Exporting the Luxembourg Rail Protocol to the Convention on International Interests in Mobile Equipment to Africa

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Abstract

This article recommends the Cape Town Convention on International Interests in Mobile Equipment and appeals to African countries to accede to the Luxembourg Protocol on Railway Rolling Stock (Rail Protocol). The discussion in this article focuses on the extent to which Article XXII of the Rail Protocol can be applied with respect to Africa. The article critically analyses the competence of the African Economic Community (AEC) and its sub-regional organizations to accede to the Cape Town Convention and Rail Protocol. The author provides a detailed argumentative analysis of the legal mandate of the AEC and the influence of African Union (AU) laws on the competence of the AEC's sub-regional organizations to make declarations under the Cape Town Convention and Rail Protocol. The analysis confirms that competence to accede to the Convention and Rail Protocol resides with sovereign States in Africa and not with the AU, the AEC, the Organisation pour l'harmonisation en Afrique du Droit des Affaires, or any existing sub-regional organization in Africa.

I. Introduction

The 1991 Treaty Establishing the African Economic Community (AEC Treaty) outlines the importance of transnational trade and uniform laws and policies among AEC countries.[1] One objective of the AEC Treaty is to harmonize regulations to further develop African rail infrastructure and easy access to rail

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1 Treaty Establishing the African Economic Community 1991 (AEC Treaty), Art 4(1)(d) and Art 4(2)(d).

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finance.[2] This objective aligns with those of the Agreement Establishing the African Continental Free Trade Area (AfCFTA),[3] the 2001 Convention on International Interests in Mobile Equipment (Cape Town Convention),[4] and the Protocol on Matters Specific to Railway Rolling Stock (Rail Protocol).[5] The AfCFTA is designated to create a single market for the free movement of persons and easy carriage of freight across Africa.[6] The AfCFTA covers a market of 1.2 billion people in Africa and a gross domestic product of US $2.5 trillion.[7] Participating countries include all 55 Member States of the African Union (AU).[8] In terms of participating countries, the AfCFTA is the world's largest free trade area since the formation of the World Trade Organization in 1995.[9] A single interconnected market with modern infrastructure, such as access to rail, would provide businesses with economies of scale and business mobility while enhancing Africa's competitiveness.[10] The success of the AfCFTA to facilitate the transportation of goods hinges on adequate financing of the transportation sector.

Financial investment in Africa's rail transport sector has grown over the years. At the first United Kingdom (UK)–Africa Investment Summit held in London on 20 January 2020, UK Prime Minister Boris Johnson declared that the UK had established itself as a 'partner of choice' for Africa in trade and infrastructure investment.[11] Successful private sector financing of monorail trains in Cairo, Egypt, supported by UK Export Finance, was cited as an example, with an assurance that similar arrangements will materialize in other African countries.[12] Furthermore, the availability of modern rail equipment in Africa will give impetus to African countries through a virtuous cycle to adopt the 1980

[2] I.N. Kessides, Regionalising Infrastructure for Deepening Market Integration: The Case of East Africa (2012) 4 Journal of Infrastructure Development 115; See also A. Jerome and D. Nabena, 'Infrastructure and Regional Integration in Africa' in D. H. Levine and D. Nagar (eds) Region-building in Africa: Political and Economic Challenges (Springer 2016).

[3] Agreement Establishing the African Continental Free Trade Area 2018.

[4] UNIDROIT, Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001).

[5] UNIDROIT, Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 23 February 2007).

[6] Assessing Regional Integration in Africa VIII (UN Economic Commission for Africa 2017) 11.

[7] D. Luke, 'Making the Case for the African Continental Free Trade Area' in D. Luke and J. Macleod (eds) *Inclusive Trade in Africa the African Continental Free Trade Area in Comparative Perspective* (Routledge 2019) 5.

[8] The AU is an international organization formed in 2001 to accelerate the socio-economic and political integration of the African continent, see African Union Handbook 2021 (African Union Commission 2021).

[9] Ibid.

[10] L. Abrego, Maria A. Amado, Tunc Gursoy, Garth P. Nicholls, and Hector Perez-Saiz, *The African Continental Free Trade Agreement: Welfare Gains Estimates from a General Equilibrium Model* (IMF Working Paper WP/19/124, 2019) 4.

[11] S. Kedem, 'UK-Africa Investment Summit Hints at Post-Brexit Future' (African Business, February 2020) 29.

[12] 'PM Africa Investment Summit Speech' (International, 20 January 2020); 'UK–Egypt Cooperation on Transportation Projects' (Trade and Investment, 25 May 2021).

Convention on International Carriage by Rail (COTIF),[13] the Uniform Rules Concerning the Contract for International Carriage of Passengers and Luggage by Rail,[14] and the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail.[15] The potential adoption of these laws can advance the development of transnational contract law of carriage by rail in Africa. In addition, the inherent capacity of railway rolling stock to move volumes of freight or passengers in an environmentally friendly and energy-efficient way makes it an attractive and sustainable means of transportation.[16]

Acknowledging the socio-economic value of access to modern rail equipment, this article offers a call for reform directed to all African countries to accede to the Cape Town Convention and the Rail Protocol. The Rail Protocol will enhance the availability of modern rail equipment in Africa while providing a global regime for recognizing, registering, and enforcing international security interests held by creditors and lessors of railway rolling stock. Creditors and lessors require security to ensure that credit advanced through loans or leases will be repaid. Protection of property rights in rail equipment and easy and quick repossession of collateral in the event of default or insolvency of the debtor—even when the collateral moves from one country to another—are often required for secured financing.[17] The Rail Protocol will bring uniformity to rail private sector financing laws both in Africa and globally, which can act as the needed catalyst for the modernization of rail infrastructure, thus leading to an efficient transportation system.

The main discussion in this article focuses on the legal reasons why Regional Economic Integration Organizations (REIOs)—that is, sub-regional organizations—in Africa cannot accede to the Cape Town Convention and the Rail Protocol. Following the provisions of Article 6 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT), the founding treaties of sub-regional organizations in Africa do not equip REIOs with the competence to legislate over matters in the Cape Town Convention and the Rail Protocol. Additionally, this article concludes that the AU and the AEC lack the competence to make a declaration on behalf of their Member States subject to Article XXII(2) of the Rail Protocol.

[13] Convention on International Carriage by Rail (Convention Relative aux Transports Internationaux Ferroviaires, 'COTIF'), adopted in Bern, 9 May 1980, later revised in the Protocol of Modification of 3 June 1999 (in force 1 July 2006). Presently, Algeria, Tunisia and Morocco are the only African OTIF member states and contracting parties to COTIF.

[14] In force from 1 July 2006.

[15] In force from 1 July 2006.

[16] The European Green Deal is a nascent growth initiative that seeks to transform the EU into a fair and prosperous society through sustainable railway transportation, see European Commission, 'Decision (EU) 2020/2228 of the European Parliament and of the Council of 23 December 2020 on a European Year of Rail 2021 (OJ L 437, 28.12.2020, 108).

[17] R. Goode, *Convention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock: Official Commentary* (2nd edn, UNIDROIT 2014) para 3.1.

The essence of the Cape Town Convention and the Rail Protocol will first be explained, followed by an examination of the mechanism behind the European Union (EU) accession to the Cape Town Convention and the Rail Protocol. Next, a summary of the AU's sub-structure and its inter-relationship with the AEC will be discussed. It demonstrates why the author concedes that the AU and AEC sub-regional organizations lack exclusive competence to accede to the Cape Town Convention and the Rail Protocol. A detailed account of the emergence and legal responsibilities of the AU, the AEC, and the Organisation pour l'harmonisation en Afrique du Droit des Affaires (OHADA) will also be undertaken to shed light on why they do not enjoy exclusive competence over matters governed by the Rail Protocol. Finally, the article expounds that any REIO/sub-regional organization in Africa that attempts to accede to the Cape Town Convention or the Rail Protocol on behalf of their Member States will be contravening Article 6 of the 1986 VCLT, the AEC Treaty, and other AU laws. Conclusively, the author holds that the direction taken by African countries that have ratified or acceded to the Cape Town Convention and the Protocol on Matters Specific to Aircraft Equipment (Aircraft Protocol) is the justifiable approach that should be maintained when ratifying or acceding to the Rail Protocol.

II. Background to the Cape Town Convention

The Cape Town Convention and Aircraft Protocol were jointly adopted on 16 November 2001 at a Diplomatic Conference hosted in Cape Town, following the invitation of the government of South Africa.[18] The conference was coordinated under the joint aegis of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization.[19] The Cape Town Convention establishes a uniform law for secured financing of high-value mobile equipment that frequently crosses international borders.[20] The lack of global uniformity in recognizing security interests in mobile equipment promoted its adoption. Mobile equipment may be attached unexpectedly or, in the worst case, perfected in another country with an unpredictable property system.[21] There is also the risk of pluralism among national laws, inconsistencies in legal application and judicial interpretation, and inefficient collateral registries. The inoperability of the *lex rei sitae* rule governing proprietary rights, which can apply to the law of the jurisdiction where the mobile asset is located, presents another challenge.[22]

[18] UNIDROIT, 'Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol' (Cape Town, South Africa, 29 October—16 November 2001).

[19] Pursuant to Article 49(1) of the Convention, it entered into force on 1 March 2006.

[20] R. Goode, 'Transcending the Boundaries of Earth and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment' (1998) 3 Uniform Law Review 52.

[21] M. Lehmann, 'The State of Development of Uniform Law in the Fields of European and International Civil and Commercial Law' (2008) 7 European Legal Forum 266, 269.

[22] R. Goode and H. Rosen, 'Explanatory Report of the Draft Protocol on Matters Specific to Railway Rolling Stock' (UNIDROIT/OTIF 2006 DCME-RP—Doc. 4) 1.

The Cape Town Convention regulates the creation, registration, priority, and enforcement of international interests in high-value and uniquely identifiable mobile equipment held by a conditional seller under a retention of title contract, a lessor's proprietary right under a leasing agreement, and a chargee's security interest.[23] Using the original two-pronged structure (the convention and a protocol), the Cape Town Convention under Article 2(3) contemplates two other accompanying protocols (not yet in force): the Luxembourg Protocol for Railway Rolling Stock (Rail Protocol), adopted in 2007,[24] and the Berlin Space Protocol for Space Equipment (Space Protocol), adopted in 2012.[25] Article 51(1) of the Cape Town Convention acknowledges the creation of future protocols, which has culminated in the adoption of the Protocol for Mining, Agricultural and Construction Equipment (MAC Protocol) in 2019.[26] Though these protocols operate separately under the Cape Town Convention; the Convention and each protocol should be read and interpreted together as one instrument.[27] In the event of inconsistency between the Convention and a protocol, that protocol will prevail.[28] These protocols are intended to supplement and amend the Convention's provisions, thus being responsive to the modern requirements that arise with a particular category of equipment, including related industry practices and expectations.[29]

Matters within the Cape Town Convention's scope include default remedies and an international registration system that governs the effects of an international interest against competing claimants, insolvency matters, assignments of associated rights, and rights of subrogation. When concluding the agreement that creates the international interest in favour of the creditor, the debtor must be situated in a Contracting State, irrespective of whether the creditor is located in a non-Contracting State.[30] The interpretative meaning given to 'international interests' under the Convention does not rely on any national law definition.[31] Likewise, the motive of the Convention is not to unify national private law and

[23] R. Goode, 'From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols' (2012) 17 Uniform Law Review 599; see also Convention, Art 2(2).

[24] UNIDROIT, Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 23 February 2007). It will enter into force in accordance with Art XXIII.

[25] UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 9 March 2012). It will enter into force pursuant to Art XXXVIII.

[26] UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agriculture and Construction Equipment' (Cape Town, 22 October 2019). It will enter into force pursuant to Art XXV.

[27] Convention, Art 6(1).

[28] Convention, Art 6(2).

[29] B. von Bodungen and H. Rosen, 'From the Luxembourg Rail Protocol to the Draft MAC Protocol' (2018) 23 Uniform Law Review 190, 191.

[30] Convention, Art 2(2).

[31] S. Gopalan, 'Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment' (2003) 9 Law and Business Review of the Americas 255, 263.

substantive rules on personal property security in a domestic context but, rather, to create an optional and harmonized transnational secured transactions legal instrument specific to high-value mobile assets.[32] Thus, by developing a *sui generis* global regime, the Convention and accompanying protocols do not interfere with existing domestic substantive rules on personal property security, with the intent of avoiding, as far as possible, the need to depend on conflict of law rules.[33]

At its irreducible core, the Cape Town Convention seeks to promote cross-border commercial transactions between debtors and creditors; second, it promotes certainty in making equipment financing reasonably accessible while ensuring that creditors have expeditious remedies to enforce their rights in identifiable assets; and, third, it cuts down on transactional costs and other costs involved with monitoring the collateral and enforcing the rights of creditors.[34] Simply put, according to Sir Roy Goode, QC, the Convention and the protocols are governed by five underlying principles—namely, practicality, party autonomy, predictability, transparency, and sensitivity to the local laws of national jurisdictions.[35]

1. The Cape Town Convention

The Cape Town Convention remains one of the most successful private international law treaties today. Eighty-three countries, including the EU, are Contracting States.[36] In total, 27 African countries have either ratified or acceded to the Convention. Today, the Aircraft Protocol is the only protocol in force, having already met the requirement of eight instruments of ratification, acceptance, approval or accession.[37] The Convention enters into force only in the Contracting States to which the respective protocol applies.[38] Two African countries—Ethiopia and Nigeria—were among the first eight countries that deposited their instrument of ratification, which brought the Cape Town Convention and the Aircraft Protocol into force on 1 March 2006.[39] The

[32] N. Orkun Akseli, 'The Interpretation Philosophy of Secured Transaction Law Conventions' (2013) 21 ERPL 1299; C. Bourbon-Seclet, 'Cross-border Security Interests in Movable Property: An Attempt at Rationalising the International Patchwork—Part 2' (2005) 20 JIBLR 501, 506.

[33] K.F. Kreuzer, 'Jurisdiction and Choice of Law Under the Cape Town Convention and the Protocols thereto' (2013) 2 Cape Town Convention Journal 149.

[34] I. Davies, 'The New Lex Mercatoria: International Interests in Mobile Equipment' (2003) 52 ICLQ 151, 153–4.

[35] R. Goode, *Official Commentary* n 17 above, para 2.13–2.18.

[36] European Commission, 'Council Decision of 6 April 2009 on the accession of the European Community to the Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment, adopted jointly in Cape Town on 16 November 2001' (2009/370/EC, 15 May 2009).

[37] Aircraft Protocol, Art XXVIII. The Luxembourg Rail Protocol requires four instruments of ratification, Art XXIII; the Berlin Space Protocol requires ten instruments of ratification, Art XXXVIII; the MAC Protocol requires five instruments of ratification, Art XXV.

[38] Convention, Art 49.

[39] The eight countries were Ethiopia, Ireland, Malaysia, Nigeria, Oman, Panama, Pakistan, and USA.

Convention is open for acceptance, approval, or accession by a sovereign State or an REIO, which may also be constituted by sovereign States that have transferred competence to the REIO.[40] However, the Convention does not specify the legal personality of a REIO. Nor does Article 48 of the Convention explain the degree of competence that a REIO should possess before legislating over matters governed by the Convention.

The author supports the view that African REIOs are responsible for meeting their existing *erga omnes* obligations following the 2008 Protocol on Relations between the African Union and the Regional Economic Communities (Protocol on Relations). Article 28 of the Protocol on Relations obliges REIOs to realize their regional integration objectives by entering into cooperation agreements with international organizations or with third countries, provided that such agreements do not conflict with the objectives of the AEC Treaty. On the basis of this article, the competence of REIOs to legislate in specific matters on behalf of its Member States in Africa will be analysed. This view has been taken because of the gradual unification of law through the emerging AU legal framework, subject to Article 6 of the 1986 VCLT.[41] This emerging framework recognizes cooperation and integration between REIOs and sovereign States in Africa on various policy levels such as human rights, economic, political, or other, indicative of the existence of legal personality in REIOs.[42] The geographical delimitation of an REIO cannot be used as a determining factor because a country can belong to several REIOs.[43] There are 54 countries in Africa, and the continent is fragmented into many political jurisdictions and international boundaries. For many African countries to access global markets, they would inevitably depend on poor transport infrastructure and underdeveloped routes through other countries.[44] This is an endemic problem in Africa because of the proliferation of several competing sub-regional organizations where countries belong to multiple REIOs, resulting in duplication and overlapping economic activities.[45]

African governments' declarations complement the Cape Town Convention's application in Africa.[46] The position of African governments on the Convention

[40] Convention, Art 47–8. Any State that has not signed the Convention at the time of adoption may accede to the Convention at a later date—see Art 47(3).

[41] M. Olivier, 'Conceptualizing AU Law within the Constitutional Framework of the AU' in O. Amao, M. Olivier, and K.D. Magliveras (eds), *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (OUP 2021) 11.

[42] Ibid.

[43] J.T. Gathii, 'African Regional Trade Agreements as Flexible Legal Regime' (2010) North Carolina Journal of International Law 572, 648.

[44] P. Collier, 'Building an African Infrastructure' (2011) 48 IMF Finance and Development 18, 19.

[45] R. Tavares & V. Tang, 'Regional Economic Integration in Africa: Impediments to Progress?' (2011) 18 South African Journal of International Affairs 217, 223.

[46] Financing the Development of Aviation Infrastructure, 'Declaration and Framework for a Plan of Action for Development of Aviation Infrastructure in Africa' (3rd International Civil Aviation Organization (ICAO) World Aviation Forum, 20–2 November 2017, Abuja, Nigeria).

and the Aircraft Protocol was presented at the Diplomatic Conference adopting these instruments.[47] This fact was also supported in the former South African Minister of Transport's opening statement at the First Meeting of the Diplomatic Conference adopting the Cape Town Convention and the Aircraft Protocol in 2001, directed towards African government delegates.[48] African governments recognize the socio-economic and financial benefits of the Convention, which include the affordable acquisition of modern equipment, reduced travel fares, improved repayment interest rates, longer or slower repayment terms, increased level of financing, access to letters of credit, and reduced pressure on African governments to finance mobile equipment.[49] Accomplishing these benefits would allow African governments to divert scarce public funds to other sectors of their economy.

2. *The Rail Protocol*

Following the success of the Cape Town Convention and the Aircraft Protocol, the Rail Protocol was negotiated by UNIDROIT and the Intergovernmental Organization for International Carriage by Rail (OTIF).[50] The negotiations began in 2001 with a joint UNIDROIT–OTIF Committee session of governmental experts attended by 38 participants of 20 States and six observers from four international organizations.[51] On 23 February 2007, the Rail Protocol was officially opened for signature. The Rail Protocol is not yet in force,[52] but it has

[47] African States' Position on the Draft Convention on International Interests in Mobile Equipment and The Draft Protocol on Matters Specific to Aircraft (Presented by the African States) DCME Doc No. 25, 19 October 2001.

[48] UNIDROIT, 'Summary Record of the Meetings of the Conference Plenum—First Meeting' in *Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol: Acts and Proceedings* (UNIDROIT, Monday 29 October 2001) 733, statement by Minister of Transport of South Africa '*Permit me also to express a special word of welcome to the delegations from fellow African States. In the context of the newly created African Union and developments in the Aviation sector on our continent, your presence is precious to South Africa as we seek together to promote the interests of our continent*'.

[49] Dean N. Gerber and David R. Walton, 'De-registration and Export Remedies under the Cape Town Convention' (2014) 3 Cape Town Convention Journal 49.

[50] Unform Law Instruments, 'Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock' (2007) 12 Uniform Law Review 585.

[51] Report on Committee of Governmental Experts for the Preparation of a Draft Protocol to the Draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (First Joint Session, OTIF/JGR/3 - UNIDROIT 2001 Study LXXIIH—Doc. 5, Berne, 15–16 March 2001). The primary working paper for the Committee was the 'Preliminary Draft Protocol to the Draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock' (OTIF/JGR/2—UNIDROIT 2000 Study LXXIIH—DOC. 4). This preliminary draft Rail Protocol was produced by the Rail Working Group (RWG), co-ordinated and chaired by Mr Howard Rosen, an expert on international railway financing. During the discussions, OTIF advised that relying entirely on railway financing models such as sovereign guarantees and taxpayers funding were unsustainable, but rather an asset-based financing approach should be considered—see H. Kronke, 'The Luxembourg Protocol to the Cape Town Convention: A Pillar for the Bridge to the Future of Rail Transportation Secured Rail Financing' (2007) 12 Uniform Law Review 420.

[52] It has been signed by France, Gabon, Germany, Italy, Luxembourg, Mozambique, South Africa, Spain, Sweden, Switzerland, and United Kingdom.

been signed by three African countries: Gabon, Mozambique, and South Africa. The Rail Protocol requires four instruments of either ratification, acceptance, approval, or accession, among other requirements, before it enters into force.[53] So far, the EU and three countries (including Gabon) have submitted the required instruments.[54] Many African countries have either ratified or acceded to the Cape Town Convention, compared to similar conventions such as COTIF[55] and the 1988 UNIDROIT Convention on International Financial Leasing (Ottawa Convention).[56] The Cape Town Convention will prevail over them to the extent of any inconsistency between it and the Ottawa Convention or COTIF regarding rail equipment leasing and financing.[57]

The Rail Protocol's objectives are to facilitate private sector financing for rolling stock worldwide, eliminate bottlenecks that impede industry from participating in rail sector development, and resolve cross-border legal issues in rail financing.[58] An international legal framework to protect the rights of secured creditors and lessors who supply rolling stock under leasing agreements and retention of title contracts is a fundamental step in boosting access to finance.[59] The Rail Protocol applies to all types of rolling stock, such as movable vehicles on a fixed railway track or on, above, or below a guideway, along with parts installed on such vehicles and all manuals, records, and other data.[60]

Generally, railway systems globally have different methods of identifying rolling stock.[61] Due to the inconsistent identification systems with rolling stock, different registers for recording security interests, and many manufacturers operating worldwide, there was no mechanism to validate these different systems on which an international interest could attach successfully.[62] The Rail Protocol considered three solutions to identifying rolling stock: practically, a unique identifier designated by the international registry;[63] a national or regional numbering system utilized by a Contracting State;[64] and a manufacturer's

[53] Rail Protocol, Art XXIII.

[54] Gabon submitted an acceptance on 4 April 2017. Luxembourg ratified on 31 January 2012. Sweden ratified on 2 July 2018.

[55] Algeria, Morocco and Tunisia are the three African Contracting States to COTIF.

[56] Ghana, Guinea, Morocco, Nigeria, and Tanzania are the African signatories to the Ottawa Convention. Only Nigeria has ratified it.

[57] Rail Protocol, Art XIX and Art XX.

[58] H. Rosen, M. Fleetwood and B. von Bodungen, 'The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry' (2012) 17 Uniform Law Review 609.

[59] R. Goode, *Official Commentary* n 17 above, para 2.4.

[60] Rail Protocol, Art I(2)(e).

[61] M.J. Fleetwood, 'All Tracks Lead to Luxembourg: the Luxembourg Rail Protocol' (2007) 6 JIBFL 318; See also Rail Working Group, 'What Equipment is Covered by the Luxembourg Protocol?' (Briefing Paper).

[62] B. von Bodungen and H. Rosen, 'From the Luxembourg Rail Protocol to the draft MAC Protocol' (2018) 23 Uniform Law Review 190, 199.

[63] Rail Protocol, Art XIV (1) states that the Registrar shall allocate a unique number to an item of rolling stock which may either be affixed or associated with the existing manufacturer's or national and regional identification number.

[64] Rail Protocol, Art XIV (2–4).

serial number.[65] However, operating the international registry with three different identifiers can become cumbersome and expensive. A viable solution was to use a unique identifier—a 12-digit number, known as the Unique Rail Vehicle Identification System (URVIS), allocated by the registrar on demand and applied to a specific item of rolling stock.[66] Considering that not all countries have a dedicated registry for recording interests in rolling stock, having a harmonized recording system through URVIS, the Rail Protocol will make financing more secure for creditors while promoting transparency in ascertaining rights in rolling stock.[67]

An apparent feature of the Rail Protocol is that a Contracting State, subject to a formal declaration, can prioritize public transport accessibility, whereby the rolling stock is 'habitually used for the purpose of providing services of public importance', either for the purpose of carriage of freights or passengers.[68] Under this exemption, a Contracting State can declare that it will continue to apply its national rules of law and public regulations, which may preclude, suspend, or govern the Cape Town Convention and Rail Protocol's enforcement remedies so long as the rolling stock is habitually used to offer public transport service.[69] Effectively, the creditor may not be able to enforce the international interest over every item of railway rolling stock. Furthermore, enforcement may be unavailable because a Contracting State government may have policies dictated by constitutional matters, such as inter-city transportation, that the Rail Protocol may affect if the creditor of the rolling stock is allowed to foreclose on the rolling stock.[70] The effects of this legal quagmire can potentially cripple the public rail transport system and, ultimately, the economy. In certain circumstances, this enables the State to prevent the creditor from asserting superpriority rights against the collateral, so long as any person, including the State or a public authority retaining control, compensates the creditor of an amount equal to the greater of the rolling stock lease rental and the amount as agreed under national law.[71] The Rail Protocol stipulates that a Contracting State

[65] Rail Protocol, Art XIV (1).

[66] E. Hirst and N. Gavage, 'The International Rail Registry and The Luxembourg Rail Protocol to The Cape Town Convention—Global Registration of Mobile Assets' (2015) 46 UCCLJ 359, 368. URVIS was developed upon the completion of the Luxembourg Diplomatic Conference adopting the Rail Protocol. The Rail Working Group led an industry task force to develop URVIS, consulting with representatives from the Association of the European Rail Industry (UNIFE), Community of European Railway and Infrastructure Companies (CER), and the European Commission.

[67] B. M. Goodstein and H. Rosen, 'Financing Rolling Stock: Luxembourg Rail Protocol Steams Ahead' (2017) 257 New York Law Journal 1, 2.

[68] Rail Protocol, Art XXV.

[69] S. Saidova, *Security Interests under the Cape Town Convention on International Interests in Mobile Equipment* (Hart 2018) 238; R. Goode, *Official Commentary* n 17 above, para 3.30.

[70] B. von Bodungen and K. Schott, 'The Public Service Exemption under the Luxembourg Rail Protocol: A German Perspective' (2007) Uniform Law Review 573, 577.

[71] Rail Protocol, Art XXV(3). Rail Protocol Article XXV(4) enables a Contracting State to disapply the rules enshrined in Art XXV(2) and (3) with regards to enforcement of an international interest in the rolling stock.

should ensure that the relevant public establishments in the State swiftly cooperate with and support the creditor to the extent necessary to enforce the foreclosure order,[72] unless the Contracting State declares that it will continue to apply the rules of law in force in its territory.[73] The Cape Town Convention binds the courts of Contracting States to apply the provisions of the Convention and the Rail Protocol.[74] This may happen when, for instance, an African State becomes a Contracting State. The court in that State must apply the legal rules when the debtor is situated in a Contracting State at the time of the conclusion of the security agreement (for example, a lease agreement) that creates or provides for the international interest in the rolling stock. The location of the creditor, whether in a Contracting State or not, is irrelevant.[75]

3. *Rolling stock regulation and policy in Africa*

The institutional mechanisms that have attempted to transform rolling stock infrastructure in Africa since the dawn of the 20th century have led to an avalanche of initiatives that, for the most part, did not gain the necessary traction as anticipated.[76] Since the 1970s, African railway companies have been managed as public enterprises with government oversight. By the mid-1980s, there were gradual changes to facilitate privatization and eliminate bureaucratic bottlenecks and enhance the financial sustainability of African railways.[77] Many African railways reformed their legal status to accommodate liberalization and commercialization, encouraging private sector participation, with concessions concluded in some countries.[78] However, in many cases, privatization did not promote positive financial results as envisaged. Since then, railway traffic has gradually declined because of resource mismanagement, inadequate infrastructure, and outdated rolling stock equipment.[79]

One of the most significant of these initiatives is the Protocol on Transport, Communications and Tourism, annexed to the AEC Treaty, that confirms the

[72] Rail Protocol, Art VII(5).

[73] Rail Protocol, Art XXV.

[74] S. Kozuka, 'The Cape Town Convention and Its Implementation in Domestic Law: Between Tradition and Innovation' in Souichirou Kozuka (eds), *Implementing the Cape Town Convention and the Domestic Laws on Secured Transactions* (Springer 2017) 25.

[75] Convention, Art 3.

[76] The regulation of railway rolling stock in Africa stretches back to the Geneva Convention on the International Regime of Railways 1923, following the old British Empire's ratification, see Convention and Statute on the International Regime of Railways and Protocol of Signature (signed 9 December 1923, ratified 29 August 1924) UK Treaty Series No. 23 1925 (Cmd. 2418). See also J.G. de Matons, *A Review of International Legal Instruments: Facilitation of Transport and Trade in Africa* (2nd edn, SSATP 2014) 50.

[77] PIDA, *Progress Report 2019 Summary Update: Positioning Africa to deliver on Agenda 2063 and Economic Integration through Multi-sectoral Approaches to Infrastructure Development* (25 November 2019).

[78] Towards the African Integrated High-Speed Railway Network (AIHSRN) Development (African Union, March 2017) 2.

[79] Rail Infrastructure in Africa: Financing Policy Options (African Development Bank 2015). See also, Towards an Enhanced Africa-EU Cooperation on Transport and Connectivity: Report by the Task Force on Transport and Connectivity (European Commission, February 2020).

intention of African governments to modernize their rail infrastructure. Article 61 of the AEC Treaty encourages AU Member States to harmonize transportation rules and regulations and prepare plans to improve and harmonize rail networks across the AEC Member States to support inter-connectivity and harmonize rail transport policies.[80] Additionally, the Brazzaville Declaration and Plan of Action on African Railways was adopted in 2006 by the first meeting of the African Ministers responsible for railway transport, reaffirming African governments' commitment to modernizing their railway system to promote development and economic integration in Africa.[81] This event was followed by the Railway Professional Conference on Interconnection, Interoperability and Complementarity of African Railway Networks hosted in Johannesburg in November 2007, which considered the strategies for harmonizing standards for rolling stock and operational procedures for African railways.[82]

Further, the United Nations Economic Commission for Africa's (UNECA) Committee of Experts of the Conference of African Ministers of Finance, Planning and Economic Development, at its 38th meeting in Marrakech, explored a holistic approach to reforming railway rolling stock financing in Africa.[83] The Committee raised questions at this conference, such as the socio-economic benefits of the Rail Protocol and the extent of legal protection available to creditors who finance rolling stock through leases, secured credit, and conditional sale contracts.[84] Afterwards, the AU Commission took up the mandate to further explore the benefits of the Rail Protocol. Subsequently, it recommended the adoption of the Rail Protocol by all AU Member States:

> Recommendations: A resolution be considered to support the adoption of the Luxembourg Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock by African Member States. The Rail Protocol will make it easier and cheaper for private rail operators to finance new procurements of rolling stock using private capital.[85]

This AU mandate reflects a welcome approach to accept the Rail Protocol as an international secured transactions law solution in Africa to modernize and finance rail networks in Africa. Furthermore, the Resolution supports the reform initiatives calling upon African organizations such as UNECA to raise public

[80] AEC Treaty, Art 61(1)(c), (2)(b) and (2)(f).

[81] The conference was held from 13–14 April 2006 in Brazzaville, Republic of Congo and it was attended by several national government representatives. The Brazzaville Declaration was adopted by the Ministers from twenty-seven African States participating at the conference—see First African Union Conference of Ministers responsible for Railway Transport (International Union of Railways, 28 April 2006).

[82] See AIHSRN, n 78, 2.

[83] Financing Railway Rolling Stock: A New Solution for Africa—Issue Paper (Thirty-eighth Meeting) UNECA E/ECA/COE/38/15 (Marrakech, Morocco, 20–2 March 2019).

[84] Ibid, 1.

[85] African Union, Developing Smart Infrastructure to Boost Africa's Continental Transformation and Integration (Second Ordinary Session of the African Union Specialised Technical Committee on Transport, Transcontinental and Interregional Infrastructure, Energy and Tourism) STC-TTIIET/Min/Final/Rpt(II) (14–18 April 2019 Cairo, Egypt) 7.

awareness of the need for African countries to adopt the Rail Protocol and sensitize private and public sector stakeholders in regard to the benefits of adopting the Rail Protocol.[86] The analysis shows that African countries have remained attentive to the work of UNIDROIT on the Rail Protocol. Also, delegates from the AU were present at the first session of the Economic Commission for Europe Working Party on Rail Transport in Geneva, thus reinforcing the commitment of African governments to adopt the Rail Protocol.[87] In the next phase of this article, the EU's accession to the Rail Protocol in the capacity of a REIO will be discussed before embarking on the challenges surrounding the AU and African REIOs' competence to accede to the Rail Protocol.

III. The EU accession to the Rail Protocol

A REIO, constituted by sovereign States, can sign, accept, approve, or accede to the Cape Town Convention and the Rail Protocol,[88] so long as the REIO has competence over matters covered by the Rail Protocol.[89] Upon accession to the Rail Protocol, the REIO will be furnished with rights and obligations like a Contracting State to the extent that it has competence over matters governed by the Rail Protocol.[90] Before acceding to the Convention, the EU (then, the European Community) issued two regulations: Council Regulation 1346/2000 on Insolvency Proceedings (Insolvency Regulation) and the Brussel Regulation on Jurisdiction and Judgements (Brussels I), which relates to matters under the Convention.[91] It was concluded that the EU, and not its Member States, could conclude 'international agreements' that affect these two EU regulations.[92] Article 48 of the Convention grants less flexibility to the EU (and REIOs broadly) in implementing a protocol than sovereign countries since EU law does not harmonize the legislative environment for the rights and obligations of debtors and creditors under substantive secured transactions law.[93] Under Article XXII, the Rail Protocol deemed it necessary to permit the EU and other competent REIOs to become a Contracting State. As applicable to all Contracting States

[86] Report of the Conference of Ministers on the work of its fifty-second session (Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development) E/ECA/CM/52/2 965(LII) (Marrakech, Morocco, 25–6 March 2019) 18–19.

[87] Report of the Group of Experts on Permanent Identification of Railway Rolling Stock on its first session (Economic Commission for Europe Inland Transport Committee, Working Party on Rail Transport) ECE/TRANS/SC.2/PIRRS/2020/2 (Geneva, 2–4 September 2020).

[88] The Convention applies in relation to international interests in railway rolling stock as provided by the terms and provisions of the Rail Protocol, see Rail Protocol, Art II (1); See also Convention, Art 48.

[89] R. Goode, *Official Commentary* n 17 above, para 4.310; See R. Goode and H. Rosen, 'Explanatory Report' n 22, 14.

[90] Rail Protocol, Art XXII (1).

[91] R. Goode and H. Rosen, 'Explanatory Report' n 22, 68.

[92] R. Goode, *Official Commentary* n 17 above, para 4.310–4.312.

[93] H. Kronke, 'UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions' (2003) 8 Uniform Law Review 10, 22.

(inclusive of a REIO), a State can only effectively become a contracting party to the Rail Protocol when it has ratified or acceded to the Convention, and the Convention must be in force in that State.[94]

When acceding to the Rail Protocol, the REIO must declare competence by making a declaration under the Rail Protocol specifying the matters regarding which competence has been transferred to it from its Member States.[95] The REIO must also notify the depository—that is UNIDROIT—in the event of changes in its competence over such matters under the Rail Protocol.[96] For example, the EU deposited an instrument of approval on the basis of the:

> Declaration to be made pursuant to Article XXII(2) concerning the competence of the European Union over matters governed by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (the 'Rail Protocol'), adopted in Luxembourg on 23 February 2007, in respect of which the Member States have transferred their competence to the Union.[97]

This Declaration closely follows the European Council's previous Decision to accede to the Aircraft Protocol in conjunction with adhering to the Cape Town Convention on 28 April 2009.[98] In its proposal to accede to the Rail Protocol, it was stated that the EU has exclusive competence over some of the matters governed by the Rail Protocol,[99] such as jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[100] insolvency proceedings (other than substantive insolvency law),[101] and law applicable to contractual obligations (Rome I).[102] In contrast, EU Member States have competence over other matters governed by the law. This strategy wittingly lends to the narrative based on an agreed bilateral compromise; the Convention can be a

[94] Vienna Convention on the Law of Treaties, Art 2(1)(g); See also R. Goode, *Official Commentary* n 17, para 5.74-5.75.

[95] Rail Protocol, Art XXII(2).

[96] Rail Protocol, Art XXII(2). See also Seminar—The European Community and the Cape Town Convention: Summary Report (UNIDROIT: DC9/DEP—Doc. 8, Rome 26 November 2009) 6.

[97] Declarations Lodged by the European Union under the Luxembourg Protocol at the time of the deposit of its Instrument of Approval (UNIDROIT).

[98] European Commission, 'Council Decision of 6 April 2009 on the Accession of the European Community to the Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment, adopted jointly in Cape Town on 16 November 2001' (2009/370/EC, OJ L 121, 15 May 2009).

[99] European Commission, 'Proposal for a Council Decision on the Approval, on behalf of the European Union, of the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock adopted in Luxembourg on 23 February 2007' (COM 349 Final 2013/0184 (NLE) Brussels, 11 June 2013) 8.

[100] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L 351, 20 December 2012).

[101] Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings (OJ L 160, 30 June 2000).

[102] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) (OJ L 177, 4 July 2008).

split competence instrument whereby some competence can be vested with a REIO, while other competencies can be vested in an REIO Member State.[103]

The EU accession to the Cape Town Convention and Rail Protocol was possible because the Convention accords a REIO constituted by sovereign States—where Member States have transferred competence in some matters covered by the Convention to the REIO.[104] The effect of a REIO exercising the right to accede to the Convention is that it assumes all the rights and obligations of a Contracting State to the extent that such a REIO has the competence over matters governed by the Rail Protocol.[105] While the EU's accession to the Convention and the Rail Protocol unmasks the scope for other REIO adoption, existing sub-regional organizations in Africa arguably possess REIO status. Still, they lack the competence to accede to the Convention and the Rail Protocol. The forthcoming analysis will address two main questions—that is, legal personality of REIOs and their competence over matters governed by the Rail Protocol. The extent to which these sub-regional organizations lack the competence to legislate on matters under Rail Protocol will be scrutinized in this article. The forthcoming analysis will initially discuss legal reception in Africa and, subsequently, the role of the AU in African legal reform, and, afterwards, a study of the AU's interrelationship with the AEC's sub-regional organizations.

IV. Legal reception in Africa

The EU's accession to the Cape Town Convention and the Rail Protocol paves the way for other REIOs, including REIOs comprising developing and underdeveloped countries, to consider adopting these international instruments. The Convention has been designed to bring significant economic benefits to countries, particularly to developing countries, by allowing them to easily access secured finance for mobile equipment that was once costly and unavailable.[106] Globally, no African country is currently ranked as a developed country.[107] Today, a fundamental issue with Africa's relentless pursuit for development hinges on its economic integration policy, which is often dependent on the complicated relationship between the AU and the regional economic communities (RECs) in Africa. Untangling this complex relationship contributes to the

[103] H. Rosen, 'The Luxembourg Rail Protocol to the Cape Town Convention: Some Practical Differences from the Aviation Protocol' in S. Kozuka (eds), *Implementing the Cape Town Convention and the Domestic Laws on Secured Transactions* (Springer 2017) 364.

[104] Convention, Art 48(1), Rail Protocol. Art XXII (1).

[105] Convention, Art 48(1), Rail Protocol. Art XXII (1). See also R. Goode, 'Transnational Commercial Law and the Influence of the Cape Town Convention and Aircraft Protocol' (2011) 50 Canadian Business Law Journal 186, 207; R. Goode, 'Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and Its Protocols' (2016) 65 ICLQ 523, 538.

[106] R. Goode, *Official Commentary* n 17.

[107] African economies have been categorised as either underdeveloped or developing, see World Economic Situation and Prospects as of Mid-2020 (United Nations New York 2020).

critical discussion of whether the AU and RECs can accede to the Convention and the Rail Protocol as competent REIOs under Article XXII.

Achieving uniformity in the interpretation of the Cape Town Convention and the Rail Protocol in an AU context is a challenge that is distinct from merely realizing uniformity in implementation. Transnational legal rules do not exist in a vacuum but must be incorporated into extant regional and domestic law systems.[108] The Convention and the Rail Protocol encompass many discrete areas commonly under the jurisdiction of domestic and regional rules sometimes nested within domestic legal systems, such as collateral registration, priority rules against competing claimants, insolvency, enforcement remedies, and public service access to transport. Thus, there is an additional layer of complexity when considering the reception of treaties in a REIO. For this reason, it is of significance to understand the nature of the AU in recognizing international laws and whether the AU and AEC sub-regional organizations possess the legal personality to accede to an international treaty that may bind its Member States.

There has never been a uniform approach to adopting any private international law convention through the AU in Africa. African States individually apply the 'dualist' or 'monist' approach to conventions, following the previous practices in the domestication of treaties used by colonial powers: mainly, Britain, France, and Portugal.[109] However, many African State constitutions now embody both 'dualist' or 'monist' elements.[110] Monism aligns with the ideology that international and domestic law encompasses a particular legal order or intertwined legal orders that produce a consistent and uniform result.[111] Municipalities may draw upon international law as a rule of decision where necessary. Dualism expounds that national governments may choose to incorporate international law elements into local domestic law.[112] Still, national governments are generally free to reject other aspects of international law if they so choose.[113] Traditionally, African common law countries have been seen as dualists and civil law countries as monists.[114] Provisions of francophone African constitutions are modelled on the civil law monist doctrine, thus reflecting the spirit of Article 55 of the Constitution of France: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament,

[108] B.F. Havel & J.Q. Mulligan, 'The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool & Andrej Jonovic' (2014) 3 Cape Town Convention Journal 81, 83.

[109] M. Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 NILR 259, 273.

[110] Ibid.

[111] J.G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 British Yearbook of International Law 66, 74.

[112] J. Turley, 'Dualistic Values in the Age of International Legisprudence' (1993) 44 Hastings Law Journal 185.

[113] Ibid.

[114] M. Killander & H. Adjolohoun, 'International Law and Domestic Human Rights Litigation in Africa: An introduction' in M. Killander (eds) *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010) 4.

subject, with respect to each agreement or treaty, to its application by the other party.'[115] Upon ratification or accession at an international level and subsequent publication at the municipal level, an international convention can be integrated into a civil law country's domestic law. In a conflict between existing domestic law and the international convention, the constitution will prioritize the international convention, and domestic law will take a subordinate position.[116] An opposite position has been taken by dualist common law African countries, ensuring that an international convention is first enacted into law by order of legislation before it can attract the force of national law.[117]

Based on the analysis above, international law cannot be directly transplanted into Africa through an international organization such as the AU. AU institutions and organs do not possess the authority to accede to international laws on behalf of AU Member States. This is because the relationship between the AU and its Member States is built upon voluntary accession to the AU, which is fundamentally different from the relationship between an African Sovereign State and individuals at the national level.[118] The AU supports these findings under Article 4 of the AU Constitutive Act, which states that it is the AU's function to maintain sovereign equality and interdependence among the Member States and respect Member States' independence.[119] Thus, the AU recognizes the status of respective national laws as the applicable law in AU Member States, thereby superseding the law of the AU in the Member States. The AU also recognizes democratic principles, human rights, the rule of law, and good governance among its Member States.[120]

The AU coordinates and harmonizes the policies between existing and future sub-regional organizations of the AEC—that is, RECs.[121] The AEC Treaty led to the creation of sub-regional organizations in Africa to harmonize the laws and policies in Africa.[122] The Protocol on Relations defines a REC as 'a regional

[115] See the Francophone constitutional provisions of Bénin Republic 1990, Article 147; Burkina Faso 1991, Article 151; Burundi 2018, Article 279; Cameroon 1972, Article 45; Central African Republic 2016, Article 94; Chad 2018, Article 225; Congo 2015, Article 223; Côte d'Ivoire 2016, Article 123; Democratic Republic of the Congo 2005, Article 215; Guinea 2010, Article 151; Mali 1992, Article 116; Mauritania 1991, Article 80; Niger Republic 2010, Article 171; Rwanda 2003, Article 168; Senegal 2001, Article 98; and Togo 1992, Article 140.

[116] M. Killander & H. Adjolohoun, n 114, 5.

[117] See the dualist constitutional provisions of Malawi 1994, section 211(1); Nigeria 1999, section 12(1); and Zimbabwe 2013, section 327(2).

[118] M. Barnard, 'Legal Reception in the AU against the Backdrop of the Monist/Dualist Dichotomy' (2015) 48 CILJSA 144, 145.

[119] AU Constitutive Act, Art 4.

[120] AU Constitutive Act, Art 4.

[121] AU Constitutive Act, Art 3(l), Art 6.

[122] There are eight sub-regional organizations—Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central and Eastern African States (ECCAS), the Southern African Development Community (SADC), the Community of Sahel-Saharan States (CEN-SAD), the Economic Community of West African States (ECOWAS), the Inter-Governmental Authority on Development (IGAD), the Arab Maghreb Union (AMU) and the East African Community (EAC).

grouping of African States organised into a legal entity by treaty, with economic and social integration as main objectives'.[123] The AEC Treaty declares that signatories and sub-regional organizations should observe the AEC's legal system when implementing its objectives.[124] The AEC supports the harmonization of African national policies to promote intercontinental activities such as transportation (for example, rail and air)[125] while gradually removing barriers affecting the free movement of persons, goods, and services.[126] Article 61 of the AEC Treaty promotes the harmonization of transportation rules and regulations. It outlines the responsibilities of the AEC Treaty signatories to expand and modernize transport infrastructures by mobilizing the necessary technological and financial resources to enable the Member States to be linked.[127] The AEC Treaty ostensibly denotes the AEC as an umbrella body that allows the sub-regional organizations to operate.[128] However, the sub-regional organizations' activities must be geared towards realizing a primary objective—namely, creating an AEC.[129] What currently exists in Africa is a complex web of economic integration initiatives consisting of several geo-economic legal structures (that is, sub-regional organizations) and a non-supranational umbrella regime (the AEC), all working towards a uniform and singular treaty-mandated framework (the AU Constitutive Act).

Despite Article 5 of the AEC Treaty stating that the AEC's primary aim is developing sub-regional communities, there is a growing concern that sub-regional organizations tend to create parochial policies, thereby losing sight of the main objective, which is the establishment of a common market.[130] The AEC's close relationship with its sub-regional organizations is re-echoed under the Protocol on Relations. While the Protocol on Relations was created to provide horizontal and vertical cooperation and harmonization of economic integration programs and agendas between the AU and the REC, national governments have not conferred supranational rights on sub-regional organizations.[131] Nevertheless, the signatories to the Protocol on Relations have agreed to continue cooperating with national governments to harmonize their policies and

[123] Protocol on Relations, Art. 1. Signatories to the Protocol on Relations are the AU and seven RECs namely COMESA, ECCAS, SADC, ECOWAS, IGAD, CEN-SAD, and EAC. It was signed on 27 January 2008.

[124] AEC Treaty, Art 3(e).

[125] AEC Treaty, Art 4 (2)(e).

[126] AEC Treaty, Art 4 (2)(i).

[127] AEC Treaty, Art 61 (2).

[128] R.F. Oppong, 'Redefining the Relations between the African Union and Regional Economic Communities in Africa' (2009) 9 Monitoring Regional Integration in Southern Africa Yearbook 5, 6.

[129] Ibid.

[130] J.G. de Matons, 'Facilitation of Transport and Trade in Sub-Saharan Africa: A Review of International Legal Instruments Treaties, Conventions, Protocols, Decisions, Directives' (SSA Transport Policy Working Paper No. 73, January 2003) 61.

[131] D. Nagar and F. Nganje, 'The AU and Africa's Regional Economic Communities' (African Union Report: Regional and Global Challenges, Centre for Conflict Resolution, 2016) 26.

programs while enabling the implementation of the AEC Treaty and AU Constitutive Act's objectives.[132] The next section of this article will analyse the legal personality of the AU and the AEC and its sub-regional organizations, including their limitations in acceding to the Rail Protocol.

1. Legal personality: the status of the AU and AEC sub-regional organizations

To the extent that it is relevant to this discussion, the legal status of the RECs, the AEC, and the AU is perhaps one of the most perplexing dilemmas in regard to Africa's economic integration story. This legal dogma can be expounded by first explaining the principles of subsidiarity and proportionality within the AU context. The principle of subsidiarity establishes an international organization's complementary role by prescribing that only matters that cannot be effectively dealt with at the regional level should be acted upon by the relevant international organization.[133] Thus, a community of a higher order (for example, the AU or the AEC sub-regional community) should not interfere in a matter within the jurisdiction of a sovereign State, thereby depriving the sovereign State of its objectives. Instead, they should be supported to coordinate their activities with the activities of the AU to meet the overarching goals of the AU and the AEC. The proportionality principle considers whether the actions employed by the higher order are suitable and necessary for achieving the objectives in their founding treaties.[134]

The above discussion feeds into this normative analysis—whether sub-regional organizations or the AU possess the appropriate legal capacity to accede to the Cape Town Convention and the Rail Protocol as a REIO and whether they have competence in certain matters under Article XXII of the Rail Protocol. As a starting point, sub-regional organizations in Africa possess legal personality, with evidence of legal personality etched in their founding treaties.[135] Likewise, implicitly, it can be inferred from Article 98(2) of the AEC Treaty that the AEC possesses legal personality. As the AEC's legal representative, the provision explains that the AU Secretary-General may, on behalf of the Community, enter into contracts and be a party to judicial and other legal proceedings. Yet, curiously and rather critically, the AU Constitutive Act is silent on the international legal personality of the AU. A sensible explanation for this unfortunate omission can be traced back to the 1965 General Convention on Privileges and Immunities of the Organization of African Unity. Article 1 of the 1965

[132] Protocol on Relations, Art 4(a).

[133] B. Møller, The Pros and Cons of Subsidiarity: The Role of African Regional and Subregional Organisations in Ensuring Peace and Security in Africa (Danish Institute for International Studies (DIIS) Working Paper, Copenhagen 2005) 3.

[134] B. Fagbayibo, 'Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union' (2013) 20 South African Journal of International Affairs 411, 418.

[135] See examples in ECOWAS Treaty, Art 88(1); COMESA Treaty, Art 186(1); EAC Treaty, Art 138(1); SADC Treaty, Art 3(1).

Convention states that the OAU (now the AU) possesses a 'juridical personality' and can enter into contracts and institute legal proceedings. Regardless, this lack of clarity surrounding the AU's legal personality represents a missed opportunity for the AU in its Constitutive Act to clarify the status of its existence as a legal person and its capacity to enter into international agreements and ratify conventions.[136]

It is noteworthy that the OAU's objectives were not aligned with those of the AU because the OAU was formed almost exclusively to tackle colonial issues.[137] In contrast, the AU was later formed to advance African sovereign States' economic integration and socio-economic development while promoting democratic principles and institutions.[138] The AU has supranational authority over its Member States,[139] although the AU was brought into existence by its Member States.[140] The AU has been described as a body 'endless in size and eternal in time, allowing for the admission of other members at any time after the entry into force of the [Constitutive] Act'.[141] The AU Constitutive Act itself does not confer international legal personality on the AU. Instead, it was recognized in the decision of *Femi Falana v African Union*[142] that, as an international organization, the AU has its distinct legal personality separate from its Member States with the legal capacity to become a party to an international treaty. This conferred status of 'international organization' on the AU makes the AU more responsive to the international law-making process.

It has also been stated that the AEC is an integral part of the AU,[143] and the AU Constitutive Act will supersede and take precedence over the AEC Treaty where there are inconsistencies or contrary provisions in its application.[144] This is because the AU represents a political umbrella organization for the independent African States championing a social, cultural, and political agenda. At the same time, the AEC is a part of the AU's plan for economic integration. However, the same cannot be agreed in regard to sub-regional organizations as dependent on the AU because of their legal personality status. Surprisingly, the AEC Treaty is silent about the legal status of sub-regional organizations within the AEC and whether they are subject to the AEC Treaty regarding inconsistencies between their founding treaties and the AEC Treaty.

[136] The OAU Charter 1963, adopted in Addis Ababa, is also silent about the legal personality of the OAU.

[137] K.D. Magliveras and G.J. Naldi, *The African Union: History, Institutions, and Activities* (Wolters Kluwer 2018) 105.

[138] Ibid.

[139] AU Constitutive Act, Art 4.

[140] AU Constitutive Act, Preamble.

[141] N.J. Udombana, 'The Institutional Structure of the African Union: A Legal Analysis' (2002) 33 California Western International Law Journal 69, 82.

[142] African Court on Human and Peoples' Rights, Application No. 001/2011.

[143] AEC Treaty, Art 98(1).

[144] AU Constitutive Act, Art 33(2).

There is no express indication under the AEC Treaty about whether sub-regional organizations (that is, REIOs) are organs, members, or agents of the AEC. The AEC Treaty does not specify any membership criteria. However, it provides a benchmark stating that contracting parties to the AEC Treaty are members of the AEC.[145] Membership of the AEC comprises African sovereign States. Thus, it can be argued that sub-regional organizations are not organs of the AEC.[146] To take a purposive and holistic approach, it is conclusive that sub-regional organizations are neither members nor organs of the AEC. Since they are neither organs nor members of the AEC, in consideration of their objectives, sub-regional organizations are agents of the AEC with a mandate to realize the AEC's objectives, strengthen their relationship with the AU, and align their policies with those of the AU.[147] As agents of the AEC with legal personality, REIOs in Africa can enter into contractual obligations under treaty law. The position of an REIO as a body with legal personality was further reinforced under Article 1 of the Protocol on Relations, where it was stated that 'Regional Economic Community' means a corporate legal entity established by its Treaty (AEC Treaty) whose objective is to promote economic integration towards the establishment of the AEC.

2. *Competence to accede to the Cape Town Convention and the Rail Protocol: challenges and opportunities*

It has been realized that sub-regional organizations in Africa have legal personality and the capacity to enter into contractual obligations. Still, the extent to which they can achieve this over sovereign States is questionable. The effect of private international laws needs to be discussed here because the Cape Town Convention and the Rail Protocol require contracting parties—in this case, REIOs—to make necessary declarations regarding competence that directly affect their Member States. A modern private international law can provide legal certainty for transnational secured transactions over mobile equipment that may cross national borders of sovereign States in Africa while simultaneously ensuring that substantive domestic laws are not fundamentally altered. Notwithstanding, there has been little success in developing a *corpus juris* on private international law in Africa. However, there have been some superficial attempts to harmonize private international law in the sub-regions. For example, Article 57(1) of the Economic Community of West African States (ECOWAS) Treaty states that the Member States should 'cooperate in judicial and legal matters with a view to harmonizing their judicial and legal systems'. Also, Article 126 of the EAC Treaty requires Member States to 'encourage the standardisation of judgements of court within the community'. Likewise, Article 86(2) of the Common Market for Eastern and Southern Africa (COMESA)

[145] AEC Treaty, Art 2.

[146] AEC Treaty, Art 7(1) states that the organs of the AEC are Assembly of Heads of State and Government, Council of Ministers, Pan-African Parliament, Economic and Social Commission, Court of Justice, General Secretariat and Specialised Technical Committees.

[147] Protocol on Relations, Art 5.

Treaty expects Member States to 'harmonise or approximate their laws to the extent required for the proper functioning of the Common Market'.[148]

The ideology of harmonization is discussed inconsistently across the sub-regional organizations' founding treaties. There is no clear guidance on how sub-regional organizations will implement legal harmonization in the Member States, which institutions will be responsible, or which instruments (for example, directives, protocols, conventions, and so on) will be adopted by Member States. Harmonization of law in sub-regional organizations requires the existence of strong institutions to facilitate this vital objective. Such institutions should possess the authority to create, enforce, and interpret harmonized laws.[149] No single institution is explicitly assigned the responsibility of harmonizing private international law within African sub-regional organizations.[150] Harmonization and unification of law within a sub-regional organization depend on the availability of a legal foundation. This legal foundation necessitates an imposition on its Member States to adhere to the legal obligations stemming from such legal foundation. An example of a legal foundation for applying the Cape Town Convention and the Rail Protocol is substantive law rules on insolvency law.[151] The rights of competing claimants in the enforcement of security interests over personal property are not currently within the competence of sub-regional organizations in Africa. Also, the priority of competing security rights and enforcement of secured and unsecured security rights falls exclusively within national law. Similarly, remedies on insolvency regarding the three alternatives under Article IX of the Rail Protocol fall under national law jurisdiction to implement its provisions.

Also, there are no uniform sub-regional transport policies for rolling stock regarding maintaining public service access. In Africa, sub-regional organizations cannot make declarations relating to public services under the Rail Protocol because they do not have exclusive competence over rail transport service laws. The 2011 African Charter on Values and Principles of Public Services and Administration (Public Services Charter) strengthens cooperation among Contracting States and the AU to improve public services, such as transportation, in each Contracting State. The Public Services Charter is now in force, having received 38 signatures and been ratified by 19 African countries.[152] The Contracting States to the Public Services Charter are required to implement its

[148] The COMESA Treaty enjoins its member states to co-operate in trade liberalisation, transportation, and a host of other socio-economic areas of importance, see Art 82(6)(c).

[149] R.F. Oppong, 'Regional Integration and Fundamentals of Legal Harmonisation' in J. Döveling and H.I. Majamba (eds), *Harmonisation of Laws in the East African Community: The State of Affiars with Comparartive Insights from the European Union and other Regional Economic Communities* (TGCL Series 5, 2018) 125.

[150] Ibid, 126.

[151] Convention, Art 29.

[152] Public Services Charter, Art 30(1). The nineteen countries are Algeria, Benin Republic, Burkina Faso, Burundi, Cameroon, Cote d'Ivoire, Comoros, Congo, Kenya, Mali, Malawi, Mozambique, Mauritius, Namibia, Rwanda, South Africa, Sao Tome and Principe, Tanzania, and Zambia.

provisions by ensuring the continuity of public services 'under all circumstances', while protecting the rights of public transport users.[153] The Public Services Charter instructs sub-regional organizations to encourage their Member States to ratify or accede to its Charter and implement it.[154] There is no indication whatsoever that the Public Service Charter is open to signature from the sub-regional organizations. The Public Service Charter has been designed for adoption at the national level and not at a sub-regional level.

While it can be argued that sub-regional organizations possess legal personality, they do not have the competence to accede to an international convention, such as the Cape Town Convention and the Rail Protocol, which could become community law to bind the Member States.[155] Their founding treaties do not empower them to conclude treaties and conventions with respect to Article 6 of the 1986 VCLT. However, sub-regional organizations may encourage Member States and cooperate with them to become Contracting Parties to international conventions that align with the objectives of the sub-regional organizations and the AU. In this respect, the 2014 Convention on Cross-Border Cooperation (Niamey Convention)[156] facilitates cross-border cooperation at local and sub-regional levels.[157] It commits contracting parties to promote cross-border cooperation in areas such as industry and transportation.[158] Regional cooperation can be the facilitator of choice of law rules on secured transactions over mobile equipment in the sub-regions while ensuring adherence to uniform standards outlined under the respective treaties of the sub-regional organizations. The recognition and enforcement of foreign judgments in sovereign States that have ratified the Convention and the Protocol would ensure the effectiveness of judicial decisions, thus aiding harmonized transnational settlement of disputes in sovereign States. Regional cooperation between national courts would furnish sub-regional organizations with greater insight and influence that may impact Africa's future rolling stock legal policies, leading to uniform interpretation and consistent application of the Convention and the Protocol.

While it is conclusive that sub-regional organizations lack exclusive competence over private law matters under the Cape Town Convention and the Rail Protocol, other contemporary legal frameworks have made attempts to reform private laws in Africa by harmonizing substantive business law. These frameworks are influenced by historical legal traditions and past affiliations with foreign administration and colonialists. A prime example is the OHADA and its collection of legal instruments (uniform acts) designed to harmonize business

153 Public Services Charter, Art 3.

154 Public Services Charter, Art 23(ii).

155 R.F. Oppong, *Legal Aspects of Economic Integration in Africa* (CUP 2011) 69–72.

156 The Niamey Convention has been signed by seventeen African states. It has received five ratifications. It will come into force after the fifteenth instrument of ratification has been received by the AU Commission.

157 Niamey Convention, Art 2(1).

158 Niamey Convention, Art 3(2).

laws of participating African States.[159] It represents an ambitious effort in reforming investment and business law.[160] However, OHADA has been set up with a particular structure and purpose. This article will subsequently consider the mandate of OHADA and whether OHADA can exercise competence to legislate over matters under the Convention and the Rail Protocol.

3. *Is OHADA the answer?*

The OHADA Treaty was enacted to facilitate business activities and foreign investment in 17 francophone African countries.[161] OHADA possesses an international legal personality and may enter into contracts to fulfil its objectives.[162] The OHADA Treaty creates a single supranational court—the Common Court of Justice and Arbitration—to hear disputes on OHADA law.[163] OHADA's Uniform Act Organising Securities (UAS) regulates substantive commercial law rules over real security and personal security in OHADA countries.[164] The type of securities encompasses legal mortgages, pledge of debt, pledge of documentary intangibles, reservation of title agreements, assignment of debts, liens, and personal guarantees.[165]

OHADA's status as an international organization with a sub-regional mandate that can exercise competence under the Cape Town Convention and the Rail Protocol is disputable. First, the Protocol on Relations defines a sub-regional organization as a group of African States with 'economic and social integration' as a primary objective.[166] Article 28 of the AEC Treaty requires sub-regional organizations to coordinate and harmonize their activities in 'all fields or sectors'. These definitions do not align with the mandate of OHADA, which is to facilitate a single, cross-border regime of uniform business law in civil law, French-speaking African States.[167] Second, although the AU has aligned its policies with the AEC, tasked to further the economic integration of

[159] R. Beauchard and M.J. Vital Kodo, 'Can OHADA Increase Legal Certainty in Africa?' (Justice and Development Working Papers 65989, 2011) 7.

[160] Ibid.

[161] The OHADA Member States are Bénin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of the Congo, Senegal, Togo. See also M. Frilet, 'Legal Innovation for Development: The OHADA Experience' (2013) 4 World Bank Legal Review 335.

[162] OHADA Treaty, Art 46.

[163] C.M. Dickerson, 'The OHADA Common Court of Justice and Arbitration: Exogenous Forces Contributing to Its Influence' (2016) 79 Law & Contemporary Problems 63.

[164] The UAS was adopted on 17 April 1997. It came into force on 1 January 1998, and subsequently revised and adopted on 15 December 2010 in Lomé, Togo.

[165] J. J. Milingo Ellong, 'OHADA and the Intra-African Regulation of Commercial Exchanges: Critical Study' (2015) International Business Law Journal 517, 528.

[166] Protocol on Relations, Art 1.

[167] Article 53 of the OHADA Treaty welcomes non-OHADA member countries to sign its Treaty, including non-Member States of the OAU (i.e., now AU); See B. Fagbayibo, 'Towards the Harmonisation of Laws in Africa: is OHADA the way to go?' (2009) 42 Comparative and International Law Journal of Southern Africa 309.

Africa, there is a proliferation of several other competing organizations (that is, sub-regional organizations), resulting in occasional duplication and overlapping economic activities.[168] Such proliferation makes the task of challenging economic integration due to overlapping membership, thereby leading to irrational configurations and inconsistencies in harmonization and coordination of trade liberalization and facilitation.

On the other hand, some OHADA Member States belong to one or more sub-regional organizations in Africa, thus presenting a challenge for OHADA to be considered an REIO under Article XXII of the Rail Protocol. For instance, Senegal and Coôte d'Ivoire are Member States of ECOWAS and the Community of Sahel-Saharan States—two different sub-regional organizations with separate regional economic objectives. Yet, these two countries are also OHADA Member States. While OHADA promotes trade and investment in predominantly OHADA civil law countries regardless of their sub-regional affiliations, sub-regional organizations take a different approach, enhancing economic integration within their respective communities.[169]

In the event of overlapping membership, transfer of competence from one REIO to another is unprecedented. A comprehensive legal framework would need to be agreed upon by Member States at both the continental and sub-regional levels to transfer competence or move REIOs towards supranational governance. To do this, certain requirements need to be met. First, normative instruments will need to be adopted and ratified. Currently, ratifying regional standards is a passive and non-binding process that leads to delays in the operationalization and effectiveness of regional laws in Africa.[170] Second, there needs to be a concerted effort to transfer power to REIOs. Striking a balance between State sovereignty and supranationalism should be carefully considered. The AU Commission on International Law is responsible for the codification and progressive development of international law in African.[171] However, a framework that details the gradual transfer of competence to institutions responsible for monitoring governance standards will need to be established by the AU Commission on International Law.

OHADA was created to increase investment and trade participation in civil law countries in Africa. Signatories to the Cape Town Convention and the Rail Protocol and the Member States of sub-regional organizations are not delineated based on the legal system of their participating countries. The Convention and the Rail Protocol are open to accession by any country,

[168] R. Tavares & V. Tang, 'Regional Economic Integration in Africa: Impediments to Progress?' (2011) 18 South African Journal of International Affairs 217, 223.

[169] Protocol on Relations, Art 3(b).

[170] B. Fagbayibo, 'Enhancing Good Governance in Africa: The Imperative of a Supranational Approach' (2012) 14 U Botswana LJ 135, 143.

[171] Statute of the AU Commission on International Law 2009 ('AUCIL Statute'), Art. 4(a).

regardless of the legal system—whether common law, Shariah law, civil law, and so on.[172] Several rules under the Convention and the Rail Protocol enable contracting parties to make certain declarations about the applicability or scope of their legal provisions or the approach they wish to take in its implementation.[173] This step was necessary to accommodate the diversity of legal systems worldwide regarding the recognition and implementation of the Convention's provisions (for instance, some countries may need a particular approach to exercise extra-judicial remedies). The declarations are open to both Contracting States and REIOs, with the intention that all Contracting States make the declarations fully compliant with the Convention and the Rail Protocol's obligations. Though OHADA possesses supranational authority over its Member States, it cannot be classified as an REIO due to a lack of a primary economic integration mandate. Thus, OHADA cannot claim competence to legislate over matters under Article 48 of the Convention and Article XXII of the Rail Protocol.

V. Conclusion

This article concludes the argument surrounding the competence of the sub-regional organizations in Africa to accede to the Cape Town Convention and the Rail Protocol under Article XXII of the Rail Protocol as REIOs. According to the AU Constitutive Act and the AEC Treaty provisions, sub-regional organizations cannot accede to the Convention and the Rail Protocol. It has been concluded that the AU and the AEC's legal structures and economic objectives do not furnish sub-regional organizations with the exercise of exclusive competence on matters under the Convention and the Rail Protocol. African States can ratify the Convention and the Rail Protocol in their sovereign capacities. In total, 27 African States have either ratified or acceded to the Convention; two have signed the Rail Protocol, while only Gabon has accepted the Rail Protocol. Acceding to the Rail Protocol will have several impacts for African States. Railway rolling stock is crucial to support economic growth and sustainable development in Africa. This infrastructure deficit is a significant hindrance to intra-African trade.[174] Africa lost 25 per cent of its expected growth in the last 20 years due to inadequate infrastructure, thus leading to the high cost of

[172] Contracting States may make declarations under the Convention and Rail Protocol Declarations arranged by Article Deposited Under the Cape Town Convention On International Interests In Mobile Equipment.

[173] There are five different categories of Declarations: Opt-in, Opt-out, Declarations relating to State's Own Laws, Mandatory Declarations, Others. The Declaration under Article 54(2) of the Convention is required to be made at the time of the Contracting Party's deposit of its instrument of ratification, acceptance, approval of, or accession to, the Rail Protocol. All other Declarations under the Convention as they pertain to rolling stock may be made by Contracting Parties at the time or at a later time—see R. Goode, *Official Commentary* n 17 above, Appendix X.

[174] V. Foster and C. Briceño-Garmendia, *Africa's Infrastructure A Time for Transformation* (World Bank Group, Paper 52102, 2010) 113.

trade.[175] Improving infrastructure by acceding to the Cape Town Convention and Rail Protocol will enable African countries to engage fully in intra-African trade and reap socio-economic development benefits. Accession will open up multinational private sector financing from investment entities such as leasing companies, banks, and private equity funds, rather than national public funding.

The vast size of Africa and its landlocked countries encourages the development and use of high-speed, high-capacity rail rolling stock. The availability of modern rail rolling stock can also accelerate membership of OTIF in African States, thus leading to reform of railway contract law in Africa. Such reform could be achieved by adopting COTIF,[176] the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail,[177] and the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail.[178] With the launch of the AfCFTA, the realization of the 2030 Agenda for Sustainable Development and Agenda 2063 ('The Africa We Want') is achievable.[179] Interregional connectivity and efficient logistic services through better rail rolling stock are at the core of this agenda. Rail transport is a safe and cost-effective way to transport large freights and valuable commodities such as crude oil, mined natural resources, and agricultural goods while ensuring greater energy efficiency and lower greenhouse gas emissions.[180] The AfCFTA has created a single interconnected market to provide African businesses with economies of scale and enhanced product mobility, thereby creating enormous markets. African countries accession to the Rail Protocol can bring long-term economic growth and sustainable development to the continent.

[175] Assessing the Status of Regional Integration in Africa (Thirty-eighth Meeting) UNECA E/ECA/COE/38/3/Rev.1 (Marrakech, Morocco, 20-22 March 2019) 9-10.

[176] 'Accession to the [COTIF] Convention shall be open to any State on the territory of which railway infrastructure is operated', COTIF, Art 37.

[177] Applicable from 1 July 2006.

[178] Applicable from 1 July 2006.

[179] L. Abrego, M.A. Amado, T. Gursoy, G.P. Nicholls, and H. Perez-Saiz, *The African Continental Free Trade Agreement: Welfare Gains Estimates from a General Equilibrium Model* (IMF Working Paper WP/19/124, 2019) 4.

[180] Vera Songwe and Howard Rosen, 'The Luxembourg Rail Protocol: Making the Railways Work for Africa' (Rail Working Group).