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COMMENTS

(Submitted by the United States Department of States)

1. The United States of America appreciates the opportunity to comment on the revised draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment. Substantial progress occurred during the first session of the Committee of Governmental Experts in March 2017, and we look forward to continuing this work at the October 2017 meeting. We would like to provide the following comments on several issues for consideration by other delegations in advance of the meeting:

A. Title

2. As this Protocol is commonly known and referred to as the “MAC Protocol”, we suggest that the title and text of the protocol be made consistent with this usage rather than with the alphabetical order of categories of equipment. Thus, we suggest that the title of the Protocol refer to “Mining, Agricultural, and Construction Equipment” in that order, and that conforming changes be made throughout the text.

B. Article VII

3. We propose several changes to Alternative A in Article VII. We believe that it is appropriate to include Alternative A as an approach that would provide the most robust protection for international interests in immovable associated equipment. However, the current text may be slightly overbroad in some respects, while failing to explicitly address other important issues.

4. First, while the current text of Alternative A states that an international interest in immovable-associated equipment would never be affected by the association with the immovable property, we suggest limiting this rule to instances in which the equipment can be removed without irreparable physical damage to the immovable property. For any states that choose to apply this Alternative, domestic law could provide any rules needed to allocate financial responsibility for repairing damage caused by removal.

5. Second, we suggest adding a second paragraph to Alternative A to provide that the Protocol would not affect the application of domestic law to situations in which removal of the equipment would cause irreparable damage to the immovable property.

6. Third, we believe that Alternative A should explicitly clarify that—unlike under Alternative B—an international interest is not affected by any domestic law that would otherwise have determined that the equipment has lost its legal identity or otherwise ceased to be a movable asset due to the association with immovable property. For example, assume that the law of State X provides that if a tractor is used on a farm that is subject to a mortgage, the tractor loses its legal identity and becomes subject to the mortgage on the farm. If State X chooses to apply Alternative A, that domestic law rule should not apply to equipment covered by the Protocol, as an international interest in immovable-associated equipment should continue to exist and should retain its priority as long as no irreparable physical damage would be caused by removal of the equipment. By contrast, Alternative B would permit the domestic law rule to continue to apply, thus permitting international interests to be extinguished or subordinated due to association of the equipment with immovable property.

7. Finally, none of the Alternatives in Article VII, as currently drafted, explicitly address the creation of new international interests in immovable-associated equipment after the equipment has been associated with the immovable property (i.e., a post-association interest). Currently, all three merely address the extent to which association with immovable property affects *existing* international interests (e.g., whether such an existing interest “continues to exist” or “ceases to exist”). We believe that this ambiguity regarding the creation of new international interests is undesirable, and that Alternative A should explicitly provide that post-association interests can be created in immovable-associated equipment. (Revising Alternatives B and C to clarify their impact on creation of post-association interests would also seem prudent, and we look forward to hearing other delegations’ suggestions in that regard.)

8. With these changes, Alternative A would be drafted as follows:

Alternative A

~~3. An international interest in agricultural, construction or mining If immovable-associated equipment is removable without any irreparable physical damage to the immovable property, is not affected by the association of the equipment with the immovable property does not affect~~

~~(a) any person’s power to dispose of the immovable-associated equipment, or~~

~~(b) the creation, continued existence, or and continues to exist and retain its priority as against any rights or interests of an international interest in the immovable-associated equipment,~~

~~regardless of whether otherwise-applicable domestic law would have determined that the equipment lost its legal identity or otherwise ceased to be a movable asset or that an interest in the equipment was subordinated to a right or interest in the immovable property.~~

~~4. This Protocol does not affect the application of any law of the State where the immovable property is situated that determines whether an international interest in immovable-associated equipment ceases to exist, is subordinated to any other rights or interests in the immovable associated equipment, or is otherwise affected by the association of the equipment with immovable property, if removal of the equipment would cause irreparable physical damage to the immovable property.~~

C. Articles VIII(5), IX(6), X Alt. A(8), and X Alt. C(9)

9. We propose deleting paragraph 5 of Article VIII, as we believe that this provision would be too vague, and potentially too broad, in the context of this Protocol. Whereas under earlier Protocols, analogous provisions imposed obligations on states that were fairly discrete and well-understood, it remains unclear what types of assistance might be required for the export of MAC equipment and which administrative authorities might be affected. It would therefore be difficult for states to clearly understand the scope of the obligations they would be undertaking. Given the more limited benefits that the obligation might provide under this Protocol, we believe that deletion would be appropriate. For the same reason, we believe that Articles IX(6), X Alt. A(8), and X Alt. C(9) should be deleted.

D. Article XVII(3)

10. Because Article XXXII will impose significant duties on UNIDROIT (e.g., regular reports and organization of conferences or meetings in multiple scenarios), we believe it would be appropriate to provide for the recovery of the reasonable costs incurred in carrying out the Secretariat-like tasks under that article. However, we would not support the approach taken in the current draft, which would permit recovery of costs for the basic duties of the Depositary set out in Article 62 of the Convention. We are not aware of precedents for a Depositary recovering the costs of performing these basic duties, and we would hesitate to establish a precedent under this Protocol that might affect treaty practice more broadly. We therefore propose the following text for Article XVII(3):

The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry, ~~and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 17(2) of the Convention, and the reasonable costs of the Depositary~~ UNIDROIT associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 62 of the Convention XXXII of this Protocol.

E. Article XXVII

11. Although Article XXVII is not intended to set forth an exclusive list of Convention declarations that would apply under the Protocol, the omission of certain articles (e.g., Article 52) from the illustrative list can cause confusion. We suggest omitting the illustrative list in Article XXVII.

F. Article XXXII

12. We would like to thank other delegations for the considerable amount of effort devoted to revising Article XXXII during the March 2017 session. We believe that the revised text provides a balanced approach that will provide a sufficiently nimble mechanism for amending the Annexes while also respecting states' general practices for treaty amendments. We therefore have only some minor drafting suggestions to clarify the revised text.

13. First, we would suggest clarifying some of the cross-references in paragraph 3, particularly as Article XXIII does not explicitly refer to entry into force of amendments.

14. Second, we believe that the terminology used in the Article needs to be consistent, as the current draft uses "States Parties" at times and "Contracting States" at other times, without intending any substantive difference.

15. Third, we would suggest reversing the order of paragraphs 4 and 5 and then adding the phrase “other than those changes described in paragraph 4 of this Article” to the first sentence of the new paragraph 5, as shown below. This change would clarify that the more extensive procedure, in which states must notify the Depositary whether they consent to be bound by an amendment to an Annex, applies only to amendments that change the scope of the Annexes. (As currently drafted, the more extensive procedure could be read as applying to both categories of amendments—those that would change the scope of Annexes and those that would not change the scope of Annexes).

16. Fourth, in order to use wording that is more standard in amendment provisions, we would suggest “consent” to be bound, instead of “accept” to be bound, and “enter into force” instead of “become effective.”

17. Fifth, for entry into force of amendments to Annexes under the streamlined procedure, ninety days might generally be an appropriate timeframe. However, further consideration may be needed regarding how to ensure that these amendments enter into force at the same time that the Harmonised System changes become effective. For amendments to Annexes using the more extensive procedure, we believe that [XX%] should be replaced by 50%.

18. Finally, in paragraph 6, we would suggest clarifying that the phrase “becomes applicable” is included because of the possibility that a state may specify, through a declaration under Article XXV (Transitional Provisions), a date when certain Articles will become applicable to preexisting rights or interests in equipment added to the scope of a Protocol by an amendment.

19. With these changes, paragraphs 3 through 6 of Article XXXII would be drafted as follows:

3. Any amendment to this Protocol other than to the Annexes [pursuant to paragraphs 4 and 5 of this Article] shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States Parties which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by five States Parties in accordance with the provisions of Article XXXIII of this Protocol relating to its entry into force.

[5. 4. After each revision of the Harmonised System, or such other times as the circumstances may require, the Depositary, after consultation with the Supervisory Authority, shall convene a meeting of Contracting States Parties to this Protocol to consider any amendments to the Annexes that reflect changes to the Harmonised System that have affected the Harmonised System codes listed in the Annexes without changing the scope of the Annexes. Each such amendment shall be approved by at least a two-thirds majority of States participating in the meeting. After approval of an amendment by Contracting States Parties the amendment will become effective enter into force upon the expiration of [ninety] days after such approval. The Depositary shall immediately notify all Contracting States Parties of the amendment and the date at which the amendment becomes effective enters into force.]

[4. 5. After each revision of the Harmonised System, or such other times as the circumstances may require, the Depositary, after consultation with the Supervisory Authority, shall convene a meeting of Contracting States Parties to this Protocol to consider any amendments to the Annexes that reflect changes to the Harmonised System that have affected the Harmonised System codes listed in the Annexes other than those changes described in paragraph 4 of this Article, or the inclusion of any additional codes covering uniquely identifiable high value mobile equipment of a type that is used in the agricultural, mining or construction sector that may warrant inclusion of such equipment in the Annexes. Each such amendment shall be approved by at least

a two-thirds majority of States participating in the meeting. The Depositary shall communicate to all ~~Contracting~~ States Parties the adoption of the amendment. ~~Contracting States Parties~~ shall notify the Depositary within a period of twelve months from the date of the communication if they do not ~~accept~~ consent to be bound by the amendment. Any such amendment shall ~~become effective~~ enter into force in respect of the other States ninety days after the end of that period of 12 months unless 50% or more of the ~~Contracting States Parties~~ have notified the Depositary that they do not ~~accept~~ consent to be bound. The Depositary shall immediately notify all ~~Contracting States Parties~~ of the amendment and the date at which the amendment ~~becomes effective~~ enters into force.]

6. Any revision to the Annexes shall not affect rights and interests arising prior to the date the revision enters into force or, in the case of a declaration under Article XXV, becomes effective ~~or~~ applicable.