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Congolese Maritime Ports: Suggestions For Reform

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CONGOLESE MARITIME PORTS: SUGGESTIONS FOR REFORM

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I. INTRODUCTION

The Democratic Republic of the Congo (DRC) has many ports, all of which were built along the Congo River and its affluent. Some of them are used solely for domestic transport, while others are used for international trade.[1] The Congolese maritime ports that are used for international trade were constructed along the Congo River during the colonial period and have belonged to the Congolese government since 1935.[2] Under State control, these ports are run by the Office National des Transports (Onatra).[3] Onatra, a Congolese public enterprise that specializes in transport, is owned, in its entirety, by the Congolese government.[4]

Over the past few decades international trade and maritime ports, as centers for the international transport of goods, have experienced significant changes. With the recent phenomena of containerization and

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1. William A. Hance & Irene S. Van Dongen, *Matadi, Focus of Belgian African Transport*, 48 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 41 (1958). There are three maritime ports in the DRC that are used for international trade: Matadi, Boma, and Banana. *Id.* Matadi, the most important of these three ports, is situated on a narrow land corridor on the western edge of the Congo, giving the almost landlocked country access to the Atlantic Ocean. *Id*.

2. Onatra, Historique de l'Onatra, www.onatra.info/suite.php?newsid=8 (last visited Mar. 30, 2009).

3. *Id.*

4. Although the name of this company has changed several times—from the Colonial Transport Agency (Otraco) to Agency of Transports in Congo (Otraco) in 1960, then to the National Agency of Transports (Onatra) in 1971—it remains, as it has been since 1935, a State owned corporation. *Id.*

globalization, the maritime transport sector has grown exponentially.[5] As a result, the efficiency of port industries has become increasingly important to port users "for whom ports services have always constituted a bottleneck in periods of rapid international trade."[6] In an effort to meet the needs of this rapidly growing industry and satisfy the demand for increased efficiency most maritime ports have invested in infrastructure and technology renewal.[7] The expansion and modernization of maritime ports and changes in the shipping industry have resulted in a maritime transport and management system that is characterized by "mega-carriers and mega-ships calling at efficient mega-ports."[8]

Globalization of trade and expansion of import-export activities in Africa places many African countries, including the DRC, in a position to be major players in the future of international trade.[9] This is particularly important to the DRC because increased trade "opens access to new markets and opportunities . . . fostering [the] export-led economic growth [that is] essential to alleviate poverty on a significant scale."[10] At the same time, most African maritime ports are not equipped to satisfy the needs of the globalized maritime sector.[11] In addition, management, port access,

5. Alan Harding et al., *Port and Maritime Transport Challenges in West and Central Africa*, at ix (World Bank Sub-Saharan Afr. Transp. Policy Program, Working Paper No. 84, 2007).

6. Raul Compes Lopez & Nigel Pool, *Quality Assurance in the Maritime Port Logistics Chain: The Case of Valencia, Spain*, 3 J. SUPPLY CHAIN MGNT. 33, 34 (1998).

7. *See* Press Release, Ernesto Zedillo, President, Mex., Mexico Now Has a Modern and Efficient Port System (Nov. 24, 1998), *available at* http://zedillo.presidencia.gob.mx/welcome/bulletins/b1187.htm; Manmohan Singh, Prime Minister, India, Speech at the Foundation Stone Laying Ceremony of International Container Transshipment Terminal (Feb. 16, 2005), *available at* http://pmindia.nic.in/speech/content.asp?id=75; Peter Ong, Chairman, Mar. & Port Auth. of Sing., Address at the Second International Conference on Port and Maritime R & D and Technology (Sept. 10, 2003), *available at* http://74.125.93.104/custom?q=cache:g4Yu8AKUO4MJ:www.mpa.gov.sg/sites/pdf/030910a.pdf+technological+advances&cd=6&hl=en&ct=clnk&gl=us&client=google-coop; Fotis Karamitsos, Dir. Logistics, Innovation, Co-modality & Mar. Transp., European Comm'n, The New European Ports Policy (Nov. 21, 2007), *available at* http://74.125.93.104/search?q=cache:wpEBvC1wGkQJ:www.espo.be/downloads/archive/7f5c3616-e9f5-4acc-b706-50a8d920f639.pdf+maritime+ports,+infrastructure,+modern,+europe&cd=17&hl=en&ct=clnk&gl=us&client=firefox-a.

8. Harding et al., *supra* note 5, at 3.

9. *Id.* at 45. In fact, Sub-Saharan African Transport Policy Program (SSATPP) conducted a study that indicates that "[n]ew trade patterns are emerging in Sub-Sahara Africa with increasing trade in Asia and Latin America and decreasing trade with Europe." *Id*. at 1.

10. *Id.*

11. *Id.* at 9.

security, and cost issues have had a negative impact on the number of ships calling on these ports. Consequently, the DRC's maritime ports have been marginalized in international trade.[12] This Article outlines these issues in greater detail and explores potential solutions to these problems. In addition, this Article calls for reforms to Onatra, evaluates the steps that the Congolese government has already taken, and suggests alternatives for improving management and attracting much needed capital.

II. Challenges Facing Maritime Ports and Transport in the Democratic Republic of the Congo

The Congolese maritime ports, constructed at the beginning of the twentieth century, are products of Belgian colonial power.[13] Limited resources have resulted in little renewal or development of these ports' infrastructure since their construction in the 1930s. This has left the DRC's ports in a position where they are unable to respond to the needs of modern international commerce. As a result these ports have lost their ability to compete in the world market.[14] The major operational obstacles to Congolese participation in international trade include an inability to process containerized vessels, limited capacity, and an inability to address dredging and navigational issues. Further aggravating the situation is an increase in freight rates. Until each of these issues have been addressed, Congolese ports will continue to be marginalized by major shippers.

A. Operations

Containerization revolutionized maritime transport activities.[15] However, because Western and Central African ports are unable to efficiently process containerized goods "a commodity, which would be shipped in a container from a Far Eastern or from a European port, may still be carried in break-bulk from an African port."[16] As a result, the "containerized rate of traffic in [Western and Central Africa (WCA)] remains low

12. *Id*. at 11.
13. Hance & Van Dongen, *supra* note 1, at 45. The construction of the Matadi maritime port was finished in 1933. *Id.* The DRC gained independence from Belgium on June 30, 1960. George Wright, The Destruction of a Nation 25 (1997).
14. Hance & Van Dongen, *supra* note 1, at 45. Port traffic, estimated at 530,567 metric tons in 1938, increased to 1, 827,058 tons in 1955. *Id.*
15. *See* Harding et al., *supra* note 5, at 3.
16. *Id.* at 10.

and container traffic from or to Africa remains marginal in the world."[17] Despite the negative impact that obsolete infrastructure has had on trade, Onatra has not thought seriously about investing in the equipment necessary to efficiently process container vessels. Until Congolese's ports adapt to the phenomenon of containerization they will be unable to compete with other ports in the region and around the world.

In addition to out-of-date infrastructure, the limited capacity of WCA and Congolese maritime ports makes it difficult for these ports to compete with others in the region. WCA maritime ports are all small; mega-maritime ports have not been necessary there because the volume of trade in the countries is low.[18] With most goods today being transported via mega-container vessels, "[m]ajor ocean carriers may be reluctant to call at certain [WCA] ports" because their limited capacity is likely to be associated with "high turnaround time and poor port efficiency."[19]

Finally, Congolese maritime ports are faced with maintenance, dredging, and navigational challenges.[20] The *Regie des Voies Maritimes* (RVM) is the Congolese public enterprise in charge of dredging the Congo River from the Atlantic Ocean to the port of Matadi.[21] The agency, like most public enterprises in the Congo, has limited to financial resources.[22] Thus, much of the agency's equipment, essential to maintaining the sea lanes, is obsolete and in disrepair discouraging trade.[23]

B. Increased Freight Costs

Increased freight rates—a consequence of the imbalance between imports and containerizable exports—are also having an adverse impact on maritime transport in the region. Freight cost are highest for products with a low value to weight ratio—i.e., agricultural and mining products.[24] The decline in the value of mining and agricultural end-products on the world market has lead to increasingly higher shipping costs for these products.[25]

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17. *Id.* "In 2005, containerized traffic in West and Central Africa accounted for 0.6 percent of the world containerized traffic (0.75 percent in 1995). Africa's container traffic share has ranged from 0.6 percent to 0.85 percent in the last ten years." *Id.*

18. *See* Harding et al., *supra* note 5, at xii-xiii.

19. *Id.* at 19.

20. *Id.* at 9.

21. World Investment News, Regie des Voies Maritimes, http://www.winne.com/congo/reports/2005/cp/rvm/index.php (last visited Apr. 15, 2009).

22. *See id.*

23. *Id.*

24. WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 115 (2004).

25. Harding et al., *supra* note 5, at 17-18.

The majority of WCA countries rely extensively on the export of domestic goods.[26] For example, the WCA's main exports—sugar, cocoa, coffee, tea, cotton, forest products, iron ore, copper, and other minerals—"represent more than 80 percent of the volume of non-oil export freight handled by ports in WCA."[27] Consequently, the increased freight rates have lead to "[t]he erosion of export volumes" handled by WCA ports over the past decade.[28]

The decrease in the volume of exports has aggravated the already high freight costs associated with increased trade with Asian mega-ships. Despite an overall decline in export rates, trade activities between the DRC and Asia have grown substantially over the past five years.[29] Historically, WCA countries have partnered with European countries for the purpose of operating their maritime ports.[30] However, these economic relationships have been steadily deteriorating.[31] As a result, African countries have sought alternative commercial partners, developing relationships with Far East Asian countries such as India, China, United Arab Emirates (Dubai), and Singapore.[32] Asian countries make up sixteen of the world's twenty container shippers.[33] The increase in container traffic from Asia has amplified "the imbalance between imports and containerizable exports result[ing] in the export of a large number of empty containers and contribut[ing] to increases in maritime freight rates in the region."[34] In addition, the increasing number of mega-ships calling on Congolese ports have exacerbated congestion and increased dwelling times for ships calling at these ports.[35]

26. *Id*. at 18.

27. *Id.*

28. *Id*. at 17. "For the 30 most significant non-oil exports combined, SSA's [Sub-Saharan Africa] average market share declined from 20.8 percent in the 1960s to 9.7 percent in 1990 of world exports of those products." *Id.* at 18.

29. Harding et al., *supra* note 5, at 17-18.

30. *See id*. at 17.

31. This change can be attributed in part to trade growth between African countries and countries of the Far East and the appreciation of the Euro, which has diminished the competitiveness of European products on the global market. *See, e.g.,* Uwe Bower et al., *Commodity Price Fluctuations and Their Impact on Monetary and Fiscal Policies in Western and Central Africa* (Euro. Cent. Bank, Working Paper No. 60, 2007). Increased trade with Asia can also be explained by the change in composition of exports from WCA ports from fifty percent to eighty-five percent oil. Harding et al., *supra* note 5, at 17.

32. Harding et al., *supra* note 5, at 17.

33. John W. Miller, *The Mega Containers Invade*, WALL ST. J., Jan. 26, 2009, at B1.

34. Harding et al., *supra* note 5, at 17.

35. *See id.* Although, congestion of the Congolese maritime ports is not new—the port of Matadi, for example, has been experiencing problems with congestion since 1946—it

III. MANAGEMENT OF CONGOLESE PORTS

The majority of African maritime ports are publicly owned and are managed as public services—limiting the private sector, including global operators, role in management.[36] This management structure is modeled after the traditional French approach *établissement public*.[37] Also known as the landlord model, *établissement public* ports are managed by an incorporated government agency.[38] In France, the agency, which was in charge of infrastructure, real estate (domaine), and marine services, was regulated, to some degree by the French government.[39] However, since October 2008, the French government has initiated important reforms, privatizing the management of its maritime ports.[40] For example, Marseille, Bordeaux, Nantes-Saint-Nazaire, La Rochelle, Le Havre, and Dunkerque have become *Grand Port Maritimes*[41]— managed by a private entity and regulated by the French government.[42]

Like France, many countries have had to engage in reforms to continue to meet global expectations, as well as conditions imposed by European Union partners and international financial institutions. While some WCA countries, including, Senegal, Ghana, Benin, and Cameroon have successfully undertaken similar reforms, the DRC has not.[43] The DRC's failure to take the measures necessary to transform its maritime port management system has perpetuated centuries of poor management.[44] Problems with the

continues to be a major obstacle to efficient port management. Hance & Van Dongen, *supra* note 1, at 45.

36. Hance & Van Dongen, *supra* note 1, at 11.

37. *Id.* at 21.

38. *Id*. WCA maritime port management systems are modeled on colonial ones with "[t]he institutional framework . . . depend[ing] primarily on its inheritance of either the French or the British model." *Id.*

39. *Id.*

40. *See French Ports Change Their Structure*, World Cargo News, Oct. 18, 2008, *available at* http//www.worldcargonews.com.

41. Hance & Van Dongen, *supra* note 1, at 11.

42. *Id*. Under the British model "port authorities were also incorporated statutory public bodies but usually enjoy[ed] a greater degree of autonomy. They usually were service ports. The port agency entered more directly into landside port operations such as shore handling, storage, or towage." *Id.*

43. *See generally* Conference on Trade and Development, Mar. 31, 2003, *African Ports: Reform and the Role of the Private Sector* ¶ 48, tbl.10 (analyzing private sector participation in port management reform in Africa).

44. Copirep, a Congolese governmental agency, is preparing to reform all the publicly owned companies. *See* COPIREP, www.copirep.org (last visited Feb. 28, 2009). Laws on

management structure exacerbate the logistical problems outlined above. Thus, reformation of these port's management systems is essential to their future ability to meet the expectations of the global market.

IV. Port Access and Port State Security

In addition to cost and efficiency, port access and port state security have a significant impact on the number of ships that call at a particular port. Typically, maritime port operations are within the jurisdiction of the port state.[45] Under international customary law and the United Nations Convention on the Law of the Sea (UNCLOS), ships flying foreign flags have a right of innocent passage—an exception to State sovereignty—through a country's territorial seas or internal waters.[46] Innocent passage does not, however, guarantee access to the ports of other states. Nevertheless, "the commercial interest of states and the need for competitiveness and communication have led to the present situation under which most of the world's maritime ports are open to international trade and traffic."[47] This is, however, "a reflection of common will between sovereign states, and does not ensue from any customary obligations."[48] In short, without a binding agreement the port state has no obligation to provide access to foreign ships. Thus, some port states entered into bilateral treaties of commerce and navigation to ensure access and encourage trade.

Such treaties are not a new phenomenon and several early attempts were made to guarantee access to foreign maritime ports through bilateral agreement.[49] For example, the Convention and the International Regime of Maritime Ports and Protocol of Signature (Regime of Maritime Ports Convention) signed in 1923, provided parties access to other member

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public enterprises were adopted and promulgated last year as part of the reform process. *Id.*

45. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 2(1), 11, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

46. *See id.* art. 17; *see also* Corfu Channel Case (U.K. v. Alb.) 1949 I.C.J. 4, 28 (Apr. 9).

47. George Cc. Kasoulidos, Port State Control and Jurisdiction: Evolution of the Port State Regime 4-5 (1993).

48. *Id.* at 5.

49. International Convention Concerning The Regime of Navigable Waterways of International Concern, Apr. 20, 1921, 7 L.N.T.S. 51; Convention on the International Regime of Maritime Ports, Dec. 9, 1923, 58 L.N.T.S. 285 [hereinafter 1923 Ports Convention]; Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1609, 516 U.N.T.S. 205; UNCLOS, *supra* note 45.

states' maritime ports.[50] By ensuring port access, these early agreements lead to long-standing trade relationships between the member states.

Access under the Regime of Maritime Ports Convention, however, was only guaranteed to member states. Thus, there was no guarantee of access to ports located in states, such as DRC, that were not parties to a treaty that provided for port access. This both discouraged ships from calling at these ports and prevented these states from establishing long-term trade relations with other countries. This was resolved, in part, in 1994, when the UNCLOS was entered in force. Although UNCLOS does not explicitly provide for access to member states' ports, some interpret the Convention's landlocked country provisions as mandating that countries that open their ports to international trade "open them at least to the parties to the Convention, and arguably also to all comers on a non-discriminatory basis."[51] Thus, it is possible that under UNCLOS all of the 145 member states, including the DRC, are entitled to call at other member states' maritime ports that are opened to international commerce and commercial shipping. This is an important development to international trade and commerce; however, old habits die hard and countries that have long established trade relations are more inclined to frequent each other's ports.

Port State security also plays a central role in the number of ships that call on a particular port. The UNCLOS made it clear that coastal states have jurisdiction over their maritime ports and are competent to issue regulations related to the safety of the ports and the protection of the environment.[52] Since September 11, 2001, maritime security has been dramatically increased to protect port operations and international trade. For example, many states have adopted the International Ship and Port

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50. The Convention provided that:

> Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full employment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers. The equality of treatment thus established shall cover facilities of all kinds, such as allocation of berths, loading and unloading facilities, as well as dues and charges of all kinds levied in the name or for the account of the Government, public authorities, concessionaries or undertakings of any kind.

1923 Ports Convention, *supra* note 49, art. 2.

51. KASOULIDOS, *supra* note 47, at 3-4 (quoting DANIEL PATRICK O'CONNELL, THE INTERNATIONAL LAW OF THE SEA, Vol. II, at 84 (Ivan Anthony Shearer ed., 1984)).

52. UNCLOS, *supra* note 45, arts. 211(3), 25(1), (2).

Facility Code (ISPS Code) for security in maritime ports.[53] However, WCA states are facing constraints on enforcement of the ISPS Code, impacting their ability to ensure security in their maritime ports.[54] This situation makes maritime trade between WCA countries and some developed countries, such as the United States, which is strict in security matters, difficult.

V. ACCESSING RECENT CHANGES TO THE CONGOLESE MARITIME PORT MANAGEMENT SYSTEM

Recently the Congolese government has tried an alternative to managing its ports, adopting a mixed management public-private partnership.[55] In December 2007, they hired Progosa, a Spanish company specializing in the management of maritime ports, to work in conjunction with Onatra.[56] According to Progosa its mission is to improve the management of Onatra. Progosa proposes to accomplish its goal through a "24-month consultancy contract [that] will be handled in partnership with two internationally renowned sub-contractors: French company Systra, a subsidiary of SNCF (French rail), and professional services firm PricewaterhouseCoopers."[57] Although the first step in addressing many of the issues facing the DRC ports is restructuring the management system, the approach chosen by the Congolese government may not be the most effective solution.

The primary reason that this approach is unlikely to work is that it does not provide for any new investments in the DRC ports. It does not appear that Progosa, or any of the consulting agencies, intend to invest capital in Onatra.[58] Furthermore, their participation may place an additional burden on Onatra's already limited financial resources. For example, it remains to be seen how Progosa will be compensated, and without outside capital

53. MPA, Circulars & Notices: Maritime Security – Amendments to SOLAS 74 Adopted by the IMO Diplomatic Conference on Maritime Security Held in London in December 2002, http://www.austlii.edu.au/au/other/dfat/treaties/2004/29.html (last visited Mar. 9, 2009).

54. Memorandum from the Mar. and Underwater Sec. Consultants to the U.K. Comm. on Transp. (Jan. 11, 2006), *available at* http://www.publications.parliament.uk/pa/cm 200506/cmselect/cmtran/1026/6032918.htm.

55. *See* President's Message, ONATRA, www.onatra.info (last visited Feb. 28, 2009).

56. In addition, Progosa has indicated that it is willing to subcontract Systra, a French company, and Pricewaterhouse, a famous international office. *See id.*

57. Progosa, www.progosa.com (last visited Feb. 28, 2009).

58. *Id.*

Onatra will have to compensate them.[59] As the state owned enterprise is already under significant financial stress, bankruptcy may be the end result of such an arrangement. Furthermore, without new investments to fund improvements in the infrastructure, as well as the technical and logistical operations of Congolese ports, it is unlikely this partnership will achieve the desired outcome.

The success of the Progosa/Onatra partnership is currently being evaluated. The Onatra Labor Union, contending that Progosa did not provide any real expertise and exploited Onatra, has asked the Congolese Parliament to revise the contract.[60] To the contrary, Progosa argues that it has improved the financial situation of Onatra and is trying to solve the delay in the payment of the salaries of employees.[61]

Although the success of the Progosa/Onatra partnership remains to be seen, long-term stabilization and improvement will require a management system that encourages the flow of new investments in order to renew the ports' infrastructures. This can be achieved through a complete or partial privatization, a joint-venture company, or a landlord management model.

Privatization of the Congolese maritime ports is likely to be the most effective solution. Private investors will be able to bring capital and fund development and renewal of infrastructures, as well as the management skills necessary to compete in the global market. In addition, privatization of the DRC's three ports by different investors will incentivize best management practices by encouraging competition between the ports.

VI. CONCLUSION

Congolese maritime ports built in the early twentieth century have not adapted to modern maritime transport. The war that has ravaged the DRC for more than a decade has fostered a culture of mismanagement and corruption that has resulted in the decline of it economy. However, after the elections held in 2006 the DRC is on a path towards positive change. In light of these changes, the Congolese government should take the opportunity to completely privatize port management. Private actors can provide for the management skills, investments, and infrastructures

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59. *Id.*

60. Luc Mabiala, *L'Onatra s'elance sous la conduite de l'Adg Claude Pecune dans la consolidation de ses relations avec ses partenaires prives*, Digitialcongo.net Jan. 31, 2009, http://www.digitalcongo.net/article/56237.

61. *See Onatra: les agents reclament le depart de l'ADG et du PCA*, RADIO OKAPI (Kinshasa, DRC), Apr. 12, 2009, *available at* http://www.radiookapi.net/index.php?i=53 &a=22928.

necessary to meet the growing demands of global maritime transport activities. This is the only way for the Congolese maritime ports to meet the needs of the global market, which require decreasing the cost of maritime operations and increasing efficiency. Congolese maritime ports can only begin to satisfy these requirements if they are privatized and if the private actors bring new investments to the sector.

Although privatization is likely the solution to many of the issues facing Congolese ports, selecting private investors has to be done in accordance with norms of competitiveness and transparency to ensure that they comport with the law of procurement and to avoid corruption from the governmental institution in charge of the transaction. It will also be necessary to reform the legal status of Onatra in order to allow private investment in the maritime port sector and confine the government's role to that of regulator. Once corruption and capital have been addressed, privatization of the Congolese maritime ports will certainly improve maritime ports operations by providing additional capital for the updated infrastructure and equipment necessary to avoid chronic delays for loading and unloading operations, address congestion, and avoid high surcharges.