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Committee of Governmental Experts  
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**MAC WORKING GROUP'S POSITION PAPER IN SUPPORT OF AND COMMENTING  
ON THE CAPE TOWN CONVENTION'S PROPOSED MINING, AGRICULTURE AND  
CONSTRUCTION PROTOCOL**

7 February 2017

The MAC Working Group (the WG) represents companies operating in the agricultural, construction and mining equipment manufacturing and financing sectors. See Schedule 1 for a list of the WG's members.

**Overview**

This position paper expresses the WG's support for a proposed fourth protocol (the MAC Protocol) to the Cape Town Convention (the CTC), an extension of the CTC's scope to include mining, agriculture and construction (MAC) equipment. This paper further provides comments on the current version of the MAC Protocol<sup>1</sup> so that the MAC Protocol may be adapted to better reflect the realities and needs of the MAC industries as best understood by market participants.

**Key points of support**

1. Savings and growth: The MAC Protocol will generate growth and increase efficiency in MAC industries for lenders and borrowers, for equipment manufacturers and purchasers, in developed and emerging countries alike by reducing the risks and costs of asset-based financing. The CTC and its first protocol on aircraft equipment (the Aircraft Protocol) have attracted 66 ratifications (65 countries and the EU) to date and are expected to create savings of U.S.\$161 billion in financing costs from 2009-2030.<sup>2</sup> The MAC Protocol promises to replicate the same success. Based on a comparison of the annual trade in aircraft and MAC equipment, the MAC Protocol will, even with a scope limited to select, high-value HS Codes (as defined on page 3), generate savings comparable to those of the Aircraft Protocol.<sup>3</sup>

2. Development: The MAC Protocol will enable developed and emerging economies to finance and acquire sophisticated, high-value MAC equipment cheaper and more efficiently. In doing so, the MAC Protocol will assist in achieving Sustainable Development Goals 9.3, 17.3 and 17.5, regarding

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<sup>1</sup> UNIDROIT 2016 - S72K – CGE1 – Doc. 2: Preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment, *available at* <http://www.unidroit.org/english/documents/2016/study72k/cge1/s-72k-cge01-02-e.pdf> (last visited Dec. 28, 2016).

<sup>2</sup> Study by Vadim Linetsky (Northwestern University): *Economic Benefits of the Cape Town Treaty* at 2 - 4 (2009), *available at* <http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf>.

<sup>3</sup> See *infra* page 3; Mooney, Dubovec and Brydie-Watson, *The Mining, Agriculture and Construction Equipment Protocol to the Cape Town Convention Project: the Current Status* at 347, Oxford University Press, 332-360 UNIF. L. REV., Vol. 21, 2016, doi: 10.1093/url/unw023.

the provision of improved financing for and investment in developing countries, adopted and committed to by over 150 world leaders at the United Nations in September 2015.<sup>4</sup>

3. Therefore, the WG urges countries to support adoption of the MAC Protocol at the first session of the Committee of Governmental Experts. The WG hopes and trusts the comments in this paper will be duly considered by attendees of the meeting to ensure the MAC Protocol reflects the realities and needs of the MAC industries.

## **I. THE PROBLEM: A NEED FOR INTERNATIONAL COLLABORATION TO INCREASE LEGAL CERTAINTY AND REDUCE THE COSTS OF ASSET-BASED FINANCING IN MOBILE EQUIPMENT**

Asset-based financing faces expensive legal uncertainty when collateralized objects (e.g., planes, mobile cranes and industrial tractors) cross borders. “The widely adopted conflict-of-law rule associated with tangible movables, *lex rei sitae* (the applicable law will be the law where the property is situated), is not well suited for dealing with [this problem].”<sup>5</sup> Borrowers and lenders are exposed to risk when they cannot be certain which law will apply and whether security interests (which cannot feasibly be registered in every county’s domestic registry) will take priority over a financed object in the event of default. This legal uncertainty translates into increased financing costs and less global trade and development.

## **II. A PROVEN SOLUTION: THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL**

4. The CTC has a demonstrated legacy of success in improving secured financing practice, as best exemplified by its Aircraft Protocol, which has to date attracted 66 ratifications (the EU and 65 contracting States, representing both emerging and developed economies). The CTC and Aircraft Protocol lower the cost of financing high-value movable aircraft property by providing an international regulatory framework and a central global registry for security interests. Under this system, no matter where a financed object moves, parties to financing contracts may be certain of the law that will apply and may register security interests in one central registry.

5. The implementation of the Aircraft Protocol has resulted in significant risk reduction in aircraft financing. It is expected to create savings of U.S.\$161 billion in financing costs between 2009 – 2030.<sup>6</sup> Further, “[s]trong evidence of the CTC’s effect in reducing credit risk is the recognition by the Organisation for Economic Co-operation and Development’s Aircraft Sector Understanding . . . which allows export credit agencies to charge lower premiums on the financing provided to end users located in contracting States.”<sup>7</sup>

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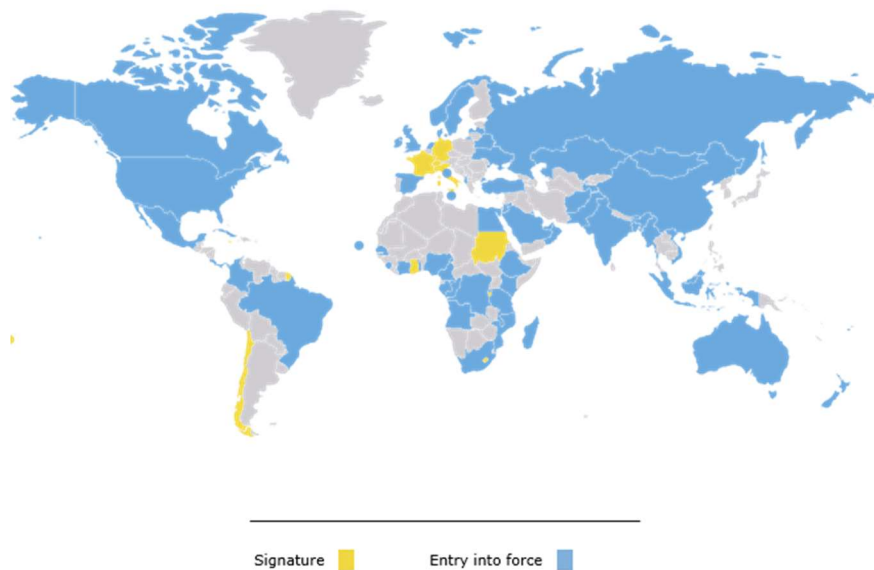
<sup>4</sup> Sustainable Development Goals 9.3, 17.3 and 17.5 listed on page 5.

<sup>5</sup> Mooney, Dubovec and Brydie-Watson, *supra* note 3 at 334, Oxford University Press, 332-360 Unif. L. Rev., Vol. 21, 2016, doi: 10.1093/ur/unw023.

<sup>6</sup> Vadim Linetsky (Northwestern University). *Economic Benefits of the Cape Town Treaty 2–4* (2009), available at <http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf>.

<sup>7</sup> Mooney, Dubovec and Brydie-Watson, *supra* note 3 at 341 (citing Organization for Economic Co-operation and Development, Sector Understand on Export Credits for Civil Aircraft, Doc TAD/ASU (1 February), <http://www.oecd.org/tad/xcred/ctc.htm>).

### **Status of the Cape Town Convention's Aircraft Protocol<sup>8</sup>**



### **III. ANOTHER OPPORTUNITY: THE MINING, AGRICULTURE AND CONSTRUCTION PROTOCOL**

6. The MAC Protocol will extend the economic benefits of the CTC to certain high value agricultural, construction and mining equipment. By lowering the risk and cost of credit for acquiring MAC equipment, companies in emerging and developed economies may acquire sophisticated, high-value MAC equipment cheaper and more efficiently. In some cases, the MAC Protocol may even make the acquisition of high value MAC equipment possible for companies who previously did not have access to it due to the lack of availability of affordable financing.

7. In the aggregate, it is hoped that the MAC Protocol will generate saving comparable to those of the Aircraft Protocol, roughly U.S.\$8 billion per year between 2009 and 2030.<sup>9</sup> The scope of the MAC Protocol will be defined with the terms of Harmonized Commodity Description and Coding System (the HS). The HS is used by more than 200 countries for 98% of international trade in goods to catalogue and organize tangible objects into roughly 5,000 six-digit codes (HS Codes). The MAC Protocol's applicable scope will be defined with a list of HS Codes that contain high-value, mobile MAC equipment. The WG advised UNIDROIT and the drafters of the MAC Protocol by providing a priority list of HS Codes pertaining to equipment that would significantly benefit from the CTC and MAC Protocol. After discussions at UNIDROIT, the MAC Protocol's scope tailored to include a list of HS Codes including exclusively high-value MAC equipment. The final list of HS Codes for the MAC Protocol concerned more than U.S.\$117 billion in transnational trade as determined by UN Comtrade Data.<sup>10</sup> In comparison, the Aircraft Protocol concerned roughly U.S.\$125 billion in transnational trade.<sup>11</sup> In effect, the scope of these two Protocols should be quite similar.

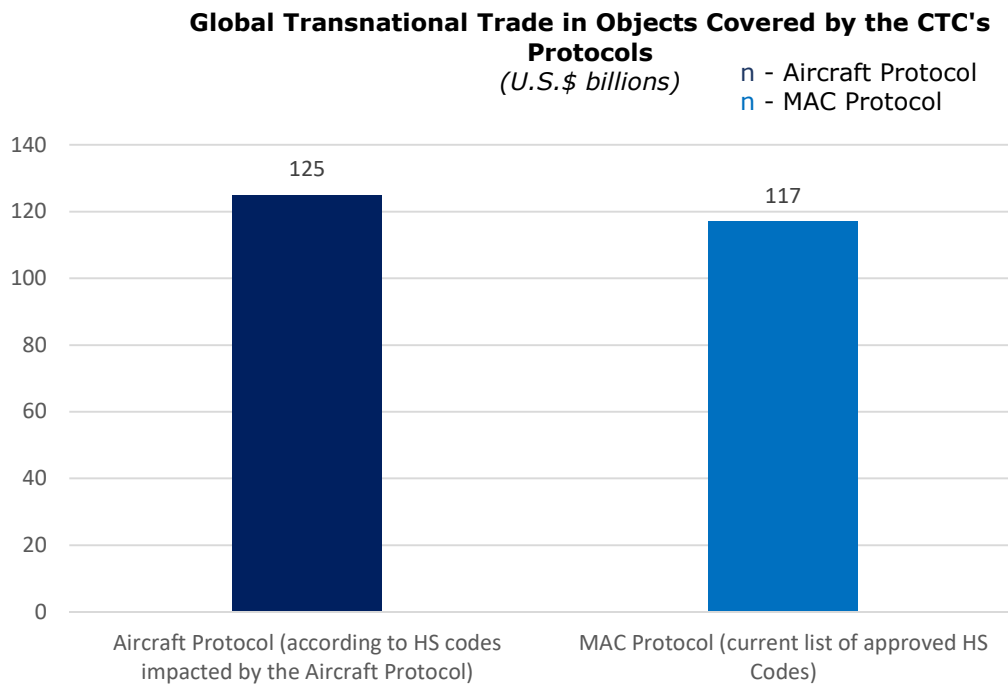
<sup>8</sup> Status Map, UNIDROIT, available at <http://www.unidroit.org/status-2001capetown-aircraft?id=1773>.

<sup>9</sup> Mooney, Dubovec and Brydie-Watson, *supra* note 3.

<sup>10</sup> *Id.* At 347 (citing UN Comtrade Date, available at <https://comtrade.un.org/data/>).

<sup>11</sup> *Id.*

8. The preliminary list of HS Codes is available on UNIDROIT’s website.<sup>12</sup> The WG supports the list of HS Codes set forth in the draft MAC Protocol.



#### IV. COMMENTS: IMPROVING THE MAC PROTOCOL TO BETTER MEET THE MAC INDUSTRIES’ REALITIES AND NEEDS

9. The MAC Protocol will generate the greatest possible savings when (1) its terms are certain and (2) non-governmental entities remain informed of the MAC Protocol’s status. The WG, therefore, recommends the changes below.

##### 1. Include only Alternative A of Article X with regards to remedies on insolvency

10. The WG recommends that Alternatives B and C (of Article X on remedies on insolvency) be removed from the MAC Protocol to increase legal certainty and, thus, further reduce the cost of financing. In this case, a country would have the option of either ratifying under the terms provided in Alternative A or simply retaining domestic law. It is the WG’s position that, though only allowing for Alternative A may be viewed negatively by some States, potential concerns would be outweighed by the benefit of increased certainty about the protections provided by the MAC Protocol. Furthermore, practical experience with the Aircraft Protocol shows that among the 66 current ratifications, only one nation has ratified the Aircraft Protocol with an alternative other than Alternative A.<sup>13</sup>

##### 2. Provide a better system for keeping non-governmental entities informed

11. The WG recommends that the MAC Protocol include a system for notifying non-governmental entities of the status of the MAC Protocol. Article XXXIII provides that UNIDROIT, as the designated

<sup>12</sup> *Introduction to the MAC Protocol*, UNIDROIT (19 Dec. 2016), <http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol>.

<sup>13</sup> See Status - Protocol to the Convention on International Interests in Mobile Equipment On Matters Specific To Aircraft Equipment, UNIDROIT, <http://www.unidroit.org/status-2001capetown-aircraft> (last visited Jan. 27, 2017). It is also worth noting that this lone nation is currently considering re-ratification of the Aircraft Protocol with Alternative A.

Depository, will inform Contracting States of ratifications, withdrawals, changes to declarations and denunciations of the MAC Protocol under Article XXXI. The WG recommends that a system be put in place for similarly notifying non-governmental entities. Such a function could be assumed by the Central Registry and/or UNIDROIT. The Central Registry maintains the emails of “Approved Administrators” (entities and individuals that have registered interests).<sup>14</sup> UNIDROIT could provide updates to the Central Registry, which would relay those updates to Approved Administrators. Additionally, the Central Registry or UNIDROIT could maintain a mailing list that other individuals or entities could sign up for so as to update those that do not have a registered international interest.

12. The WG considers these changes critical improvements to the MAC Protocol. The WG’s support for the adoption MAC Protocol is, however, not contingent on the acceptance of all of these recommendations.

## **V. THE NEXT STEP: COUNTRIES SHOULD SUPPORT THE ADOPTION OF THE MAC PROTOCOL**

13. The WG supports the adoption of the MAC Protocol. The MAC Protocol will follow the example of the Aircraft Protocol, which has attracted 66 ratifications to date and is recognized as a great success in reducing the cost of financing, to benefit the MAC industries, equipment manufacturers and purchasers, lenders and borrowers, and developed and emerging economies alike.

14. In conclusion, the WG urges countries to support adoption of the MAC Protocol at the first session of the Committee of Governmental Experts. The WG hopes and trusts the comments in this paper will be duly considered by attendees of the meeting in UNIDROIT to ensure the MAC Protocol reflects the realities and needs of the MAC industries.

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### Sustainable Development Goals <sup>15</sup>

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**Goal 17.3:** Mobilize additional financial resources for developing countries from multiple sources.

**Goal 17.5:** Adopt and implement investment promotion regimes for least developed countries.

**Goal 9.3:** Increase the access of small-scale industrial and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets.

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<sup>14</sup> *How Do I Get Started?*, INTERNATIONAL REGISTRY OF MOBILE ASSETS, <https://www.internationalregistry.aero/ir-web/> (last visited Jan. 20, 2017).

<sup>15</sup> *Sustainable Development Goals*, UNITED NATIONS, <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> (last visited Dec. 28, 2016).

**Schedule 1**

## Members of the MAC Working Group

<b>Member</b>	<b>Description</b>
Association of British Mining Equipment Companies	Represents over 30 British member companies and over U.S.\$1 billion worth of export mining equipment.
Association of Equipment Manufacturers	Represents over 900 members in the U.S., Canada and China.
AGCO	Global leader in the design, manufacture and distribution of agriculture solutions. AGCO's full line of equipment and related services are distributed globally through over 3,000 independent dealers and distributors in more than 140 countries. In 2015, AGCO had net sales of U.S.\$7.5 billion with over 20,000 employees.
Caterpillar	The world's leading manufacturer of construction and mining equipment, diesel and natural gas engines, industrial gas turbines and diesel-electric locomotives.
CEMA (European Agricultural Machinery)	Represents 4,500 manufacturers and 10 national associations.
CNH Industrial	Global agricultural vehicle manufacturer with over 64,000 employees in 64 manufacturing plants and 50 research and development centres in 180 countries.
Equipment Leasing and Finance Association (ELFA)	Represents financial services companies and manufacturers in the U.S.\$1 trillion U.S. equipment finance sector.
John Deere	Deere & Company is a world leader in providing products and services for agriculture, construction, forestry and turf care. John Deere sells products in more than 130 countries and has more than 55,000 employees globally.
Tractors and Farm Equipment Limited	Indian tractor manufacturer with annual sales of over 150,000 tractors (domestic and international) and presence in over 100 countries.
VDMA (Verband Deutscher Maschinen- und Anlagenbau, Mechanical Engineering Industry Association)	Represents more than 3,200 mostly medium-sized companies in the capital goods industry, making it the largest industry association in Europe.
VDP (Association of German Pfandbrief Banks)	Represents financiers for residential and commercial construction.
Vermeer	Global manufacturer of underground construction, surface mining, tree care, environmental and agricultural equipment, helping the world connect to the necessities of life, manage natural resources and nourish a vibrant food supply.