scope of the Freedom of Navigation**

It is not enough to define what is meant by "freedom of navigation." It is also necessary to determine, in each case, the territorial extent of the application of the principle.

**Tributaries and Sub-tributaries.** Treaty practice since the Congress of Vienna in 1815 regarding the incorporation of tributaries and sub-tributaries into the navigational and legal regime of an international river has not been uniform. The principle adopted in the Final Act of Vienna (in Article-10) was that of extending the freedom of navigation only to such affluents as are themselves international; that is, only those tributaries and sub-tributaries traversing or separating two or more States. This position was generally followed in subsequent European treaties, the major exceptions being the Convention on the Navigation of the Po of 1849<sup>35</sup> and the Austrian-Bavarian Treaty of 1851.<sup>36</sup> The former extended the free navigation of the Po "to affluents from the point where each of

---

33. See Helsinki Rules on the Uses of Waters of International Rivers, art. 19 in I.L.A., Report of 52nd Conference, 510 (1966).

34. Id.

35. Convention on the Navigation of the Po of 1849.

36. Austrian-Bavarian Treaty of 1851.

them becomes navigable, regardless of whether they are shared by different States or pass through the territory of only one State.”<sup>37</sup> The latter, which related to navigation on the upper and middle courses of the Danube, provided as follows:

Navigation on the Danube and its affluents, shall be free to the ships of all nations from points where the river and its affluents become navigable through the whole territory of the Contracting States.<sup>38</sup>

No specific mention was made in this treaty regarding the legal status of those affluents which were exclusively located in the territory of only one state.

The General Act of Berlin of 1885 incorporated this principle by providing as follows:

The affluents of the Niger shall be in all respects subject to the same rules as the river of which they are tributaries.<sup>39</sup>

Article 5 of the Convention of St. Germain went even further, incorporating not only the tributaries and sub-tributaries of the Niger, but also those rivers, their tributaries and sub-tributaries, and all the lakes situated in the entire hydrological basin of the Niger river. The first Niamey conference took up this issue and, in the preliminary discussions, it was suggested that the freedom of navigation should apply to the river, its affluents, sub-affluents and all the streams, and their mouths and outlets as well as the lakes situated in these States. This is what may be termed the “hydrological basin approach” to river basin regulation and management and, in the case of the Niger, includes Lake Chad and its basin and the coastal drainage area—indeed, the greater part of the West African sub-region.

This formula was abandoned at the second conference, the limitation being to “the river, its tributaries and sub-tributaries.” This change of formula is quite apparent from a comparison of the provisions of Articles 6, 8 and 10 of the draft treaty drawn up at the first Niamey conference and Articles 2 and 3, *inter alia*, of the Act of Niamey. In practical terms this limitation was just as well, because from the point of view of navigability only one of the Niger’s numerous tributaries, the Benue, is of any consequence. What should also be noted here is that the Niamey Treaties do not require such tributaries (or sub-tributaries) themselves to be international. This should be contrasted, for example, with the position adopted by the Final Act of Vienna of 1815, referred to above.

---

37. 38 Brit. & For. State Papers at 130.

38. Full text of treaty in 16 N.R.G. at 63.

39. See General Act of Berlin, art. 28; see also art. 15 of the same treaty relating to the Congo (cited in note 4).



**Roads, Railways and Lateral Canals.** The General Act of Berlin is generally regarded as having introduced into international law the practice of assimilating to the river regime all such canals, roads and railways constructed with the purpose of avoiding the non-navigable parts of the river. But this assertion may be qualified by the observation that it is only true to the extent that even at that time what was considered as international law was still largely, if not exclusively, the body of principles and rules which regulated the legal relations between nations of the European Christendom. For it should be noted here that there was at least one treaty outside Europe which had earlier alluded to this idea. In the Peace Treaty of Guadalupe Hidalgo of 1848 between the United States and Mexico there was a provision to the effect that:

If it should be ascertained to be practicable and advantageous to construct a road, canal or railway, which should in whole or in part run upon its right or its left bank [it may] serve equally for the use and advantage of both countries.<sup>40</sup>

The import of this provision was undoubtedly to extend the freedom of navigation to the road, canal or railway in question. At any rate, the issue was adopted at the Niamey conferences and Article 8 of the draft treaty contained a provision in this regard. This provision now appears in Article 14 of the Agreement of 1964:

The roads, railways and lateral canals that may be constructed for the special purpose of avoiding the non-navigable portion of the River or of improving certain sections of the waterways, shall be considered in their use as means of communication an integral part of the River Niger, and shall be equally open to international traffic within the framework of specific regulations set up by the Commission and approved by the riparian States.

On these roads, railways and canals only such tolls shall be collected as are calculated on the cost of construction, maintenance and management. As regards such tolls, the nationals of all States shall be treated on the basis of complete equality.

The relevance of this provision in the treaty cannot be doubted. The Niger has a number of major rapids along its course, notably the Bamako rapids (some sixty miles between Bamako and Koulikoro). There are also rapids downstream around Ansongo (the Labezzenga rapids) and also between Say (in Niger) and Boussa (in Nigeria). No lateral canals have been constructed, apart from the one at Markala which is intended to circumvent the Markala-Sansanding barrage in Mali, but the legal basis for such

---

40. See art. 2. Full text of treaty in 14 N.R.G. at 7.

possibilities exists. On the other hand, road and rail links do exist in the non-navigable sections of the Niger. In particular, a rail track between Bamako and Koulikoro has been constructed. The navigation of the upper section of the Niger is also supplemented by a railway, a 165-mile section from Siguiri to Bamako, which in fact extends the Bamako-Dakar rail system and thus, in effect, connects the Niger and Senegal river systems.

## **The Rights of the State in Whose Waters Free Navigation Is Granted**

### **Sovereignty**

Article 2 of the draft statute concluded at the first Niamey conference expressly referred to the respective sovereign rights of the riparian States.<sup>41</sup> In this, the new States were only following the established practice in international law, namely that even when the freedom of navigation is granted to the vessels and nationals of another State, the riparian State concerned (the grantor State) still retains sovereignty over that part of the waterway lying within its territory. This is not disputed, even by those who view the granting of the right of free navigation as the creation of an international servitude, and remains the case whether or not it is expressly so stated in the treaty or treaties concerned. Thus, Article 28 of the 1887 Resolution of the International Law Institute, to which reference has already been made above, made this general provision:

Every riparian State preserves its sovereign rights to those parts of the international rivers which are subject to its sovereignty within the limits established by the provisions of this regulation and the treaties or conventions.<sup>42</sup>

This view was upheld by the P.C.I.J. in the Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube* when it was stated:

Rumania exercises power as territorial sovereign over the maritime Danube in all respects not incompatible with the powers possessed by the European Commission . . .<sup>43</sup>

The issue was more aptly expressed in a more recent remark, relating to Articles 108–116 of the Final Act of the Vienna Congress, 1815, by a rapporteur of the International Law Association:

41. For full text of draft statute, see Report of First Niamey Conf., 2 (1963); Jurisdiction of the European Commission of the Danube Between Galatz and Braila, Advisory Opinion of Dec. 8, 1927.

42. Inst. de Droit Int'l, Report and Research of Conference (1887); see also Annuaire de l'Inst. (Supp. 1887).

43. P.C.I.J. (ser. B) No. 14, at 64; see also note 29.

It must be borne in mind that, in signing the Treaty, the signatory States intended to create conventional law and not to limit the complete sovereignty of each riparian State over portions of an international river within its territory, for conventional freedom of navigation had long been considered largely as an exception to the general rule of absolute sovereignty . . .<sup>44</sup>

Accordingly, the first paragraph of Article 2 of the Act of Niamey provides as follows:

The utilization of the River Niger, its tributaries and sub-tributaries, is open to each riparian State in respect of the portion of the River Niger basin lying in its territory and *without prejudice to its sovereign rights* in accordance with the principles defined in the present Act and in the manner that may be set forth in subsequent special agreements . . . (Emphasis added).

The legal position still remains the same even where there is no specific reference to "sovereignty" in the treaty itself. In all such cases, the sovereignty reserved to the riparian State is limited only to the extent that the exercise of such sovereignty must not be inconsistent with the terms of the treaty or, indeed, with the very notion of freedom of navigation.

### Legislation

The logical implication of the retention by the riparian States of their sovereignty over those portions of the river within their territories is that vessels and nationals navigating those waters are subject to the riparian State's laws and regulations. So, quite clearly, the granting of freedom of navigation does not imply freedom from regulation by the riparian State. But what regulations are permissible?

The areas in which States may commonly be expected to pass legislation, insofar as concerns the issue of freedom of navigation, are: matters relating to public order and general security, customs and fiscal regimes, sanitary and veterinary regulations and, of course, rules relating to navigation itself where there is no existing riparian organization entrusted with the promulgation of such rules.

That the maintenance of public order and security over that section of the international waterway lying within the territory of a given State should be both the right and duty of that State is an obvious consequence of the attribution of sovereignty over the section in question to that State. Consequently, it may be said that all acts of shipping companies (boatmen) and passengers performed on board vessels, as well as the legal status

---

44. Int'l Law Assoc. Conf. Report 441 (1962).

of transported goods, are governed by the laws in force in the respective riparian States. It only needs to be re-emphasized here that the cardinal condition for the application of the legislative and administrative provisions of the riparian State is that such provisions must not restrict without good cause the free exercise of navigation.

Most of the navigation treaties since the conclusion of the Final Act of Vienna in 1815, such as the Statute of Barcelona (Article 6), the Statute of the Danube of 1921 (Article 25) and the Elbe Navigation Act of 1922 (Article 38), provide that the riparian States shall enact measures necessary for policing the territory and the river, laws and regulations relating to customs, public health, animal and plant diseases, the import and export of prohibited goods and so on. The Niamey Treaties are remarkable for the lacunae they contain in this respect. Earlier, the draft statute had stipulated that:

Chacun des Etats riverains conserve les prérogatives dont il jouit actuellement, d'édicter des dispositions et de prendre les mesures nécessaires à la police générale du Territoire et à l'application des lois et règlements concernant les douanes, la santé publique, les lois de police et de sûreté . . .<sup>45</sup>

The draft article proceeded to enter the proviso that these laws and regulations should not impede the equitable utilization of the river and should be applied on a footing of perfect equality to the nationals, goods and vessels of all States, a more or less standard proviso in the majority of treaties concluded since the turn of the century. It is not clear from the proceedings of the second Niamey conference why the High Contracting Parties decided to dispense with the draft provision. A possible explanation might be that having secured in Article 2 of the Act, the retention of their sovereign rights over those portions of the river within their territories, the riparian States took the view that their right to pass the necessary legislation, whether or not in matters of direct interest to the navigation of the river, would automatically follow from this affirmation. Hence, there was no need for an express provision in this regard. There is nothing inherently wrong with this view, but it may still be noted that the absence of any specific provisions spelling out the riparian States' rights regarding matters of river or shipping police, customs, health, public security, and so on, in the Niamey Treaties does represent a departure from the recent practice of States in this area of international law.

On the other hand, it may be noted that with regard to the promulgation of navigation rules, the international organization established by the ri-

---

45. "Each riparian State shall continue to exercise its existing right to pass legislation and to adopt any measures necessary for the general policing of its territory and the application of laws and regulations concerning customs, public health, police and security." (Free translation by author.)

parian States has been accorded express powers by Article 2(e) ("to draw up General Regulations regarding all forms of navigation on the River") and Article 15 of the Agreement of 1964. The latter provides:

The River Niger Commission shall establish general regulations to ensure the safety and control of navigation on the understanding that such regulations shall be designed to facilitate, as much as possible, the movement of vessels and boats.

What is the legal import of these provisions and how is one to reconcile the Commission's regulations with those of the riparian States in the event of there being a conflict or an inconsistency between them? A brief examination of the legislative and executive powers of the Commission is necessary here.

Articles 2 and 15 of the Agreement give the Commission general powers to legislate for the navigation of the river, its affluents and sub-affluents. So, the Commission is empowered to formulate regulations not only for the navigation, but also in respect of river police, pilotage, sanitary measures and other such matters. Two limitations on the Commission's *jus edicendi* can be discerned from the provisions of the Niamey accords. These regulations, (i) must not be in conflict with the principles enshrined in the Act of Niamey, and (ii) must be such as will facilitate navigation to the greatest extent possible.<sup>46</sup>

But it should be recalled here that as the Permanent Court of International Justice held in its Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube*, and as Article 2 of the Act of Niamey reaffirms, even when freedom of navigation is granted to other States, the riparian State concerned is regarded as retaining sovereignty over those sections of the river lying within its territory.<sup>47</sup> And, as was argued above, the logical implication of this is that the vessels and nationals navigating those sections of the river are subject to the riparian State's laws and regulations.

The position, then, is that on the one hand the riparian organization may have been accorded legislative powers in virtue of the provisions of a treaty; on the other hand, the riparian States possess a similar *jus edicendi* naturally arising from their very nature as independent sovereign State entities. The limitation in either case is, of course, that any laws and regulations so enacted or promulgated must not be inconsistent with the principle of freedom of navigation and the equality of the States

---

46. See, e.g., art. 15 of the Agreement, which states:

The River Niger Commission shall establish general regulations to ensure the safety and control of navigation on the understanding that such regulations shall be designed to facilitate, as much as possible, the movement of vessels and boats.

47. P.C.I.J. (ser. B) No. 14, at 11-12, 38-41.

concerned in their utilization of the international watercourse in question. This is the case with the Niger regime. But, as was asked above, how is one to reconcile the Commission's regulations with those of the riparian States?

It is one of the defects of the Niamey accords that they do not address themselves to this possibility: there is no mechanism for reconciling such a conflict. However, it is the view here that in such a situation, the right of the States to pass legislation and regulations in respect of the same subject-matter (navigation, customs or river police rules, among others) must override that of the Commission. It is of course the case that integrated, multilateral river/lake basin management is based on the twin concepts of limited territorial sovereignty and community of interest. But this does not imply a total abandonment by a State of its sovereignty and its consequent right to pass necessary legislation over those sections of the river within its territory. The practice of African States over the two decades of their post-independence existence points to their obvious unwillingness to surrender their sovereignty, whether wholly or in part, to international organizations. It is true that two of the signatories to the Niamey Treaties did provide for this possibility in their constitutions.

The Constitution of Mali (1960) provided:

The Republic may conclude with African States agreements of association or community, comprising a partial or total abandonment of sovereignty in order to realise African unity.<sup>48</sup>

This provision was identical to that of Article 34 of the Constitution of Guinea (1958). As constitutional provisions—and not merely hortatory preambular statements on African unity—it cannot be doubted that they were clearly intended to produce positive legal results. But apart from the abortive attempts to establish a Ghana-Guinea-Mali Union, these provisions have never been put into effect. Indeed, in the case of Mali (as also of Ghana), the constitutions themselves have long been suspended or abrogated by successive military regimes. None of the other members of the Commission have ever made similar undertakings in their constitutions, nor is there evidence of any deliberate intention to divest themselves of their legislative powers in the Niamey Treaties or in the *travaux préparatoires* of the conferences leading up to the conclusion of these accords. The correct interpretation, therefore, is that the Commission's regulations could only complement those of the riparian States (where they existed) but could not override them in the event of a conflict between them. Any inconsistent Commission regulation could thus be declared invalid provided, of course, that the riparian State's own regulations do

---

48. Constitution of Mali, art. 48 (1960).

not themselves fundamentally contradict the underlying spirit of freedom of navigation and equality of States.

To date, there has not been any actual instance of a fundamental conflict between the Commission and any of the individual riparian States in this respect. This is due to the practice of prior consultation that exists between the organization and the States. One major difference between the Rhine and Danube Commissions and the Niger Commission is that in the case of the former, the riparian or member States were expected to see to it that the Commission's regulations were carried out; but in the case of the Niger, the Commission is its own executive authority and ensures that its regulations are followed.

### AGRICULTURAL AND INDUSTRIAL UTILIZATION

For most riparian communities, the utilization of rivers for domestic and agricultural purposes long preceded that of navigation. Indeed it may be said that it was only when the need for trading contacts with other riparian communities arose that the importance of navigation came to the fore and at once assumed a somewhat pre-eminent position over other uses. It was the pre-eminence of this use which necessitated the conclusion of the early multilateral conventions for the major international rivers in Europe, starting with the Treaty of Munster of 1648 relating to the Scheldt.<sup>49</sup>

The first international treaties concerning African rivers, in line with European practice, also exclusively dealt with matters of navigation. But among these pre-independence treaties, there was one notable exception: the Nile Waters Agreement of 1929 (between the United Kingdom and Egypt)<sup>50</sup> was not so much concerned with navigational uses as with Egypt's irrigational needs. In fact, the utilization of the Nile for navigation was not stipulated in that treaty.

The post-independence regulation of international watercourses in Africa shows an unmistakable shift in emphasis away from navigational aspects towards a wider range of non-navigational uses. Thus, while still containing specific provisions relating to the navigation of such international watercourses as the Niger and Senegal rivers and Lake Chad, the Niamey conventions as well as the various treaties relating to the Senegal river and Lake Chad basins no longer regard navigation as an exclusive use of these watercourses. This change from what may be termed a single-purpose "use-oriented" to a multi-purpose "resource-oriented" approach has in fact rendered navigation only a subsidiary aspect of integrated river lake basin management as far as the new riparian

---

49. A. Dumont, *Corps Universel Diplomatiques du Droit des Gens*, Vol. VI, 1726-1731, 249 (1731).

50. 160 Brit. & For. State Papers at 106.

States in Africa are concerned. The greater emphasis is now placed on the economic exploitation of these waters. Of course it needs to be reiterated here that such uses as irrigation, fishing, hydropower production, timber-floating and so on, did feature alongside navigation even in the case of the major European rivers. But as has been indicated above, these other uses did not in themselves occasion the elaboration of international treaties among the European riparian States, nor were they accorded the same importance as is attached to them today.<sup>51</sup>

The increase in consumptive water uses and the shift in emphasis to economic exploitation of international watercourses as evidenced in the recent African treaties is in part due to the ever-growing number of water intensive industries. In this respect "economic exploitation" is defined only in the widest possible terms, thus leaving the parties much latitude for independent action. Thus Article 2 of the Act of Niamey states that the utilization of the Niger "shall be taken in a wide sense to [refer to] agricultural and industrial uses and collection of the products of its fauna and flora." Similarly, Chapter Two of the Agreement of 1964 is entitled "Agricultural and Industrial Utilization and Development," but the provision of Article 12—the only article of which the chapter is constituted—does not define the categories of these agricultural and industrial uses. Some oblique guidance might be said to lie in the fourth paragraph of the preamble to the Act which alludes to "plans for hydraulic developments such as irrigation, water supply, hydro-electric installations, civil works, soil and river basin improvement [and] exploitation of fishery resources."<sup>52</sup>

The categories of economic exploitation cannot, of course, be exhaustively enumerated, nor can they be closed. Every stage of technological advancement is likely to open up new uses of water resources. Some of the more obvious and common uses are: domestic and sanitary (washing, cooking, bathing); industrial and commercial (manufacturing, mining, and so on); agricultural and pastoral (irrigation, afforestation, drainage, stock-breeding); fishing (for both subsistence and commercial purposes); and sport and leisure (the tourist industry). There are, in addition, such uses as hydroelectric production and the ancient timber-floating industry.

---

51. The major exception in this regard was the Geneva Convention of 1923 on the Development of Hydro-Electric Power Affecting More Than One State, Dec. 9, 1923, art. 5, 36 L.N.T.S. 83.

52. The full text of this preambular provision (para. 4) reads:

CONSIDERING that, in the wake of technical progress, several of the riparian states have already drawn up plans for hydraulic developments such as irrigation, water supply, hydro-electric installations, civil works, soil and river basin improvement, and also plans for dealing with the problems of water pollution, exploitation of fishery resources, the improvement of agricultural practices and industrial development of the basin.



An appreciation of the nature of the industrial and agricultural exploitation envisaged under the Niamey treaties can best be achieved by an examination of some of the economic programs which have been undertaken by the riparian States over the last two decades. The aim in such an exercise would not be to catalogue each and every individual development project, but rather to select the major ones that may help illustrate the magnitude of the multilateral co-operation and regulation involved. This would also demonstrate the extent of the shift away from navigation to non-navigational uses by the new African States. Considerations of space and the declared scope of the present paper would not, however, permit such an exhaustive examination of these programs. For the moment, suffice it to note that the envisaged industrial and economic projects in the Niger basin have embraced such divergent activities as dam construction and mineral production, on the one hand, to fishing and hydrological forecasting facilities, on the other. Although, right from the start, the riparian States have placed emphasis on the need to improve the navigability of the Niger, it is quite clear that even greater emphasis has been placed on the non-navigational aspects of the utilization of the river. For instance, at a meeting of six of the riparians (Benin, Ivory Coast, Mali, Niger, Nigeria, and Bourkina Fasso) in Lagos, Nigeria, on February 8, 1967 particular attention was given to plans for the fishing industry on the Niger. It was agreed that the United Nations, in conjunction with two Nigerian universities, was to spend nearly half a million pounds on a fisheries institute.<sup>53</sup> Five years later, at its sixth session, the Niger River Commission laid down plans for the following possible projects: mineral production of manganese in Bourkina Fasso, limestone in Nigeria and Benin, uranium in Niger and iron in Benin; and the pumping of underground water reserves and irrigation so as to develop food crops and expand stock breeding over thousands of hectares in the river basin.<sup>54</sup>

The emphasis placed on the economic and industrial exploitation of the Niger is partly reflected in the magnitude of the investment funds committed to the various projects and the involvement of such varied bodies as the Economic Commission for Africa, the United Nations Environmental Programme, the World Bank, Canadian International Development Agency, French Aid and Cooperation Fund, the World Health Organization and the World Meteorological Organization, among others. All these bodies, for instance, took part in a donors' conference held in Paris from September 6 to 9, 1976 at which a five-year program of action was approved. Intended to improve the navigability of the river and boost industrial activity, the program was expected to cost 25.5 million dollars.

---

53. 4 Africa Res. Bull. 669 (1967).

54. 8 Africa Res. Bull. 2008 (1971).

Quite correctly, then, it was repeatedly observed at the extraordinary summit of the Heads of State and Government (of the riparians) on January 26, 1979 in the Nigerian capital, Lagos, that the economic development of the member States (of the Niger River Commission) depends, to a crucial extent, on the development of their river basin. Above all, economic development depends on the multilateral and integrated development of the Niger basin.<sup>55</sup>

The industrial utilization of the Niger will obviously occasion technical problems which equally require multilateral solutions. Pre-eminent among these is the problem of pollution. In order to avoid, or at least minimize, this problem, Article 2 of the Agreement urges the riparian States to inform the Niger Commission of all projects in their initial phases, while Article 12 engages them not to embark upon any work that may pollute the waters or modify the biological characteristics of its fauna and flora without adequate prior consultation with the Commission. The strict prohibition of pollution here is thus primarily intended to safeguard the fishing, agricultural and pastoral industries—a significant provision considering that the riparian communities in the Niger basin are largely agricultural and pastoral. Accordingly, it would appear from a perusal of the Niamey instruments that the prevention of pollution was to be regarded as being of prime importance even at the expense of relegating—indeed prohibiting—other uses if they are likely to cause such pollution. But what was envisaged here was preventive rather than corrective action. So, no obligation is placed upon the riparian States to eradicate existing pollution. This may be an indication of the recognition of the practical (and indeed financial) difficulties that would entail such an exercise, desirable though it might be.

## CONCLUSION

International fluvial law is the one branch of law to whose development the new West African States riparian to the Niger have had the opportunity to contribute as active participants. In the two decades which have elapsed since the first treaty regarding the regulation of an international water-course was concluded in post-colonial West Africa, several other treaties of this nature have been concluded by a significant number of other States. These treaties have, on the one hand, merely reaffirmed certain established concepts of customary international law, such as the principles of freedom of navigation, equitable utilization, prior consultation, pollution control and so on. But, on the other hand, some of the legal concepts adopted by these African States are unique to these treaties and do not simply

---

55. 16 Africa Res. Bull. 4981 (1979).

echo concepts embodied in the earlier European treaties. The assimilation of roads, railways and lateral canals to the international regime of river navigation, the extension of the beneficiaries of the freedom of navigation to include non-riparian States, and the regulation of cabotage are only some of the examples. What is of undoubted significance to the international lawyer here is that these legal concepts have not only been incorporated into the treaties which have been the immediate focus of this work, the Niamey Treaties, but they are also to be found in the international fluvial conventions concluded by other States elsewhere in post-colonial Africa. In particular, one discerns in all these treaties two underlying principles, namely: (a) that each co-riparian or co-basin State is entitled to an equitable and reasonable use of the waters and resources of a common watercourse; and (b) that these States must regard the drainage basin as one whole, or as an integrated unit, and must thus coordinate their efforts in the management and development of the water resources through the creation of riparian organizations.

International fluvial law today finds itself in a continuing state of evolution. This is only to be expected, for any new and varied uses for which the waters of international watercourses are employed inevitably necessitate the formulation of new rules of international law in this area. The codification work currently being undertaken by the International Law Commission in this regard,<sup>56</sup> and the continued search by riparian and basin States in different parts of the world for commonly acceptable legal formulae in their regulation of common international watercourses are evidence of this continuing process of development.

The practice of some of the West African States examined in this study offers a peculiar and distinct contribution to this evolutionary process. But this contribution has so far been fairly marginal and must not be grossly exaggerated. Indeed, the present writer would not go so far as to declare that the doctrines articulated in the treaties examined above are, for example, comparable in importance to some of the well-known Latin American ones, the Calvo Doctrine and the Drago Doctrine; nor can one talk unreservedly in terms of the existence of an African or a West African international fluvial law. For it must be remembered that these treaties are not of a general law-making character as such. Having said that,

---

56. Para 1 of U.N. General Assembly Resolution 2669 (XXV) of Dec. 8, 1970 recommended that "the Commission should take up the study of the law of the non-navigational uses of international watercourses, with a view to its progressive development and codification." This was included in the I.L.C.'s general programme of work in 1971 under the proposed title of "The Law of Non-Navigational Uses of International Watercourses." The Special Rapporteur presented his first report on the topic in the course of the Commission's 31st session in 1979. Other draft proposals have been submitted at subsequent sessions, but at the time of writing it would appear it will take some time before this codification exercise is completed.

however, it may still be concluded from this study that the West African conventions may at least be regarded as constituting an undeniable contribution to the development of international fluvial law in general. Significantly, some of the concepts embodied in these treaties have already found expression in the preliminary drafts being considered by the International Law Commission in the codification program referred to above and are more than likely to be embodied in the multilateral convention which will, no doubt, eventually be adopted on the subject.