

# From red tape to red carpet: the UNIDROIT Cape Town Convention and MAC Protocol's Adventure in Africa

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## Abstract

This article examines the implementation of the Mining, Agricultural and Construction (MAC) Equipment Protocol under the Cape Town Convention in Africa, focusing on enhancing economic growth and sustainable development through improved access to financing for high-value mobile equipment. Africa's economic development is significantly hindered by inadequate infrastructure, which escalates transaction costs and limits access to international markets. Investment in modern infrastructure, particularly in the mining, agricultural, and construction sectors, is typically expensive for many businesses in the African region. The MAC Protocol aims to address these challenges by providing a uniform legal framework that supports the financing of MAC equipment. The Convention and the MAC Protocol facilitate access to affordable capital and reduce risks for financiers who take international interests in MAC equipment, promoting economic activities in Africa. The article highlights the legal protections offered by the MAC Protocol, ensuring rights against third-party claims and enhancing the enforceability of international interests. The adoption of the MAC Protocol by African States could significantly impact their ability to meet the United Nations Sustainable Development Goals by making modern, cost-efficient equipment more accessible, thus boosting productivity and economic diversification. The article advocates for adopting the MAC Protocol, emphasizing its potential to enhance foreign investment in the mining, agriculture, and construction sectors, stimulating economic development in Africa. This strategic move will propel African countries towards greater economic resilience and integration into the global economy. The article also critically analyses and illustrates the several declaration mechanisms available to countries adopting the MAC Protocol, accompanied by a guidance note to sensitize lawmakers when signing and/or ratifying or acceding to the Cape Town Convention and the MAC Protocol.

## I. Introduction

Infrastructure is the foundation of development and an enabler of prosperity that can contribute to economic growth in Africa, thereby reducing the cost of doing business and attaining its United Nations (UN) Sustainable Development Goals targets.<sup>1</sup> The African region faces a shortfall in investment in critical areas such as construction, transport, mineral resources, and agriculture.<sup>2</sup> Investment commitments to Africa's infrastructure averaged

<sup>1</sup> UNECA, 'Assessing Regional Integration in Africa: Africa's Services Trade Liberalization & Integration under the AfCFTA' (United Nations Economic Commission for Africa, 2021) 16.

<sup>2</sup> *ibid.*

US \$75 billion in the last decade, mainly because of a reduction in funding from China, estimated at US \$14.5 billion, and a US \$4.9 billion decline in private sector investment.<sup>3</sup> African governments' contributions to infrastructure financing were sharply curtailed after the commodity price shock between 2014 and 2016.<sup>4</sup> The African Development Bank Group (AfDB) estimates that Africa needs approximately US \$150 billion annually to meet its projected needs, and with an infrastructure deficit of about US \$100 billion, the challenge of mitigating financial sustainability is enormous.<sup>5</sup>

The availability of modern infrastructure reduces transaction costs for businesses that lease or acquire equipment, with improved access to the global input and output market.<sup>6</sup> According to the African Union's *Agenda 2063: The Africa We Want*, infrastructure plays a crucial role in facilitating Africa's roadmap for transformation into the global powerhouse of the 21st century.<sup>7</sup> In a recent issues paper, the UN Economic Commission for Africa (UNECA) stipulated that foreign private investment is an essential source of financing for productivity, infrastructure development, and modern equipment in post-pandemic Africa.<sup>8</sup> The high cost of modern equipment is prohibitive for small businesses that lack available capital—especially equipment of high value—thereby exacerbating financial exclusion.<sup>9</sup>

An enabling legal environment is critical to protect property rights in certain types of movable equipment that may be used in various countries during its existence, financed by a holder in due course, and are effective against third-party competing claimants. These legal obstacles hinder cross-border private sector financing for mining, agricultural, and construction equipment. To boost financing in MAC equipment globally, the Mining, Agricultural and Construction Equipment Protocol (MAC Protocol) was adopted at a diplomatic conference in Pretoria, South Africa, on 22 November 2019. The MAC Protocol is a uniform law prepared by the International Institute for the Unification of Private Law (UNIDROIT).

This article encourages African countries to accede to the MAC Protocol. The mining, agriculture, and construction sectors contribute to economic growth and improved quality of life in most African countries.<sup>10</sup> This article analyses the benefits of the MAC Protocol, with the potential to lead to reduced costs in financing MAC equipment, while allowing African countries to augment their export diversification within and outside Africa. Further, it addresses the various African Union (AU) mining, agriculture, and construction policies and their impact on the African Continental Free Trade Area (AfCFTA) Agreement Protocol on Trade in Goods. The status and legal position of the MAC Protocol, its legal, social, and economic benefits for African countries, and how the MAC Protocol can catalyse infrastructural value chain and sustainable development, financial inclusion, and trade liberalization form the subject matter of this article (see [Figure 1](#)).

<sup>3</sup> UNECA, 'Innovative Finance for Private Sector Development in Africa' (United Nations Economic Commission for Africa, 2020) 19.

<sup>4</sup> Montfort Mlachila and Rasmané Ouedraogo, 'Financial Development Curse in Resource-rich Countries: The Role of Commodity Price Shocks' (2020) 76 *Quarterly Review of Economics and Finance* 84.

<sup>5</sup> AfDB, 'Africa's Infrastructure: Great Potential but Little Impact on Inclusive Growth' (African Economic Outlook, 2018) 82.

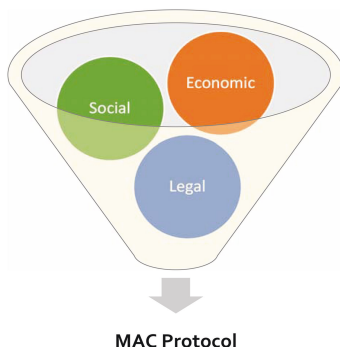
<sup>6</sup> Aparajita Goyal and John Nash, 'Reaping Richer Returns Public Spending Priorities for African Agriculture Productivity Growth' (World Bank Group, October 2016) 11.

<sup>7</sup> 43: The Africa We Want (Aspiration 2), 'We aspire that by 2063, Africa shall ... have a world class, integrative infrastructure that criss-crosses the continent'.

<sup>8</sup> UNECA, 'Africa's Economic Development in the Postcoronavirus-disease Era: The Role of Regional Integration, Infrastructure and Technology' (United Nations Economic Commission for Africa, Issue Paper E/ECA/CPRT/IT/2/5, December 2021) 3–5.

<sup>9</sup> John Linarelli, Steven L. Schwarz and Ignacio Tirado, 'Financial Inclusion, Access to Credit and Sustainable Finance' (2021) 84 *Law & Contemporary Problems* i, iv.

<sup>10</sup> Jules Pretty, Zareen Pervez Bharucha and Others, 'Foresight and African Agriculture: Innovations and Policy Opportunities' (UK Government Office for Science, 2014); see Gary Toenniessen, Akinwumi Adesina, Joseph DeVries, 'Building an Alliance for a Green Revolution in Africa' (2008) 1136 *Annals of the New York Academy of Science* 233.



Legal Benefits	Economic Benefits	Social Benefits
<p><i>International interests:</i> They can be created over MAC equipment used in African countries.</p> <p><i>Ranking of priority:</i> The rights of financiers against competing claimants in insolvency are predictable.</p> <p><i>Legal personality:</i> Businesses in Africa can access MAC equipment under the MAC Protocol regardless of their legal personality, whether registered or unregistered, private or public entities.</p> <p><i>Property registry:</i> MACIR will ensure that searchers can search for interests in equipment, and financiers can also register their international interests.</p> <p><i>Applicable law:</i> Property laws in African countries remain relevant for establishing international interests in immovable-associated equipment under the alternative choices in Article VII.</p>	<p><i>Affordable access to finance:</i> Debtors in Africa who require high-value MAC equipment can import them with cheaper interest rates.</p> <p><i>Foreign capital:</i> African countries can manufacture and export MAC equipment overseas. The financial health of MAC companies in Africa will be boosted by capital from abroad.</p> <p><i>Increased outputs and employment:</i> The MAC Protocol contributes significantly to the mining, agricultural, and construction sectors, as well as to GDP, while improving employment in the manufacturing, agriculture and mining industries in Africa.</p> <p><i>Modern equipment:</i> Companies in Africa that use MAC equipment will have better access to more modern equipment.</p> <p><i>Partnerships:</i> African firms can enter major supply chain and distribution agreements with global investors.</p> <p><i>Productivity:</i> Improved market access where more countries adopt the MAC Protocol may lead to higher productivity in the mining, agricultural and construction sectors where equipment is needed.</p>	<p><i>Social inclusion:</i> The MAC Protocol will boost agricultural mechanization in Africa, thereby developing value chains and food systems to render postharvest and processing activities efficient and environmentally friendly.</p> <p><i>Poverty Alleviation:</i> Secured transactions law reforms through the MAC Protocol will contribute to achieving the African Union Agenda 2063 goal of eradicating poverty.</p> <p><i>Sustainability:</i> For sustainable mining, agricultural and construction growth in Africa in the short to medium term, adopting mechanized legal policies such as the MAC Protocol will set Africa on a sustainable path to commercial development while protecting the environment because of access to modern equipment.</p>

Figure 1. The Legal Economic and Social Benefits of the MAC Protocol

## II. Current problems and challenges for MAC equipment financing in Africa

On 21 March 2018, 44 Member States of the AU signed the AfCFTA Agreement, thereby creating one of the largest free trade areas in the world.<sup>11</sup> Today, the AfCFTA Agreement connects 55 countries and 1.3 billion people in Africa. The combined gross domestic product (GDP) of the AfCFTA economies is estimated at US \$3.4 trillion.<sup>12</sup> The AfCFTA Agreement officially entered into force on 30 May 2019 after its ratification by 22 AU Member States. The AfCFTA Agreement was not initially envisioned in the 1991 Abuja Treaty establishing the African Economic Community,<sup>13</sup> but its establishment, according to *Agenda 2063: The Africa We Want*, responds to a need for an effective means of promoting African productivity in a rapidly changing world economy.<sup>14</sup>

The AfCFTA Agreement promotes competition by increasing incentives among African countries to add value to raw materials while promoting regional value chains, thus leading to African countries joining global supply chains.<sup>15</sup> UNECA recently undertook an economic modelling analysis to assess the implications of the AfCFTA modalities on trade in goods in African economies.<sup>16</sup> It was evaluated that, if trade was not liberalized to accommodate the sale and financing of goods across value chains and supply chains, the AfCFTA might fail to achieve its guiding principle of substantial liberalization.<sup>17</sup>

In the past decade, Regional Economic Communities (RECs) in Africa have identified key priorities in regional value chain development of economic value based on comparative advantages, including construction, mining, and agriculture.<sup>18</sup> For example, the Southern African Development Community's (SADC) *Regional Industrialisation Strategy and Roadmap 2015–2063* has committed to developing six regional value chains (agro-processing, minerals and mining, capital goods, and services).<sup>19</sup> Since 2010, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union have adopted the West Africa Competitiveness Programme, a six-year policy strategy to develop value chains involving agriculture and mining at the national and regional levels.<sup>20</sup> Following the development of the East African Community Cotton, Textiles and Apparel Strategy,<sup>21</sup> the industry emerged as a priority sector within national development plans of East African Community Member countries, with the expected target to build a globally competitive industry using a modern production infrastructure.

Despite the regional initiatives to boost infrastructural development across mining, construction, and agriculture sectors, most of these initiatives are yet to be fulfilled. Most African economies have not capitalized on the availability of commodities to expand their

<sup>11</sup> African Union, Agreement Establishing the African Continental Free Trade Area (AfCFTA).

<sup>12</sup> UNECA, 'Governing the African Continental Free Trade Area–Regional Economic Communities Interface' (2021) 8.

<sup>13</sup> Treaty Establishing the African Economic Community 1991 (Abuja Treaty).

<sup>14</sup> Vusi Gumede, 'The African Continental Free Trade Agreement and the future of Regional Economic Communities (2020) 39 *Journal of Contemporary African Studies* 470, 471.

<sup>15</sup> See UNECA (n 12) 11.

<sup>16</sup> UNECA, 'An Empirical Assessment of the African Continental Free Trade Area Modalities on Goods' (ECA and African Trade Policy Centre, November 2018).

<sup>17</sup> *ibid.*, p. 2; see AfCFTA, Art. 5 j.

<sup>18</sup> Frank Hartwich and Christoph Hammer, 'Africa's Interregional Trade and Regional Value Chain Integration: Facts and Considerations for Future Policy Action' (2021) *Keynote for Africa Industrialisation Week and the second round of pre-events in preparation for the AU Summit on Industrialization and Economic Diversification* 20–4.

<sup>19</sup> SADC Industrialisation Strategy and Roadmap (Harare, April 2015).

<sup>20</sup> West Africa Competitiveness Programme (WACOM). The programme is aligned to support the implementation of major West African regional policies and programmes including the West Africa Common Industrial Policy (WACIP), West Africa Quality System Programme (WAQSP) and ECOWAS Private Sector Development Strategy.

<sup>21</sup> The East African Community, 'Cotton Textiles Apparels Strategy and implementation Roadmap 2020–2030' (May 2019).

participation in regional and global value chains.<sup>22</sup> Limitations in mobilizing domestic financing have hampered the realization of national industrialization programs.<sup>23</sup> Most of these initiatives have failed because of a lack of capital to sustain these sectors' industrial operability and a lack of government willingness to inject capital into their development.<sup>24</sup>

For example, many countries have not adhered to their commitments to the *African Union Development Agency 2003 Maputo Declaration on Agriculture and Food Security* to reserve at least 10 per cent of their national budgets for agriculture and infrastructure.<sup>25</sup> The UN Third Industrial Development Decade for Africa 2016–2025 program has been ineffective in developing operational plans for allocating financial resources to Africa's agriculture, mining, and construction sectors.<sup>26</sup> Similarly, many African nations have failed to adhere to the New Partnership for Africa's Development plans, which rely on external financing but with limited international policy and legal strategy to protect financial stakeholders.<sup>27</sup> Enhancing access to domestic finance is therefore crucial to sustainably finance the realization of regional industrialization strategies that affect mining, agriculture, and construction in Africa.

### III. Cape Town Convention: background, scope, and application

The MAC Protocol is an extension of the Convention on International Interests in Mobile Equipment (hereinafter 'Convention'), adopted on 16 November 2001.<sup>28</sup> Eighty-seven Contracting States have either ratified or acceded to the Convention, including 28 African countries. The Cape Town Convention provides an international regime for secured financing of high-value mobile equipment that travels across borders or equipment often used abroad: for example, mining, agricultural, and construction equipment exported to Africa for infrastructural development projects. In addition to reducing risks for financial providers who export this equipment, the Convention also lowers borrowing costs associated with equipment financing for the public sector's benefit and enterprises who require movable equipment (for example, MAC equipment) for their projects.<sup>29</sup>

The Cape Town Convention is supported by four existing Protocols, including the MAC Protocol (see [Figure 2](#)).<sup>30</sup>

Many economies face financing constraints for acquiring high-value equipment due to uncertainties and imperfections in the credit markets.<sup>31</sup> This may occur in times of crisis and on an ongoing basis due to asymmetric information between the foreign lender and borrower, resulting in under-investment in equipment and machinery vital for economic development.<sup>32</sup> Historically, conflicts involving persons from different jurisdictions are resolved by reference to conflict-of-law rules.<sup>33</sup> Since each jurisdiction has its peculiar

<sup>22</sup> African Union, 'Africa's Development Dynamics 2022: Regional Value Chains for a Sustainable Recovery' (AUC/OECD 2022) 73.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> African Union, 'CAADP Country Implementation under the Malabo Declaration' (African Union, Addis Ababa, 2016) 3.

<sup>26</sup> Third Industrial Development Decade for Africa 2016–2025 (United Nations Industrial Development Organisation UNIDO).

<sup>27</sup> United Nations, 'Third Industrial Development Decade for Africa 2016–2025' (UN A/70/L.49/Rev.1, 30 June 2016).

<sup>28</sup> Convention on International Interests in Mobile Equipment 2001. The Convention was adopted in tandem with the Aircraft Protocol by the International Institute for the Unification of Private Law (UNIDROIT) and International Civil Aviation Authority (ICAO).

<sup>29</sup> Vadim Linetsky, 'Economic Benefits of the Cape Town Treaty' (18 October 2009).

<sup>30</sup> Aircraft Protocol 2001, Luxembourg Rail Protocol 2007, Berlin Space Protocol 2012.

<sup>31</sup> H. Kraemer-Eis Frank Lang, *The Importance of Leasing for SME* (European Investment Fund Working Paper 2012/15 EIF Research & Market Analysis, August 2015).

<sup>32</sup> *ibid.*

<sup>33</sup> M. Bogdan, *Private International Law as Component of the Law of the Forum* (The Hague Academy of International Law 2012) 27.

			
Aircraft Protocol 2001	Luxembourg Rail Protocol 2007	Berlin Space Protocol 2012	Pretoria MAC Protocol 2019

**Figure 2.** The Four Protocols of the Cape Town Convention 2001.

conflict of laws and rules, which law applies and the outcome of the dispute will largely depend upon where the proceedings are brought.<sup>34</sup> This can lead to an unpredictable application of legal rules about enforcement, insolvency, and the establishment of real rights in the equipment.

In transnational commercial law, especially in cross-border transactions such as international equipment financing, a concerted effort is necessary to mitigate reliance on unpredictable conflicts of laws to create a uniform global law with transparent and predictable rules.<sup>35</sup> The Convention has been developed to recognize and protect the security interests created by foreign lenders in mobile equipment internationally while ensuring the users (that is, borrowers) of mobile equipment can affordably lease, buy, or grant a security interest in the equipment they use. The Convention facilitates the financing of certain types of high-value mobile equipment by establishing a uniform set of rules for creating and enforcing three types of interests in personal property:

- a grantee's security interest;
- an unpaid sellers' lien under a title reservation agreement; and
- a proprietary right of a lessor under a financial and true lease agreement.<sup>36</sup>

These interests are referred to in the Convention as 'international interests'.<sup>37</sup> It is a requirement that a debtor is based in a Contracting State at the time of the agreement. This requirement enables an effective creation of an international interest against the collateral on behalf of the financier, regardless of whether the financier has its base in a non-Contracting State.<sup>38</sup> Following the Convention, international interests exist independently of national interests. Thus, no reference is made to it, nor is there a requirement to satisfy any national law to create international interests.<sup>39</sup> The Convention's significance is that it has been considered the 'most successful secured transactions-related international instrument ever, by virtually any measure'.<sup>40</sup>

Accordingly, the Convention intends not to unify national private law and substantive rules on domestic personal property security over mobile equipment but, rather, to develop a single legal instrument for financing high-value mobile equipment.<sup>41</sup> By creating a *sui*

<sup>34</sup> *ibid.*

<sup>35</sup> R. Goode, 'Earth, Air, and Space: The Cape Town Convention and Protocols and their Contribution to International Commercial Law' in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 650.

<sup>36</sup> Convention, Art. 1(j).

<sup>37</sup> Convention, Art. 2.

<sup>38</sup> T. de las Heras Ballell, 'The Interaction between the MAC Protocol to the Cape Town Convention and Domestic Law' (2020) 2 *JIBFL* 112 at 113.

<sup>39</sup> 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.

<sup>40</sup> Benjamin von Bodungen and Charles W. Mooney Jr., 'Immovable-Associated Equipment under the Draft Mac Protocol: A Sui Generis Challenge for the Cape Town Convention' (2017) 6 *Cape Town Convention Journal* 37.

<sup>41</sup> C. Bourbon-Secler, 'Cross-border Security Interests in Movable Property: An Attempt at Rationalising the International Patchwork—Part 2' (2005) 20 *JIBLR* 501, 506.

*generis* uniform law, the Convention and the MAC Protocol do not conflict with existing domestic substantive rules on personal property security so that conflicts of law can be avoided to the greatest extent possible.<sup>42</sup> Through the Convention, debtors and financiers can conduct cross-border commercial transactions in equipment effectively and with greater certainty, while financiers enjoy expedited remedies to enforce their rights in equipment.

Also, the Convention cuts down the transactional costs and other costs associated with monitoring collateral and enforcing *in rem* rights (that is, proprietary legal rights) of financiers.<sup>43</sup> Five underlying principles govern the Convention (and the MAC Protocol),<sup>44</sup> namely:

- practicality;
- party autonomy;
- predictability;
- transparency; and
- sensitivity to local laws of countries.

Article 16 of the Convention states that an International Registry for each protocol is established and that various types of interests, including international interests, can be recorded in the registry.<sup>45</sup> A global interest can be created that will be governed by the substantive rules of the Convention (including the default remedies in Chapter III), irrespective of whether the international interest is registered.<sup>46</sup> As long as an international interest is registered, the registered interest remains effective in insolvency proceedings against the debtor and third-party claimants.<sup>47</sup> International interests that are not registered also risk being defeated by other registered interests, regardless of the order in which they were created or if the competing party was aware of the unregistered interest.<sup>48</sup>

The Cape Town Convention and the MAC Protocol are two separate texts, but they form one instrument and must be read and interpreted together. The MAC Protocol will prevail whenever there is a conflict between the Convention and the MAC Protocol. Article 51 of the Convention contemplates extending it to high-value and uniquely identifiable mobile equipment categories. Consequently, the MAC Protocol was created to facilitate cross-border financing of MAC equipment. It is intended that the MAC Protocol will supplement and amend the provisions of the Convention, thereby responding to industry needs and requirements.<sup>49</sup>

#### IV. MAC Protocol: background, scope, and application

The MAC Protocol was signed by three African States—that is, the Republic of Congo, the Republic of Gambia, and the Federal Republic of Nigeria—on the day of its adoption in Pretoria.<sup>50</sup> The MAC Protocol will come into force when it has been acceded to or ratified

<sup>42</sup> K.F. Kreuzer, 'Jurisdiction and Choice of Law Under the Cape Town Convention and the Protocols thereto' (2013) 2 *Cape Town Convention Journal* 149.

<sup>43</sup> I. Davies, 'The New Lex Mercatoria: International Interests in Mobile Equipment' (2003) 52 *ICLQ* 151, 153–4.

<sup>44</sup> 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.

<sup>45</sup> Examples of registrable interests include assignment and notice of assignment, subordination of rights, non-consensual rights, and acquisition of subrogation.

<sup>46</sup> Bruce Whittaker, 'Floating Securities under the Cape Town Convention: Swimming, Sinking or Treading Water' (2018) 7 *Cape Town Convention Journal* 39, 45.

<sup>47</sup> Convention, Article 30(1).

<sup>48</sup> *ibid.*

<sup>49</sup> R. Goode, 'From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols' (2012) 17 *Uniform Law Review* 599.

<sup>50</sup> MAC Protocol status <<https://www.unidroit.org/instruments/security-interests/mac-protocol/status/>> accessed 12 July 2024.

by at least five countries.<sup>51</sup> With the accession and implementation of the MAC Protocol in the African region, the Convention will extend to its regional mining, agriculture, and construction sectors, thereby increasing access to low-cost asset-based financing for lessees, buyers, and debtors in Africa. The MAC Protocol unifies complex international secured transactions and insolvency rules about the creation, registration, priority, and enforcement of international interests held by a conditional seller, lessor, and secured creditor over mining, agricultural, and construction equipment.

A key concept behind the MAC Protocol is that it uses the Harmonized Commodity Description and Coding System (HS System).<sup>52</sup> States use the HS System for customs tariffs and trade statistics to identify goods and equipment. The MAC Protocol covers a variety of equipment in the form of six-digit HS System codes, which are listed in three annexes to the MAC Protocol.

By adopting these three annexes covering three categories of MAC equipment, the MAC Protocol covers MAC equipment that meets the criteria of high value, mobility, and uniqueness. However, the range of the scope is determined by the HS codes alone (not subjective factors such as the high value or utility of the equipment). Thus, some HS codes include machinery that can be manufactured in different capacities and sizes, such as the HS code 842951, which covers graders and excavator equipment that may sell for US \$1 million and those on the lower financial end that sells for US \$10,000. Thus, African countries have no significant financial expectation to seek financing where equipment is expensive because the MAC Protocol does not exclude the acquisition of low-value equipment.

It is important to note that the Annexes form an intrinsic part of the MAC Protocol and are not merely ancillary. Therefore, the Annexes are not additional or supplementary elements; they are fundamental to the functioning of the MAC Protocol. Under Article II(2) of the MAC Protocol, a Contracting State can declare that it will limit the application of the MAC Protocol to one or two Annexes. Specifically, a country can declare that it will only apply the MAC Protocol to one or two of the Annexes rather than all three. For example, suppose a country wants the MAC Protocol to apply only to construction equipment (Annex 3). In this case, it can submit a declaration limiting the scope of the MAC Protocol to that Annex. This could be due to economic considerations, political preferences, or specific needs of the country's industries.

Beyond that, Contracting States cannot modify, partially ratify, accede, or adhere to the Annexes or make a declaration in that respect, other than Articles II (3) and XXXI (4) will allow.<sup>53</sup> This implies that, while Contracting States can limit the application of the MAC Protocol to specific Annexes, Article II(3) and Article XXXI (4) set strict limits on how much flexibility they have in altering the terms of their accession when they submit a declaration. Under Article II(3), a country cannot arbitrarily modify the terms of the Annexes themselves, nor can it partially accede to an Annex without adhering to the entirety of that Annex. For instance, if a country adheres to the MAC Protocol only for construction equipment under Annex 3, it cannot then exclude certain types of construction equipment from that Annex. Additionally, Article XXXI (4) specifies the conditions under which countries can make certain declarations, particularly related to the scope of their obligations under the MAC Protocol. However, it reinforces that such declarations must align with the MAC Protocol's structure and cannot deviate from its essential legal framework.

<sup>51</sup> MAC Protocol, Art XXV.

<sup>52</sup> International Convention on the Harmonized Commodity Description and Coding System (adopted 14 June 1983, entered into force 1 January 1988 No. 25910) 1503 UNTS 3 (Brussels) ('HS Convention'). The HS Convention has been ratified by over 150 Contracting States while the HS System is applied by more than 200 customs administrations worldwide <[https://ec.europa.eu/taxation\\_customs/business/calculation-customs-duties/customs-tariff/harmonized-system-general-information\\_en](https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/customs-tariff/harmonized-system-general-information_en)> accessed 10 February 2024.

<sup>53</sup> T. de las Heras Ballell and M. Hara, 'MAC Protocol and Treaty Design: Examination of the Delimitation of Scope and Mechanism of Amendment' (2017) 6 *Cape Town Convention Journal* 10, 22.



As with the first three Protocols (that is, those in regard to aircraft, rail, and space), the process for financing mobile equipment under the MAC Protocol is primarily the same as the other protocols. There are some steps involved in creating an international interest. Parties should agree on the financier's international interest in the equipment. It is required under Article 7 of the Convention that:

- the agreement is in writing;
- the debtor has an ownership right in the equipment;
- the equipment can be identified under the MAC Protocol; and
- the secured obligation (if it is a security agreement) should be determined; there is no need to specify the actual amount or a limit.

Under the MAC Protocol, equipment may be identified by a description of the equipment or broadly by type of equipment, either present or future (after-acquired) equipment.<sup>54</sup> It is advisable for the financier to register its international interest on the MAC register. Under the MAC Protocol, registering an international interest is crucial for ensuring the international interest and enforceability of a financier's rights.<sup>55</sup> Registration serves to ascertain the 'priority' of international interests and assignments, therefore granting the financier a legally recognized claim to the equipment that can be enforced against third-party claimants, including other creditors and sometimes during insolvency proceedings.<sup>56</sup> Without registration, a financier's interest may be vulnerable to competing claims, leaving the financier with little to no recourse if the debtor defaults or other creditors seek to enforce a claim against the same equipment. By registering the interest, the financier creates a publicly accessible record of their international interest, adding transparency and predictability to the transaction.<sup>57</sup> In accomplishing registration, the financier should match the equipment's unique identification to the international interests by including a description of the equipment, containing its manufacturer's serial number and any additional information as required and deemed necessary to satisfy the provisions of Article 18(1) of the Convention.

The forthcoming MAC Protocol International Registry (MACIR) regulations will specify the manufacturer's serial number format and provide what additional information is required to ensure uniqueness.<sup>58</sup> Significantly, a financier can register an international interest before finance is offered to the debtor. The Convention allows for the registration of 'prospective' international interests (commonly referred to as 'notice filing' or 'notice registration') in advance of the international interest being created or attached to the equipment.<sup>59</sup> Filing a notice to register allows a financier to secure its priority position before granting finance to the debtor.

## V. Social, legal, and economic benefits of the MAC Protocol for African countries

In the last 20 years, several secured transactions and law reforms have occurred in Africa.<sup>60</sup> However, many domestic reforms do not encompass security interests granted to

<sup>54</sup> MAC Protocol, Art. V.

<sup>55</sup> R. Goode, *Convention on International Interests in Mobile Equipment Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Mining, Agricultural and Construction Equipment 'Official Commentary'* (UNIDROIT 2021) para 4.129.

<sup>56</sup> R. Goode, Official Commentary (n 55), para 4.193.

<sup>57</sup> R. Goode, Official Commentary (n 55), para 2.23.

<sup>58</sup> Rob Cowan, 'Comparison of the Aircraft and MAC International Registries' (2018) 7 *Cape Town Convention Journal* 21, 24.

<sup>59</sup> Charles W. Mooney Jr., 'The Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application' (2014) 55 *Virginia Journal of International Law* 163, 166.

<sup>60</sup> Marek Dubovec and Louise Gullifer, *Secured Transactions Law Reform in Africa* (Hart Publishing, 2019).

financiers abroad. Many countries in Africa have had some success in reforming their secured transactions law, but some others have resulted in legal frameworks that do not meet international best practices.<sup>61</sup> For example, some civil law jurisdictions, as seen under the Organisation for the Harmonisation of Business Law in Africa (OHADA) Uniform Act Organising Securities, require a notary public to authenticate a secured transaction contract between a debtor and a secured creditor.<sup>62</sup> Some African countries, such as Nigeria and Ghana, have separate registries for company charges and other types of personal property.<sup>63</sup>

Africa comprises predominantly agrarian nations; their needs are predicated on building infrastructure to support development and food security. For African countries without a national secured transactions law, the MAC Protocol represents a necessary legal framework that will assist mining, agricultural, and construction businesses in raising finances without the need for the country to have an established collateral registry to record security interest, since the forthcoming MACIR will record international interests in MAC equipment.

A statistical analysis of the Cape Town Convention concluded that shorter repossession delays (if it is repossession under the Aircraft Protocol) from the worldwide average of 10 months to 60 days if countries adopt the Convention, could reduce the loss-given-default to a financier by 25–30 per cent.<sup>64</sup> The analysis was based on a Dynamic Asset Financing Model (DAFIM), which provided examples using input variables, output risk analysis, and pricing of secured asset financing transactions.<sup>65</sup> It was estimated that such a risk reduction mechanism led to risk mitigation against financed airlines while benefiting those with weak credit ratings.<sup>66</sup>

It was also concluded that debtor airlines with a rating lower than BBB–, if their country adopts the Convention and Aircraft Protocol, would experience credit rating upgrades of between one to two notches, thereby mirroring the upgrade benefits as seen in the USA considering enforcement protections afforded to creditors under Chapter 11, section 1110, of the Bankruptcy Code. The DAFIM calculates the economic benefit of reducing the delay to 60 days by using a mathematical formula based on the World Bank data on general contract enforcement delays for that jurisdiction and statistical adjustment based on examination of the aviation-specific data.<sup>67</sup>

## VI. MAC equipment sold in the course of business

Commercially, it is expected that when a seller, in the course of business, transfers title in an inventory such as mining or agricultural equipment, a clean title can pass to the buyer, free of any encumbrance.<sup>68</sup> Existing security interests (irrespective of whether the security interest was registered) granted to a third-party creditor will not diminish the buyer's rights.<sup>69</sup> As an example, under common law, when a seller in the course of business grants

<sup>61</sup> These best practices include those of the United Nations Commission on International Trade Law (UNCITRAL), particularly its Model Law on Secured Transactions, and its Legislative Guide. See examples of Moveable Property Security Rights Act 2017 (Kenya) that does not provide other means of perfection other than via registration, see s 15. The Borrowers and Lenders Act 2014 (Sierra Leone) restricts the status of lenders to commercial banks and financial institutions only, see s 1.

<sup>62</sup> Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), Art 201.

<sup>63</sup> Iyare Otabor-Olubor, 'Reforming the Law of Secured Transactions: Bridging the gap between the Company Charge and CBN Regulations Security Interests' (2017) 17 *Journal of Corporate Law Studies* 39.

<sup>64</sup> Vadim Linetsky, 'Economic Benefits of the Cape Town Treaty' (18 October 2009).

<sup>65</sup> The DAFIM model can be applied to other types of property including land and personal property e.g., aircraft, rolling stock, ships, and machinery (e.g., mining, agricultural, and construction equipment).

<sup>66</sup> *ibid*, 13.

<sup>67</sup> *ibid*, 7.

<sup>68</sup> Alan Schwartz and Robert E. Scott, 'Rethinking the Laws of Good Faith Purchase' (2011) 111 *Colum. L. Rev.* 1332.

<sup>69</sup> Robert H. Skilton, 'Buyer in Ordinary Course of Business Under Article 9 of The Uniform Commercial Code (and Related Matters)' (1974) *Wis. L. Rev.* 1.

a floating charge over its inventory, the seller can sell that inventory free of the floating charge in the ordinary course of business because the charge primarily acts as a floating security over the inventory.<sup>70</sup> Also taking account of this trend are Article 9 of the US Uniform Commercial Code and other jurisdictions in Africa that have reformed their secured transactions laws under the codified Personal Property Security Laws and Secured Transactions Acts,<sup>71</sup> in addition to the UN Commission on International Trade Law (UNCITRAL) Model Law on Secured Transactions 2016.

Under Article 29(3) and (4), a buyer, a conditional buyer, or lessee under a sale at the time of purchase, conditional sale, or lease agreement acquires a mobile equipment subject to any prior registered interest. In African markets, where informal transactions are relatively common,<sup>72</sup> this approach can mitigate the risk to buyers, ensuring that they can obtain a clean title to the equipment without the risk of hidden encumbrances. This fosters greater confidence among businesses and promotes more fluid market transactions, which is crucial for economic growth.

Neither the Convention nor the Aircraft, Rail, or Space Protocols reflect this expectation. According to the Convention, a registered international interest takes priority over all other competing interests, including that of a good faith buyer and lessee, without notice of the existing international interest.<sup>73</sup> This rule applies to equipment that pertains to aircraft, rolling stock, and space assets. Since these assets are not often subject to inventory exchange, buyers are usually the end-users; this rule works for these asset categories, and the financier should search the register to ascertain the existence of any secret encumbrance.

However, in drafting the MAC Protocol, the drafters acknowledged that this rule would be incompatible with financing MAC equipment when it is leased or sold by a dealer/seller in the course of business.<sup>74</sup> Consequently, the MAC Protocol departs from the rule in Article 29 of the Convention, as seen in Article XII of the MAC Protocol, by addressing the uniqueness of inventory financing. Under Article XII, if a Contracting State has made a declaration as per Article XXVIII(4) of the MAC Protocol, interests in inventory held by a dealer as debtor are not considered international interests if the dealer operates within that Contracting State.<sup>75</sup> This contrasts with Article 29 of the Convention, which generally establishes a priority system for registered interests over unregistered ones in mobile equipment without specific exceptions for inventory in a dealer's possession. Furthermore, Article XIII(3) disappplies Article 29(3)(b) and (4)(b) of the Convention, which typically allow a buyer, conditional buyer, or lessee to take inventory free of unregistered interests. Without this provision, a dealer's creditor without an international interest would lose priority even if buyers were aware of the creditor's interest. Instead, Article XII(3) leaves it to national law to decide if a buyer, conditional buyer, or lessee takes free, allowing appropriate creditor protections under domestic law.<sup>76</sup> This means MAC equipment dealers are protected from competing registered international interests in a way that Article 29 would not typically allow.<sup>77</sup>

<sup>70</sup> Louise Gullifer, 'The Reforms of the Enterprise Act 2002 and the Floating Charge as a Security Device' (2002) 46 *Canadian Business Law Journal* 399; Adrian Walters, 'Statutory Erosion of Secured Creditors' Rights: Some Insights from the United Kingdom' (2015) 2 *University of Illinois Law Review* 543.

<sup>71</sup> Personal Property Securities Act 2013 (Malawi), Secured Transactions in Movable Assets Act 2017 (Nigeria).

<sup>72</sup> Ernest Aryeetey, 'Informal Finance for Private Sector Development in Sub-Saharan Africa' (2005) 7 *Journal of Microfinance/ESR Review* 1.

<sup>73</sup> Convention, Art. 29.

<sup>74</sup> Dealer means 'a person (including a manufacturer) that sells or leases equipment in the ordinary course of its business', see Art. I(2)d; see R. Goode, Official Commentary (n 55), para 3.134.

<sup>75</sup> R. Goode, Official Commentary (n 55), para 3.132.

<sup>76</sup> R. Goode, Official Commentary (n 55), para 3.135.

<sup>77</sup> Three exceptions will apply: (1) For transactions completed before the Contracting State's declaration's entry into force, Article XII does not apply to national interests in internal transactions. These interests continue to be governed by the Convention's registration and priority rules under Article 50(2) if the Contracting State has also declared under Article 50(1); (2) the priority of a registered interest under Article 29(3)(a) and (4)(a)

Therefore, the MAC Protocol provides that a lessee or buyer of inventory equipment from a dealer will acquire their interest in the equipment free of any registered interests earlier granted by the dealer to a third party.<sup>78</sup> This ensures that the outcome of the MAC Protocol maintains commercial expectations of the industry and reflects the ‘seller in the ordinary course of business’ taking-free rule found in other modern secured transaction laws.<sup>79</sup>

## VII. MAC equipment: interaction with immovable property

Where the equipment is installed on an immovable property, the international interest in the equipment may be determined by applicable domestic property law, which may curtail the financier’s rights if that equipment is situated in a non-Contracting State.<sup>80</sup> An equipment’s association with immovable property means that while it may be an inventory to the financier, it can also be stationary in its operation and installed on an immovable property by the end-user as immovable-associated equipment (IAE).<sup>81</sup> As a matter of sovereignty for States, harmonizing immovable interests at an international level is tricky.<sup>82</sup> This has several implications if the holder of the interest in an immovable property can further acquire an interest in the IAE under the law of the Contracting State where the immovable property is situated.

A Latin maxim states that whatever is fixed to the ground becomes part of the ground—*quicquid plantatur solo, solo cedit*.<sup>83</sup> In many African States, this principle applies today. Determining whether an item is a chattel (personal property) or a fixture can have severe consequences because it affects the ownership rights of the chattel. If there is a conveyance of the land, the fixtures are transferred as part of the land, thus belonging to the land titleholder.<sup>84</sup> *Holland v Hodgson* laid down two tests to differentiate between personal property and land fixtures: the test of ‘degree of annexation’ (the extent to which personal property is physically annexed to land) and the test of ‘object of annexation’ (if the annexation to land, viewed objectively, is designed to be permanent).<sup>85</sup>

Traditionally, courts used the degree of annexation to determine whether an item was a chattel or a fixture. However, the purpose of annexation has become increasingly important in recent cases.<sup>86</sup> Personal property affixed to land to enjoy the land is more likely to constitute a fixture, while personal property attached to land for the sake of enjoying the personal property is more likely to constitute a fitting.<sup>87</sup> Common law allows non-incorporate debtors (that is, unregistered businesses) to grant personal property security for loans and other obligations while keeping possession of personal property through a security bill of sale.<sup>88</sup> The security interests by the bill of sale exclude fixtures annexed to

remains intact despite the declaration. This means that previously registered interests maintain their priority status even if inventory interests are generally excluded by Article XII; (3) non-consensual rights or interests that have priority under Article 39(1) are unaffected by the declaration and continue to hold priority as defined by the Convention; see R. Goode, *Official Commentary* (n 55), para 5.75–5.76.

<sup>78</sup> MAC Protocol, Art. XII(1) and (2).

<sup>79</sup> UNCITRAL Model Law on Secured Transactions 2016, Art. 34.

<sup>80</sup> MAC Protocol, Art. VII.

<sup>81</sup> MAC Protocol, Art. I(2)(k) define immovable-associated equipment (IAE) as ‘equipment that is so associated with immovable property that an interest in the immovable property extends to the equipment under the law of the State in which the immovable property is situated’.

<sup>82</sup> UNIDROIT, Study 72K- CGE2 - Doc. 8 (Legal Analysis, 2016) Part 2.

<sup>83</sup> P. Luther, ‘Fixtures and Chattels: A Question of More or Less...’ (2004) 24 *Oxford Journal of Legal Studies* 597, 598–9.

<sup>84</sup> S. Thomas, ‘Mortgages, Fixtures, Fittings and Security over Personal Property’ (2015) 66 *Northern Ireland Legal Quarterly* 343, 359.

<sup>85</sup> (1872) LR 7 CP 328, 335. See also *Leigh v Taylor* [1902] UKHL 1.

<sup>86</sup> *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL).

<sup>87</sup> *Botham v TSB Bank* (1996) 7 P & CRD 1 (CA).

<sup>88</sup> Bills of Sale Act 1878; Bills of Sale (Amendment Act) 1882.

land.<sup>89</sup> The creditor cannot recover the goods if they are attached to the land because they belong to the land titleholder.<sup>90</sup>

Suppose a document is treated as a bill of sale transferring trade machinery. In this case, a clause must indicate that the trade machinery is assigned separately as personal property.<sup>91</sup> The bill of sale document will demonstrate such an intention if it creates rights over the machinery beyond those that would pass by operation of law on the conveyance of land—for example, expressly granting the creditor the right to separate the machinery from the land or to sell it separately.<sup>92</sup> Assets such as fixed motive powers, fixed power machines, and water, gas, and steam pipes in the factory are not regarded as trade machinery.<sup>93</sup> Whether assigned separately from the land to which they are affixed or transferred along with land other than the land to which they are affixed, the above assets are not considered 'personal chattels' within the scope of the Bills of Sale Act 1878.<sup>94</sup>

The MAC Protocol provides three alternatives to clarify the relationship between an international interest in MAC equipment and a property right interest arising from domestic property law.<sup>95</sup> Alternative A appears to be the most international interest-friendly option among the alternatives.<sup>96</sup> The MAC Protocol will only then not apply if the IAE is not severable from the land. Alternative C relies squarely on domestic law to determine whether international interests in IAE cease to exist, are subordinated to any other rights or interests in the equipment, or are affected in any way by its association with movable property. The MAC Protocol does not affect the application of national law.<sup>97</sup> Alternative B takes a neutral approach based on whether the IAE has lost its identity. The domestic property law will apply if its identity is lost due to its association with the land.<sup>98</sup> If it is not lost, the time of registration of the IAE will be considered in determining whether the international interest will take priority over the domestic property interest.<sup>99</sup>

Article VII(2) of the MAC Protocol states that at the time of submitting the instrument of adherence to the MAC Protocol, a Contracting State should declare that the entirety of Alternative A, B, or C will apply concerning an international interest in IAE, which is situated in the Contracting State. When acceding to the MAC Protocol, African States will need to make a declaration to this effect. Practically, as an example, Alternatives A and B will allow international financiers of MAC equipment to enforce their rights under the MAC Protocol over MAC equipment if the equipment is severable from the land, the equipment has not lost its identity due to being associated with land, and the international interest has been duly registered before the land title being registered.<sup>100</sup>

Similarly, companies in Africa that manufacture and supply MAC equipment in other African countries or abroad (only if the debtor is in a Contracting State) may benefit from either Alternative A or Alternative B if that Contracting State has made a declaration to this effect. However, where the debtor's place of business is in a Contracting State that has made a declaration to be bound by Alternative C, the property law of the Contracting State will be the applicable law—that is, the *lex rei sitae*. Enforcement of rights over the MAC equipment, if the equipment is an IAE, will be determined by the local property law of that Contracting State. The same applies if an African State declares to be bound by Alternative

<sup>89</sup> *ibid.*

<sup>90</sup> 1878 Act, s 4.

<sup>91</sup> Halsbury, *Laws of England*, Vol. 4(1), para. 650.

<sup>92</sup> G. McBain, 'Repealing the Bills of Sale Acts' (2011) 5 *Journal of Business Law* 475, 498.

<sup>93</sup> *ibid.*

<sup>94</sup> *Topham v Greenside Glazed Fire-Brick Co.* (1888) L.R. 37 Ch. D. 281.

<sup>95</sup> MAC Protocol, Art. VII.

<sup>96</sup> MAC Protocol, Art. VII (Alternative A).

<sup>97</sup> MAC Protocol, Art. VII (Alternative C).

<sup>98</sup> MAC Protocol, Art. VII (Alternative B).

<sup>99</sup> *ibid.*

<sup>100</sup> MAC Protocol, Art. VII (Alternatives A and B).

C. The Bills of Sale Acts (where applicable) secured transactions laws, and other relevant laws will establish whether the IAE has become part of the land.

## VIII. Geo-economic and geopolitical factors influencing the submission of declarations

Despite the benefits of the Cape Town Convention and the MAC Protocol, there can be challenges associated with implementing these instruments in Africa. One concern is the capacity of African countries to effectively implement and enforce the provisions of the Convention and the MAC Protocol. Issues such as weak legal institutions and financial corruption can potentially undermine the effectiveness of these instruments.<sup>101</sup> Political instability is a significant geopolitical problem affecting Africa's private sector financing.<sup>102</sup> Many African countries experience frequent changes in government, political unrest, and conflicts, which create an unpredictable business environment.<sup>103</sup> This instability discourages long-term investments and increases the risk for private sector financiers.<sup>104</sup> Additionally, governance issues such as corruption, lack of transparency, and weak legal frameworks further exacerbate the problem.<sup>105</sup> Corruption leads to the misallocation of resources and undermines investor confidence.

To mitigate these geopolitical and geo-economic challenges, the Cape Town Convention, under Article 56, and the MAC Protocol, under Article XXVIII, allow Contracting States to submit declarations. Declarations can enable African countries to tailor the Convention and the MAC Protocol implementation to their specific political, economic, and legal contexts. For example, a declaration might outline how a State intends to apply certain provisions that account for its unique challenges, such as weak governance or political instability.<sup>106</sup> This tailored approach can make the implementation more effective and sustainable in the long term, addressing the root causes of instability and fostering a more conducive environment for investment and economic growth.

Declarations are formal statements by Contracting States when they ratify or accede to an international treaty or convention,<sup>107</sup> such as the Convention or MAC Protocol: 'An important element of the Convention and its associated Protocols is the system of declarations allowing a Contracting State to make choices that will preserve adherence to their fundamental legal philosophy, for example, a rule against the exercise of self-help remedies.'<sup>108</sup> These declarations allow States to customize how they apply specific provisions of the Convention and the MAC Protocol to their domestic legal systems, and they guide

<sup>101</sup> Darlington Richards and Sonny Nwankwo, 'Reforming the Legal Environment of Business in Sub-Saharan Africa: Moderating Effects on Foreign Direct Investment' (2005) 47 *Managerial Law* 154–63.

<sup>102</sup> Mojeed Olujinmi A. Alabi, 'The Legislatures in Africa: A Trajectory of Weakness' (2009) 3 *African Journal of Political Science and International Relations* 233.

<sup>103</sup> Theodora-Ismene Gizelis, Steve Pickering and Henrik Urdal, 'Conflict on the Urban Fringe: Urbanization, Environmental Stress, and Urban Unrest in Africa' (2021) 86 *Political Geography* 102357.

<sup>104</sup> Rasmané Ouédraogo, Relwendé Sawadogo and Hamidou Sawadogo, 'Private and Public Investment in Sub-Saharan Africa: The Role of Instability Risks' (2020) 44 *Economic Systems* 100787.

<sup>105</sup> Abubakar Ahmed and Mutalib Anifowose, 'Corruption, Corporate Governance, and Sustainable Development Goals in Africa' (2024) 24 *Corporate Governance: The International Journal of Business in Society* 119.

<sup>106</sup> For example, the effectiveness of the declaration under Article 40 of the Convention is partly dependent on various factors such as differing national regulations (e.g., between OHADA law and common law systems), protectionist policies, and non-tariff barriers. These can impede the uniform application of Article 40, limiting its potential benefits. The Convention and MAC Protocol supports legal unification efforts within REIOs, contributing to a more integrated and efficient market. This unification lowers non-tariff barriers without infringing on national regulations, ensuring that Article 40 can be more effectively implemented, thereby maximising the economic benefits of secured financing across the continent.

<sup>107</sup> United Nations Treaty Collection, Definition of key terms used in the UN Treaty Collection <[https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1\\_en.xml](https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml)> access 16 July 2024.

<sup>108</sup> R. Goode, Official Commentary (n 55), para 2.326.

them in making choices to preserve adherence to their legal philosophy.<sup>109</sup> Declarations allow States to opt in or opt out of certain provisions, select options (for example, alternatives), or clarify their legal positions. These declarations enable States to clarify their understanding and application of certain provisions without necessarily altering the legal effect of the treaties.<sup>110</sup> For African countries, the strategic use of declarations under the Convention and the MAC Protocol can be instrumental in ensuring that these international instruments are aligned with national interests, legal traditions, and socio-economic realities, thereby advancing the region's geopolitical and geo-economic agenda. One of the key arguments for African States considering declarations under the Convention and the MAC Protocol is the need to balance international obligations with domestic legal and economic contexts.

Declarations will provide a way for African States to address potential conflicts between their domestic legal frameworks and the Convention and MAC Protocol requirements. By making declarations, African States can assert some control over how these instruments are applied within their jurisdictions. In addition to addressing legal and sovereignty concerns, declarations can protect socio-economic interests. The MAC Protocol, for example, facilitates the financing of mining, agricultural, and construction equipment, which are vital sectors in many African economies.<sup>111</sup> However, the benefits must be weighed against the potential risks, such as the over-indebtedness of local businesses, which could lead to insolvency.

African States might use declarations to tailor the application of the MAC Protocol in a way that promotes economic development while mitigating these risks. For example, a declaration could specify how the MAC Protocol's provisions on enforcement and remedies are to be applied, ensuring they do not undermine local economic stability or development goals.<sup>112</sup> Furthermore, declarations offer a way to address practical challenges related to implementing the Convention and the MAC Protocol.<sup>113</sup> In many African countries, there may be concerns about the capacity of legal and administrative systems to fully comply with these instruments' requirements. Declarations can be used to set out how a State intends to implement specific provisions, allowing for a phased or conditional approach that considers local capacities and resources. This can prevent African States from being forced to meet international obligations beyond their current capabilities, which could lead to non-compliance.

However, while declarations offer significant advantages, they also present certain risks. If not carefully considered at the domestic level before submitting an instrument of accession or ratification, declarations can create ambiguity or inconsistencies in the application of the Convention and the MAC Protocol, potentially leading to disputes or difficulties in enforcement. Preparing and submitting a declaration should involve legal, political, and administrative considerations. African countries should assess how specific provisions, particularly the options offered through declarations, align with their existing domestic laws, policies, and economic interests. The complex process may involve various stakeholders, including government agencies, legal experts, and industry representatives. There is also the risk that too many or overly broad declarations could undermine the uniformity and predictability that these international instruments seek to establish, particularly if different African States adopt conflicting positions on key provisions having subregional impact.<sup>114</sup>

<sup>109</sup> 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, 532.

<sup>110</sup> *ibid.*

<sup>111</sup> Lingfei Weng, et al., 'Mineral Industries, Growth Corridors and Agricultural Development in Africa (2013) 2 *Global Food Security* 195.

<sup>112</sup> MAC Protocol, Art. X.

<sup>113</sup> Thomas Traschler, 'The Significance of the Qualifying Declarations under the Cape Town Convention (2019) 24 *Uniform Law Review* 42.

<sup>114</sup> Richard Frimpong Oppong, 'Private International Law in Africa: The Past, Present, and Future' (2007) 55 *The American Journal of Comparative Law* 677.

To mitigate these risks, African States must approach the making of declarations with careful consideration. Regional cooperation could play a vital role in this regard. By working together through civil society and intergovernmental organizations such as UNIDROIT and the African Union, African States can develop coordinated positions on critical issues, ensuring that their declarations consistently support broader regional integration efforts. This collective approach could also enhance the negotiating power of African States in international forums and at diplomatic conferences, enabling them to advocate more effectively for provisions and interpretations that reflect their unique needs and priorities.

Declarations clarify a Contracting State's position on the point of law and do not necessarily attempt to exclude or modify the legal effect of the Convention or MAC Protocol. Declarations can be submitted when depositing an instrument of ratification or accession at the UNIDROIT Secretariat. Note that Article 57 of the Convention allows a Contracting State to make additional declarations related to the Convention after it has entered into force for that State. Such declarations take effect six months after the UNIDROIT receives the notice, unless a longer time is specified. Existing rights and interests established before the effective date of the new declaration remain unaffected. The next part of this article will critically analyse what declarations can be submitted by African countries, either by opting in or opting out, under the Convention and the MAC Protocol.

### 1. Article 39 (1) of the Cape Town Convention: rights having priority without registration

Article 39(1) allows a country to make special rules about certain rights over mobile equipment that do not need to be officially registered to be recognised (see [Figure 3](#)). A Contracting State can declare its specific local rules about rights over these mobile objects at any time.<sup>115</sup> The types of rights covered are:

- **Non-consensual rights:** Under the Convention, these are legal claims or interests in a mobile equipment that arise without the owner's agreement, which a Contracting State might recognize.<sup>116</sup> For example, if a company repairs mining equipment, the country might give that company a 'right' to hold onto the equipment until paid, even if this is not agreed upon in a contract.
- **Priority over registered rights:** These non-consensual rights can be more critical than other officially registered rights. This means they take priority whether there is an insolvency situation or not.<sup>117</sup>

The rules of the Convention do not change a country's ability to enforce laws allowing it to seize or possess equipment.<sup>118</sup> For instance, consider a scenario where a mining company owes substantial fees to a State-owned land developer to lease and maintain mining sites. If the mining company fails to pay these dues, the government, under its local laws, can seize the mining equipment used at these sites. This action can be taken even if the equipment is subject to international interests registered under the Convention and the MAC Protocol. Thus, the State's right to recover debts by seizing mining equipment remains intact and has priority over other registered international interests.

<sup>115</sup> After a country ratifies or accedes to the Convention, it can submit additional or new declarations at any time by informing the Depositary, see Article 57. Once the country submits a new declaration, it does not take effect right away. The declaration will become effective on the first day of the month that follows six months after the Depositary has received the submission. However, if the country wants the declaration to take effect after a longer period, it can specify that, and it will take effect once that longer period has passed. For example, if a country submits a new declaration on 15 October, it will typically take effect on 1 May (six months plus the remainder of October). But if the country requests a longer delay, e.g., one year, the declaration will take effect on October 15th of the following year, see Article 57(2).

<sup>116</sup> R. Goode, Official Commentary (n 55), para 4.293.

<sup>117</sup> R. Goode, Official Commentary (n 55), para 4.278.

<sup>118</sup> Convention, Art. 39 (1)(b).



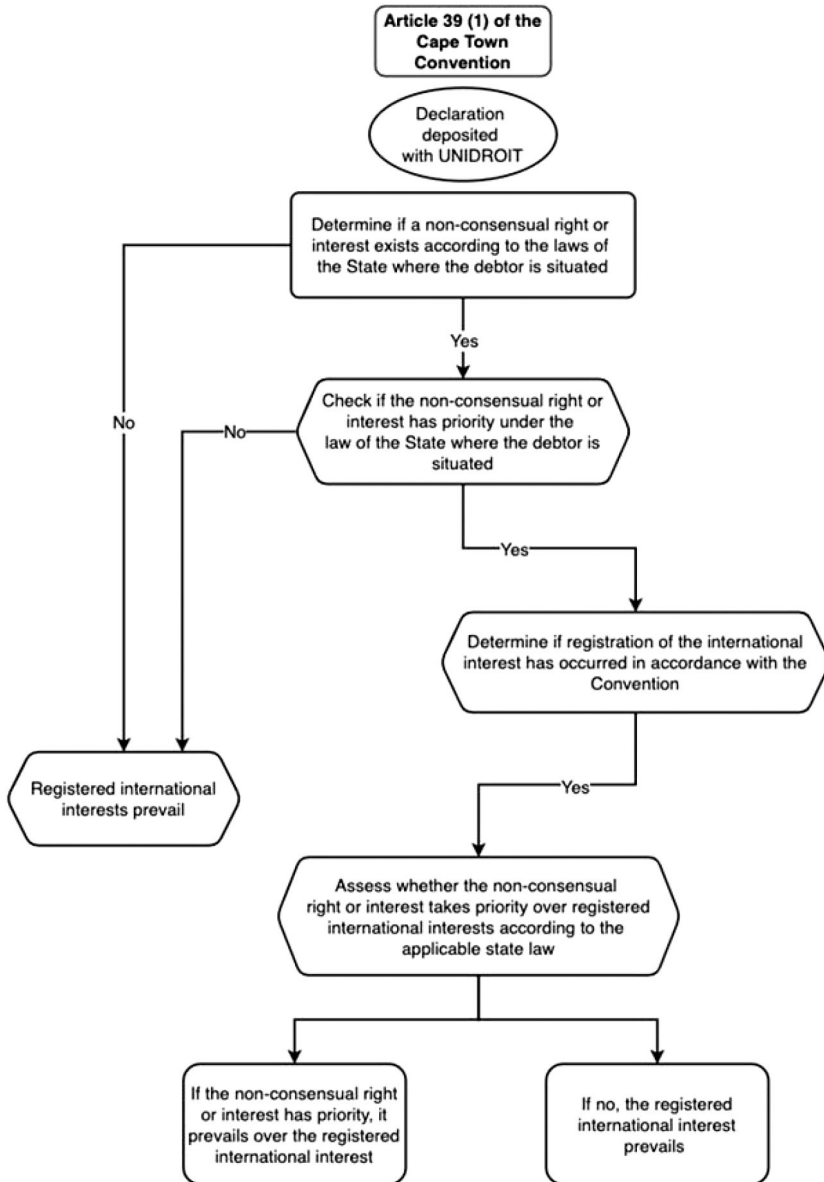


Figure 3. Article 39(1) of the Cape Town Convention

Africa has various legal systems, including common, civil, and customary laws. Implementing Article 39 can lead to fragmentation as countries might adopt varying approaches to enforcing non-consensual rights. African States should work towards harmonizing their legal frameworks concerning non-consensual rights to address legal fragmentation, therefore impacting Article 39. The African Union or regional economic communities could be crucial in facilitating this harmonization to reduce domestic legal uncertainty and foster a more conducive environment for international investment. Also, the discretionary power granted under Article 39 could be misused in regions plagued by

political instability and corruption. These discretionary powers, supported by Article 39(1) (b), are the authority and freedom that the Contracting States may have, subject to declaration, to decide how to recognize non-consensual rights or interests—rights that arise by operation of law, such as those related to taxes, contractual liens, or judicial liens. Contracting States can declare that the Convention will not affect the ability of its State or State entity, an intergovernmental organization, or a private provider of public services (such as electricity, water, or fuel providers) to arrest or detain an asset (such as machinery) for unpaid debts relating to services provided in connection with that asset or another asset. This is crucial because it ensures that essential service providers can enforce claims for unpaid amounts, even if an international interest is registered against the object. Governments might seize assets under the guise of non-consensual rights to satisfy political or economic agendas. This could undermine the trust of international investors and financiers, further exacerbating the economic challenges in these regions. Therefore, regional cooperation is necessary to implement Article 39 effectively. African States should collaborate to develop regional norms and practices that align with the objectives of the Convention and MAC Protocol while addressing regional geo-economic and geopolitical concerns. This could involve utilizing regional dispute resolution mechanisms or establishing regional guarantees to mitigate the risks of realizing non-consensual rights.

## 2. Article 40 of the Cape Town Convention: registrable non-consensual rights or interests

Article 40 allows countries that have agreed to the Convention to make opt-in declarations about certain categories of rights or legal interests usually not agreed upon through a contract (that is, non-consensual).<sup>119</sup> These can include liens for unpaid taxes or judgment liens. Typically, these rights or interests would not be covered by the Convention.

African States, often protective of their sovereignty, may hesitate to adopt international legal frameworks that seem to infringe upon their legal autonomy. Article 40 could be perceived as an imposition, requiring Contracting States to treat certain non-consensual rights, such as State-imposed liens, on par with consensual rights registrable under the international registry. This challenge is exacerbated in regions where local legal systems are deeply rooted in unique customary laws and practices.

Under Article 40, States can declare that certain non-consensual rights or interests should be treated like consensual rights regarding registration and priority (see [Figure 4](#)). This implies that they can be officially registered in the international registry, giving notice to third parties about these interests and possibly ranking their priority over other competing claims. While they are afforded the same procedural treatment as consensual interests for registration and priority purposes, they do not extend to other substantive areas, such as enforcement. The equivalence only ensures that these interests can be recognized within the international registry and are subject to priority accordingly, but they do not affect their inherent legal nature.<sup>120</sup> After submitting a declaration, these non-consensual rights or interests become officially subject to the Convention.

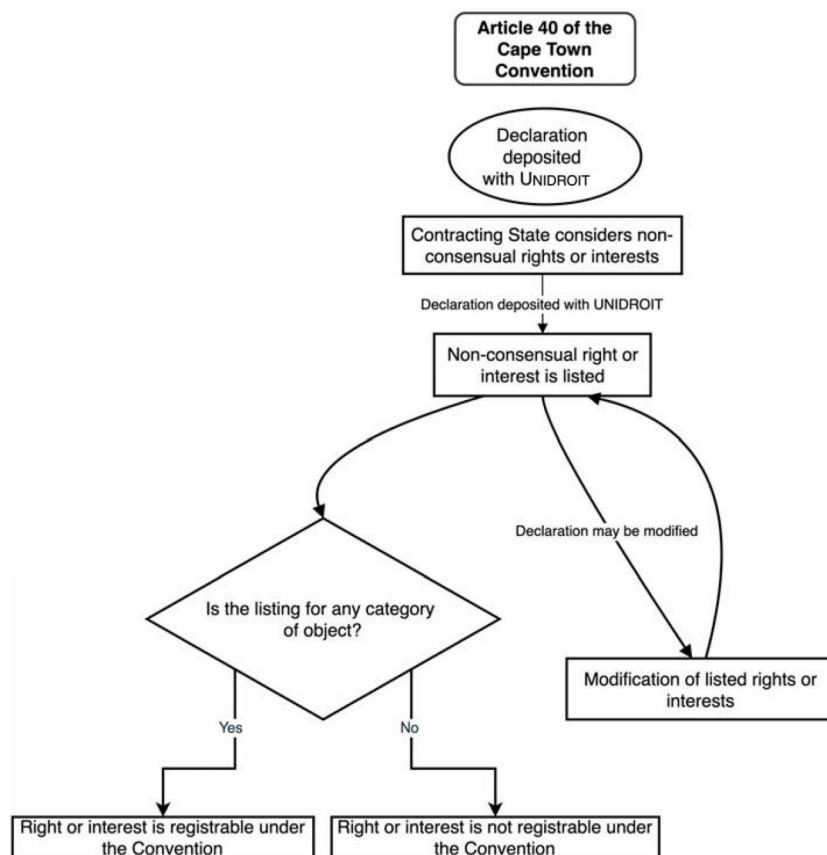
## 3. Article 48 of the Cape Town Convention and Article XXIV of the MAC Protocol: regional economic integration organizations

Article 48 of the Convention acknowledges that regional economic integration organizations (REIOs) of sovereign States, which have authority over certain areas governed by the Convention, can also accede (opt in) to the Convention and MAC Protocol.<sup>121</sup> When such an organization joins, it has the same rights and duties as a country would under the Convention and MAC Protocol, but only in areas where it has authority. When the organization accedes to the Convention, it must specify which matters covered

<sup>119</sup> R. Goode, *Official Commentary* (n 55), para 4.293–4.294.

<sup>120</sup> R. Goode, *Official Commentary* (n 55), para 4.293.

<sup>121</sup> R. Goode, *Official Commentary* (n 55), para 4.322–4.325.



**Figure 4.** Article 40 of the Cape Town Convention.

by the treaty its authority covers, as transferred to it by its Member States. As a depository, it also needs to keep UNIDROIT updated about any changes in its jurisdiction over these matters.

Article XXIV of the MAC Protocol allows REIOs with authority over specific MAC equipment to adopt the MAC Protocol similarly to individual countries. Such organizations have the same rights and responsibilities as countries under the MAC Protocol but only in the areas where they are competent. References to ‘Contracting States’ in the MAC Protocol also apply to these REIOs when appropriate.

Recognizing REIOs in the Cape Town Convention and MAC Protocol creates a complex legal and institutional application of its provisions. African REIOs (or RECs, as they are commonly called), such as the SADC and ECOWAS, often have overlapping jurisdictions with their Member States, leading to potential conflicts or ambiguities in the implementation of international agreements.<sup>122</sup> For example, while an REIO may accede to the Convention or MAC Protocol, the extent to which it can enforce or implement these obligations depends on the delegation of authority from its Member States. This complexity necessitates delineating

<sup>122</sup> Melaku Geboye Desta and Guillaume Gérout, ‘The Challenge of Overlapping Regional Economic Communities in Africa: Lessons from the Continental Free Trade Area from the failures of the Tripartite Free Trade Area (2018) *Ethiopian Yearbook of International Law* 111.

authority and responsibilities between REIOs and their Member States.<sup>123</sup> Without this clarity, the risk of inconsistent application of the Convention and the MAC Protocol across the region increases, potentially undermining the uniformity these instruments seek to achieve.

By allowing REIOs to accede to the Convention and MAC Protocol, these provisions support the alignment of legal frameworks across multiple countries, facilitating smoother cross-border transactions involving MAC equipment. This could significantly boost intra-African trade, particularly in mining, agriculture, and construction, which is vital to the continent's economic growth. However, the effectiveness of this unification depends on the REIOs' ability to enforce and implement these Convention and MAC Protocol rules within their Member States.<sup>124</sup> Given the varying levels of legal and institutional development across African countries, some Contracting States may face challenges in aligning their national laws with the obligations assumed by their REIOs.

#### 4. Article 50 of the Cape Town Convention: internal transactions

Article 50 allows a Contracting State to decide that certain parts of the convention will not apply to transactions entirely within its borders (see [Figure 5](#)). This means that if a transaction is internal, that country can choose to exclude it from the application of the Convention.<sup>125</sup> Businesses in African countries with under-developed legal systems may face challenges distinguishing between internal and external transactions, registering international interests and ensuring that the mandatory provisions of the Convention are applied consistently. In many African jurisdictions, the legal and administrative systems are not fully equipped to handle the complexities introduced by such a distinction. This could lead to issues in recognizing and enforcing international interests, particularly if local courts and registries are not adequately trained or resourced. This could result in delays, increased costs, and potential legal disputes, undermining the benefits of the Convention for both domestic and international stakeholders.

Nevertheless, if an African country decides to exclude these internal transactions, specific essential provisions of the Convention still apply under the Article 50 mechanism.<sup>126</sup> These parts make sure that rights or interests registered on an international level are recognized and protect the order of priority if a third party has a security interest in the transaction (for example, mortgage or lien). Also, suppose a country has specific laws that create national interests (for example, a tax lien or other legal claim), and these are registered internationally. In this case, the Convention will recognize these, too, even if they are transferred to a third party. So, the Convention has a flexible rule for internal transactions, but some rules must always be followed to keep things orderly and fair. This flexibility is crucial for African countries, where legal systems are often a mix of customary, colonial, and contemporary civil or common laws. It allows States to protect national interests, particularly in sectors where the government has substantial involvement, such as mining or agriculture. By allowing States to exclude purely internal transactions from the Convention's rules, Article 50 acknowledges the importance of national legal autonomy—a significant consideration for many African nations wary of external legal imposition.

#### 5. Article 52 of the Cape Town Convention and Article XXVI of the MAC Protocol: territorial units

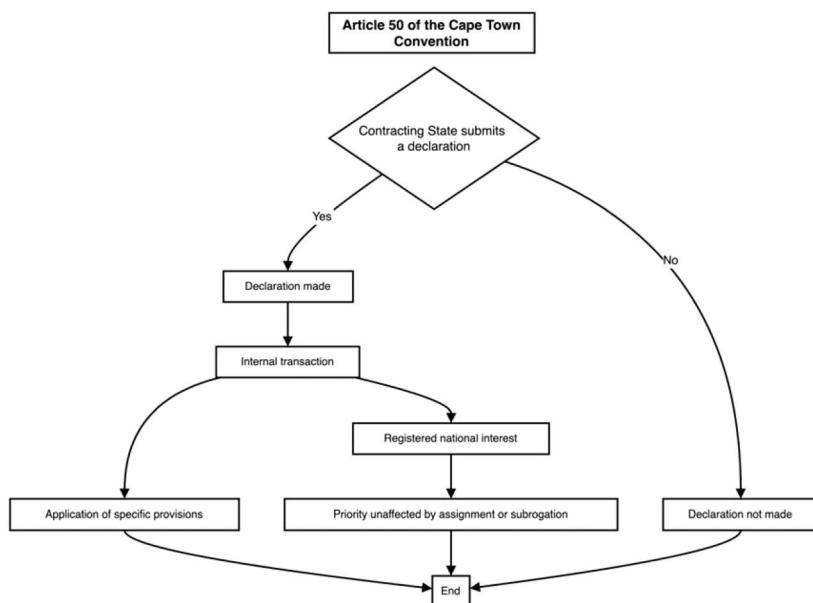
Article 52 of the Convention allows countries with different legal systems in various territorial units to choose whether the Convention applies to all their territories or just specific ones (see [Figure 6](#)). When a country adopts the Convention, it can declare (opt-in) and specify which

<sup>123</sup> Richard Frimpong Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 92.

<sup>124</sup> Iyare Otabor-Olubor, 'Exporting the Luxembourg Rail Protocol to the Convention on International Interests in Mobile Equipment to Africa' (2022) 27 *Uniform Law Review* 64.

<sup>125</sup> R. Goode, Official Commentary (n 55), para 2.304, 4.159, 4.23.

<sup>126</sup> Articles 8(4), 9(1), 16, Chapter V, Article 29.



**Figure 5.** Article 50 of the Cape Town Convention.

territory it will affect.<sup>127</sup> The Convention applies to the entire country if no territories are declared. A country can also change its decision later by submitting a new declaration. Additionally, if a country applies the Convention to only certain territories, it can make separate declarations for each region.<sup>128</sup> Therefore, a business or debtor is only considered subject to the Convention if it is based in a territory where the Convention is applied. Similarly, references to an object's location or the country's administrative authorities are within these designated territories.

While currently, no African country has territorial units with different legal systems, it is vital to consider the possibility of future legal reforms or decentralization processes that could lead to a more federal or regional legal structure. In such cases, Article 52 could become more relevant. For instance, if a country were to devolve legal authority to regional governments, those regions might adopt different legal systems or practices, potentially making Article 52 a valuable mechanism for managing the application of the Convention.

## 6. Article 53 of the Cape Town Convention: determination of courts

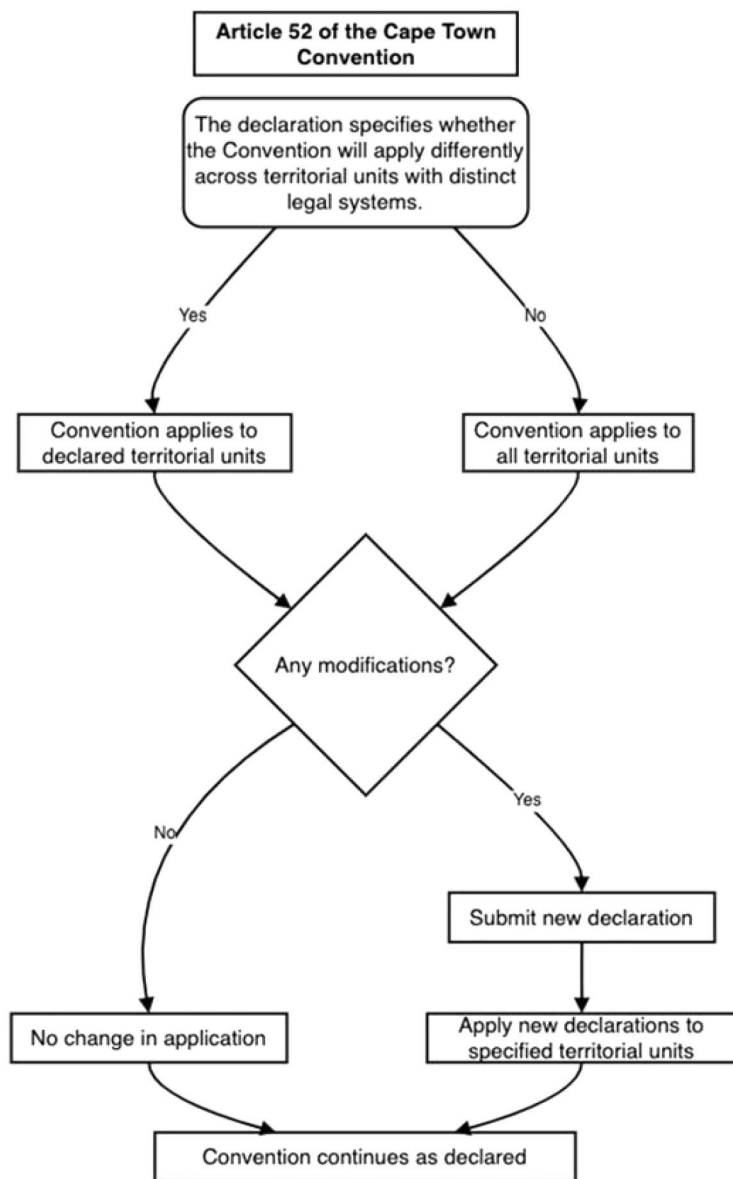
Article 53 of the Convention allows Contracting States to specify which court, or courts, will handle legal matters related to the Convention. The practical implementation of Article 53 requires courts with sufficient institutional capacity and independence. However, many African countries face significant challenges in this regard. Courts in some regions are under-resourced, lack adequately trained personnel, and suffer from delays and inefficiencies that could undermine the prompt resolution of disputes under the Convention.<sup>129</sup> Judicial independence is another concern;<sup>130</sup> in countries where the judiciary is subject to political interference, the credibility and impartiality of courts designated under Article 53 may be compromised.

<sup>127</sup> R. Goode, *Official Commentary* (n 55), para 2.308, 4.336–4.340.

<sup>128</sup> Convention, Art. 52 (4), MAC Protocol, Art. XXVI (4).

<sup>129</sup> Onsando Osiemo, 'Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa' (2014) 41 *Legal Issues of Economic Integration* 1.

<sup>130</sup> Sègnonna Horace Adjolohoun, 'Judges Guarding Judges: Investigating Regional Harbours for Judicial Independence in Africa' (2023) 67 *Journal of African Law* 169.

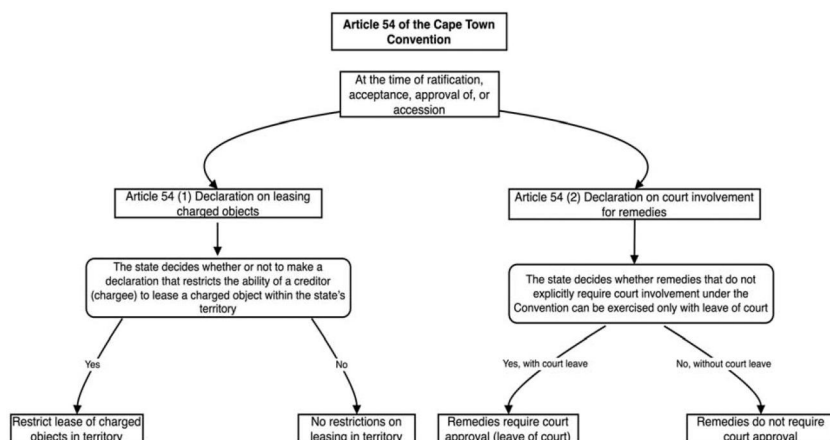


**Figure 6.** Article 52 of the Cape Town Convention.

This can discourage parties from relying on these courts, potentially leading to forum shopping or avoiding formal legal proceedings altogether.

However, when a country agrees to the Convention through ratification, acceptance, approval, or joining later, it may declare which specific court(s) within its territory will be responsible for dealing with issues that arise under Article 1 and Chapter XII of this Convention.<sup>131</sup> By making this declaration, the Contracting State ensures clarity about where legal proceedings under the Convention should be initiated and heard, helping to

<sup>131</sup> R. Goode, *Official Commentary* (n 55), para 4.341.



**Figure 7.** Article 54 of the Cape Town Convention.

streamline and direct legal actions related to international interests in mobile equipment to the appropriate court.

Enhancing judicial independence is critical for the effective functioning of Article 53. With support from international bodies, African governments should work to insulate the judiciary from political interference and ensure that designated courts operate with transparency and accountability. This may involve legal reforms, strengthening oversight mechanisms, and fostering a culture of judicial integrity.

## 7. Article 54 of the Cape Town Convention: declarations regarding remedies

Article 54 of the Convention allows Contracting States to make specific declarations about legal remedies available to creditors (see Figure 7).<sup>132</sup> For example, a country may state that if an asset with a charge attached to it is located within its borders or controlled from its territory, the creditor cannot lease it within that country without permission. Also, when a county becomes a party to the Convention, it must declare whether creditors can use certain legal remedies without going to court or need a court's approval (leave of court). This part of the Convention ensures that each country communicates how these creditor actions are recognized and enforced within their jurisdiction.

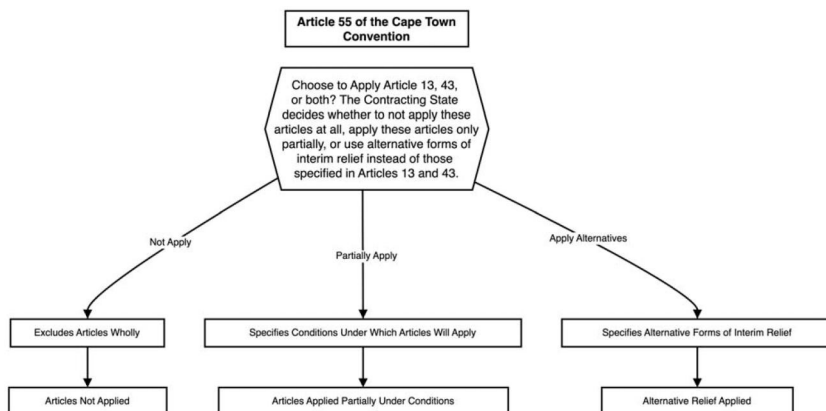
This flexibility poses a challenge to the uniform enforcement of the remedies in the Convention. For example, non-judicial remedies may be more readily accepted in common law jurisdictions, whereas civil law countries might require more judicial oversight. Moreover, in African countries where customary law might prevail, international creditor rights may be foreign or incompatible with local practices.<sup>133</sup>

Furthermore, the judiciary's capacity in some African countries is often limited by resource constraints, case backlogs, and insufficient training on international legal instruments.<sup>134</sup> These limitations can hinder the effective implementation of Article 54, particularly in enforcing non-judicial remedies, which rely on the prompt and effective action of judicial officers when required.

<sup>132</sup> R. Goode, Official Commentary (n 55), para 4.342.

<sup>133</sup> Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49 *Journal of Legal Pluralism and Unofficial Law* 143.

<sup>134</sup> Jennifer A. Widner, 'The Courts as a Restraint: The Experience of Tanzania, Uganda and Botswana' in *Investment and Risk in Africa* (London: Palgrave Macmillan UK, 2000) 219.



**Figure 8.** Article 55 of the Cape Town Convention.

## 8. Article 55 of the Cape Town Convention: declarations regarding relief pending final determination

Article 55 of the Convention allows countries that agree to join the Convention to opt out, either fully or partially, from applying specific provisions that deal with interim relief. Specifically, Article 13 details the rapid interim measures a financier can take before a final court decision, and Article 43 addresses the jurisdiction of courts to grant interim relief, particularly regarding the enforcement of rights over mobile equipment (see Figure 8).<sup>135</sup> Article 43 also establishes which courts can issue such relief based on party choice, asset location, or debtor location.

When a country adopts the Convention, it may declare whether it will not follow these articles entirely or apply them only under certain conditions.<sup>136</sup> If a government chooses to apply these provisions only under specific conditions, it must clearly state these conditions. Alternatively, the country can specify other forms of temporary relief that will be used instead, ensuring a mechanism is in place to address urgent matters pending a final legal decision.

## 9. Article 60 of the Cape Town Convention and Article XXVII of the MAC Protocol: transitional provisions

Article XXVII of the MAC Protocol modifies the transitional provisions of Article 60 of the Convention specifically for MAC equipment, adapting the framework for determining the applicability and priority of pre-existing rights or interests. Article 60(2)(a) of the Convention has been modified by Article XXVII(a) of the MAC Protocol. The definition of the ‘effective date of this Convention’ is expanded to account for three specific conditions, with the latest conditions serving as the effective date. These conditions include the date the Convention enters into force, the date the debtor’s State becomes a Contracting State, and the date the MAC Protocol becomes applicable to the relevant equipment in the debtor’s State. This modification ensures that pre-existing rights or interests in MAC equipment are governed by the Convention only once all necessary legal frameworks (that is, the Convention, the MAC Protocol, and the debtor’s State becoming a Contracting State) are in place. This approach prevents retroactive application of the Convention, protecting parties with pre-existing interests by delaying the effective date until all legal conditions are met.

<sup>135</sup> R. Goode, *Official Commentary* (n 55), para 2.277, 4.345.

<sup>136</sup> Convention, Art. 55.



Article 60(3) of the Convention has been modified under Article XXVII, which allows Contracting States to specify a transition period of between three and 10 years after their declaration becomes effective, during which the Convention and MAC Protocol provisions on priority (Articles 29, 35, and 36) will become applicable to pre-existing rights. This modification allows States to set a grace period before fully applying the Convention to pre-existing rights or interests. During this period, pre-existing rights retain their priority under domestic law. However, suppose these rights are registered in the International Registry before the grace period expires. In this case, they gain protection under the international system, regardless of whether any other competing interests have been registered. This allows parties holding pre-existing rights to preserve their priority status within the MAC Protocol while ensuring legal continuity.

Declaration Effectiveness (New Article 60(4)): Article XXVII(c) introduces a new provision regarding the effectiveness of declarations made by Contracting States. It clarifies that a declaration specifying the transition period for pre-existing rights takes effect when the MAC Protocol becomes applicable to the relevant equipment in that State. This ensures that the MAC Protocol's rules on pre-existing rights only apply once the MAC Protocol is operational in the jurisdiction, thereby maintaining clarity and predictability for stakeholders.

#### 10. Article VI of the MAC Protocol: choice of law

Article VI of the MAC Protocol discusses how the choice of law is handled for contractual rights and obligations.<sup>137</sup> This opt-in provision applies only if a Contracting State has expressly declared it will apply as per Article XXVIII(1). It allows the parties involved in a contract, a related guarantee contract, or a subordination agreement to select which jurisdiction's laws will govern their agreement, either fully or partially. This choice primarily refers to the State's domestic laws that the parties choose. If the chosen State has multiple territorial legal systems, the domestic laws of the specific territorial unit identified by the parties will apply (see [Figure 9](#)). If the parties do not specify otherwise, the default is that the domestic legal rules of the designated State or territorial unit apply to their agreement.

#### 11. Article VII of the MAC Protocol: association with immovable property

This provision deals with the interaction between international interests in MAC equipment and immovable property (that is, property that cannot be moved). It outlines three alternatives (A, B, and C) for how such associations are handled (see [Figure 10](#)).<sup>138</sup> Alternative A primarily focuses on the severability of equipment from immovable property.<sup>139</sup> If equipment can be separated from the immovable property without significant loss to the equipment, this alternative ensures that the MAC Protocol's provisions, such as the creation, priority, and enforcement of international interests, apply to the equipment. However, if the equipment is not separable from the immovable property, the MAC Protocol does not apply, and national law will become the applicable law.

Alternative B respects the laws of the State where the immovable property is located. It considers whether the equipment has lost its individual legal identity according to local laws.<sup>140</sup> If the equipment retains its identity, the MAC Protocol's rules regarding international interests apply. If not, local laws govern the association's effects on international interests. Also, in cases where the equipment, though associated with immovable property, has not lost its legal identity (that is, it is still considered a separate item), the MAC Protocol allows for domestic interests in the immovable property to take priority over the international interest in the equipment only if two conditions are met. The conditions are

<sup>137</sup> R. Goode, Official Commentary, para 5.32.

<sup>138</sup> See above section on 'Interaction with Immovable Property'.

<sup>139</sup> MAC Protocol, Art. VII, Alternative A.

<sup>140</sup> MAC Protocol, Art. VII, Alternative B.

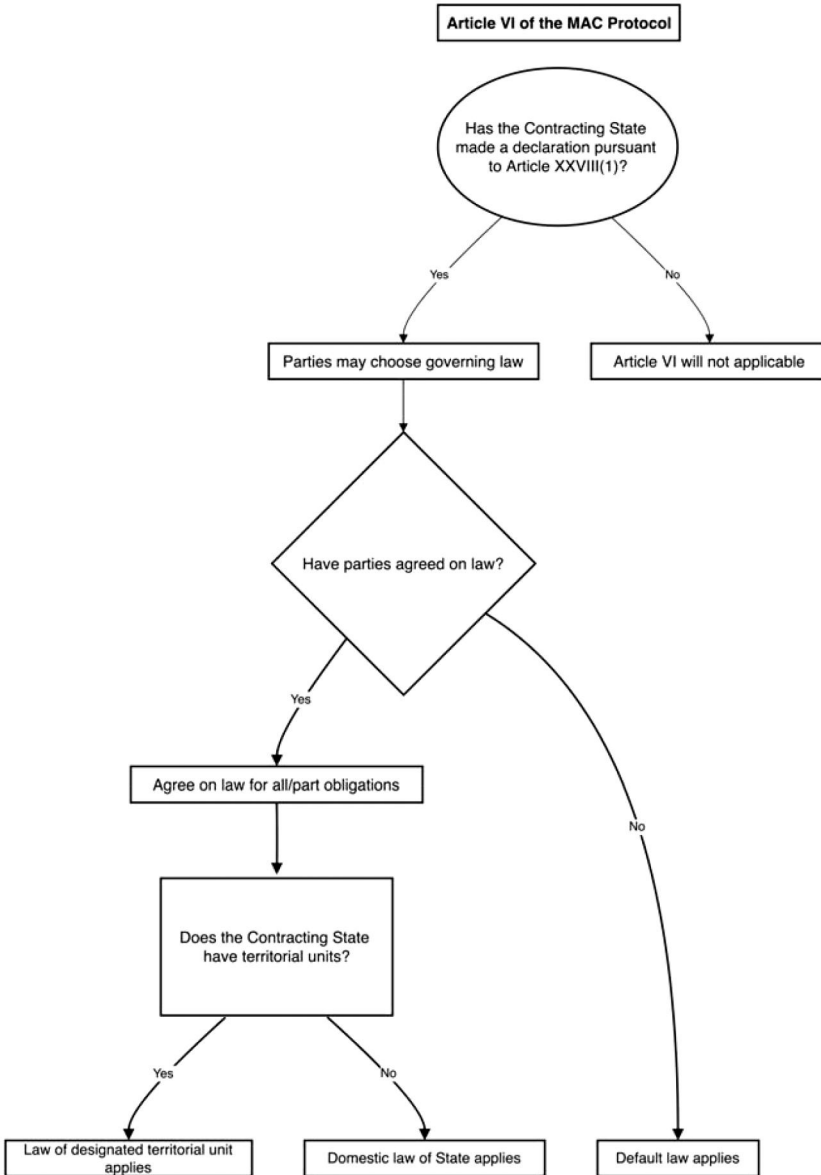


Figure 9. Article VI of the MAC Protocol.

that the national interest in the immovable property was registered under domestic law before the international interest was registered and that the equipment became associated with the immovable property before the international interest in the MAC equipment was registered.

Alternative C defers entirely to the laws of the State where the immovable property is situated regarding the creation, cessation, or subordination of international interests in equipment associated with immovable property.<sup>141</sup> This means that domestic rules will

<sup>141</sup> MAC Protocol, Art. VII, Alternative C.

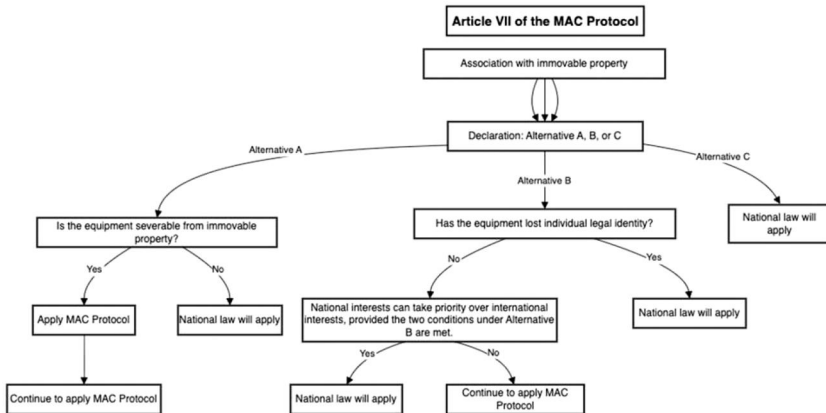


Figure 10. Article VII of the MAC Protocol.

determine whether the equipment's international interest remains valid, is subordinated to other claims, or is affected by its connection to immovable property. Alternative C ensures that local laws continue to govern these key issues, even when international interests are involved. These alternatives allow States to choose the approach that best aligns with their legal frameworks and ensures clarity and predictability in transactions involving immovable-associated equipment.

## 12. Article IX of the MAC Protocol: modification of provisions regarding relief pending final determination

Article IX of the MAC Protocol outlines modifications for how relief is provided to parties in a Contracting State that has declared its adherence to these rules.<sup>142</sup> It dictates that 'speedy' relief, as referenced in the Convention, must be provided within a pre-specified number of days as declared by the Contracting State where the relief application is made. The article introduces an additional provision, allowing for the sale of an object and the application of proceeds if both debtor and creditor agree.<sup>143</sup> The article also specifies that any ownership rights passed through such a sale are free of other interests that are subordinate to the creditor's interest as outlined in the Convention.

Additionally, it ensures that administrative authorities must provide remedies swiftly—within seven days of notification—and assist in executing these remedies while adhering to safety laws and regulations. The modifications are designed to facilitate quicker and more efficient enforcement of creditor's rights under the Convention and MAC Protocol.

## 13. Article X of the MAC Protocol: remedies on insolvency

Article X of the MAC Protocol concerns the procedures and rules that apply when an insolvency event occurs, specifically under a contract governed by the MAC Protocol and Convention, where a Contracting State is the primary jurisdiction for insolvency (see Figure 11). This article applies only if the State has submitted an opt-in declaration.<sup>144</sup> The article specifies the role of the insolvency administrator. Upon an insolvency event, the insolvency administrator or debtor must return the equipment to the financier by the end of

<sup>142</sup> R. Goode, Official Commentary, para 5.60–5.62.

<sup>143</sup> MAC Protocol, Art. IX (3).

<sup>144</sup> MAC Protocol, Art. X (1).

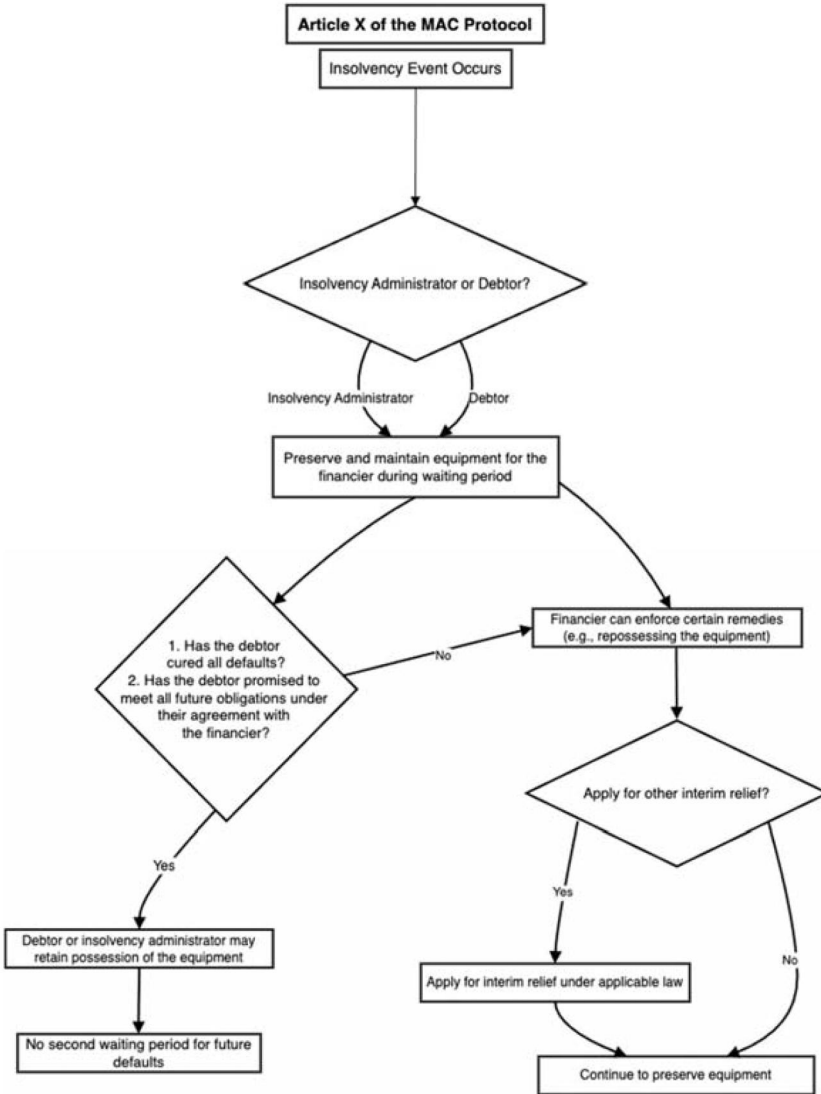


Figure 11. Article X of the MAC Protocol.

the specified waiting period or when the financier would usually be entitled to take possession if insolvency rules did not apply.<sup>145</sup>

Each State’s declaration defines the waiting period. During this period, and until the financier can take possession, the equipment must be maintained and preserved by the debtor or the insolvency administrator. If the debtor or administrator can rectify defaults (excluding those triggered by insolvency proceedings) and agree to future obligations by the specified deadline, they can retain possession of the equipment.<sup>146</sup>

<sup>145</sup> MAC Protocol, Art. X (3).

<sup>146</sup> MAC Protocol, Art. X (7).

Additionally, the creditor has the right to other interim legal remedies, and administrative support must be provided within seven days of the creditor asserting this right.<sup>147</sup> Article X ensures that insolvency proceedings do not impede the financier's rights to recover their MAC equipment or interfere with ongoing contractual obligations without the financier's consent.

#### 14. Article XI of the MAC Protocol: insolvency assistance

Article XI of the MAC Protocol addresses judicial cooperation in insolvency cases involving cross-border elements, specifically regarding MAC equipment located in a Contracting State that has submitted a declaration. It mandates that local courts collaborate extensively with foreign courts and insolvency administrators to enforce the provisions outlined under Article X. This cooperation is intended to facilitate the smooth execution of insolvency proceedings and the management of MAC equipment involved, ensuring that the legal processes in different jurisdictions are aligned and supportive of each other, thereby aiding in the effective resolution of insolvency-related issues across borders, in line with the specific State's laws.

The requirement for courts to cooperate and communicate effectively with foreign counterparts assumes a particular procedural capability. In some African countries, however, the civil procedural systems still rely on outdated processes, and the necessary legal technological infrastructure is not in place to facilitate smooth cross-border communication and insolvency case management. It is recommended that African governments should prioritize investments in technological infrastructure to support efficient communication and case management between domestic and foreign courts. This could include the development of online platforms for case tracking, document sharing, and real-time communication between judicial authorities.

### IX. Guidance notes on Adopting the MAC Protocol to the Cape Town Convention

Adopting the MAC Protocol typically involves three stages: signature (inapplicable when the MAC Protocol comes into force), ratification/accession, and implementation.

#### 1. Signature

- Once a sovereign government supports the objectives of the MAC Protocol and wishes to adopt it, it will usually sign the MAC Protocol (Article XXIII(1) of the MAC Protocol).
- A State may not become a Party to this MAC Protocol unless it is or becomes a Party to the Convention (Article XXIII(5)).
- Within a national government, there is typically a review process before the State agrees to sign, and each State has its procedures determining when a signature requires approval by a specific minister, a committee of ministers, or the head of government. The signing will occur at the depositary, UNIDROIT, in Rome.
- The signatory could be the State's ambassador on assignment to Italy, an appointed minister, or another plenipotentiary duly authorized by the concerned State. Signing indicates intent to support the MAC Protocol's entry into force and does not inherently create treaty obligations for the signing State. However, signing is not compulsory, and a State can proceed to the next stage directly without signing the MAC Protocol, even if it is not yet in force.

<sup>147</sup> MAC Protocol, Art. X (5)(b).

## 2. Ratification/Accession

- For a State to be legally bound by the MAC Protocol, it must submit a formal declaration of ratification, acceptance, or approval to the depositary, as stated in Article XXIII (1). Even when a State hasn't signed the MAC Protocol, it can become a party to it by depositing an instrument of accession with the depositary, as per Article XXIII(3) of the MAC Protocol.
- The MAC Protocol will enter into force following the expiration of three months after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, and the date on which the Supervisory Authority submits a certificate to the Depositary, confirming that the International Registry is fully functional (Article XXV).
- Suppose the MAC Protocol has not come into force at the time of ratification, acceptance, approval, or accession in a State. In this case, it will only become binding on that State at the later of two events: (i) the first day of the month after three months following the deposit of the fifth instrument of ratification, acceptance, approval, or accession; and (ii) when the International Registry is fully functional, as outlined in Article XXV of the MAC Protocol.
- The MAC Protocol provides several declarations that enable a Contracting State to opt in or opt out of specific provisions within the MAC Protocol.<sup>148</sup> Several of these declarations are optional, meaning there is no requirement for a Contracting State to make any optional declarations. These optional declarations can also be made after the MAC Protocol has become legally binding on a Contracting State.
- One declaration is mandatory, which is Article 54(2) of the Convention, specifying whether remedies can only be exercised with leave of court. When a State submits an instrument of accession/ratification to the MAC Protocol, it must submit the declaration under Article 54(2) of the Convention.<sup>149</sup> Along with depositing the instrument of ratification or accession, the State must also include the declarations it has chosen to submit. States are encouraged to submit their instruments and declarations in either English or French, the working languages of UNIDROIT.
- If a State consists of multiple territorial units, like Canada, the MAC Protocol applies to all units unless the State specifies that it only applies to certain ones.<sup>150</sup> According to Article XXVI, a State can also make different declarations for different territorial units.
- The instrument of ratification/accession should be accompanied by the necessary particulars required by the depositary (that is, UNIDROIT) and the 1969 Vienna Convention on the Law of Treaties, especially Article 7. This process is usually managed by the treaties section of a State's external/foreign affairs department.
- States have different procedures for authorizing the ratification/accession process. These procedures might involve ministerial and committee assessments that analyse the MAC Protocol's expected impact on the State. A stakeholder consultation process may also be considered before any instrument of adoption is submitted.
- After the internal ratification authorization process is completed, the ratification/accession instrument, which must be signed by the head of State, head of government, or the Minister of Foreign Affairs, along with any accompanying declarations, is then submitted to UNIDROIT, the Depositary of the MAC Protocol. This instrument can be presented by a minister or the State's ambassador in Rome or sent via courier. For the deposit to

<sup>148</sup> R. Goode, *Official Commentary* (Matrix of Declarations Permitted Under the Convention and Pretoria Protocol) Appendix IX.

<sup>149</sup> R. Goode, *Official Commentary*, para 2.334.

<sup>150</sup> R. Goode, *Official Commentary*, para 2.308.

be accepted, UNIDROIT must receive the original instruments. Draft versions of these instruments can be found on UNIDROIT's website for reference.<sup>151</sup>

### 3. Implementing the MAC Protocol

- Ratification/accession of the MAC Protocol will have status as a domestic law in some Contracting States with a monist legal system. In the event of any conflicts with existing domestic law, it will prevail.
- Dualist States must pass legislation to incorporate the MAC Protocol into domestic law. As a result, a Bill can be presented to the legislature, secondary legislation can be enacted under existing legislation (for example, statutory instruments), or a decree may be issued.
- Legislation or decrees should not contain the entirety of the MAC Protocol. Including the MAC Protocol and (separately) the declarations thereunder make it possible to incorporate the MAC Protocol by reference. Domestication of the MAC Protocol is the responsibility of the Contracting State.
- Contracting States should review critical areas of domestic laws and other related laws that could be modified by the MAC Protocol and amend such legislation to avoid conflict.

For example:

- The MAC Protocol may require amendments to domestic commercial laws or civil code.
- Article VI of the MAC Protocol guarantees party autonomy about the choice of law if adopted by the Contracting State by declaration, which may conflict with domestic law, and this will need to be addressed by the Contracting State during implementation.
- Rights in IAE will need to be carefully addressed by Contracting States. These are equipment so closely connected with immovable property that the law of the State where the property is located extends its interest in the property to include the equipment. States may need to review their respective property laws when submitting a declaration under Article VII(2).
- Any local law or commercial code regulating secured transactions law on mining, agriculture or construction, where the priorities and rights of international creditors would need to be modified by the rules set out in the MAC Protocol.

## X. Conclusion

The adoption and implementation of the MAC Protocol under the successful Convention hold significant promise for African nations in their quest for economic growth, infrastructure, and sustainable development. By facilitating access to affordable financing for high-value mobile equipment, particularly in the critical sectors of mining, agriculture, and construction, the MAC Protocol addresses some of the continent's most pressing challenges, including the high cost of modern infrastructure, limited access to private sector capital, and the legal uncertainties that have traditionally hindered cross-border financing.

Africa's infrastructure deficit has long been a barrier to its economic progress, with inadequate investment leading to increased transaction costs, limited market access, and

<sup>151</sup> Model Instruments of Ratification, Acceptance, Approval and Accession for the Assistance of States in the Implementation of The Cape Town Convention and MAC Protocol <<https://www.unidroit.org/wp-content/uploads/2023/05/MAC-MODEL-INSTRUMENTS-OF-RATIFICATION-rev.pdf>> accessed 4 September 2024.

reduced competitiveness in the global economy.<sup>152</sup> The MAC Protocol provides a uniform legal framework that can significantly mitigate these issues by reducing the risks for international creditors and ensuring their interests are protected across borders. This international secured transaction law system, in turn, encourages greater investment in the region, particularly from foreign investors who might otherwise be deterred by the uncertainties of Africa's diverse and often complex legal environments.

The MAC Protocol's reliance on the HS System ensures that it covers a wide range of equipment crucial to developing Africa's mining, agricultural, and construction sectors. This inclusivity is vital as it enables countries to finance high-value mobile equipment and more affordable machinery, thus supporting both large-scale and smaller enterprises across the continent. The ability of African States to make declarations under the MAC Protocol allows them to tailor the application of the MAC Protocol to their specific legal, economic, and social contexts, thereby maximizing its benefits while minimizing potential risks.

The three stages of adoption—signature, ratification/accession, and implementation—highlight the flexibility and adaptability of the MAC Protocol to the diverse legal frameworks within African States. Each stage allows for careful consideration and alignment with domestic laws, ensuring that the MAC Protocol can effectively integrate into national legal systems without causing undue disruption. This process is crucial for African dualist States, which must pass legislation incorporating the MAC Protocol into domestic law. The emphasis on the necessity of reviewing and amending related domestic laws, such as commercial codes and property laws, further supports the importance of a thorough and deliberate approach to implementation.

Moreover, the MAC Protocol's provision for declarations gives African countries the flexibility to opt in or opt out of specific provisions, thereby accommodating their legal traditions and economic priorities. For instance, declarations concerning the choice of law, the handling of immovable-associated equipment, and the ranking of priority rights allow States to safeguard their national interests while benefiting from the broader protections and opportunities provided by the Convention and MAC Protocol. This approach enhances the MAC Protocol's relevance to African countries and ensures that it can be aligned with existing regional and national initiatives, such as the AfCFTA.

The MAC Protocol's potential to catalyse economic development in Africa cannot be overstated. Improving access to modern, cost-efficient equipment directly contributes to productivity gains in the MAC sectors, which are crucial to the continent's economic diversification and resilience. Additionally, the MAC Protocol supports the achievement of the UN Sustainable Development Goals by promoting sustainable practices and enabling the mechanization of agriculture, which is crucial for food security and poverty alleviation.

However, the successful adoption and implementation of the MAC Protocol also depend on overcoming several challenges, particularly those related to legal capacity, governance, and political stability. African countries must ensure that their legal institutions are robust to enforce the MAC Protocol's provisions. Political stability and governance reforms are equally crucial, as they create a conducive environment for long-term private sector investments and reduce the risks associated with private sector financing. Integrating the MAC Protocol into national laws across African States will require coordinating efforts among various stakeholders, including governments, legal experts, and the private sector. Governments must take the lead in ratifying and implementing the MAC Protocol, ensuring that the necessary domestic legal and regulatory frameworks are in place to support its operation.

In conclusion, the MAC Protocol represents a significant opportunity for African countries to enhance their economic development through improved access to financing for high-value equipment. By adopting the MAC Protocol, African States can address their

<sup>152</sup> Rabah Arezki and Amadou Sy, 'Financing Africa's Infrastructure Deficit: from Development Banking to Long-term Investing' (2016) 23 *Journal of African Economies* 25.



infrastructure deficits and integrate more fully into the global economy, thereby fostering sustainable development and achieving long-term economic resilience. The careful and strategic implementation of the MAC Protocol, supported by appropriate legal and institutional frameworks, will be vital in realizing these benefits and ensuring that Africa can capitalize on the opportunities presented by this important international instrument.

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