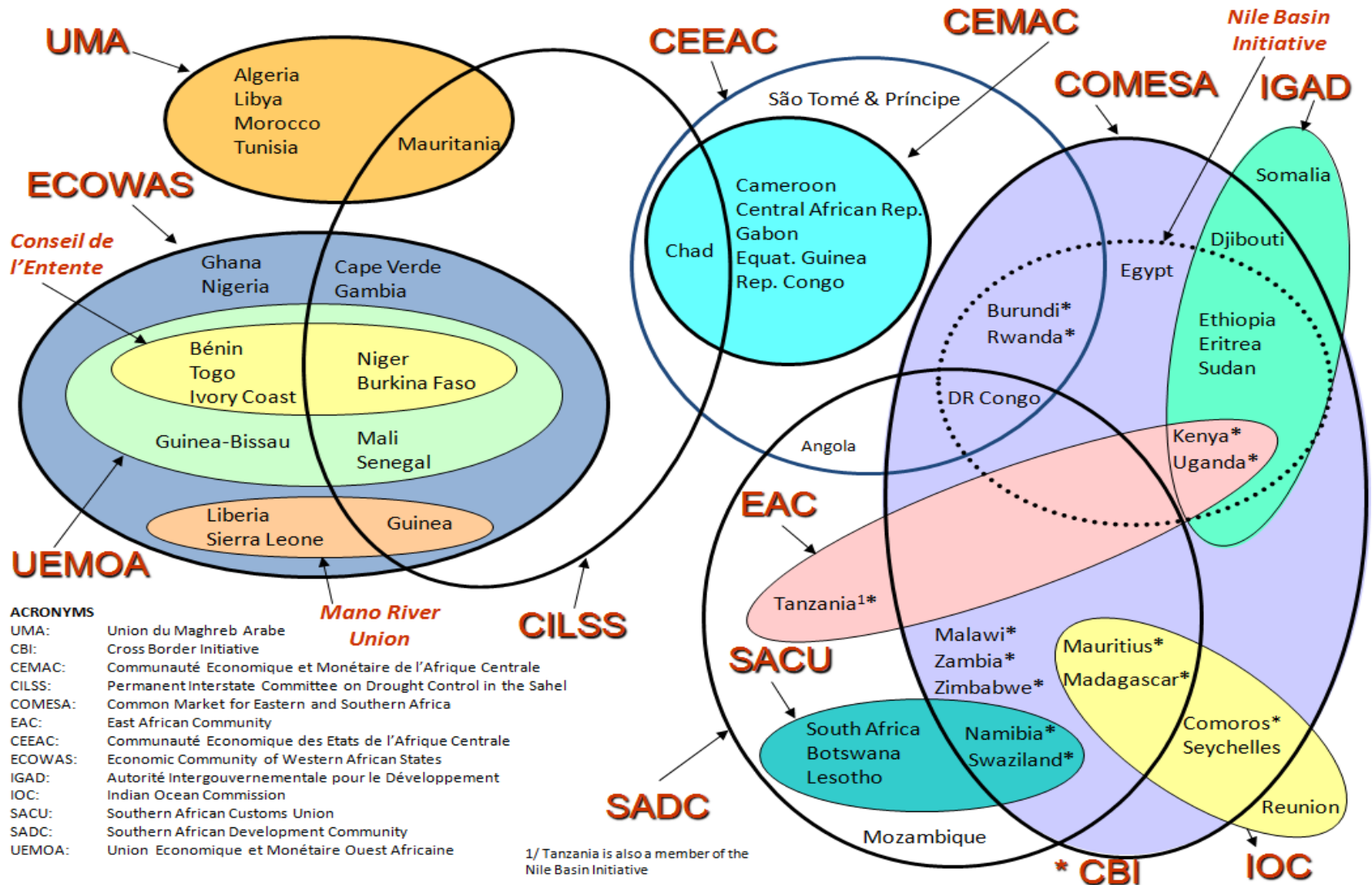


# THE EMERGENCE OF COMMUNITY LAW AND ITS IMPACT ON INVESTMENTS IN THE ENERGY AND MINING SECTORS IN AFRICA

# COMMUNITY LAW AND INVESTMENTS IN MINING/ENERGY IN AFRICA

## OVERVIEW OF THE AFRICAN REGIONAL ORGANISATIONS



# COMMUNITY LAW AND INVESTMENTS IN MINING/ENERGY IN AFRICA

## THE REGIONAL ECONOMIC COMMUNITIES IN AFRICA

### COMMON STRUCTURE AND ORGANISATIONS

#### → ORGANISATION

- Conference of Heads of State and Government
- Commission or executive body
- Court of justice

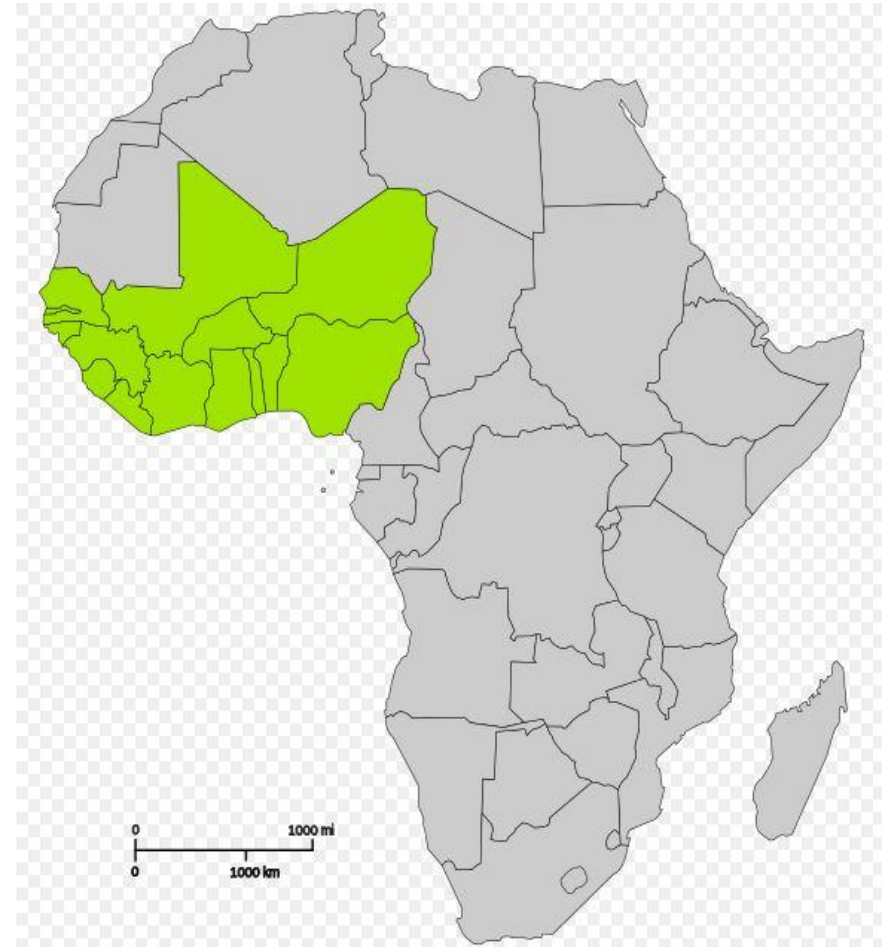
#### → COMMUNITY LAW

- Primary law : Treaty and Protocols
- Secondary law:
  - Regulations, acts, decisions of Court of justice (directly applicable)
  - Directives (transposition needed)

- Benin
- Burkina Faso
- Cape Verde
- Côte d'Ivoire
- Gambia
- Ghana
- Guinea
- Guinea-Bissau
- Liberia
- Mali
- Niger
- Nigeria
- Senegal
- Sierra Leone
- Togo

**Mauritania** left in 2000

**Morocco** candidate to accession (2017)



→ CREATED IN 1975

→ OBJECTIVES

- Ecowas is a regional organisation for promoting economic integration in all fields of activity of the member states including:
  - Industry, agriculture and transports
  - Energy and natural resources
  - Trade and monetary and financial issues

→ MAIN ACHIEVEMENTS:

- Community legislation directly applicable in all Member States
- Entry into force of the Common External Tariff (2015)
- Mining Directive (2009)
  - Member States had until July 1, 2014 to comply with the Mining Directive
  - The Community Court of Justice ensures its application
  - The Directive has been transposed in 12 States

-  Bénin
-  Burkina Faso
-  Côte d'Ivoire
-  Guinée-Bissau
-  Mali
-  Niger
-  Sénégal
-  Togo



### → CREATION IN 1994

### → OBJECTIVES

- Reinforcement of the economic and financial activities of the Member States
- Convergence of national economic policies
- Establishment of a common market
- Establishment of common sectoral policies
- Harmonisation of national legislations to the extent necessary to the establishment of a common market

### → MAIN ACHIEVEMENTS

- Establishment of a Customs union and of a common external tariff
- Common policies in the agriculture, industrial, energy and mining sectors for example

### → UEMOA MINING REGULATION

- Regulation n°18/2003/CM/UEMOA concerning the adoption of the Community Mining Code of UEMOA
- Article 43 of the UEMOA Treaty: the Regulation is directly enforceable in the Member States
  - Primacy over national law
  - Direct applicability without any transposition (vertically and horizontally)
  - General application and binding in its entirety

### → BENEFITS

- Uniform legislation across the region (companies usually have projects in several countries of the region)
- Stability of mining legislation
  - Cannot be overridden by new municipal legislation
  - Difficulties to reach the necessary political consensus to amend it makes it more stable

### → STANDARDISED MINING LEGISLATION FOR EIGHT COUNTRIES

- Need of a mining permit to explore/exploit
- Rules for classifying mines and quarries
- Need to create a mining company to exploit the mine – free carried interest of the State capped at 10%



### → OBLIGATIONS FOR MINING COMPANIES

- Undertaking an environmental assessment before granting of mining permit
- Standardised mining taxes –though no rates, which remain national

### → GUARANTEES PROVIDED BY THE MINING CODE (REVISION UNDER WAY)

- Protection of the property – guarantee against expropriation
- Free import of goods and materials; Free choice of suppliers; Free transfer of currency and benefits
- Stability of tax and custom systems during all the period of validity of the mining license

### → ENFORCEMENT GUARANTEES OF THE MINING CODE

- Uniform interpretation and application provided by the Court of Justice (Additional Protocol to the Treaty n°1)
- Disputes on the interpretation or the application of a mining convention: Court of Justice or arbitration
- Disputes for breaches of the mining code rules : national courts

### → LEGAL FRAMEWORK OF THE MINING ACTIVITIES

- 27 May 2009 : adoption of the Directive C/Dir3/D5/D9 on the harmonization of the guiding principles and policies in the mining sector (ECOWAS Mining directive).
- 17 April 2012 : ratification by the Heads of State and Government of the additional act A/SA.16/02/12 o, adopting development policy of a mining resource.
  - The Directive is not directly and immediately applicable, it binds the Member States as to the result to be achieved, whilst leaving the States the choice of form and methods for implementation

### → ENFORCEMENT GUARANTEES OF THE DIRECTIVE

- Obligation for the Member States to pass the required legislative and regulatory measures for the effective implementation of the directive. The Directive has been transposed in 12 States.
- In the case of infringement of the Directive by a State, another State can refer the matter to the Conference of Heads of State, or a person or a State can refer the breach to the Court of Justice

### → SOURCES OF MINING LAW

- National mining codes and other national legislation
- Community Legislation on Mining (Ex ECOWAS)

### → ROLE OF THE GOVERNMENT

- In civil law countries, the government has inalienable rights over mineral resources. The granting of mineral and mining rights is the prerogative of the government.
- In common law countries, the government acts a contractor for its natural resources and the grantee is allowed to deal with them in the manner that he deems fit, subject to certain restrictions

### → PROCEDURE

- In countries with civil law traditions, a higher degree of care and due diligence is required to obtain, maintain and transfer title to mineral and mining rights than that required in common law countries

### → COMPULSORY REGISTRATION FOR VALIDITY

- In civil law countries, registration of mining titles is essential for their validity.
- In most common law countries, it is sufficient to have a signed transfer contract to secure the title



## OVERVIEW OF OHADA

→ CREATION IN 1993 BY THE TREATY OF PORT-LOUIS, MODIFIED IN QUEBEC IN 2008

### → OBJECTIVES

- Facilitation of trade and investment
- Increasing legal certainty through the unification and modernization of business law in Member States
- Uniform acts adopted by Heads of State and Government – direct application on Member States
- Common interpretation of OHADA law through the establishment of a single Supreme Court (CCJA)
- Promotion of arbitration through the enactment of uniform rules and the creation of an arbitration centre (CCJA)

### → MAIN ACHIEVEMENTS

- Improvement of the business environment
- Improvement of legal certainty

### → OHADA V. COMMON LAW

- All the OHADA countries have a civil law tradition, with the only exception of the Anglophone provinces of Cameroon ; OHADA managed to conciliate both legal systems in Cameroun.

- NO TRANSPOSITION NEEDED
- SUPRANATIONAL CHARACTER OVERRIDES EXISTING NATIONAL LAW
- MEMBER STATES CANNOT DEROGATE TO OHADA LAW
- TEXTS IN FORCE INCLUDE:
  - General Commercial Law (adopted in 1998, modified in 2010)
  - Commercial Companies and Economic Interest Groups (adopted in 1998, modified in 2015)
  - Securities (adopted in 1997, modified in 2010)
  - Arbitration (adopted in 1999)
  - Simplified Debt Collection Procedures and Enforcement Proceedings (adopted in 1998)
  - Uniform Act on Bankruptcy Proceedings (adopted in 1998, modified in 2015)
  - Organization and Harmonization of Companies Accounting (adopted in 2002, modified in 2017)
  - Road Freight Agreements (adopted in 2004)

#### → JUDICIAL FUNCTION

- The CCJA is a Court of last resort in any dispute relating to OHADA law, composed of 13 judges.

#### → ADVISORY FUNCTION

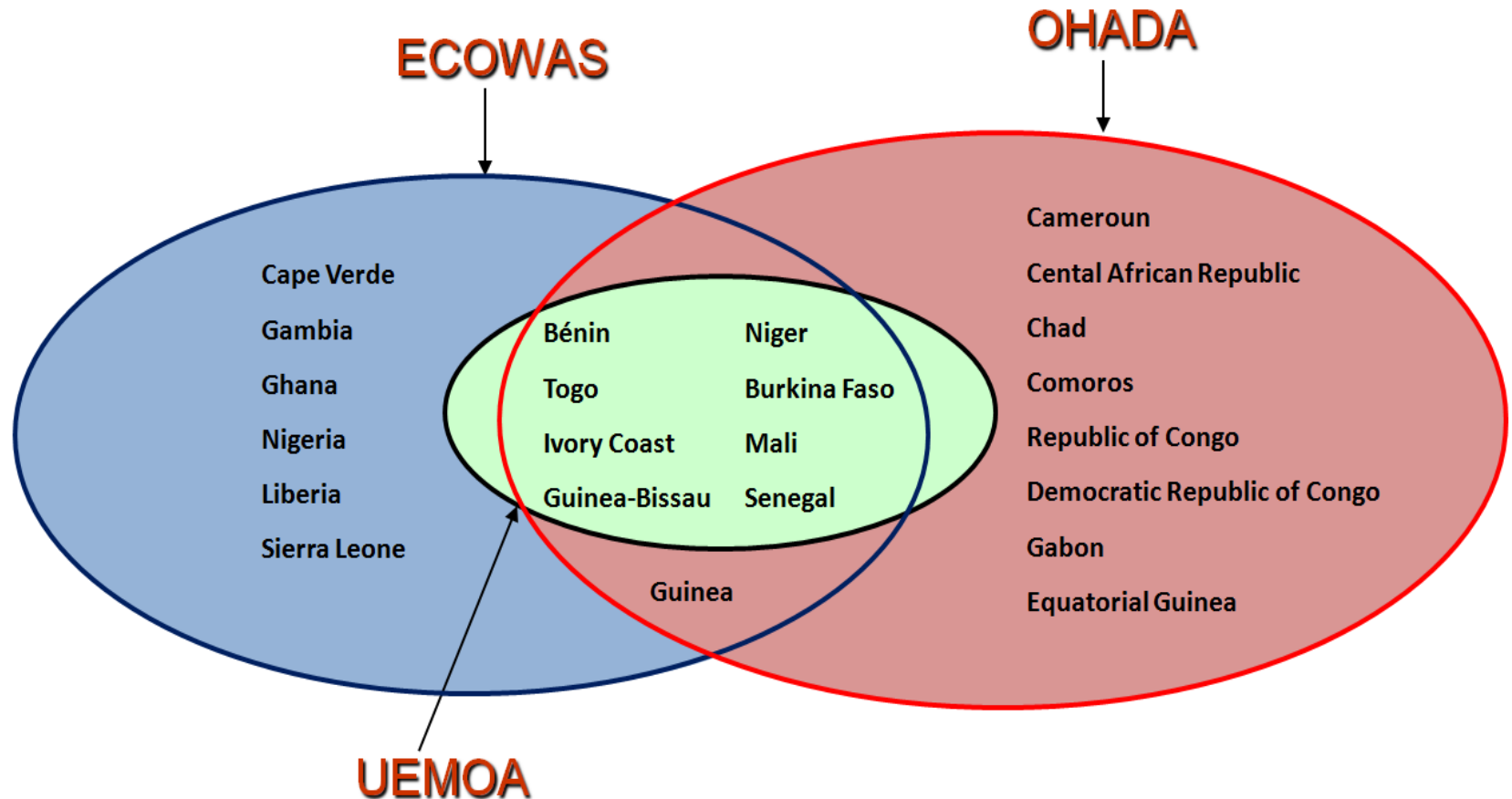
- CCJA can render advisory opinions at the request of any state member, the Council of Ministers or a national court

#### → ARBITRATION CENTER

- CCJA has jurisdiction on annulment of arbitral awards and administers the arbitration proceedings

#### → CCJA CASE LAW

- OHADA Treaty, article 20 : *Judgments of the CCJA shall have the force of res judicata and shall be enforced in the territory of the member states under the same conditions as the decisions of national courts.*





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