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APPENDICES

Appendix I – Research on the Harmonized System

1. The following section contains an analysis of the Harmonized Commodity Description and Coding System (HS). It is based upon initial research conducted by the National Law Centre (NatLaw) for consideration by the Study Group during its deliberations 2014 – 2017. It has been updated following further research undertaken by the Secretariat and consultations with the World Customs Organization (WCO).

Introduction to the HS

2. The HS is an internationally standardised system of names and numbers (nomenclature) to classify traded products. Created by the 1983 *International Convention on the Harmonized Commodity Description and Coding System*, it came into effect in 1988 and is maintained by the WCO, an independent intergovernmental organization based in Brussels, Belgium.

3. The HS was designed and developed as a “core” system so that countries and organizations adopting it could make further subdivisions (national subdivisions) according to their particular needs. Customs tariffs and statistical nomenclatures for the import and export of goods at a national level is based on the HS. It is used by Customs administrations, statisticians and those involved in trade (importers/exporters, transporters, freighters, etc.) Among the most important uses of the HS are the following:¹

- (i) As a basis for customs tariffs
- (ii) As a basis for the collection of international trade statistics
- (iii) As a basis for rules of origin
- (iv) For the collection of internal taxes
- (v) For transport tariffs and statistics
- (vi) For the monitoring of controlled goods (e.g., wastes, narcotics, chemical weapons, ozone layer depleting substances, endangered species)

Structure of the HS

4. Article 1(a) of the 1983 *International Convention on the Harmonized Commodity Description and Coding System* provides that the HS is composed of three parts:

- (i) The nomenclature itself, comprising headings and subheadings and their related numerical codes
- (ii) Section, Chapter and Subheading Notes
- (iii) General Rules for the Interpretation of the Harmonized System

(i) The HS nomenclature

5. The HS is divided into 21 Sections which contain a total of 96 Chapters numbered from Chapter 1 to Chapter 97 (Chapter 77 is not in use). An additional two chapters, Chapters 98 and 99, are not used in the HS but are made available for national use. Chapters are generally organized according to the degree of manufacture, starting with raw products, then unprocessed products and semi-finished goods, and ultimately finished products. For instance, live animals belong under Chapter 1, animal skins under Chapter 41, and leather footwear under Chapter 64.

¹ WCO, HS Classification Handbook (2013), II/3, available: http://harmonizedsystem.wcoomdpublishings.org/pdfs/WCOOMD_MSH_EN.pdf.

6. The Chapters are further sub-divided into 1,224 headings identified by 4-digit codes. Most headings are further subdivided into 6-digit subheadings. The 2017 version, currently in effect, is divided into 5224 6-digit subheadings. The previous 2012 edition contained 5,205 6-digit codes, whereas the 2007 version contained 5,051 6-digit codes.

Division	Number of digits	Example
Section	None	XVI – Machinery and Mechanical appliances; electrical equipment, parts thereof; sound recorders and reproducers; television image and sound recorders and reproducers: and parts and accessories of such articles
Chapter	Two	84 – Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof
Heading	Four	8424 - Mechanical appliances (whether or not hand-operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sandblasting machines and similar jet projecting machines
Sub-heading	Six	842482 – Other appliances – Agricultural and horticultural

7. According to Article 3 of the Convention, countries are allowed to create subdivisions based on their needs. As a result, it may be the case that a 6-digit HS codes may have been further subdivided into either 8-digit or 10-digit codes by either regional organisations or particular countries. For example, in the European Union the Combined Nomenclature of the EU utilised the HS up to 6-digits, but also included additional 8-digit subheadings to address its own needs.

8. The MAC Protocol annexes list 6-digit subheadings of HS codes, as the 6-digit codes provide the greatest degree of specification at a global level. Since the codes for 8-digit and 10-digit subheadings may vary country-by-country, the 6-digit classification which is prescribed by the Convention itself should remain the basis for the MAC Protocol.

(ii) Section, Chapter and Subheading Notes

9. The main function of the Notes is to delineate the scope and limits of each heading and subheading. Contracting Parties may include additional (national) notes for their domestic use. The EU has done so and included a number of legal notes in its HS nomenclature.

(iii) The General Rules of Interpretation (GRI)

10. The General Rules for the Interpretation of the HS are set out below.

GENERAL RULES FOR THE INTERPRETATION OF THE HARMONIZED SYSTEM

Classification of goods in the Nomenclature shall be governed by the following principles:

1. *The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:*

2. (a) *Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.*

(b) *Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.*

3. *When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:*

(a) *The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.*

(b) *Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.*

(c) *When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.*

4. *Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.*

5. *In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:*

(a) *Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;*

(b) *Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.*

6. *For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.*

11. The GRIs contain 6 guidelines that apply hierarchically i.e., Rule 1 takes precedence over all other rules. Rule 2 simply opens classifications for unassembled, disassembled, unfinished, mixed or composite goods if they are not classified under Rule 1. Rule 3 provides the rules for classification of goods that would otherwise fall under more than one heading. The rules in Rule 3 are also applied hierarchically, until a heading classification is found. Rule 3(a) directs to the heading giving the most specific description, Rule 3(b) (for mixed or composite goods or sets) to the component or material giving the essential character and Rule 3(c) to the last occurring. Rule 4 applies to goods that cannot be classified according to the previous three GRIs (1, 2 and 3) and dictates that such goods be classified under the heading appropriate to the goods to which they are most akin. This means it is restricted to goods that cannot be classified by name, type, function or material. Given the prevalence of “residual” headings, e.g., for machinery not included or specified elsewhere in the Nomenclature or other articles of base metals, it is almost never used. Rule 5 relates to packaging and containers. Rule 6 repeats the classification process at each subsequent digit level: i.e., at the 5-digit level, then the 6-digit and so on through any national digit levels.

12. By virtue of its broad definition of “Harmonized System” in Article I (2)(g), the draft MAC Protocol incorporates the Rules for interpreting HS codes listed in MAC Protocol annexes. As such, if a new item of MAC equipment enters the market that has not been previously classified, it is subject to classification under the provisions of the Rules and it may fall under the scope of the MAC Protocol if it is classified under a code that is listed in the MAC Protocol annexes.

Amendments to the HS

13. The HS is amended every five years (“HS revisions”). In general, amendments are made to the HS for three reasons: (i) clarification, (ii) structural reorganisation to reflect changes in international trade flows as influenced by technological developments and evolution in industry practices, and (iii) on the request of international organisations that utilise the HS for various purposes.

14. The amendment procedure for the HS is set out in Article 16 of the HS Convention. Contracting Parties to the HS Convention, International Organisations and the WCO Secretariat propose changes to the HS to the Harmonized System Review Sub-Committee (RSC) for initial consideration. Subject to that initial consideration, drafting is undertaken and the resulting proposed text is sent to the Harmonized System Committee (HSC) for provisional acceptance by either consensus or by voting. Once the full package of changes for a new edition is ready, the HSC provisionally accepts the package and sends it to the Council of the World Customs Organization (legally known as the Customs Cooperation Council) for adoption. Contracting Parties to the HS Convention have six months to indicate any objection to an amendment, after which it is deemed to have been accepted. However, amendments are not immediately applicable. To give Contracting Parties sufficient time to complete their legislative or regulatory formalities required for the amendment of their tariff/statistical nomenclatures, accepted amendments enter into force on 1 January of the second year following the date of notification where the latter falls between 1 January and 31 March, or on 1 January of the third year following the date of notification where the latter falls between 1 April and 31 December.²

15. Overall, HS revisions only tend to impact a small number of the existing codes; new HS editions generally alter 200 – 300 of the approximately 5300 codes (5%). Over 70% of HS codes have never been affected. The Secretariat has conducted research on how the HS codes listed in the draft MAC Protocol annexes have been affected by the last 4 revisions of the HS (2002, 2007, 2012 and 2017). For the initial three revisions covering 2002 until 2016, the codes were unaffected by the

² WCO, HS Classification Handbook (2013), II/25, available: http://harmonizedsystem.wcoomdpublishings.org/pdfs/WCOOMD_MSH_EN.pdf.

HS revisions. In 2017, four codes were affected by changes.³ The four affected codes were split into additional HS codes,⁴ on the basis of proposals from the United Nations Food and Agriculture Organization (FAO) to enhance data on trade and use of agricultural machinery.

Other international instruments that utilise the HS

16. A number of international conventions utilise the HS in defining their scope, including the *1988 Convention against illicit traffic in narcotics drugs and psychotropic substances*, *Convention on international trade in endangered species of wild fauna and flora*, *Montreal Protocol relating to substances affecting the ozone layer*, *Basel Convention on the control of transboundary movements of hazardous wastes and their disposal*, *Agreement on trade in civil aircraft* and *Stockholm Convention on persistent organic pollutants*. A list of conventions that utilise the HS is available in a WCO publication: *Correlation between the Product Coverage of Selected International Conventions and the Harmonized System*.⁵

17. However, the majority of the conventions only utilise the HS as a partial mechanism to control their scope. For example, the 1980 Agreement on Trade in Civil Aircraft, which aims to eliminate import duties for civil aircraft products as covered by its scope, partially uses the HS to define its scope. Articles 1 and 2 of the Agreement delineate product coverage through a dual approach. Article 1.1 provides for an object-definition assessment under which 'all civil aircraft, all related engines and their parts and components and all other parts, components and subassemblies of civil aircraft, as well as all ground flight simulators and their parts and components' are covered. Whether used as original or replacement equipment, all of the items mentioned above are included within the scope of the Agreement. Article 2.1.1 makes an actual end-use assessment and provides for the elimination of customs duties and other charges levied on, or in connection with, the importation of products which are classified under their respective tariff headings as listed in the Annex. This is subject to the condition that such products are required to be utilised in a civil aircraft and incorporation therein, whether in the course of its manufacture, repair, maintenance, rebuilding, modification or conversion. Concerning the actual end-use assessment of products, the duty-free treatment would also be extended to dual-use (multi-functional) products, provided that the potential importer certify that the product in question is to be utilised in a civil aircraft and incorporated therein.

18. The Annex to the Agreement reiterates that signatories agree that products covered by the descriptions which are classified under the listed HS codes shall be accorded duty-free or duty-exempt treatment, in the event that the products are exclusively used in a civil aircraft or in ground flying trainers or for incorporation therein, in the course of their manufacture, repair, maintenance, rebuilding modification or conversion. The Annex further stipulates that other items, including incomplete or unfinished products are not included, unless they have the essential character of a complete or finished part, component, subassembly or item of equipment related to a civil aircraft. Materials in any form (e.g. sheets, plates, strips, bars, pipes) are therefore not included unless they have been cut or shaped for the incorporation in civil aircraft, which can be proven where the material

³ (i) 842481: Mechanical appliances (whether or not hand-operated) for projecting, dispersing, or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines – Other appliances -- Agricultural or Horticultural (ii) 843230: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers - Seeders, planters and transplanters (iii) 843240: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers – Manure Spreaders and fertilizer distributors (iv) 870190: Tractors (other than tractors of heading 8709) – Other.

⁴ 842481 was split and replaced by 842482 and 842449, 843230 was split and replaced by 843231 and 843239, 843240 was split and replaced by 843241 and 843242, and 870190 was split into five separate codes and replaced by 870191, 870192, 870193, 870194 and 870195. For further information, see <https://www.unidroit.org/english/documents/2017/study72k/cqe02/s-72k-cqe02-06-e.pdf>.

⁵ WCO (January 2017) *Correlation between the Product Coverage of Selected International Conventions and the Harmonized System*, available: <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/interconnections/interconnection-table.pdf?la=en>

has a civil aircraft manufacturer's part number. Furthermore, raw material and consumable goods are explicitly excluded.

19. The Annex also provides for an 'ex' extension to be added in front of the HS codes listed. This is to indicate that the product description referred to does not exhaust the entire range of products within the HS codes listed in the Annex. As such, in order for an item to be covered by the scope of the Treaty, not only is that item required to be covered by a specific HS code listed in the Annex but it is also required to meet the description in Article 1.

20. The approach of the Civil Aircraft Agreement to scope of application does not appear to be particularly useful for the MAC Protocol, primarily because it uses a description based-scoping article in addition to the use of the HS codes. Given the diversity in the range of MAC equipment covered by the MAC Protocol, a description based approach would not be practical for the MAC Protocol. This problem was the main reason behind considering the WCO HS coding as opposed to an object description definition in the first place.

Further resources

21. HS Nomenclature 2017 edition, available :

<http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/hs-nomenclature-2017-edition.aspx>

22. International Convention on the Harmonized Commodity Description and Coding System, available <http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/hs/hsconve21pdf1.pdf?la=en>.

23. HS Classification Handbook (2013), II/25, available:

http://harmonizedsystem.wcoomdpublications.org/pdfs/WCOOMD_MSH_EN.pdf.

24. Correlation between the Product Coverage of Selected International Conventions and the Harmonized System (January 2017), available: <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/interconnections/interconnection-table.pdf?la=en>

25. Further information on the 2007, 2012 and 2017 HS editions:

http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_nomenclature_previous_editions.aspx

Appendix II – Research on Association with Immovable Property

1. This Appendix provides a summary of the evolution of Article VII, which deals with the association of MAC equipment with immovable property. It also provides a comparative analysis prepared on how priority as between interests in mobile assets and domestic interests in immovable property is determined under domestic legal regimes. It was originally prepared by the Secretariat to assist the Study Group in its deliberations between 2014 - 2016. It was also provided to the Committee of Governmental Experts for consideration during its two sessions in 2017.

Background

2. The first Study Group meeting in December 2014 instructed the Secretariat to conduct further research on how priority between interests in mobile assets and domestic interests in immovable property is resolved under domestic legal regimes. The Secretariat prepared a comparative analysis on this issue, which was based upon submissions made by UNIDROIT Correspondents and independent jurisdictional research by the Secretariat.

3. A summary of the results of the comparative analysis is below. National approaches concerning the relationship between movable and immovable property rights are highly diversified, especially in relation to what degree of connection is required for existing interests in equipment to be affected by its subsequent connection to immovable property. The comparative analysis highlighted the following as possible factors in determining the effect on existing interests in equipment that is subsequently connected to immovable property:

- (i) *The relationship between the immovable property and the equipment* is often an element in determining whether existing interests in the equipment are affected. Where the functionality of the immovable property is affected by the equipment, or the use or exploitation of the immovable is compromised, or the equipment is considered an essential part, it is more likely that existing interests will be extinguished and the equipment will become part of the immovable property.
- (ii) *The ease of removal of the equipment* is often a determinative factor. For example, under United States common law, existing interests in 'readily identifiable, easily detachable equipment' were likely to be preserved. If removal of the equipment would cause physical injury/damage to the immovable property, it is more likely that existing interests will be extinguished and the equipment will become part of the immovable property.
- (iii) *The intention of the owner of the immovable property* in connecting the equipment to immovable property can also be a key factor in determining whether existing interests in the equipment are affected. Where there is the intention of permanent connection, it is more likely that existing interests will be extinguished and the equipment will become part of the immovable property. Whether subjective or objective intention has to be established also varies. Intention is a relevant factor under Argentinian, Colombian, Egyptian, English and Syrian law.
- (iv) Some domestic legal regimes created special legal rights in equipment which are preserved when the equipment is connected to immovable property. An example of this is the United States where a 'fixture filing' is required to perfect security interests in movable items and equipment.
- (v) Some jurisdictions (such as Japan) consider the act of physical connection sufficient for movable equipment to become part of the immovable it has been affixed to, but include *compensatory measures in favour of creditors whose security interests have been extinguished* as a result.

Terminology

4. One of the complicating factors assessing how “affixable equipment” is regulated at a domestic level is the lack of consistent use of terminology. This matter was raised at the second Study Group in April 2015, where it was noted that the use of the terms “fixture” and “attachment” were questioned on the grounds that it would potentially create legal uncertainty, as its legal meaning might differ in common and civil law countries.

5. The comparative analysis confirmed a lack of uniformity in consistent use of terminology. The term “fixture”, as defined as movable equipment that legally becomes part of the immovable property once it becomes associated with it, is variously referred to under domestic legal regimes as “component part”, “essential part”, “integral part”, “fixed accessory”, “immovable by accession” and “attachment to immovable property”. The term “accessory”, as defined as movable equipment which retains its individual character and legal status upon association with immovable equipment is also referred to “trade fixture” and “chattel fixture”. For uniformity purposes, this document uses the terms fixture and accessory, however such terms will not be used in the draft articles themselves.

6. A similar problem exists in relation to the terminology for the verb to describe the relationship between the movable equipment and the immovable property. The terminology is difficult because there are no uniform terms used in national legislation, and the closeness of the relationship required for equipment to become a fixture varies significantly. For example, some domestic legal regimes would need a strong physical connection to establish equipment as a fixture, whereas other regimes may simply need the equipment to be placed upon the land. As such, the draft articles should not use the verbs “affixed”, “attached”, “joined”, or even “connected”. The draft Protocol uses the term “associated with”, which would be broad enough to cover the various rules under domestic law.

Legal Framework

7. Under the UNCITRAL Legislative Guide on Secured Transactions, which refers to fixtures as attachments to immovable property, the national security law governing immovable objects has priority over interests in mobile objects and that no loss of individual identity of the mobile object needs to occur for this priority of the national interest to come into effect. Under the UNCITRAL Legislative Guide, a party can remove an affixed mobile object; however, the party may do so only if it has priority as against competing rights in the immovable property and will owe an obligation to compensate the mortgagee under the domestic immovable property law for any damage incurred in removing the affixed object, other than any diminution in its value attributable solely to the absence of the fixture.

8. Article 29 of the Cape Town Convention provides that international interests created under the Convention and Protocols have priority over interests provided for under domestic legislation (which are considered to be “unregistered interests” under the Convention). Although Article 29 was not designed to address interests arising from domestic immovable property law, without an explicit Article on immovable property, international interests registered under the MAC Protocol would be upheld and not extinguished by interests established under domestic laws by virtue of the equipment’s subsequent association with immovable property.

Policy and drafting options

9. At the third Study Group meeting in October 2015 the immovable property issue was discussed in significant depth. The Study Group decided that the Protocol should include a substantive provision addressing immovable property, and that the draft Article should allow Contracting States to make a declaration in relation to the operation of the rule.

10. The following policy options were proposed for consideration by the Study Group:

- (i) *Maintain priority of international interest:* States could declare that an international interest in an object associated with immovable property will continue to exist and enjoy priority over a domestic interests resulting from its association with immovable property, even where that object would cease to being an individual asset under domestic law.
- (ii) *Create an individual identity test:* States could declare that they apply a specific test contained in the Protocol to determine whether the object retains its individual identity and thus maintains its priority international interest, free from any domestic interests arising in its association with immovable property.
- (iii) *Defer to national law:* States could declare that, where an object under the MAC Protocol becomes so associated with immovable property that it would be considered a fixture under domestic law, domestic law would apply and the international interest under the Convention would either be extinguished, or would be lose priority to a national interest. This provision would therefore act as an exception to Article 29 of the Cape Town Convention (which expressly words that in cases of conflict, the international interests recognised by the Convention and its protocols shall prevail). This option may require states to provide information on how the international interest would be affected if they make such a declaration.
- (iv) *Provide for a fixture filing system:* States could declare that the international interest will continue to enjoy priority, to the extent that it corresponds with the fixture filing system under domestic law. The policy option was suggested by the International Finance Corporation, and would allow for emerging markets to update their domestic secured transaction law while implementing the MAC Protocol.

11. In drafting provisions to implement the above policy options, the Secretariat took the following additional issues into consideration:

- (i) *Party autonomy:* As intention of the parties is an important factor in many of the domestic legal tests to determine the relationship between movable equipment and immovable property, the Protocol could allow parties to a transaction to explicitly contract out of the rule governing fixtures in the Protocol. This could be achieved by including a party autonomy exception, “unless an explicit contrary agreement between the parties exists”. This approach is consistent with other party autonomy clauses in the Cape Town Convention. For example, Article 8⁶ of the Cape Town Convention provides for certain “default remedies” available for the parties only where they have explicitly been included in the contractual agreement between the parties.
- (ii) *Timing:* It was tentatively decided during the second Study Group meeting in April 2015 that the timing of the association of the mobile equipment with the immovable property should not be relevant in applying the priority rule. For example, it should not matter whether a crane was already associated with immovable property at the time an international interest in it was registered on the International Registry. This approach was taken because it would give more flexibility to creditors to finance equipment already in use and associated with immovable property, which reflects existing practice in the finance industry.

⁶ Cape Town Convention, Article 8 – Remedies of chargee.

Declarations structure

12. As noted above, the Study Group decided at its third meeting in October 2015 that the article governing fixtures should allow states to make a declaration applying a certain legal approach to the issue. Ultimately it was decided to structure Article VII in the draft MAC Protocol as a mandatory declaration, however three options were considered.

- (i) *Mandatory declaration*: This structure would require Contracting States to actively make a declaration applying a certain approach to the treatment of fixtures under the MAC Protocol. This would be consistent with the approach of Article 54(2) of the Convention, which requires Contracting States at the time of ratification to declare whether remedies under the Convention that do not explicitly require application to a court can be exercised without the leave of a court. The failure of a Contracting State to make a mandatory declaration would result in the Depositary refusing to accept an instrument of ratification.
- (ii) *Opt-in declaration*: This structure would allow Contracting States to apply an optional opt-in rule. This would be consistent with the Insolvency Remedies in Article XI of the Aircraft Protocol, which requires to actively apply either Alternative A or B. If a Contracting State chooses not to make a declaration, the default national insolvency law applies. Adopting this approach would be complicated, as it does not appear possible to leave it to existing domestic law arrangements, as it would not be clear what would occur in the circumstance that an object subject to an international interest under the Protocol lost its individual legal identity under domestic law as a result of its association with immovable property. It would not be a simple conflict issue, as the situation would not be a conflict between a domestic and international interest if the object has ceased to be capable of being subject to separate legal interests under the domestic law, due to its association with immovable property.
- (iii) *Opt-out declaration*: This structure would apply a default rule, unless Contracting States made an optional declaration applying a different rule. This approach would require the MAC Protocol to provide for a uniform rule for the treatment of fixtures. This approach would be appropriate if one approach was favourable over other approaches, but the Protocol still wanted to give Contracting States flexibility in regulating the relationship between mobile equipment and immovable property.

Development of Article VII

13. Taking into account the above issues and the results of the comparative analysis, over several sessions and teleconferences the Study Group developed a draft Article addressing the relationship between international interests in MAC equipment and domestic law interests arising from the equipment's association with immovable property.⁷

Jurisdictional analysis on association with immovable property

14. This analysis was presented to the Study Group in advance of the first teleconference on association with immovable property in December 2015. In order to compile a comparative analysis

⁷ The development of Article VII, including earlier drafts of the rule, is available in Appendix III of the Legal Analysis provided to the second session of Committee of Governmental Experts (UNIDROIT 2017 - Study 72K – CGE2 – Doc. 4), available <https://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf>, pages 60 – 75.

of the treatment of fixtures under domestic law, the UNIDROIT Secretariat undertook research on two key issues:

What test is used in your jurisdiction to determine whether a piece of equipment has become affixed/attached to immovable property (i.e. does the equipment require permanent physical attachment to the immovable property or does it simply require some degree of connection to it)?

How does your jurisdiction treat security interests in equipment that becomes subsequently affixed / attached to immovable property?

15. To assist in this project, the Secretariat requested input from its 52 correspondents based in different jurisdictions around the world. This paper contains analysis on the legal regimes in Argentina, Canada, Colombia, Egypt, France, Germany, Greece, Hungary, Japan, Mexico, Spain, Syria, Turkey, the United States and Uruguay.

16. It is important to note that this comparative jurisdictional analysis has not been updated since 2015. As such, it is quite possible that some of the 15 States surveyed have amended their laws governing the relationship between movable assets and immovable property. However, the Secretariat is providing this information to the Committee of Governmental Experts as it demonstrates the diversity and lack of consistency in national law approaches to this issue.

*Argentina*⁸

17. In the Argentine Civil Code, movable and immovable property is distinguished either by nature, or by accession, or by their representative character.⁹ An “accessory” is defined as an item which its existence and nature is dependent and governed by a principal item to which it is subject, or to which it is attached.¹⁰ As such, the term “accessory” under Argentinian law is more closely aligned to the meaning of “fixture” used by this paper.

18. Any movable equipment or item which has physically been attached and linked to the soil is considered immovable by connection, provided that the connection is of a permanent character.¹¹ Even where there is no permanent physical attachment to the immovable property, the intention of the party in possession of the immovable to make movable equipment an accessory (in the Argentinian sense) to their immovable property will also deem the equipment to be immovable.¹² Where movable equipment is attached to a building, it shall retain its movable nature provided that either the purpose of connection is related to the profession of the owner of the building or the attachment is on a temporary basis.¹³

19. Public legal instruments which are proof of acquisition of real rights in immovable property are immovable by their representative character, except for the real rights of mortgage and security contracts.¹⁴ On the other hand, public legal instruments which are proof of acquisition of personal rights are considered movable. This is also the case for those public instruments relating to movable equipment that is attached to immovable property for only a limited period of time for construction purposes.¹⁵

⁸ This research was conducted by the UNIDROIT Secretariat.

⁹ Argentine Civil Code 1871, Translation by Frank Joannini, Article 2347 [2313].

¹⁰ Argentine Civil Code 1871, Translation by Frank Joannini, Article 2362 [2328].

¹¹ *Ibid*, Article 2349 [2315].

¹² *Ibid*, Article 2350 [2316].

¹³ *Ibid*, Article 2356 [2322].

¹⁴ *Ibid*, Article 2351 [2317].

¹⁵ *Ibid*, Article 2353 [2319].

20. The Argentinian codes also deals with usufruct (a limited real right in civil law jurisdictions that allows a party the right to use property or equipment and derive a profit from it), under which movable equipment which is destined to become part of immovable property shall be part of the property rights of that immovable, however only for the duration of the usufruct.¹⁶

*Colombia*¹⁷

21. The 1887 Colombian Civil Code focuses primarily on the nature of the object and the intention of the landowner. If equipment is of a movable nature, then this nature prevails, subject to only one exception. For mobile equipment to be deemed immovable, and to be considered as a fixture to immovable property, it must (i) be owned by the landowner, (ii) be used for cultivation or benefice of the land and (iii) there must be a demonstrable explicit intention of the landowner to destine such property as part of the land. Therefore, leased equipment would never be deemed as a “fixture” of the land, as it is not owned by the landowner.

22. Colombian law also has protections for the rights of third party creditors who receive equipment which is not movable by nature as part of collateral and security for a disposed loan. The 1887 Colombian Civil Code sets forth the notion of ‘movables by anticipation’, whereby, equipment affixed to immovable property (i.e. an elevator) can be deemed as movable property on the grounds that such a right has already been created in favour of a third party.

23. Security interest laws in Colombia were reformed by means of Law 1676, 2013 which set forth the application in Colombia of the UNICTRAL Legislative Guide on Secured Transactions, and the OAS Model Law on Secured Transactions. Since the date of force of the law (February 20, 2014), all equipment pledged on a non-possessory basis (i.e. where the creditor does not keep the possession of the pledged good, but generally the debtor keeps such equipment for its business) must be perfected by a filing in an internet website (<https://www.garantiasmobiliarias.com.co/>).

*Canada*¹⁸

24. In Canada, the regulation of property and secured transactions law are matters generally coming under the legislative authority of the provinces and territories. There may be variations in the answers from one Canadian jurisdiction to another (in particular between the province of Quebec, which is a civil law jurisdiction, and the other provinces and the territories, which are common law jurisdictions). In particular, it should be noted that Quebec law does not use the term fixture although it has a similar concept.

25. As a general rule, equipment becomes incorporated to the immovable property so as to lose its individuality, then the equipment becomes part of the immovable property and is not a fixture. The law on security interests in movable property does not apply (or cease to apply).

26. Conversely, equipment will become a fixture (movable property that becomes attached to immovable property without being incorporated to the property) if it becomes physically attached to immovable property (the meaning of physical attachment not being however clear in in all circumstances). The mere fact that equipment is placed on immovable property to be used for the operation of a business on or with that property (e.g. to operate a mine located on that property) is not sufficient to transform the equipment into a fixture. In such case, the equipment remains subject in all respects to the law governing security interests in movable property.

¹⁶ *Ibid*, Article 2355 [2321].

¹⁷ The information on Colombian law is a summary of research submitted by UNIDROIT Correspondent Mr Rafael Castillo-Triana.

¹⁸ The information on Canadian law is a summary of research submitted by UNIDROIT Correspondent Mr Michel Deschamps.

27. A security interest created in equipment that is or becomes a fixture is subject to registration in the registry for security interests in movable property. If registration is made before the equipment becomes a fixture, the security interest will rank prior to interests registered against the immovable property. If the security interest is registered after the equipment becomes a fixture, then the security interest will rank after those who have a registered interest in the immovable property; however, in such scenario, the secured creditor may register in the land registry a notice of the existence of its security interest and will thereby have priority over interests subsequently registered in the land registry.

*Quebec*¹⁹

28. The 1991 Civil Code of Lower Canada was reformed and was rendered obsolete in 1994. The amended text, the 1994 Civil Code of Quebec (CCQ), includes the phrase 'immeuble au sens du droit civil du Québec' or 'immovable within the meaning of Quebec civil law' which has been replaced by the determinant of 'immeuble par destination' or 'immovable by destination'. The latter was also included in the Expropriation Act.²⁰ Canadian Common law on the other hand incorporates the term 'accessoire fixe' which would literally cover 'fixtures'.

29. In order to harmonize civil law and common law terminologies, the Canadian Ministry of Justice published a series of 'Bijural Terminology Records' in order to achieve a higher degree of legal certainty. The harmonised provision explicitly includes the term 'fixtures'.

30. The Bijural Terminology Records provide that the term 'land' includes lands, mines, buildings, structures, fixtures and objects which are buildings under the civil law of Quebec. Also targeted are minerals whether precious or base, on, above, or below the surface, with the exception of minerals above the surface in Quebec.²¹

31. The 1994 Civil Code of Quebec (CCQ), explicitly mentions that 'anything forming an integral part²² of immovable property or a construction of a permanent nature is deemed as immovable. When movable equipment is affixed to an immovable in a fashion where its individuality is completely compromised and is employed for the utility purposes of the principal immovable, it is considered to form an integral part of that immovable.²³ However, in the case of temporary detachment, an integral part would maintain its immovable nature, provided that the intention of restoring the integration is existent.²⁴

32. In the case of permanent attachment where the individuality of the equipment is not lost, the movable equipment in question shall be considered as immovable given the condition that it will remain within that structure and contribute to the utility of the parent immovable.²⁵ In cases where there is an economic element to the property's use, i.e. the operation of an enterprise or related activities, the affixed mobile equipment would remain movable.²⁶

33. Under this approach, legal uncertainty can arise in the case where for example a drilling unit had been placed on an immovable property, like a land, and is being physically attached or joined to that immovable property on a lasting basis albeit without losing its individuality. The driller is

¹⁹ The information on Quebec law was conducted by the UNIDROIT Secretariat

²⁰ Expropriation Act, RSC (1985), c. E-21.

²¹ Harmonization Act, No. 3 of the Federal Law – Civil Law, SC 2011, c. 21, para. 127(2).

²² Civil Code of Quebec 1991, c. 64, a. 900.

²³ Civil Code of Quebec 1991, c. 64, a. 901.

²⁴ *Ibid*, c. 64, a. 902.

²⁵ *Ibid*, c. 64, a. 903.

²⁶ *Ibid*.

considered an immovable, provided that it remains on the principal immovable property in order to ensure the proper functionality of that principal immovable. However, if a driller is placed on a land for special purposes, namely the operation of an enterprise or its activities, is would be considered as a movable object.

*Egypt and Syria*²⁷

34. Largely inspired by the French Civil Code, both the Syrian Civil Code and the Civil Code of the Arab Republic of Egypt apply similar approaches when distinguishing immovable and movable property types. Any equipment fixed to immovable property the removal of which would inevitably be detrimental to its substance or nature, is deemed to be immovable, whereas equipment falling outside this definition is considered to be movable.²⁸

35. In cases where the landowner of immovable property is also the owner of movable equipment which is attached to that immovable, and the landowner demonstrates an intention to utilise that equipment for particular purposes of services and exploitation of the immovable property, then such equipment is considered as immovable by reason of its destined use.²⁹ As such, the intention of the landowner is a significant determinant both in Syrian and Egyptian jurisdictions.

*France*³⁰

36. According the French Civil Code, all things are either movable or immovable. As such, all things, tangible or intangible, should fall into one of these two categories.

37. Immovable are defined by article 517 which states that things are immovable either by (i) their nature, (ii) the object to they are applied, or (iii) their destination. 'Immovables by nature' includes land, buildings and windmills. 'Immovables by the object to which they applies' are incorporeal things which are given by statute the nature of an immovable on account of the object on which they bear: usufruct, servitude and right or action to recover an immovable.

38. An 'immovable by destination' is a movable thing deemed immovable by statute (French civil code art. 524 & 525) due to its being, at the initiative of the owner of an immovable thing, either:

- attached to it so as to remain permanently attached (i.e. its removal would cause damage or breakage either to the movable itself or to the immovable it has been attached to). This category is based on the existence of an apparent and physical connection between the movable and the immovable.
- placed thereupon for the use or cultivation of such immovable. It includes (art. 524): farming implements, seeds given to farmers or sharecroppers, pressers, boilers, stills, vats, and barrels, tools necessary for working ironworks, paper-mills and other factories, straw and manure. In this case, the criterion used is the economic purpose of the immovable by destination. Movable that participate in the productive function of an immovable must share its nature.

39. Movable are defined by article 527 which states that things are movable either (i) by their nature or (ii) as provided by the Law. A thing is movable by nature if it can be moved from one place to another. Movable by declaration of the law are incorporeal things to which the law gives the

²⁷ This research was conducted by the UNIDROIT Secretariat.

²⁸ Syrian Civil Code (Arabic Version) 1949, Article 84. The Civil Code of Arab Republic of Egypt, Article 82.

²⁹ Syrian Civil Code (Arabic Version) 1949, Article 84. The Civil Code of Arab Republic of Egypt, Article 82.

³⁰ The information on French law was submitted by Professor Jean-François Riffard, member of the MAC Protocol Study Group.

status of movable. It includes secured debts, intellectual property rights, shares or interests in partnerships/corporations and intangibles business assets.

*Germany*³¹

40. The relationship between rights in immovable property and rights in movable equipment which becomes affixed is governed by the notions 'Bestandteil' (part) and 'wesentlicher Bestandteil' (essential part). Section 93 of the German Civil Code (BGB) defines essential parts as 'parts of a thing that cannot be separated without out or the other being destroyed or undergoing a change of nature'.

41. Objects that are firmly attached to immovable property are considered essential parts (s94(1)) and essential parts of a building include things that are inserted in order to construct a building (s94(2)). While physical attachment is a requirement, objects that can easily be removed can still be considered essential parts of immovable property. The test is effectively whether the movable is essential for the function which the building performs. Examples under recent jurisprudence include:

- An oil tank was considered an essential part of a building which need heating (BGH 19/10/2012, NJW-RR 2013, 652)
- A 10 tonne transformer station the size of a garage is an essential part of the immovable property which it is on by virtue of its weight (OLG Schleswig Holstein 21/5/2013).
- A compressor unit/system is an essential part of a building that is used as a garage (OLG Thuringen 3/1/1996).

42. Exceptions to this rule include objects connected to land for a temporary purpose, and objects that are affixed to immovable property belonging to a third party. For example, a tenant builds a garage on land they are renting. Although fixed to the ground, it will not become an essential part, but remain as separate property of the tenant because the tenant does have intention to attach the garage permanently to land owned by another party (Baur/Sturmer, 18th ed 2009, 15).

43. If a movable becomes an essential part, separate proprietary rights in the object cease to exist. Agreements between parties to the contract will have effect inter partes, but not in rem due to the mandatory character of the rules, which state that essential parts cannot be the object of separate rights. Equipment that is a part but not an essential part will remain legally independent, to the effect that security interests vesting in a third party will persist.

44. Separate from both parts and essential parts, s97(1) of the BGB defines 'accessories' as movables which, without being (essential or non-essential) parts of the immovable property, are intended to serve a permanent economic purpose and is in a special relationship that corresponds to that intention. S97(2) exempts temporary relationships from being accessories. To qualify as an accessory, (i) the object must be movable (the main property can be immovable or movable), (ii) the accessory cannot qualify as an essential part, and (iii) the quality of the economic purpose of the accessory must be identified by prevailing public opinion and non merely a value relationship, which is determined by examining the objects objective statue, actual use and other external circumstances.

³¹ The information on German law is a summary of research submitted by Professor Eva-Maria Kieninger on behalf of UNIDROIT Correspondent Professor Jurgen Basedow.

45. In regards to geographical proximity, the courts set a low standard. It is not necessary that an accessory remains on the land it is serving (e.g. an excavator working outside of the business premises can still be an accessory). In the case of a farm, equipment and livestock intended for commercial operations are accessories.

46. Accessories are still capable of being the object of separate proprietary rights, and does not automatically share the legal status of the main object (be it immovable or moveable property). Under §311(c) of the BGB, a contract of sale or mortgage of an immovable will in case of doubt also include accessories, and a mortgage over land will automatically include accessories and non-essential parts (§1120 BGB). Generally, execution against immovables held by a judgment debtor can also be directed against the accessories to an immovable (§865 ZPO).

*Greece*³²

47. The main criterion according to which a piece of equipment is an essential element/component (affixed) as compared to an accessory (attachment) of the immovable property³³ is the fact that it cannot be separated from the main thing without detriment of the part or the main thing or without alteration of its substance or its intended use (article 953 Greek Civil Code).

48. According to article 954 of the Greek Civil Code, affixed parts of an immovable property are (i) things firmly attached to the ground, including buildings, (ii) the products of the immovable as long as it is connected with the soil, (iii) underground waters and springs (iv) seeds when sowed and plants when planted.

49. Things that have only been attached to the ground for a transitional purpose shall not be deemed affixed part of the immovable (article 955 Civil Code). Buildings or constructions which have been erected on an immovable belonging of another person by a person exercising a right in rem thereon shall not be deemed affixed.

50. A fixture to immovable property may not become a distinct object of ownership or other rights in rem (article 953 Civil Code) whereas a real legal action on the immovable property shall in case of doubt include the attached thing (article 958 Civil Code). If a movable object has been linked to an immovable in such a manner as to be affixed to the immovable, the ownership of the immovable property shall also extend to the movable (article 1057 Civil Code). The ownership of a fixture shall after its separation from the immovable property also belong to the owner of the immovable (article 1064 Civil Code).

51. An accessory (attachment) is a movable object which without being affixed to the main property (movable or immovable) has been destined to permanently serve the economic purpose of the main property and has already been placed in regard to the property in a local relationship corresponding to such purpose (article 956 Greek Civil Code). A temporary separation of the accessory from the main property does not remove its quality as accessory (art. 957 Civil Code).

52. Regarding agricultural property the utensils tools and cattle destined for the economic exploitation of an agricultural immovable (property) shall be deemed accessories of the immovable property together with the agricultural products that are required for the further cultivation of the land until the new harvest and with the fertilizers originating from and existing on the said land provided that the other relevant conditions are being fulfilled (art. 960 Civil Code).

³² The information on Greek law is a summary of research submitted by the Hellenic Institute of International and Foreign Law.

³³ Immovables are the ground and its components. Movables are what is not immovable (article 948 Civil Code).

53. In case of a building constructed for the purpose of serving permanently an industrial enterprise the machines, utensils and tools destined for the enterprise shall be deemed accessories of the building if the other relevant conditions as described in art. 956 Civil Code are also fulfilled (article 959 Civil Code).

54. Where a movable being affixed or attached to immovable property subject to a mortgage is separated from the immovable and transferred to a third party, the mortgagee (creditor) shall not be entitled to claim back the movable thing from the third party (article 1283 Civil Code).

*Hungary*³⁴

55. The 2013 Hungarian Civil Code provides a clear cut distinction between a 'component part' and an "accessory". Act V of the Civil Code provides that a component part is an object that is permanently joined with the principal property in such a way that their separation would cause the principal property or its separated part to be destroyed or would significantly reduce its value or usability due to the separation.

56. The Hungarian supreme court (the Curia) stated that a functional approach must be applied and despite of the physical, technical separability, the principal property-component part relation may be established if the principal property's operation is rendered impossible due to the separation even though they are not destroyed.³⁵ The lasting relation between the property and its component part is typically based on physical relation, but it is not necessary and it may also be based on the functional interdependence between them.³⁶ The underlying natural, physical, legal and economic relationship must be taken into consideration.³⁷

57. Under this functional relation approach, not only industrial machines and equipment permanently fixed to the building and required for the technological process, but also additional tools not attached physically to the machines and equipment that are necessary for the proper functioning of the factory are component parts of an industrial facility.³⁸

58. An accessory is an object that is in an economic (economical) relation with the principal property.³⁹ Permanent physical connection is not necessary. From the requirement of proper use and the lack of a thing-component part relation, it may be deduced that the equipments, machines, animals, products and crops not considered as component parts necessary and used for farming constitute accessories of the agricultural land.⁴⁰ In the case of an industrial facility machines, tools, raw material and equipment are considered equally as accessories if they used to carry out the industrial activity and do not qualify as component part.⁴¹

³⁴ The information on Hungarian law is a summary of research submitted by UNIDROIT Correspondent Mr Tamás Szabados.

³⁵ K-H-KJ-2013-307. bírósági határozat a Kúria határozata közigazgatási ügyben (Kúria Kfv.I.35.601/2011/3.); KGD 2014. 199 (Kúria Kfv. I.35/465/2012/5.).

³⁶ Attila Menyhárd, A tulajdonjog, in Lajos Vékás (ed.), Szakértői javaslat az új polgári törvénykönyv tervezetéhez (Complex, Budapest, 2008), 605; Barnabás Lenkovics, Dologi jog (Eötvös József Könyvkiadó, Budapest, 2008), 45; Attila Menyhárd, Dologi jog (Osiris, Budapest, 2007), 76-77.

³⁷ Attila Menyhárd, A tulajdonjog, in Lajos Vékás (ed.), Szakértői javaslat az új polgári törvénykönyv tervezetéhez (Complex, Budapest, 2008), 605.

³⁸ BH 2004. 509 (Legf. Bír. Gf. I. 30.605/2002. sz.). Attila Menyhárd, Dologi jog (Osiris, Budapest, 2007), 77.

³⁹ Ferenc Petrik, A tulajdonjog, in György Wellmann (ed.), Polgári jog – Dologi jog (HVG-ORAC, Budapest, 2014), 62.

⁴⁰ Attila Menyhárd, A tulajdonjog, in Lajos Vékás (ed.), Szakértői javaslat az új polgári törvénykönyv tervezetéhez (Complex, Budapest, 2008), 606; Attila Menyhárd, Dologi jog (Osiris, Budapest, 2007), 82.

⁴¹ Attila Menyhárd, A tulajdonjog, in Lajos Vékás (ed.), Szakértői javaslat az új polgári törvénykönyv tervezetéhez (Complex, Budapest, 2008), 606; Attila Menyhárd, Dologi jog (Osiris, Budapest, 2007), 82.

59. The accessory may be the subject of a legal transaction separately from the principal thing: it may be transferred or charged separately.⁴² However, the legal status of the principal property covers automatically the accessory, unless otherwise agreed by the parties.

*Japan*⁴³

60. The Japanese Civil Code stipulates that a comprehensive evaluation of facts is required in order to determine whether mobile equipment is a fixture to immovable property. A socioeconomic evaluation is made, under which the possibility of separation, the nature of the equipment as well as its process of affixation is thoroughly examined. Therefore, for movable equipment to become a fixture to immovable property, not only physical Annexation is a prerequisite, but also the mere act of detachment would cause 'grave disadvantages socioeconomically'.

61. Under the Japanese Civil Code, with the actual joining of equipment to an immovable property, the independent property rights (including security interests) in the equipment will cease to have any legal effect. In order to safeguard the legal rights of creditors, the Code sets forth two possible compensatory measures against the owner of the immovable property, on the grounds of unjust enrichment. This can be done either directly by the creditor or alternatively through a claim by the grantor of the equipment by way of subrogation.

62. However, the law lacks any protective measures against the risk of double compensation imposed on the owner in case both claims are brought simultaneously. This issue has not been substantively explored by Japanese case law, so the exact interaction of the Code and unjust enrichment doctrines remains somewhat unclear.

*Mexico*⁴⁴

63. The Mexican Civil Code defines equipment as immovable when it is permanently united with immovable property, detachment of which would be detrimental either to the principal immovable property or to the structure as a whole. This includes machines and utensils which are intended by the owner of the immovable property to be utilised directly or exclusively for industrial objectives and its exploitation.⁴⁵

64. As consistent with the approach under Mexican law, most South American countries' commercial legislations provide for rights for landowners concerning interests in movable equipment connected to their immovable property. However, in practice companies have been able to contract out of such provisions. In order to stimulate foreign investment by increasing protection of creditors' rights, in particular in the mining industry, an explicit 'party autonomy' clause is often included in development and production agreements. Parties acknowledge with this clause that mobile, and attached, equipment do not become part of the property of the owner of the land, building or licensee of the mining rights.

65. Foreign parent companies often set up subsidiaries in most South American countries under the light of existing Bilateral Investment Treaties (BITs), transfer assets and mobile equipment to the subsidiaries on a temporary basis only, while retaining the ownership titles in an attempt to secure interest protection, to reduce the risks of expropriation as well as to shield against country-specific legislations on foreign investment.

⁴² Ferenc Petrik, A tulajdonjog, in György Wellmann (eds.), Polgári jog – Dologi jog (HVG-ORAC, Budapest, 2014), 62; Menyhárd, A tulajdonjog, in Vékás L. 606; Attila Menyhárd, Dologi jog (Osiris, Budapest, 2007), 82.

⁴³ Extracts from the Japan submission to UNIDROIT.

⁴⁴ The information on Mexican law is a summary of research submitted by UNIDROIT Correspondent Ms Hernany Veytia.

⁴⁵ Mexican Civil Code, Translation by Michael Wallace Gordon 1980, Article 750.

*Spain*⁴⁶

66. The 1889 Spanish Civil Code distinguishes between immovable or real state property and chattels or movable property. On the one hand, Article 334 lists what is considered immovable property. Along with lands, buildings, roads and anything which is affixed to the ground, the concept of immovable property does also comprise other assets anyhow related to an immovable property that are deemed 'immovable by destination' (bienes inmuebles por destino o pertenenciales) under the following criteria:

- Firstly, the criterion of the fixed attachment. Anything which is joined to an immovable property on a fixed basis where its separation would either break the material or impair the object will be deemed immovable property.
- Second, an intentional criterion. In that regard, statues, paintings, and other ornamental objects that are placed in an immovable property by the owner of the immovable in a manner which would reveal the purpose of uniting them to the immovable on a permanent basis will be immovable property as well.
- Third, the criterion of purpose or function. Machines and utensils which are destined by the owner of immovable property, in the context of an industry or an undertaking, in order to satisfy the needs of that industrial activity or exploitation, are also covered.

67. Movable property is instead defined by exclusion. As per Article 335 Civil Code, any other property, which is capable of being transferred from one point to another without any potential impairment to an immovable property to which it is joined, is deemed movable. This includes income or pensions, which are related to a person or a family, provided that they do not cause any limitation to a real lien of an immovable property, as well as securities representing mortgage loans.

68. The 1954 Law on Chattel Mortgages and Non-Possessory Pledges (LHMPSD) takes a similar approach to the Hungarian Civil Code when defining the criteria for mobile, and attached, equipment. The test to determine whether equipment is a fixture or accessory considers its function within the industrial process rather than in the physical criteria as being affixed or attached to immovable property. Articles 20, 21 and 22 LHMSPD set out such factors to demarcate the scope of the chattel mortgage in a commercial establishment that would cover fixed or permanently installed facilities, as well as machines, equipment and furniture destined to satisfy business needs (provided that other conditions are met as well). Likewise, for instance, as regards security interests in aircrafts, as per Article 39 chattel mortgage in an aircraft would comprise, unless otherwise agreed, airframe, engine, propeller, navigation and radio systems, and so, even if they can be separated from the aircraft. In addition to its functional character, other factors like a clear identification of the equipment in question, its peculiarities, its general status and its location would also be taken into account.

69. On the other hand, as per Article 111 Mortgage Act of 1946, unless otherwise agreed by parties or expressly stated by statute, mortgages in real estate will not cover any movable object permanently located in the immovable property, regardless of the purpose (ornamentation, use, industrial exploitation), provided that it can be removed or detached therefrom without breaking the property or damaging the object. Accordingly, an agreement to extend the mortgage in such objects is otherwise feasible ("an extension covenant"). Such an extension covenant is arguably a commonplace clause in mortgage contracts today.

⁴⁶ The information on Spanish law is a summary of research submitted by UNIDROIT Correspondent Mr David Morán Bovio and Study Group member Professor Teresa de las Heras-Ballell.

70. Considering the foregoing, several security interests can be created over the same movable asset with differing legal effects. In particular, movable and immovable mortgages and non-possessory pledges may concur over the same movable asset. The following example can better illustrate those situations of concurrence of varied security interests. Over industrial equipment, for instance, several security interests can be created. Firstly, unless agreed otherwise, a chattel mortgage over commercial premises covers equipment, tools and machines (Article 21 LHMPD) – as well as trademarks, commercial names and other intellectual property rights –, provided that some conditions are met. Secondly, equipment and machines can be covered, if agreed, by the chattel mortgage over commercial premises as merchandise devoted to the running of the business activity (Article 22 LHMPD). Thirdly, equipment can be encumbered by a specific chattel mortgage of industrial equipment (Article 42 LHMPD). Fourthly, to the extent that equipment is not devoted to an industrial activity, a non-possessory pledge could be also created over it (Article 53 LHMPD) when the conditions laid down by Article 42 are not satisfied. Finally, a real mortgage could be extended by agreement to cover equipment (Article 111.1. Mortgage Act).

71. Therefore, the following possible conflicting scenarios can be considered:

- Should an object be located on immovable property subject to a mortgage with an extension clause, and the object is detached from the property, the detached object is acquired by the third party free from any security interest, except in case of fraud or bad faith. Despite that the mortgage in the immovable property is deemed to extend over those objects that are permanently located in it, a specific object is not subject to the mortgage until the mortgage is enforced – similar to the idea of “crystallization” in a “floating charge” -. In the meantime, the object can be removed free of any security interest.
- A possible conflict may arise between a mortgage in the immovable with an extension agreement and pre-existing security interests in objects that are located or to be used in that immovable or commercial establishment. Article 75 LHMPD provides for a rule to solve the conflict. When a chattel mortgage or a non-possessory pledge is granted over those movables (equipment, machines, instruments, tools) located or used in an immovable property a marginal notice (“nota marginal”) will be included in the margin of the registration of the title in the immovable in the Property Registry. Then, the chattel mortgage or the non-possessory pledge, provided that is annotated in the Property Registry as indicated, will have priority over any mortgage in the immovable where they are located, used or placed, that would otherwise extend to cover those objects.
- Article 75 LHMPD does not, however, provide for a solution in case that the chattel mortgage or the non-possessory pledge is created over an object that is located in an immovable property subsequently to a previously-created mortgage in the property with an extension clause. In such cases, it is discussed whether the same solution might be applied. Prior registered mortgage will gain here priority over the subsequent security interest created in the object, that was already covered by the extension clause of the mortgage.
- There is no express legal solution either, when the conflict arises between a reservation of title in an object located on immovable property and a mortgage in the immovable including an extension clause. It is argued then that all these cases can be solved on the basis that the security interests that has been previously registered will be preferential over any subsequently-registered security interest. Except for the cases of acquisition financing that will always prevail (as purchase money security interest), even if posterior, over the mortgage. Such a solution would be endorsed by Article 21 LHMPD that, in relation to chattel mortgages in commercial

establishments, likely to extend over equipment, tools, furniture and other instruments, excludes from the scope of the chattel mortgage those objects whose acquisition price is not entirely paid.

*Turkey*⁴⁷

72. The 2001 Turkish Civil Code⁴⁸ (TCC) distinguishes between an 'integral part' and an "accessory". An integral part of principal property (movable or immovable) is an essential part of that property where its detachment and separation would inevitably destroy or damage the principal property or alternatively, would change its character. The owner of the principal property would also hold ownership of all its integral parts.⁴⁹

73. An accessory is movable equipment which, based on either local usage or the clear intention of the owner of the principal property to which it has been attached to, is permanently destined for the principal item's use, enjoyment or preservation. It is therefore connected in a fashion that it would duly serve for its purpose. Accessories would retain their character even in case of temporary separation from a principal item.⁵⁰

74. Under the 2001 Turkish Civil Code (TCC), in cases of non-possessory chattels, movable equipment is required to be registered at a special public registry, in accordance with Turkish law, in order for any claim related to the equipment's security interests to have a legal effect.⁵¹

75. Where movable equipment has subsequently been affixed to immovable property upon which a mortgage lien has been established, such equipment is also covered by the mortgage. A mortgage lien, in general, includes integral parts as well as accessory items which are associated with the immovable property in question.⁵² In the case of a mortgage where certain equipment is explicitly considered as an accessory, whereby it has been included in the land register's 'notice' section, (e.g. machines or hotel furniture) such equipment shall be deemed as an accessory. However, if the equipment is not legally entitled to be considered as such, the rule will be ineffective.⁵³

76. The Code further specifies that the rights of third parties are preserved in case where movable equipment has subsequently been attached to an immovable property.⁵⁴ It is noted under the Turkish analysis that the term 'affixed' is used consistently with its meaning in other jurisdictions, whereas 'attached' is used to correspond with the connection of an accessory.

*The United States*⁵⁵

77. Under the Uniform Commercial Code (UCC), the Secured Transactions section provides for two different and distinct set of definitions on the terms "accession" and "fixture". The UCC Section 9-102(a)(41) provides that 'fixtures' means 'goods that have become so related to particular real property that an interest in them arises under real property law'.

⁴⁷ The information on Turkish law is a summary of research submitted by UNIDROIT Correspondent Professor Ergun Özsunay.

⁴⁸ 2001 Turkish Civil Code No. 4721.

⁴⁹ *Ibid*, Article 684.

⁵⁰ *Ibid*, Article 686.

⁵¹ 2001 Turkish Civil Code No. 4721, Article 940 II.

⁵² *Ibid*, Article 862 I.

⁵³ *Ibid*, Article 862. II.

⁵⁴ *Ibid*, Article 862 III.

⁵⁵ The information on United States law is a summary of research submitted by UNIDROIT Correspondents Professor Louis Del Duca and Professor Peter Winship.

78. UCC Section 9-102(a)(1) defines accessions as 'goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.' As such, the UCC definition of accession deals with objects that are attached to other movable objects, not immovable land.

79. This incorporation of the definition of "fixtures" is limited by UCC § 9-334(a), which further provides that "[a] security interest under this article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this Article in ordinary building materials incorporated into an improvement on land." Accordingly, while each state is free to develop its own definition of "fixtures," bricks, lumber and mortar, which start out as personal property and are subsequently incorporated into a permanent structure, lose their identity and become part of the real estate and may not be considered as fixtures.

80. Apart from this uniform "ordinary building materials" limitation, there is substantial disparity in the case law of the various states in classifying property as goods, fixtures or realty. In the absence of a statutory definition, applicable state case law must be consulted. While courts of the various states agree on: (1) the degree of Annexation, (2) the use of property attached to the real estate, and (3) the intent of the parties as criteria to be used in determining whether specific collateral is to be classified as goods or fixtures or real estate, the results under the case law in the various US jurisdictions in classifying property as a fixture are not always uniform or predictable.

81. UCC § 9-502(a) & (b) requires a creditor to file a "fixture filing" in order to perfect a security interest in goods which are or are to become fixtures. UCC § 9-102(a)(40) defines a "fixture filing" as the "filing of a financing statement covering goods that are to become fixtures and satisfying UCC § 9-502(a) and (b)."

82. The general rule regarding sufficiency of the financing statement found in UCC § 9-502(a) requires that the statement:

- (1) provide the name of the debtor;
- (2) provide the name of the secured party or a representative of the secured party; and
- (3) indicate the collateral covered.

83. UCC § 9-502(b) adds that if the financing statement is filed as a "fixture filing and covers goods that are or are to become fixtures," the financing statement must, in addition to the above requirements found in UCC § 9-502(a):

- (1) indicate that it covers this type of collateral,
- (2) indicate that it is to be filed [for record] in the real property records;
- (3) provide a description of the real property to which the collateral is related [sufficient to give constructive notice of a mortgage under the law of this State if the description were contained in a record of the mortgage of the real property]; and
- (4) if the debtor does not have an interest of record in the real property, provide the name of a record owner.

84. UCC § 9-501(a)(1)(B) provides that a fixture filing must be filed in the office designated for the filing or recording of a record of a mortgage on the related real property. UCC § 9-301(3)(A) requires the fixture filing to be filed in the state in which the fixture is located.

85. These provisions are designed to give creditors easier access to information concerning encumbrances on fixtures. A search of the real estate records will normally suffice to disclose whether fixtures attached to specific real estate are subject to a creditor's security interest.

*Uruguay*⁵⁶

86. According to Uruguayan law, objects are classified into two main types: movable and immovable depending on whether they can be moved place to place or not (section 462 and 463 of Uruguayan Civil Code).

87. Additionally, movable objects are considered immovable property by virtue of their use or their permanent physical attachment to immovable property. In this sense, section 465 of Uruguayan Civil Code sets forth that movable objects which are permanently intended for use, cultivation and benefit of a immovable property, even when they could be removed without detriment, are considered immovable property (e.g. mining and farming tools, equipment part of an industrial establishment, etc)

88. The movable objects abovementioned will be considered movable assets again once they are separated from the immovable property in order to be used for others purposes (independent from the immovable property), pursuant to section 468 of Uruguayan Civil Code.

89. In conclusion, the attachment to immovable property or the permanent destination and use in relation to immovable property are the tests used by Uruguayan civil law to determine whether a piece of equipment has become part of immovable property.

90. Under Uruguayan Law security interests in movable assets are either dispossessory or non-dispossessory pledges, and in immovable assets are the mortgages. A non-dispossessory pledge and mortgage must be recorded in Uruguayan Public Registries in order to achieve effectiveness against third parties. Priority of security interests in the same object is determined by their registration date.

⁵⁶ The information on Uruguayan law is a summary of research submitted by UNIDROIT Correspondent Ms Cecilia Fresnedo de Aguirre.

Appendix III – Research on special insolvency regimes affecting farmers and agricultural enterprises

1. This appendix was prepared by the NatLaw for Inter-American Free Trade in collaboration with the UNIDROIT Secretariat for consideration at the third Study Group meeting in October 2015. It provides a comparative survey of special insolvency law regimes in eight States (Brazil, Canada, France, Mexico, Russia, South Africa and the United States). It is important to note that this analysis has not been updated since it was first prepared, and some States surveyed may have amended their relevant laws.

2. States adopt different approaches to defining the scope of application of their insolvency laws. Some insolvency laws apply to all debtors with certain narrowly defined exclusions while other States distinguish between natural person debtors and juridical or legal person debtors and provide different insolvency laws for each category. A further approach distinguishes between legal and natural persons on the basis of their engagement in economic activities. Some of these laws address the insolvency of “merchants,” who are defined by reference to their engagement in economic activities as ordinary occupations, or companies incorporated in accordance with commercial and corporate laws and other entities that regularly undertake economic activities. Finally, a number of States have developed special insolvency regimes for different sectors of the economy, particularly the agricultural sector.⁵⁷

3. Accordingly, States may:

- (i) regulate the insolvency of farmers in their general insolvency law under the same rules that apply to all types of businesses;
- (ii) regulate the insolvency of farmers in their general insolvency law but in a specific chapter (e.g., the United States);
- (iii) regulate the insolvency of farmers in their general insolvency law that includes special provisions applicable only to farmers (e.g., Colombia, France and Russia);
- (iv) exclude individual farmers from the application of their general insolvency laws, in which case their debts and assets are liquidated under the commercial law (e.g., Brazil);
- (v) exclude only “small farmers” from the scope of their general insolvency law (e.g., Mexico);
- (vi) provide for specific insolvency regimes that supplement their general insolvency law and that apply to farmers (e.g., Canada); or
- (vii) provide for specific insolvency regimes that apply exclusively to farmers (e.g., South Africa).

4. The following paragraphs summarise the insolvency treatment of agricultural producers in a number of selected countries, organised alphabetically.

Brazil

5. The current Brazilian Bankruptcy Law (Lei No 11.101, De 9 Fevereiro de 2005) introduced the concept of “company reorganisation.”⁵⁸ Article 1 of the Law states that its rules apply exclusively to businesspersons and business corporations. The Law’s reorganisation procedures and

⁵⁷ See further UNCITRAL Legislative Guide on Insolvency Law, Parts I and II, at 38 (2004), available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

⁵⁸ Law No. 11.101 is available at http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm.

requirements were modelled on the United States' Bankruptcy Code Chapter 11.⁵⁹ The Law provides for three forms of proceedings: (i) judicial reorganisation; (ii) extrajudicial reorganisation; and (iii) bankruptcy.⁶⁰ The most frequently utilised proceeding is judicial reorganisation, that provides for a stay of 180 days during which the enforcement of creditors' rights is suspended; the duration of the stay may not be extended.⁶¹ However, Article 2 further provides that the processes of reorganisation and bankruptcy do not apply to cooperatives because they are subject to specific regimes. Finally, unless an individual farmer is registered as a businessperson with the Registry Board of Trade and meets other requirements specified by the law and Article 971 of the Civil Code, he or she may not be eligible for reorganisation.⁶² The Code of Civil Procedure provides for special insolvency regimes for those debtors not eligible for relief under the Bankruptcy Law.⁶³

Canada

6. Sections 43 to 46 of the 1985 Federal Bankruptcy and Insolvency Act regulate the process by which a creditor files an involuntary bankruptcy petition against a debtor. However, Section 48 of the Federal Bankruptcy and Insolvency Act states that the rules laid down under Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is farming. Section 81 of the Bankruptcy and Insolvency Act provides for special claims of farmers for unpaid produce delivered to their bankrupt customers.

7. Canada has also adopted the 1997 Farm Debt Mediation Act that applies to insolvent and over-indebted farmers.⁶⁴ The Act prescribes certain procedures that override those applicable under the provincial and territorial secured transactions laws – the Personal Property Security Acts. An insolvent farmer may apply for a stay of proceedings in the event that a creditor seeks to enforce its security interest. The stay is initially imposed for a period of 30 days and can be extended in 30 day increments for a total of 120 days in certain circumstances. A farmer can apply for mediation even before he or she becomes insolvent but in that case there is no stay protection during the process.⁶⁵ Under this Act, a debtor is able to propose a re-structuring plan but creditors are not obliged to participate and may exercise their normal collection remedies once the stay is lifted.⁶⁶

8. Bankruptcy laws also allow farmers to exempt certain assets from liquidation to facilitate their "fresh start". Such assets include livestock, essential farm machinery and equipment, and farm tools, up to a value of \$7500. However, these exemptions apply only against judgment creditors and do not affect those creditors that have taken an effective and unavoidable security interest in these assets. Under Section 67, the insolvent debtor is entitled to exempt certain assets (e.g., retirement savings) that may not be utilised to satisfy the claims of creditors. Section 67 also defers to the applicable provincial law and many Provinces and Territories provide for specific exemptions applicable in bankruptcy. For instance, in Alberta a person is entitled to exempt farm property

⁵⁹ Jeffrey M. Anapolsky & Jessica F. Woods, Pitfalls in Brazilian Bankruptcy Law for International Bond Investors, 8(2) Journal of Business & Technology Law, at 398 (2013).

⁶⁰ John J. Rapisardi & Joseph Zujkowski, Bankruptcy Basics under Brazilian Law, 252(02) New York Law Journal (July 2014).

⁶¹ *Id.*

⁶² Cooperatives are not eligible for bankruptcy because of their civil nature and the fact that their activity is not related to business. Therefore, their affairs may be administered in an out-of-court liquidation provided by Law 5.764/71. See Appeal 999.134/PR (Superior Court of Justice - 1st Group, AgRg, August 18 2009, DJe September 21 2009), in Court rules that agricultural cooperatives are not entitled to judicial restructuring, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?q=ec88ee9d-98fb-4c0a-a006-c565eb5e64c1>.

⁶³ Dennis Faber, Niels Vermunt, Jason Kilborn & Tomas Richter (eds.), Commencement of Insolvency Proceeding, National Report for Brazil (2012).

⁶⁴ See <http://laws-lois.justice.gc.ca/eng/acts/F-2.27/>.

⁶⁵ See http://www.plea.org/legal_resources/?a=257&searchTxt=&cat=28&pcat=4.

⁶⁶ See further http://www.bankruptcysask.ca/services.php?f_action=news_detail&news_id=9744.

required for 12 months of operations and in Ontario, if the debtor is a farmer, he or she is entitled to exempt livestock, fowl, bees, books, tools and implements and other chattels not exceeding a prescribed amount, or \$28,300.⁶⁷

9. Canadian provinces have adopted special laws that protect farmers outside of insolvency proceedings. For instance, the Manitoba Farm Machinery and Equipment Act regulates the manner in which repossession must be carried out, also providing for the arbitration of disputes concerning repossession of farm machinery and other farm equipment. This Act also imposes a limit on the extent of assets that farmers may provide as collateral to secure the payment of the purchase price of some equipment. Section 36(2) provides that “no part of the price of new or used farm machinery or farm equipment may be secured by a lien on any goods not sold under the sale contract or agreement of purchase and sale for the machinery or equipment.” Under Section 38(1), “A lienholder shall not repossess farm machinery or farm equipment that is subject to a lien without leave of the board and except in accordance with this Act.” Accordingly, the secured creditor must apply to a board to sanction the intended repossession. Upon repossession, the secured creditor must retain the farm machinery/equipment for 10 working days allowing the farmer to redeem those assets.

10. The province of Manitoba also adopted the Family Farm Protection Act in 1986, under which a creditor cannot foreclose on farmland until the concerned farmer has had the opportunity to go through the mediation process.⁶⁸ When a creditor intends to foreclose, due to a default of the debtor, they are required to obtain leave of the court. Similarly, the Saskatchewan State Farmers Security Act also requires creditors to follow certain procedures before seizing or repossessing farm equipment.⁶⁹ For instance, secured creditors must give a 15day notice of their intention to take possession of equipment. When the farmer receives the notice of intention to seize the machinery, he or she has 30 days to apply to the court for a hearing. Once the farmer files a petition with the court, the creditor’s right to take possession is suspended.

Colombia

11. Colombia’s 2010 Law No. 1380, establishes the insolvency regime for natural persons (with the exception of merchants)⁷⁰ while Law No. 1116 of 2006 governs corporate insolvency.⁷¹ Depending on the nature of the agricultural business, the person may be eligible for relief under one of the two regimes. The law for natural persons contains special provisions for debtors who are agricultural producers and fishermen, including their access to the resources available from the National Agricultural Reactivation Program. This program allocates financial resources for the benefit of agricultural producers and fishermen who are delinquent in the payment of their debts, with the purpose of allowing them to continue their activities during and after the renegotiation of their debts.⁷²

France

12. The 1985 Law regarding the reorganisation and the judicial liquidation of companies is open to merchants, registered craftsmen, farmers and legal entities. The eligible debtors against whom bankruptcy proceedings may be initiated are defined in Article 620 of the Commercial Code, and

⁶⁷ Alysia Davies, *Federal Exemptions in Bankruptcy: Canada and Three Other Countries* (October 2008), available at <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0228-e.htm>.

⁶⁸ See further <http://www.ruralsupport.ca/admin/FileUpload/files/handouts/Farm%20financial%20Handouts%20june%202010%20B&W.pdf>.

⁶⁹ See <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S17-1.pdf>.

⁷⁰ See http://www.cconsumidores.org.co/index.php?option=com_content&view=article&id=101:ley-1380--2010-regimen-de-insolvencia&catid=19:legislacion&Itemid=126.

⁷¹ See http://www.secretariassenado.gov.co/senado/basedoc/ley_1116_2006.html.

⁷² See further http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402204_text.

include farmers. The Rescue Act of 2006 specifically mentions farmers as being eligible for rescue (reorganisation) proceedings.⁷³ The French law also provides for a special compromise arrangement procedure that remains applicable only to farmers. In those proceedings, for example, agricultural experts, and not judicial administrators, are nominated as conciliators.⁷⁴

Mexico

13. The Mexican Insolvency Law of 2000 is applicable to all persons considered merchants under the Commercial Code, which includes farmers.⁷⁵ Article 5 provides that “small merchants” can only be subjected to the law if they voluntarily agree by means of a written consent. Small merchants are those whose valid and outstanding obligations are not higher than 400,000 UDIS⁷⁶ (near MX\$ 2,116,000.00 or US\$ 139,210.00).⁷⁷

Russia

14. In Russia, entrepreneurs and farmers of all sizes may be eligible for relief under a single law that excludes from its scope only individuals not engaged in any business activity.⁷⁸ Under Article 139 of the Law on Insolvency of 2002 No. 127-FZ, agricultural organisations are defined as legal entities whose primary activity consists of growing agricultural produce whose proceeds amount to no less than 50% of the entity’s total revenues. The essence of the first special rule regulating the bankruptcy of agricultural organisations is such that when the immovable property of the bankrupt organisation is sold, other agricultural organisations or farm enterprises have priority to buy it. The second special rule is such that the duration of external management of an agricultural organisation is extended to account for the seasonal nature of its operations and the necessity to wait until the end of the respective agricultural season. The Law on Insolvency also protects certain assets of the insolvent debtor to the extent that they are exempted from execution under the law of civil procedure. One of the consequences of filing for bankruptcy is the termination of the debtor’s status as a businessman, and the debtor may not seek registration as a business entity for a specific time period.⁷⁹ Certain aspects of insolvency for agricultural producers are also governed by the Federal Law on Financial Rehabilitation of Agricultural Producers of 2002.⁸⁰

South Africa

15. Insolvency matters in South Africa are governed by the Insolvency Act No. 24 of 1936.⁸¹ This Act does not entirely codify South African insolvency law and for a number of aspects, related

⁷³ Jones Day, Comparison of Chapter 11 of the United States Bankruptcy Code with the Rescue Procedure in France, at 23, available at <http://www.jonesday.com/files/Publication/1ec093d4-66fb-42a6-8115-be0694c59443/Presentation/PublicationAttachment/e5b46572-7aeb-4c34-ab2e-bee2f8f3d3c2/Comparison%20of%20Chapter%2011%20%28A4%29.pdf>.

⁷⁴ See further Reed Smith, Insolvency Law in France, available at http://www.reedsmith.com/files/Publication/dd0e30b6-2d8c-4912-b35e-0fe8a7bddc95/Presentation/PublicationAttachment/6dc8fc38-e58f-48c9-9986-53814f7dffbf/France_%28as_published%29.pdf.

⁷⁵ See <http://www.diputados.gob.mx/LeyesBiblio/pdf/29.pdf>.

⁷⁶ Mexico’s Investment Units (UDIS) are units based on price increases used to settle mortgage obligations or other commercial transactions. UDIS were created in 1995 to protect banks and focused mainly on mortgage loans.

⁷⁷ Exchange rate according to the Federal Diary of the Federation of 4/1/2015: 1 UDIS = MX\$ 5.29; 1 USD available at www.dof.gob.mx.

⁷⁸ INSOL International, Specifics of Personal and Corporate Bankruptcy Under Russian and Ukrainian Laws, at 1-2 (May 2014), available at http://www.insol.org/emailer/June_2014_downloads/FINAL%20Technical%20Paper%20No%2029%20_21%20May%202014.pdf.

⁷⁹ *Id.*, at 3.

⁸⁰ Jensowitzsch, The Insolvency Law of Central and Eastern Europe, at 386 (INSOL Europe).

⁸¹ See <http://www.justice.gov.za/legislation/acts/1936-024.pdf>.

legislation governs.⁸² One such legislation is included in Part III of the Agricultural Credit Act No. 28 of 1966 that contains special provisions regarding settlements by farmers (compromise with creditors) who are unable to pay their debts.⁸³ The Act authorises the appointment of a trustee or liquidator, but remains concerned primarily with immovable collateral. With respect to movable property, Section 23(d) provides that no person shall take possession of, or institute any proceedings for, the return of any tractor or other agricultural machinery or any agricultural implements or irrigation machinery or lorry or livestock sold to the applicant subject to a suspensive or resolute condition and used exclusively in connection with his or her farming operations. The rescue regime for companies is also governed by the Companies Act No. 71 of 2018.

The United States

16. Beginning with the first enactment of federal bankruptcy law in 1898, American bankruptcy law has always paid special attention to and provided special protection for the American farmer.⁸⁴ The pro-farmer bankruptcy legislation of the Great Depression and the Family Farmer Bankruptcy Act of 1986 are just two examples. These Acts featured a special protection for farmers against involuntary bankruptcies.

17. The US Bankruptcy Code contains a special regime under chapter 12, available for “family farmers” with “regular annual income”. Under Section 303, an involuntary petition may not be filed against a family farmer under Chapter 12. Not all farmers automatically qualify for special protections, which are limited by both the gross annual income and the aggregate debt of the farmer. Chapter 12 is a tailored bankruptcy regime to meet the economic realities of family farming, compared to Chapters 11 and 13, which are designed for corporate organisations and consumers, respectively. Under Chapter 12, debtors propose a repayment plan to make instalments to creditors over a period of three to five years. However, secured creditors must be paid at least as much as the value of the collateral securing the debt. The relief under Chapter 12 is voluntary, and only the debtor may file a petition under the Chapter. If the debtor files the petition under Chapter 12, all enforcement actions are “automatically stayed”. Secured creditors may receive repayment of the debt over a period of five years.

Effect of special insolvency-agricultural regimes on the MAC Protocol

18. Special insolvency-agricultural regimes and provisions do exist in the legislation of many States. However, the deviations from the general insolvency law relate primarily to:

- (i) the (priority) claims of farmers against bankrupt customers;
- (ii) exemption of certain farming equipment from the pool of assets available for distribution; however these exemptions do not affect secured creditors and are limited in value;
- (iii) protection of the farmers’ right to land;
- (iv) stays of actions against assets (i.e., collateral owned by farmers);
- (v) access to a public fund to facilitate the restructuring of debts; and
- (vi) limitation as to the ability to file an involuntary insolvency petition against the farmer.

19. For the most part, these special insolvency-agricultural regimes protect small-scale farmers that are unlikely to own large, high-value items of equipment to be covered by the MAC Protocol.

⁸² Country Report: South Africa, available at https://www.justiz.nrw.de/WebPortal_en/projects/ieei/documents/public_papers/country_report_sa.pdf.

⁸³ See <http://faolex.fao.org/docs/pdf/saf20851.pdf>.

⁸⁴ See David Ray Papke, Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law, 54(4) *Missouri Law Review* (1989).

However, MAC equipment may also be subject to secondary sales and financing provided to farmers in developing countries whose laws may include such special protections.

20. It is these countries that may consider applying their domestic insolvency law rather than choosing one of the insolvency alternatives set forth in the MAC Protocol. Such a choice might have a negative impact on the economic impact of the MAC Protocol in improving access to and lowering the cost of finance.

21. Earlier versions of the draft MAC Protocol permitted Contracting States to apply different insolvency alternatives to the three different categories of equipment. This approach would have allowed Contracting States to preserve their existing protections for farmers by potentially not applying an Article X insolvency alternative to equipment covered by the HS codes listed in Annex 2 (agricultural equipment). However, such an approach became overly complex when taking Article II(1) of the draft Protocol, which provides that the Protocol applies, “irrespective of any intended or actual use of the equipment”. This could have resulted in the undesirable application of special insolvency protections designed for farmers to mining or construction companies using equipment covered by Annex 1. Ultimately, it was decided that such an approach was too complex.

Appendix IV – Research on restrictions on enforcement of security interests in agricultural equipment

1. This appendix was prepared by NatLaw and presented to the Study Group at its third meeting in October 2015. It also incorporates data received from UNIDROIT Correspondents whom were consulted on the issue in July 2015. It provides a comparative survey of national law restrictions on the enforcement of security interests in agricultural equipment in nine States (Australia, Canada, Kenya, Mexico, Nigeria, the United States, Hungary, Turkey and Japan). It is important to note that this analysis has not been updated since it was first prepared, and some States surveyed may have amended their relevant laws.

2. Some countries have adopted laws that affect the powers of secured creditors to enforce their rights against farming machinery and similar equipment provided as collateral. However, research shows that any restrictions on these enforcement powers apply mainly to protect family and individual farmers who own low-value items. Furthermore, these restrictions do not eliminate the possibility of extra-judicial enforcement and rather only delay the process by requiring the secured creditor to either: (i) provide special notices; (ii) provide the debtor with certain grace periods for the opportunity to cure the default, or (iii) initiate mediation prior to the foreclosure.

3. The following paragraphs provide an overview of some of these laws and the kinds of limitations they impose on secured creditors. Since the draft MAC Protocol is designed to apply only to high-value equipment, such protective measures of States should not be applicable to these types of transactions. This could pressure certain States to reconsider the value of the ratification of the future MAC Protocol or call for declarations that would allow them to continue to apply these types of protective measures to a narrowly defined set of transactions or equipment types.

Australia

4. In Australia, enforcement rights of secured creditors are governed and recognised by the recently adopted Personal Property Securities Act of 2009 (PPSA), which is a federal law. In addition to the PPSA, some Australian states also regulate particular aspects of the enforcement of security interests against farmers. New South Wales and Victoria have adopted legislation that mandates farm debt mediation. Other states have no formal schemes or only have voluntary mechanisms in place (e.g., Western Australia).⁸⁵ Since these statutes provide for the use of non-uniform mechanisms, the Federal Government has been studying the possibility of adopting a common federal approach with respect to these protective measures for farmers.⁸⁶

5. In general, these special non-PPSA laws require creditors, including those whose rights are secured with farming equipment, to initiate mediation through an independent third party prior to enforcing their rights.⁸⁷ The Victoria statute defines farming equipment to include a harvester, binder, tractor, plough or other agricultural implement.⁸⁸ While both parties to a security agreement may initiate mediation, in practice, it has been the creditors who have acted as the initiators in a significant majority of cases.⁸⁹ In Victoria, the mediation is conducted by the Small Business Commissioner. The fees associated with the mediation are reasonably low due to a partial subsidy from the

⁸⁵ See <https://www.agric.wa.gov.au/grains/farm-debt-mediation-wa-scheme>.

⁸⁶ See http://www.agriculture.gov.au/ag-farm-food/drought/assistance/approach_to_farm_debt_mediation.

⁸⁷ See <http://www.holdingredlich.com/agribusiness-rural-industries/farm-debt-mediation-how-to-make-it-successful>.

⁸⁸ See s. 3 of the Farm Mediation Act, No. 42 of 2011, available at http://www.austlii.edu.au/au/legis/vic/num_act/fdma201142o2011209/.

⁸⁹ *Id.*

government.⁹⁰ Under Section 6 of the Victorian statute, any action taken by the secured creditor in violation of its duties under the statute shall be void. Section 8 also imposes a moratorium of 21 days on any enforcement action which commences the day the secured creditor gives notice of its intention to enforce the rights to the debtor.

Canada

6. In Canada, every province and territory has its own PPSA. Like in Australia, the Canadian PPSAs recognise extra-judicial enforcement of security interests taken in any form of personal property, including farming machinery. The rights of secured creditors set forth in the PPSAs may be affected by federal and provincial legislation. On the federal level, the 1997 Farm Debt Mediation Act was adopted to apply to insolvent and over-indebted farmers.⁹¹ Under the Act, a farmer may apply for a stay of proceedings in the event that a secured creditor seeks to enforce its security interest. The stay is initially imposed for a period of 30 days and can be extended in 30 day increments for a total of 120 days in certain circumstances.

7. Canadian provinces have also adopted special laws that protect farmers and impose limitations on the enforcement powers of secured creditors. For instance, the Manitoba Farm Machinery and Equipment Act regulates the manner in which repossession must be carried out, also providing for the arbitration of disputes concerning repossession of farm machinery and other farm equipment. Under Section 38(1), “a lienholder shall not repossess farm machinery or farm equipment that is subject to a lien without leave of the board and except in accordance with this Act.” Accordingly, the secured creditor must apply to a board to sanction the intended repossession. Upon repossession, the secured creditor must retain the farm machinery/equipment for 10 working days allowing the farmer to exercise its right of redemption. This Act also imposes a limit on the extent of assets that farmers may provide as collateral to secure the payment of the purchase price of some equipment. Section 36(2) provides that “no part of the price of new or used farm machinery or farm equipment may be secured by a lien on any goods not sold under the sale contract or agreement of purchase and sale for the machinery or equipment.”

8. The province of Manitoba also adopted the Family Farm Protection Act in 1986, under which a secured creditor cannot foreclose on farmland until the concerned farmer has had the opportunity to go through the mediation process.⁹² When a secured creditor intends to foreclose, upon default of the debtor, they are required to obtain leave of the court. Similarly, the Saskatchewan State Farmers Security Act requires secured creditors to follow certain procedures before seizing or repossessing farm equipment.⁹³ For instance, secured creditors must give a 15 day notice of their intention to take possession of equipment. When the farmer receives the notice of intention to seize the machinery, it has 30 days to apply to the court for a hearing. Once the farmer files a petition with the court, the creditor’s right to take possession is suspended.

Kenya

9. The Hire-Purchase Act, adopted in 1982, regulates a transaction in which it “shall be implied... that the legal ownership of, and title, to the goods shall automatically be vested in the hirer upon payment by the hire-purchase price in full”.⁹⁴ This type of transaction is similar to financial leasing that allows lessees (hirers) to acquire assets, mainly equipment. This Act also established the

⁹⁰ *Id.*

⁹¹ See <http://laws-lois.justice.gc.ca/eng/acts/F-2.27/>.

⁹² See further <http://www.ruralsupport.ca/admin/FileUpload/files/handouts/Farm%20financial%20Handouts%20june%202010%20B&W.pdf>.

⁹³ See <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S17-1.pdf>.

⁹⁴ Hire Purchase Act, 1982 (Rev 2010), art. 8(e).

Registrar of Hire-Purchase Agreements.⁹⁵ According to Article 3(1), the scope of the Act is limited to those agreements covering obligations that do not exceed four million shillings, the equivalent of approximately USD \$40,000.⁹⁶ As a result, this Act is inapplicable to transactions covering high-value equipment, the financing of which the draft MAC Protocol seeks to facilitate.

10. The Act includes some limitations on the powers of secured creditors to enforce their rights in case of the debtor's default. After the borrower pays two thirds of the total sum due, the secured creditor loses the right to repossess the item extra-judicially. Instead, it must bring a suit against the hirer.⁹⁷ If the secured creditor repossesses the asset in violation of the requirements of the Act, the agreement is to be deemed terminated and the hirer and its guarantor, if any, are to be released from all liability and entitled to recover all monies paid to the secured creditor.

11. The limitation on the enforcement rights of a secured creditor in the case of a borrower's default has been recently reinforced in the new Consumer Protection Act (CPA).⁹⁸ Section 20(1) of the Act provides that when a consumer has satisfied two thirds or more of the payment obligation under a future performance agreement, any provision in the agreement, or in the security agreement incidental to the agreement, under which the supplier may retake possession of the goods or resell the goods or services upon default in payment by the consumer, is not enforceable, except by leave of the High Court. Given the target of this protection – the consumer, arguably it would not be applicable to the owners and users of MAC equipment. However, Kenyan courts have already granted protection under this Act to legal entities, arguing that the Act protects a "person" rather than an individual.⁹⁹

Mexico

12. Latin American countries share some of the rules restricting secured creditors' rights to extra-judicially seize certain assets of the debtor if they are those seen as necessary to perform an economic activity or protect the debtor's family. The rules affecting secured creditors' enforcement rights in some Latin American countries (the minority)—which can be generally found in civil procedure codes—are specific to farming equipment or machinery (e.g., Mexico). However the rules of others (the majority), make no reference to farming equipment or machinery, covering instead only "instrumentalities that are necessary for the debtor in his/her profession, art or trade" (e.g. Argentina, Colombia, Chile, Guatemala, and Peru).¹⁰⁰ Unlike Australia, Canada and the United States, there is no mandatory mediation legislation for farm debt in Latin America.

⁹⁵ *Id.*, art. 5.

⁹⁶ *Id.*, art. 3(1).

⁹⁷ When the owner retakes possession of the goods in violation of the requirements of the HPA, the agreement shall terminate and the borrower and his guarantor shall be released from all liability and entitled to recover all monies paid to the owner. See, Section 15, Hire-Purchase Act, CAP 507, available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20507>.

⁹⁸ No. 46 of 2012, available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2046%20of%202012>.

⁹⁹ *Nairobi Metropolitan PSV SACCOS Ltd & ors v. County of Nairobi Government & ors*, (2013) eKLR, para. 2, available at <http://www.kenyalaw.org/caselaw/cases/view/93353/>.

¹⁰⁰ For Argentina see Civil and Commercial Procedural Code of the Nation [Código Procesal Civil y Comercial de la Nación], art. 219, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16547/texact.htm> (last accessed Aug 25, 2015). For Colombia see Civil Procedure Code Decrees No. 1400 and 2019 [Código de Procedimiento Civil Decretos No. 1400 y 2019 de 1970], art. 684(11), (1970) (Col.) available at http://www.cancilleria.gov.co/sites/default/files/tramites_servicios/apostilla_legalizacion/archivos/codigo_procedimiento_civil.pdf (last accessed Aug 28, 2015). For Peru see Civil Procedure Code [Código de Procedimiento Civil], Decreto Legislativo 12760, art. 179 (1975) (Peru), available at http://spij.minjus.gob.pe/graficos/legcomp/sudamerica/bolivia/codigo_de_procedimiento_civil.pdf (last accessed Aug 28, 2015). For Guatemala see Civil and Commercial Procedural Code [Código Procesal Civil y Mercantil], art. 306 (6), Decreto-Ley No. 107 (1964) (Guatemala), available at <http://www.minfin.gob.gt/archivos/leyes/tesoreria/Decretos/DECRETO%20LEY%20107.pdf> (last accessed Aug

13. In Mexico, if the debtor objects to extra-judicial enforcement, the secured creditor must resort to judicial enforcement mechanisms that are governed by the Commerce Code (Código de Comercio), the Federal Code of Civil Procedure (Código Federal de Procedimientos Civiles) (FCCP), and subsidiarily by the civil procedure codes of Mexican states.¹⁰¹ It should be noted that these state codes mirror, almost in their entirety, the FCCP. Whenever a money judgment is entered due to default on a loan against a debtor who is a party to a security agreement and the debtor fails to voluntarily comply with the judgment, the creditor can request the court seize the goods (embargo) of the debtor to satisfy the debt and incidental costs. A court officer will ask the debtor to select the goods that should be judicially seized.¹⁰² If the debtor refuses to identify any goods, the creditor has the right to make such a selection.¹⁰³ The creditor's right to select and seize goods is limited by Article 434 of the FCCP.¹⁰⁴ Two of the limitations found in Article 434 are relevant to this report.

14. The first limitation is known as "estate exemption" or patrimony (patrimonio de la familia) and can be found in Article 434 (I) of the FCCP. Under this Article, the creditor cannot judicially seize goods that are considered part of the debtor's estate exemption, even if these assets are subject to a security interest. This type of exemption is different from the one found in other laws (e.g., in the United States) and effectively precludes the creation and enforcement of a security interest. The estate exemption must be created by the interested party before a judge or a notary public and must be registered at the Public Registry of Property (Registro Público de la Propiedad) in order to be effective against third parties.¹⁰⁵ The interested party must be the owner of the assets at the moment the estate exemption is created.¹⁰⁶ Arguably, this protection would not apply to those assets the debtor is to acquire with the financing provided by the secured creditor *i.e.*, purchase money security interests are unaffected. With respect to already-owned assets, the prospective creditor must search the registry to determine whether the assets offered as collateral have been declared as exempt. Assets subject to an estate exemption are considered to be completely separate from those of the debtor.¹⁰⁷ Therefore, debts of the debtor cannot be repaid with the protected assets and a creditor's only defense against an estate exemption is fraud.¹⁰⁸ For example, according to Article 739 of the Civil Code of the Federal District (Codigo Civil para el Distrito Federal) (Federal District Code), an estate exemption cannot be created by a debtor to fraudulently avoid creditors' rights.¹⁰⁹

15. According to Article 723 of the Federal District Code, the estate can include, inter alia, the family's house and a farm together with all the "tools" necessary for farming.¹¹⁰ The estate must not

28, 2015). For Chile see Civil Procedure Code [Código de Procedimiento Civil], Ley 1552, art. 445(12) (1902) (Chile), available at <http://www.leychile.cl/Navegar?idNorma=22740&idParte=0> (last accessed Aug 28, 2015).

¹⁰¹ Code of Commerce [Código de Comercio], art. 1063 (1989) (Mex.), available at http://www.diputados.gob.mx/LeyesBiblio/pdf/3_261214.pdf (last accessed Aug 24, 2015).

¹⁰² Federal Code of Civil Procedure [Código Federal de Procedimientos Civiles], art. 437 (1943) (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/6.pdf> (last accessed Aug 24, 2015). [FCCP]

¹⁰³ *Id.*

¹⁰⁴ *Id.*, art. 434.

¹⁰⁵ Fernando Antonio Cárdenas González, *El Patrimonio de Familia su Constitución, Modificación y Extinción ante Notario*, p. 39 - 47, Revista de Derecho Notarial Mexicano, núm. 111, México (1998), available at <http://www.juridicas.unam.mx/publica/librev/rev/dernotmx/cont/111/pr/pr6.pdf> (last accessed Sept 9, 2015)

¹⁰⁶ *Id.*, p. 39.

¹⁰⁷ *Id.*, p. 49-50.

¹⁰⁸ *Id.*

¹⁰⁹ Civil Code of the Federal District [Codigo Civil para el Distrito Federal], art. 739 (1928) (Mex.), available at <http://docs.mexico.justia.com.s3.amazonaws.com/estatales/distrito-federal/codigo-civil-para-el-distrito-federal.pdf> (last accessed Aug 24, 2015). When an estate exemption is created to fraudulently avoid creditor rights, the creditor can exercise his/her right of avoidance of all fraudulent acts (*acción pauliana o revocatoria*). Fernando Antonio Cárdenas González, *El Patrimonio de Familia su Constitución, Modificación y Extinción ante Notario*, Revista de Derecho Notarial Mexicano, núm. 111, México (1998), available at <http://www.juridicas.unam.mx/publica/librev/rev/dernotmx/cont/111/pr/pr6.pdf> (last accessed Sept 9, 2015).

¹¹⁰ *Id.*, art. 723.

exceed the estimated amount of USD\$135,000.¹¹¹ However, the Family Code of the State of Sonora (Código de Familia para el Estado de Sonora),¹¹² which is the law applicable to family matters in the State of Sonora, Mexico, is more generous when establishing the assets that can be subject to the estate exemption. Instead of using the word “tools” as the Federal District Code does, Article 535 of the Family Code of Sonora specifically provides that “machinery and equipment” necessary for farming can also be part of the estate exemption. Another substantial difference between the Federal District Code and the Family Code of Sonora is that the Code in Sonora does not limit the value of the machinery and equipment that can be subject to the estate exemption.¹¹³

16. The second limitation to the creditor’s right to select and seize goods in Mexico is found in Article 434(IV) of the FCCP. According to Article 434(IV), “machinery, tools, and animals necessary for farming activities” cannot be judicially seized.¹¹⁴ The determination of whether the particular equipment is deemed to be “necessary” for farming activities is routinely done by a court appointed expert.¹¹⁵ Unlike the estate exemption, this limitation does not have to be registered in the Public Registry of Property in order to be effective against third parties.

Nigeria

17. In general, Nigerian law does not provide express limitations on the enforcement of security interests in Nigeria. The Hire Purchase Act (HPA), enacted in 1968, under which equipment of any kind may be financed, is limited in the scope of its application to transactions of a relatively low value.¹¹⁶ This monetary limitation does not apply to motor vehicles.¹¹⁷ The definition of “motor vehicle” includes mechanically propelled vehicles intended for agricultural purposes.¹¹⁸ Therefore hire purchase agreements for mobile farm equipment may be governed by the HPA, even when they exceed the minimum monetary threshold. The Act imposes strict restrictions on the enforcement rights of secured creditors/owners, by requiring that once three fifths of the value of the motor vehicle has been paid, the owner may not repossess the equipment extra-judicially.¹¹⁹ However the HPA does permit the owner, when three or more instalments of the hire-purchase price are due and outstanding, to remove the motor vehicle to a premise under its control for the purpose of protecting it from damage or depreciation, pending the outcome of the action.¹²⁰ The HPA also prescribes that any provision in a hire purchase agreement that seeks to grant the owner or its agents the right to enter upon any premise to repossess the equipment, or absolve the owner of any liability for any such act, will be void.¹²¹

18. In May 2015, Nigeria enacted the Equipment Leasing Act (ELA) to cover finance and operating leases, cross-border leases, leveraged leases and other forms of equipment lease arrangements. It provides for the establishment of an equipment lease registry in which all equipment leases must be registered within 14 days of their execution.¹²² The ELA limits the rights of the lessee to enter into a

¹¹¹ *Id.*

¹¹² Family Code of the State of Sonora [Codigo de Familia para el Estado de Sonora], art. 535 (Mex.), available at <http://compilacion.ordenjuridico.gob.mx/obtenerdoc.php?path=/Documentos/ESTADO/SONORA/o521739.doc> (last accessed Aug 24, 2015).

¹¹³ *Id.*, art. 545.

¹¹⁴ FCCP, *supra* note 102, art. 434 (IV).

¹¹⁵ *Id.*

¹¹⁶ Section 1 (a) HPA.

¹¹⁷ *Id.*

¹¹⁸ Section 20 (1) HPA.

¹¹⁹ Section 9 HPA.

¹²⁰ Section 9 (5) HPA.

¹²¹ Section 3 (a) HPA.

¹²² Section 12 ELA.

sub-lease or create a pledge over the leased equipment.¹²³ When the lessee defaults in payment of the rentals, the lessor must serve the lessee a default notice, giving the lessee 15 days within which to remedy the default.¹²⁴ If the lessee fails to do so, the lessor may terminate the lease agreement.¹²⁵ Upon termination, if the lessor seeks to repossess the equipment and the lessee refuses to give up possession after receiving due notice, the lessor may apply to the Federal High Court by way of an ex parte motion for repossession of the leased equipment.¹²⁶ Section 38 of the ELA requires that if the judge is satisfied with the information on oath that the lessee has defaulted on her/his obligations and the lessor has complied with the requirements of a default notice and termination notice,¹²⁷ then s/he may issue a warrant to repossess the equipment. The lessor is also entitled to the rents due and may claim damages.¹²⁸ The ELA does not seem to impose any undue limitations on the ability of the lessor to enforce its rights upon default of the lessee.

The United States

19. The U.S. secured transactions law embodied in the Uniform Commercial Code Article 9 does not provide any special protections to farmers against repossession of their farming machinery.¹²⁹ Like the Australian states and Canadian provinces, a few U.S. states have adopted legislation mandating mediation of farm debts. One such state is Minnesota that enacted the Farmer-Lender Mediation Act.¹³⁰ Utah also included certain provisions governing the mediation of farm debts in Title V of its Agricultural Credits Act.¹³¹ Under Section 583.22, Minnesota's Farmer-Lender Mediation Act does not apply to certain types of agricultural property, such as assets leased to the debtor or farm machinery that is primarily used for custom fieldwork. Section 583.26 requires every creditor, before commencing an enforcement action, to serve a notice of mediation on the debtor, to which they will have 14 days to respond. If the debtor does not respond to the mediation notice, they forfeit the right to mediate with the secured creditor.

Summaries from UNIDROIT Correspondents

20. The following sections are summaries derived from the Correspondents' submissions.

Hungary

21. The Hungarian Judicial Enforcement Act provides for a closed list of 'farmer' definitions, whereby based on eligibility, the individuals shall be exempt from remedial enforcements in favour of potential creditors.

Turkey

22. The Turkish Code on Enforcement and Bankruptcy¹³² provides for special legal protection for farmers and agricultural equipment against any potential remedial enforcement brought upon by

¹²³ Section 20 (1) ELA.

¹²⁴ Section 36 ELA.

¹²⁵ Section 37.

¹²⁶ Section 38 (1) ELA.

¹²⁷ Sections 36 and 37.

¹²⁸ Section 38 (3) (4) ELA.

¹²⁹ For instance, in *Deere & Co. v. New Holland Rochester*, Deere sought and obtained a pre-judgment replevin order of farming machinery that it had initially financed – a USD \$265,000 loan to acquire a harvester that the debtor subsequently traded in to Holland. *Deere & Co. v. New Holland Rochester, Inc.*, 2010 Ind. App. LEXIS 1899 (Ind. Ct. App. 2010).

¹³⁰ See <https://www.revisor.mn.gov/statutes/?id=583>.

¹³¹ See <https://www.govtrack.us/congress/bills/100/hr3030/text>.

¹³² Turkish Code on Enforcement and Bankruptcy No 2004, 9 June 1932.

creditors for their security interests. Debtor farmers and their agricultural equipment and livestock are protected, provided that such equipment is deemed essential for the sustenance of the farmer and his family.¹³³

23. However, in case of certain crops of agricultural nature that are secured prior to their harvest by a creditor, which are subsequently sold or transferred by the farmer to a third party, the creditor shall not lose his entitlement.¹³⁴

Japan

24. The Japanese Civil Enforcement Act provides for an exemption from seizure for 'indispensable equipment for agriculture' subject to certain conditions. This includes assessment of whether the equipment in question can be substituted by alternative options, the scale and mode of debtor's farming as well as the conditions for ordinary farming in the region. Farmers are protected against mere seizure, however, transfer of such equipment is not prohibited. Therefore, the security interests which do not require actual seizure, namely 'security by way of assignment', are legally effective and enforceable against the agricultural equipment.

25. Additional responses from correspondents in Colombia, Spain, Greece and Uruguay confirmed that there is no special treatment and legal privilege for farmers and agricultural equipment in these jurisdictions.

Conclusion

26. Whilst varying formulations are used, it is clear that the restrictions on the enforcement of security interests against agricultural machinery is designed to protect small, family farming operations:

- The Hungarian legislation adopts the approach of defining a limited category of farmers who are exempt from enforcement proceedings.
- Turkish debtor farmers are protected if their equipment is deemed essential for the sustenance of the farmer and his family.
- Japan has a discretionary mechanism that takes into account the size of the farming enterprise and farming conditions in the region.
- Mexico prevents judicial and extra-judicial enforcement against machinery necessary for farming activities.
- Certain states in Australia, Canada and the United States mandate mediation and delay enforcement actions for farmers, rather than outright preventing enforcement of security interests against farming equipment.

27. Kenyan protections are not specific to agricultural equipment and instead provide protections for lower value security interests that have been substantially repaid. Similarly, the majority of Latin American states (Argentina, Colombia, Chile, Guatemala and Peru) contain general protections for the extra-judicial seizure of assets which are necessary to perform an economic activity or protect the debtor's family.

¹³³ *Ibid*, Article 82/No 4.

¹³⁴ *Ibid*, Article 84.

28. As summarised above, the research indicates that at least seven jurisdictions have special legal regimes protecting farmers which delay, prevent or restrict the enforcement of security interests against farming equipment. It is likely there are further jurisdictions with similar laws.

29. It is clear that the various domestic legislative regimes are designed to protect small family farming enterprises only, which are unlikely to be using the high-value agricultural equipment to be covered by the MAC Protocol. However, it is foreseeable that a family farming enterprise could purchase a piece of internationally registerable equipment under the MAC Protocol, and then attempt to protect themselves from the strong enforcement mechanisms under the Convention the applicable domestic law protection.

30. The Study Group discussed two options. The first option was to not address the issue in the Protocol, and simply require Contracting States that have such protections to reform their domestic law to exempt agricultural equipment registerable under the MAC Protocol from the application of the enforcement restrictions. The second option was to include an article in the draft Protocol allowing States to limit the application of the Protocol (or possibly just the default and insolvency remedies) in relation to family farming enterprises, where such enterprises were protected by existing domestic legislation. This could have operated as an opt-in declaration, requiring States to declare exactly what family farming enterprises would be protected. Ultimately, on the basis that small family farmers in the overwhelming majority of jurisdictions do not use the type of agricultural equipment covered by the MAC Protocol Annexes, it was decided to adopt the first option and not provide a specific rule in the text of the instrument.

Appendix V – Research on Registration and Titling of MAC Equipment in Domestic Registries

1. This appendix was prepared by NatLaw and presented at the third Study Group meeting in October 2015, following discussions at the first and second Study Group meeting. It provides a comparative survey of the treatment of MAC equipment in national law registries in seven States (Argentina, Australia, Canada, Mexico, Nigeria, Spain and the United States). It is important to note that this analysis has not been updated since it was first prepared, and some States surveyed may have amended their laws or changed the operation of their registries.

2. This section examines whether certain items of MAC equipment are subject to laws that require the issuance of certificates of titles, similarly to those covering vehicles. In general, the application of these laws to motor vehicles also cover certain items of MAC equipment, particularly tractors, that fall under the definition of “motor vehicle” as it is included in these laws. These laws may require that security interest be noted on the certificates as a condition of their effectiveness against third parties. This form of achieving third-party effectiveness will be superseded by registration of international interests in the future International Registry.

3. The application of these laws may also have relevance to the ability of the secured creditor to enforce its rights efficiently and expeditiously. For instance, under Article VIII(5) of the draft MAC Protocol, on default of the debtor, the assistance of relevant authorities may be necessary to procure de-registration of an ownership relating to the MAC equipment.

Argentina

4. In Argentina, motor vehicles (automotores) are governed primarily by Decree No. 1.1144/97.¹³⁵ According to Article 1 of the Decree, the acquisition of ownership over motor vehicles is only effective between the parties to the transaction and against third parties when such a transfer is registered in the National Registry of Motor Vehicle Ownership (Registro Nacional de la Propiedad del Automotor) (National Registry).¹³⁶ Judicial liens and security interests over motor vehicles must also be registered in the National Registry.¹³⁷ According to Article 5 of the Decree, the definition of the term “motor vehicle” includes “agricultural machinery including tractors and combines, cranes, road construction machinery, and all self-propelled machinery.”¹³⁸ Once a motor vehicle is registered in Argentina, the National Registry must issue a motor vehicle title (Título de Automotor) to its owner that, among other information, indicates the chassis and/or engine number.¹³⁹

Australia

5. Each Australian state and territory established its own set of rules for the registration of motor vehicles. For instance, in the state of Victoria the Road Safety Act of 1986 (Road Act)¹⁴⁰ and

¹³⁵ Decree No. 1.114/97 – Legal Framework of Motor Vehicles [Decreto No. 1.114/97 - Régimen Jurídico del Automotor], available at http://www.dnrpa.gov.ar/portal_dnrpa/regimen_juridico/informacion/rja.pdf (last accessed Aug 24, 2015).

¹³⁶ *Id.*, art. 1.

¹³⁷ *Id.*, art. 17. See also Digest of Technical Registration Rules [Digesto de Normas Técnico Registrales], Título I, art. 13 (2014), available at http://www.dnrpa.gov.ar/portal_dnrpa/regimen_juridico/informacion/Titulo1.pdf (last accessed Aug 24, 2015). Under art. 17, judicial liens are effective for a period of three years after registration.

¹³⁸ *Id.*, art. 5.

¹³⁹ *Id.*, art. 20(c).

¹⁴⁰ *Road Safety Act, 1986* (Vic.) (Australia), available at [http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst9.nsf/DDE300B846EED9C7CA257616000A3571/12CF032966668433CA257EC90017DD83/\\$FILE/86-127aa167%20authorised.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst9.nsf/DDE300B846EED9C7CA257616000A3571/12CF032966668433CA257EC90017DD83/$FILE/86-127aa167%20authorised.pdf) (last accessed Sept. 23, 2015).

its regulations (Road Act Regulations) are applicable to the registration of vehicles.¹⁴¹ A vehicle is defined by the Road Act as “a conveyance that is designed to be propelled or drawn by any means, whether or not capable of being so propelled or drawn, and includes bicycle or other pedal-powered vehicle, trailer, tram-car and air-cushion vehicle but does not include railway locomotive or railway rolling stock.”¹⁴² The Road Act defines the term tractor as “a motor vehicle that is designed for use in primary production, horticulture or other similar pursuits and is constructed: (i) with an implement or implements; (ii) to tow an implement or implements; or (iii) to have an implement or implements attached to it.”¹⁴³ The Road Act Regulations make reference to other potential MAC equipment, defining a special purpose vehicle as “a light vehicle” to include “a forklift, a straddle carrier, a mobile cherry picker, and a mobile crane.”¹⁴⁴

6. In order to register a new tractor in Victoria, its owner must submit “the machinery pack which is essentially a vehicle registration form.”¹⁴⁵ The registration form requires the owner to provide a description of the tractor that includes identification elements such as chassis number, engine number, make, model, colour, fuel type, year and manufacturer.¹⁴⁶ Once all the requirements established in the machinery pack have been complied with and all forms have been submitted to the registrar, a certificate of registration and number plate will be issued to the owner of the tractor.¹⁴⁷ The certificate of registration can be used as evidence of ownership of the tractor together with a bill of sale.¹⁴⁸

7. The 2009 Personal Property Securities Act (PPSA) regulates the attachment, perfection and other aspects of security interests in personal property, including vehicles. The PPSA requires that certain goods may be described by a serial number in a financing statement and provides for different legal effect depending on whether the registrant actually entered the serial number. Section 2(2) of the PPSA Regulations identifies the types of assets that may be described by a serial number, including “motor vehicle” which is defined in Section 1(7) to include any vehicle that is built to be propelled, wholly on land, by a motor that forms part of the property other than that which runs on rails, tram lines or other fixed path satisfying certain technical requirements, such as minimal speed of 10 km/h and power of at least 200 W. Arguably, a significant majority of MAC equipment would fall under this definition of “motor vehicle”, to which special rules set forth in the PPSA apply.

¹⁴¹ *Road Safety (Vehicles) Regulations*, 2009 (Vic.) (Australia), available at [http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst9.nsf/DDE300B846EED9C7CA257616000A3571/F66C78CAAE69CB61CA257E70001CBBA0/\\$FILE/09-118sra021%20authorised.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst9.nsf/DDE300B846EED9C7CA257616000A3571/F66C78CAAE69CB61CA257E70001CBBA0/$FILE/09-118sra021%20authorised.pdf) (last accessed Sept. 23, 2015).

¹⁴² *Road Safety Act*, *supra* note 140, §3 Definitions. Furthermore, a motor vehicle is defined as “a vehicle that is used or intended to be used on a highway and that is built to be propelled by a motor that forms part of the vehicle but does not include (a) a vehicle intended to be used on a railway or tramway; or (b) a motorized wheel-chair capable of a speed of not more than 10 kilometers per hour which is used solely for the conveyance of an injured or disabled person...”.

¹⁴³ *Order in Council*, Declaration of a Class of Motor Vehicles to be Tractors (May 2014), available at http://www.parliament.vic.gov.au/file_uploads/s16B_-_Road_Safety_Act_1986_9nhqJCM2.pdf (last accessed Sept. 23, 2015). The Road Act further clarifies that a motor vehicle is not a tractor “if it is primarily designed to carry goods or passengers.”

¹⁴⁴ *Road Safety (Vehicles) Regulations*, *supra* note 141, §5 Definitions.

¹⁴⁵ Telephone interview with VicRoads Contact Center, on file with the NatLaw. See also Machinery Pack, available at <https://www.vicroads.vic.gov.au/searchresultpage?q=machinery%20pack> (last accessed Sept. 23, 2015).

¹⁴⁶ Vehicle Registration form, available at <https://www.vicroads.vic.gov.au/searchresultpage?q=vehicle%20registration%20form> (last accessed Sept. 23, 2015).

¹⁴⁷ Telephone interview, *supra* note 145.

¹⁴⁸ *Id.*, see also Application for Transfer of Registration, available at <https://www.vicroads.vic.gov.au/searchresultpage?q=application%20for%20transfer%20of%20registration> (last accessed Sept. 23, 2015).

Canada

8. A motor vehicle in Canada must be registered with the transportation office that must issue and deliver a registration certificate to the owner together with a registration plate. The registration certificate is the document used to transfer ownership over the motor vehicle. Unlike in the United States, where the transportation offices are involved in the notation of liens over motor vehicles, security interests over motor vehicles in Canada may be perfected by registration in the provincial personal property registries. The following paragraphs examine in detail the relevant sections of the Motor Vehicle Act (MVA)¹⁴⁹ and its regulations (MVA Regulations).¹⁵⁰

9. The MVA distinguishes motor vehicles from farm tractors and special mobile equipment. MVA §1 defines “motor vehicle” as “every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, and not operated upon rails, but does not include a farm tractor.”¹⁵¹ MVA §1 defines the term “farm tractor” as a vehicle “designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry but does not include such a vehicle that is operated for remuneration other than in the agricultural operations of the owner thereof and that is incidentally operated on a highway.”¹⁵² MVA §1 defines “special mobile equipment” as “every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including road construction or maintenance machinery, ditch digging apparatus, well-boring apparatus, concrete mixers and any other vehicle of the same general class.”¹⁵³ Other vehicles of the same general class (special mobile equipment) include equipment “used solely for the purpose of transporting and developing power for well drilling machinery, wood cutting, threshing or for like purposes, and to which some part of the equipment is permanently attached.”¹⁵⁴ MVA §21 (1) provides that motor vehicles and special mobile equipment must be registered under the MVA, thus excluding farm tractors from the registration requirement.¹⁵⁵ However, MVA Regulations §9 establishes an annual registration fee for “crawler or caterpillar type of tractor or a farm tractor used for commercial purposes other than farming.”¹⁵⁶

10. New Brunswick’s Personal Property Security Act Regulations (PPSA Regulations)¹⁵⁷ define “motor vehicle” as “a mobile device that is propelled primarily by any power other than muscle power in, on or by which a person or thing may be transported or drawn, and that is designed for use on a road or natural terrain, or that is being used in the construction or maintenance of roads, and includes a pedal bicycle with a motor attached, a combine or a tractor, but does not include a device that runs on rails or machinery designed only for use in farming, other than a combine or a tractor.” Thus, combines and tractors are considered motor vehicles for PPSA Regulations purposes. Under the PPSA Regulations, serial numbered goods must be described by their respective serial number in the financing statement. The registrant must enter the last twenty-five characters of the serial number or all the characters if the serial number contains less than twenty-five characters in the financing statement.¹⁵⁸ The registrant must also indicate the type of serial numbered goods to which the

¹⁴⁹ Motor Vehicle Act, R.S.N.B. 1973, c. M-17, available at <http://laws.qnb.ca/en/ShowTdm/cs/M-17//> (last accessed Aug 24, 2015). [MVA].

¹⁵⁰ New Brunswick Regulation 83-42 under the Motor Vehicle Act (O.C. 83-170), available at <http://laws.qnb.ca/en/showpdf/cr/83-42.pdf> (last accessed Aug 24, 2015). [MVA Regulation].

¹⁵¹ MVA, *supra* note 149, §1.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ MVA Regulations, *supra* note 150, §7(6).

¹⁵⁵ MVA, *supra* note 13, § 21(1).

¹⁵⁶ MCA Regulations, *supra* note 150, §9.

¹⁵⁷ New Brunswick Regulation 95-57 under the Personal Property Security Act (O.C. 95-378), available at <http://laws.qnb.ca/en/ShowPdf/cr/95-57.pdf> (last accessed Aug 24, 2015).

¹⁵⁸ *Id.*, §25(1)(a).

registration relates.¹⁵⁹ According to the PPSA Regulations, the serial number for combines and tractors is the number marked on, or attached to, the chassis by the manufacturer.¹⁶⁰ On the other hand, for motor vehicles other than combines and tractors, the serial number is the vehicle identification number marked on, or attached to, the body frame by the manufacturer.¹⁶¹

Mexico

11. Registration of vehicles in Mexico is mainly governed by the Law of the Public Registry of Vehicles (*Ley del Registro Público Vehicular*) (Registry Law)¹⁶² and its regulations (Vehicle Registry Regulations).¹⁶³ The registration of a vehicle in the Public Registry creates a legal presumption that the vehicle exists, that the person who appears registered as the owner is in fact the owner, and that any notations in it are legally valid.¹⁶⁴ According to Article 2(X) of the Registry Law, the term “vehicle” is defined as “motor vehicle, trailer and semitrailer.” The definition of vehicle explicitly excludes “trains, military vehicles and those [vehicles] that by their nature have an industrial or agricultural use.”¹⁶⁵ Mobile and stationary mining, agriculture and construction equipment is not subject to registration in Mexico. The Mexican secured transactions legal framework, including the Code of Commerce and the regulations governing the secured transactions registry (*Registro Único de Garantías* or RUG) do not define the term motor vehicle (*vehículo de motor*), machinery or equipment.¹⁶⁶ As opposed to Canada, the Mexican legal framework does not specify whether serial numbered equipment must be described in the financing statement by its serial number or what the legal effect of such a description or non-description is.¹⁶⁷

Nigeria

12. In Nigeria, rights to some MAC equipment may be registered under the same process that applies to motor vehicles with the Federal Road Safety Commission (FRSC) office, and the relevant state motor vehicle registration office.¹⁶⁸ However, state agencies also have responsibility for vehicle registration. Many state laws classify tractors and bulldozers as “commercial vehicles,” thus requiring their registration.¹⁶⁹ A commercial vehicle is defined to also include “a hackney carriage, a stage carriage, a tractor, and any motor vehicle primarily designed for the carriage of goods or passengers, excluding any such vehicle used exclusively for carrying the personal effects of the owner.”¹⁷⁰ There is no special administrative law or body for the regulation of heavy mobile equipment. The FRSC

¹⁵⁹ *Id.*, §25(1)(c).

¹⁶⁰ *Id.*, §25(2)(b).

¹⁶¹ *Id.*, §25(2)(a).

¹⁶² Law of the Public Registry of Vehicles [*Ley del Registro Público Vehicular*] (2004), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/269.pdf> (last accessed Aug 24, 2015). [Registry Law]

¹⁶³ Regulations of the Law of the Public Registry of Vehicles [*Reglamento de la Ley del Registro Público Vehicular*] (2007), available at http://www.repuve.gob.mx/docs/Req_LRPV.pdf (last accessed Aug 24, 2015).

¹⁶⁴ Registry Law, *supra* note 135, art. 12.

¹⁶⁵ Registry Law, *supra* note 162, art. 2(X).

¹⁶⁶ Code of Commerce [*Código de Comercio*] as amended on June 13, 2014 (1889) (Mex.), available at http://www.diputados.gob.mx/LeyesBiblio/pdf/3_261214.pdf (last accessed Aug 27, 2015). See also RUG Regulations [*Reglamento del Registro Público de Comercio*], as amended on Nov 16, 2012, available at http://www.rug.gob.mx/Rug/resources/pdf/legislacion/Reglamento_RPP_16112012.pdf (last accessed Aug 27, 2015).

¹⁶⁷ *Registro Único de Garantías Mobiliarias, Guía del Usuario para el sitio rug.gob.mx*, p. 5, available at <http://www.rug.gob.mx/Rug/resources/pdf/guia%20de%20usuario/Manual%20de%20Usuario%20RUG.pdf> (last accessed Aug 24, 2015).

¹⁶⁸ FRSC rules require the registration of every operator and owner of articulated vehicles, as well as mandatory insurance and other legal process documents. They must also be incorporated. See Registration Requirements, FRSC Safety Requirements/ Guidelines for Articulated Lorries (Tankers/Trailers) Operations in Nigeria, available at <http://frsc.gov.ng/rtcenglish.pdf>, (last accessed Aug 28, 2015).

¹⁶⁹ See, Section 41, Lagos State Road Traffic Law, 2012.

¹⁷⁰ *Id.*

prescribes certain regulations for the operation and safety of such heavy mobile equipment as a component of its road traffic and management responsibilities.

13. In Nigeria, vehicles may be financed under a variety of laws and common law security devices, including the Bills of Sale Act, the Companies and Allied Matters Act and the Hire-Purchase Act. In 20015, Nigeria adopted the “Equipment Leasing Act” as well as the “Regulations for Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria,” neither of which has taken effect as of October 2015.

Spain

14. The registration of motor vehicles (vehículos de motor) in Spain is mainly governed by the General Regulations for Vehicles (Reglamento General de Vehículos) (Vehicle Regulations).¹⁷¹ Article 2 of the Vehicle Regulations provides for the establishment of a registry for vehicles (Registro de Vehículos) (Car Registry). Unlike other registries in Spain, such as the Personal Property Mortgage and Non-Possessory Pledge Registry (Registro de Hipoteca Mobiliaria y de Prenda sin Desplazamiento de la Posesión) and the Registry for Conditional Sales (Registro de Reserva de Dominio y Prohibición de Disponer), the Car Registry has purely administrative functions, meaning that recordings do not “create, modify or extinguish rights, security interests and other encumbrances.”¹⁷²

15. The Vehicles Regulations distinguish between the rules (i) applicable to motor vehicles, and (ii) applicable to specialised agricultural vehicles (vehículo especial agrícola).¹⁷³ Specialised agricultural equipment encompasses different types of agricultural equipment such as agricultural tractors (tractor agrícola), rototiller (motocultor), agricultural truck (tractocarro), agricultural automotive machinery (maquinaria agrícola automotriz), carrier (portador), and agricultural machinery that is hauled (maquina agrícola remolcada). The Vehicle Regulations define “specialised vehicle” to include a “self-propelled or towed vehicle conceived or constructed to perform a determined type of work or service and that, because of its characteristics, is exempted from complying with technical requirements established by [the Vehicle Regulations] or exceeds the established limits [set forth in the Vehicle Regulations] for weigh and dimension, such as agriculture machinery and its implements (remolques).”¹⁷⁴

16. Agricultural tractor is defined as “self-propelled specialised vehicle, with two or more axels, designed and manufactured to haul, push, or drag agricultural machinery.”¹⁷⁵ According to Article 28 of the Vehicle Regulations, specialised agricultural vehicles must be registered in the Official Registry of Agricultural Machinery (Registro Oficial de Maquinaria Agrícola) (ROMA). The ROMA is governed by Royal Decree 1013/2009 (ROMA Regulations).¹⁷⁶ ROMA Regulations exclude from its scope “construction and service machinery as well as machinery and equipment used in the agri-food

¹⁷¹ Royal Decree 2822/1998 [Real Decreto 2822/1998], as amended on July 18, 2015, BOE-A-1999-1826 (Spain), available at <https://www.boe.es/buscar/pdf/1999/BOE-A-1999-1826-consolidado.pdf> (last accessed Aug 27, 2015).

¹⁷² *Id.*, at p. 2.

¹⁷³ *Id.*, at Annex II.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Royal Decree 1013/2009 of June 19, about the characterization and registry of agricultural machinery [Real Decreto 1013/2009, de 19 de junio, sobre caracterización y registro de la maquinaria agrícola], BOE-A-2009-11678, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2009-11678 (last accessed Aug 28, 2015). The ROMA Regulations, under art 2, apply to agricultural tractors, rototiller, agricultural truck, agricultural automotive machinery, carrier, and agricultural machinery that is hauled as they are defined in the Vehicle Regulations.

industry.¹⁷⁷ Registrations of agricultural machinery at ROMA are immediately and automatically transmitted to the Car Registry.

17. According to the Law of Movable Mortgage and Non-possessory Pledge,¹⁷⁸ vehicles subject to registration in an administrative registry and other motor vehicles may be encumbered by a movable mortgage.¹⁷⁹ This law establishes that a movable mortgage must be created in a public deed by a notary public and that the encumbered vehicle must be insured for at least the same amount as the secured amount of the mortgage.¹⁸⁰

The United States

18. U.S. laws require motor vehicles to be registered with the respective State Departments of Motor Vehicles.¹⁸¹ In addition, a motor vehicle may have to have a certificate of title, which is used to transfer rights in the vehicle, including by notation of a lien on the certificate itself.

19. The Uniform Certificate of Title Act, a model law adopted by the Uniform Law Commission in 2005, but not yet enacted by any State, applies to vehicles which are defined in Section 2(34A) to exclude “specialised mobile equipment that is not designed primarily for transportation of individuals or property on a road or highway.” A comment to this Section explains that specialised mobile equipment includes “off-road motorized vehicles whose use of the roadway is only incidental to their off-road purpose including: motorized vehicles designed exclusively for off-road use; ditch digging apparatus; well-boring apparatus; construction equipment; road construction and maintenance machinery such as asphalt spreaders, bituminous mixers, bucket loaders, tractors other than truck tractors, ditchers, levelling graders, finishing machines, motor graders, road rollers, scarifiers, earth-moving carry-alls and scrapers, power shovels, and drag lines; self-propelled cranes; and earth-moving equipment. Specialised mobile equipment does not include a house trailer (which is not vehicle), or dump trucks, truck-mounted transit mixers, truck-mounted cranes and shovels, or other mobile equipment mounted on vehicles designed for transport of individuals or property on a roadway.” Accordingly, some MAC equipment types would fall under the definition of specialised mobile equipment for which a certificate of title is not issued while other would qualify as ordinary motor vehicles.

Arizona

20. Arizona Revised Statutes (ARS) Section 28-1171(6) defines off-highway vehicle as “a motorised vehicle when operated primarily off of highways on land, water, snow, ice or other natural terrain or on a combination of land, water, snow, ice or other natural terrain.” This definition differs from that of specialised mobile equipment set forth in the Uniform Certificate of Title Act. Given its broad breadth, several items of MAC equipment could require the issuance of a certificate of title. Under Section 28-2061 of ARS, “on the retail sale of a new off-highway vehicle as defined in Section 28-1171, the dealer or person first receiving the vehicle from the manufacturer shall apply, on behalf of the purchaser, to the department for a certificate of title to the motor vehicle in the name of the purchaser.” On the transfer of ownership of an off-highway vehicle, a person shall apply for and obtain a new certificate.

¹⁷⁷ The ROMA Regulations also apply to “hanging machinery that is attachable to an agricultural tractor,” forestry tractors, automotive machinery of any type, rated power, and weight, hauled machinery exceeding 750 kg of weight, machinery for distributing fertilizers, among other.

¹⁷⁸ Ley de 16 de diciembre de 1954, sobre Hipoteca Mobiliaria y Prenda sin Transmisión de la Posesión available at http://noticias.juridicas.com/base_datos/Privado/lhmpsd.html (last accessed Aug 28, 2015).

¹⁷⁹ *Id.* Article 12 and 34.

¹⁸⁰ *Id.* Article 36.

¹⁸¹ Such registrations must be renewed periodically (annually), and it essentially acts as a tax collecting device of the State.

21. Chapter 7 of Title 28 of the Arizona Revised Statutes (ARS) deals with certificates of title and registration. ARS 28-2001(2) defines a “serial number” as “the number placed on the vehicle by its manufacturer or assigned pursuant to Section 28-2165.” Under that Section, if a serial number is altered, removed, obliterated, defaced, omitted or otherwise missing, the director may assign a special serial number. Under sub-section D, “the director shall furnish to the applicant a serial plate together with the authorisation of use that shall be immediately delivered to a department inspector or agent who shall permanently attach the serial plate to the item in a conspicuous position and certify the attachment on the authorisation of use.”

California

22. The California Vehicle Code (CVC) refers to specialised equipment which it further sub-divides into types based on their use in specific industries. Certain specialised vehicles, including special construction, cemetery, special mobile equipment, logging vehicles, implements of husbandry, and cotton or farm trailers are generally exempt from regular registration. The owner of a qualifying vehicle is issued a specialised equipment (SE) plate and an identification card. As a requirement, a certificate of title is not issued for vehicles with the SE designation. However, the owner may voluntarily apply for a California certificate of title. SE registration is required for:

- special construction, special mobile, and cemetery equipment, and logging vehicles;¹⁸² and
- cotton and farm trailers, water tanks, oversize feed and seed motor vehicles, automatic bale wagons, and cotton module movers.¹⁸³

23. One type of SE is special mobile equipment which is: (i) not self-propelled, (ii) not designed or used primarily for transporting persons or property, and (iii) only incidentally operated on the highways. Some examples of special mobile equipment include generators, log splitters, tar pots, chippers, cement mixers, and welders. Several items of MAC equipment may fall under this category of special mobile equipment.

24. California legislation defines special construction vehicle as “a vehicle used more than 51 percent of the time for highway construction that occasionally moves over the highways, and is oversize or overweight.”¹⁸⁴ Such vehicles may also require special permits from the Department of Transportation or local authorities because of their size. Special construction equipment includes any vehicle used primarily for highway grading, paving, earth moving, or other highway or railroad right-of-way work.¹⁸⁵ Several items from the MAC List may fall under this category of special mobile equipment.

Colorado

25. Colorado laws define special mobile machinery as “machinery that is pulled, hauled, or driven over a highway and is either: (i) a vehicle or equipment that is not designed primarily for the transportation of persons or cargo over the public highways; or (ii) a motor vehicle that may have been originally designed for the transportation of persons or cargo over the public highways, and has been redesigned or modified by the addition of mounted equipment or machinery, and is only

¹⁸² California Vehicle Code, §5011.

¹⁸³ *Id.*, at §36101.

¹⁸⁴ See *V C Section 565 Special Construction Equipment*, available at https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv_content_en/dmv/pubs/vctop/vc/d1/565, (last accessed Aug 28, 2015).

¹⁸⁵ CVC §565. These vehicles are not designed for transporting persons or property and are only occasionally operated or moved over the highways.

incidentally operated or moved over the public highways.”¹⁸⁶ Special mobile machinery includes vehicles commonly used in the construction, maintenance, and repair of roadways, the drilling of wells, and the digging of ditches.¹⁸⁷ Vehicles that have been redesigned or modified with the attachment of special equipment or machinery weighing over 500 pounds in a manner that they became essential to the operation of the vehicle in accomplishing the purpose for which such vehicle is being used are also classified as special mobile machinery.¹⁸⁸ Most types of this category of equipment are used in the construction industry. All special mobile equipment must be registered in Colorado within 60 days of purchase.¹⁸⁹ Colorado also issues certificates of title for this type of equipment.

Florida

26. Chapter 316 of the Florida Statutes defines “special mobile equipment” as “any vehicle not designed or used primarily for the transportation of persons or property and only incidentally operated or moved over a highway, including, but not limited to, ditch-digging apparatus, well-boring apparatus, and road construction and maintenance machinery, such as asphalt spreaders, bituminous mixers, bucket loaders, tractors other than truck tractors, ditchers, leveling graders, finishing machines, motor graders, road rollers, scarifiers, earth-moving carryalls and scrapers, power shovels and draglines, and self-propelled cranes and earth-moving equipment.” Several Florida court cases construed this definition to distinguish between items that fall under the definition of motor vehicle and those that do not. In M.J.S. v. State, 453 So.2d 870 (Fla. 2d DCA 1984), the court decided that a construction backhoe is not a motor vehicle, as defined by Florida law. Similarly, the Florida Attorney General issued an opinion that “earth moving vehicle mounted on pneumatic tires and used solely for off-highway work is not a motor vehicle.”¹⁹⁰ In another case, a Florida court held that “we believe the legislature intended to distinguish machinery that requires the use of public highways to transport itself from motor vehicles, which are used primarily to transport persons or property.”¹⁹¹ Accordingly, in Florida, most types of MAC equipment would not be subject to the statute that applies to ordinary motor vehicles, including their registration and titling.

North Carolina

27. In North Carolina, only commercial vehicles and trailers that are intended to be operated on any state highway are required to be registered with the North Carolina Division of Motor Vehicles.¹⁹² Since most types of MAC equipment are not designed and intended to be operated on highways, they would be exempt from registration. Furthermore, N.C.G.S. 20-51 provides for specific exemptions from the registration, including:

- Farm tractors and trailers when used to transport farm implements, supplies, or products from farm to market or farm to farm;

¹⁸⁶ Colorado laws also define mounted equipment which is “any item weighing more than five hundred pounds that is permanently mounted on a vehicle, including mounting by means such as welding or bolting the equipment to a vehicle.” C.R.S. 42-1-102(60).

¹⁸⁷ C.R.S. 42-1-102(93.5).

¹⁸⁸ See City of Colorado Springs Tax Guide, Special Mobile Machinery and Equipment, *available at* <https://www.springsgov.com/units/salestax/Tax%20Guides/Ag-special%20equip.pdf> (last accessed Aug 28, 2015).

¹⁸⁹ (42-3-103(1)(a) C.R.S.).

¹⁹⁰ Op.Att’y Gen. Fla. 055-113 (1955).

¹⁹¹ Crane Rental of Orlando Inc. v. Ford S. Hausman, 518 So. 2d 395 (1987).

¹⁹² (N.C.G.S. 20-50). See also <http://www.haulinag.org/pdf/haulingAgManual.pdf#page=6&zoom=auto,-312,551> (last accessed September 25, 2015).

- Farm tractors and trailers on any trip within ten miles from point of loading, not to exceed 35 miles per hour;
- Farm trailers attached to licensed motor vehicles used to transport most agricultural commodities, livestock, supplies or equipment from farm to market or farm to farm.

28. However, for-hire farm tractors and trailers are not exempt from registration.

Texas

29. In Texas, the Department of Motor Vehicles, under Section 501.032 of the Transportation Code, has the power to assign a vehicle identification number to an item of equipment, including a tractor, farm implement, unit of special mobile equipment, or unit of off-road construction equipment:

- on which a vehicle identification number was not die-stamped by the manufacturer;
- on which a vehicle identification number die-stamped by the manufacturer has been lost, removed, or obliterated; or
- for which a vehicle identification number was never assigned.

30. Accordingly, an item of MAC equipment that does not have a serial number may be assigned one by the governmental authority.

Conclusion

31. Following the presentation of this report at the third Study Group meeting, the Study Group affirmed that the MAC Protocol should continue to include Article VIII(5) of the draft Protocol (modification of default remedy provisions) as based upon Article VII(5) of the Luxembourg Rail Protocol, and there was no need for a provision modelled on the de-registration and export request authorisation provision in Article XIII of the Aircraft Protocol.

Appendix VI – Research on the effect of registration of notices of sale under domestic law

1. This appendix was prepared by NatLaw for consideration at the fourth Study Group meeting in February 2016. Its purpose is to consider how Article XIX (Notices of Sale) of the draft MAC Protocol might affect domestic secured transactions regimes. It includes a comparative analysis of how Article XIX might affect the domestic regimes in seven countries (Colombia, France, Germany, Mexico, Spain, the United Kingdom and the United States). It is important to note that this analysis has not been updated since it was first prepared, and some States surveyed may have changed their domestic regimes.

Notices of Sale under the MAC Protocol

2. Article XVII of the Luxembourg Rail Protocol provides for the registration of notices of sale with respect to railway rolling stock. However, only the provisions relating to the mechanics of registration included in the Cape Town Convention and the Luxembourg Rail Protocol shall apply to such registrations. As a result, registration of a notice of sale shall have no effect under the Luxembourg Rail Protocol and such registrations and searches are only for informational purposes. As noted in the Official Commentary to the Luxembourg Rail Protocol: “The sole purpose of the registration facility is to give notice of the sale transaction with a view to securing a priority under national law.” Whether or not such a registration produces any effect under the domestic law is not a matter for the Luxembourg Rail Protocol.

Scenarios

3. For a clearer understanding of the implications of notices of sales that may be registered in the future MAC International Registry, this section sets out some scenarios in which a notice of sale may be expected to have an effect under the applicable domestic law. The following analysis focuses on the scenarios that involve a sale of a MAC object.

Likely unaffected transactions

4. For the purposes of this Note, sales in the ordinary course of business have been excluded as it is very unlikely that a registered notice of sale in the International Registry would have any effect on buyers in these circumstances. As a result, if Buyer 1 acquired equipment from a dealership but did not take possession, subsequent Buyer 2 should be able to take free of any interests in the equipment as long as it qualifies as a “buyer in the ordinary course of business.” The requirement for such a buyer is typically that it takes without knowledge that the sale violates the rights of another person in the goods.¹⁹³ Accordingly, a registered notice of sale would not affect the status of the buyer in the ordinary course of business unless the buyer: (i) actually searched the MAC International Registry; (ii) discovered a notice of sale; and (iii) the notice of sale included some indication that an acquisition of the equipment covered by the registered notice would be a violation of the rights of the buyer. In any case, buyers in the ordinary course of business are not expected to search any registration system in order to gain priority as against any earlier-in-time buyer of the same equipment before buying MAC equipment from a seller whose ordinary course of business is the sale of such equipment.

5. As noted in a paper discussed by the Study Group at its October 2015 meeting, many types of MAC equipment covered by the HS codes listed in the MAC Protocol Annexes are subject to registration in domestic title registries. The laws that govern these registries may also provide specific provisions on the transfer of ownership independently of the general rules incorporated in Civil or

¹⁹³ See UCC 1-201(9).

Commercial Codes.¹⁹⁴ These provisions may condition the transfer of ownership on the registration of a title document relating to the equipment irrespective of the knowledge of the transferee. Accordingly, a notice of sale registered in the International Registry might not have any effects on the transactions related to such equipment whose transfer of ownership requires registration in the domestic title registry.

6. A registered notice of sale would also not seem to affect a national interest of the secured creditor. Knowledge of a competing claim would not be relevant for the creation and priority of a security interest under many domestic secured transactions laws. Accordingly, a domestic security interest would have priority even though the secured creditor knew about a notice of sale registered in the International Registry to the extent that the seller/debtor retained sufficient rights to create a security interest. If the seller has sold the equipment in a manner in which the sale divested it of all rights, a security interest would not be created whether or not a notice of sale has been registered.

7. This appendix does not take into account the various situations that could arise in connection with the acquisition of stolen MAC equipment when the considerations protecting a good faith purchaser vary. It also does not take into account a prospective notice of sale that is registered in anticipation of consummating the sale transaction. The Official Commentary notes that such notices are highly unlikely to produce any effects under the domestic law.

Potentially affected transactions

8. At least two scenarios can be identified in which a notice of sale may have an effect on the rights of the parties involved. In both of these scenarios, the conflict between Buyer 1 and Buyer 2 is that of priority and not whether one of the transfers is invalid.

9. Registration of a notice of sale would seem to have some application in a narrow context when: (i) MAC equipment is sold not in the ordinary course of business, and (ii) the seller retains possession of the MAC equipment. If ownership is transferred to Buyer 1 who takes possession, thus divesting the seller of any power to transfer rights in that MAC equipment, there is nothing for Buyer 2 to acquire. However, if Buyer 1 allowed the seller to retain possession of the MAC equipment, many domestic laws empower the seller to transfer rights as if it were the owner so the notice of sale may play a role and affect the rights acquired by a subsequent Buyer 2.

10. A second scenario of the potential effect of a notice of sale is when Buyer 1 acquires ownership to MAC equipment but leaves the seller in possession. Subsequently, Buyer 2 acquires ownership to the same asset but also allows the seller to retain possession of the equipment. Before Buyer 2 takes delivery of the equipment, Buyer 1 registers a notice of sale. Accordingly, registration of a notice of sale may affect such buyer before Buyer 2 enters into a transaction or subsequent to concluding a sale contract but before taking delivery.

Country Reports

11. This section examines selected domestic laws and evaluates the potential impact of notices of sales registered under the MAC Protocol.

Colombia

12. Under Article 754 of the Colombian Civil Code, ownership rights over the equipment can be transferred to the buyer without the seller having to actually transfer possession of the equipment (*i.e.*, *constitutum possessorium*). Since ownership has passed to the buyer, the seller no longer retains an interest in the equipment that can be passed to a subsequent buyer. Article 762 provides

¹⁹⁴ See Arizona Revised Statutes Section 28-2058.

that “the person in possession is considered owner until another person proves his/her ownership rights.” Thus, if possession of the equipment is transferred by the seller to Buyer 2, such Buyer will be deemed to be the owner until the original buyer (Buyer 1) proves otherwise. Colombian law only provides for a presumption of ownership in favour of the subsequent buyer (Buyer 2) until proven otherwise and the subsequent buyer does not have a defence of good faith purchase as against the claim of the original buyer. S/he may defeat the claim of the original buyer only under the statute of limitations and under Article 947 of the Civil Code. Thus, since Colombian law grants greater protections to the original buyer than to the subsequent buyer and good faith is not a relevant element in the determination of ownership or priority rights of the latter, the registration of a notice of sale would seem to have no effect under Colombian law.

France

13. Article 1583 of the French Civil Code allows the transfer of ownership over equipment to a buyer without actual delivery of the equipment to the buyer. Since ownership has been transferred to the buyer, any subsequent sale of the equipment by the seller is void under Article 1599 which provides that “the sale of a thing belonging to another is null.” It should be noted that the general principle of “in matters of movables, possession is equivalent to title,” recognized by the Civil Code in Article 2276, has been interpreted by the courts to override the nullity of contract.¹⁹⁵ In order for the subsequent buyer to be protected against the original owner pursuant to Article 2276, the subsequent buyer must receive actual (“real”) possession of the equipment and act in good faith. The good faith element of this protection requires the buyer to be unaware that the seller did not have ownership rights over the equipment sold or that s/he should have known the seller did not have ownership rights over the equipment sold. Therefore, a registered notice of sale could affect the good faith status of the subsequent buyer if the subsequent buyer actually searched the International Registry or the court found that it should have searched the Registry.

14. A registered notice of sale may also have an impact on the right to damages. Article 1599 of the Civil Code provides that “...sale may give rise to damages where the buyer did not know that the asset belonged to another.” Thus, a registered notice of sale could impact the right to damages of the buyer if the subsequent buyer did search the International Registry and found a notice of sale. However the buyer must actually know about a registered notice of sale rather than just be on inquiry notice that would require a reasonable person to search as relevant to the question of priority examined in the preceding paragraph.

Germany

15. Under Article 930 of the German Civil Code, a buyer of equipment that allows the seller to remain in possession acquires ownership. Since ownership has passed to the buyer, the seller no longer retains any interest that it may pass to a subsequent buyer under Article 929. However, since the seller remains in possession of the equipment, Article 932(1) empowers the seller to transfer ownership to a subsequent buyer. For such a subsequent buyer to acquire ownership and thus trump the rights of the first buyer, s/he must acquire the equipment in good faith. The elements of good faith are governed by Article 932(2) under which the subsequent buyer does not acquire the equipment if s/he knows, or as a result of gross negligently is not aware, of the fact that the equipment has been previously sold. A notice of sale registered in the International Registry may have an impact on the good faith protected status of the subsequent buyer if the buyer actually

¹⁹⁵ Dimitar STOYANOV, *The Conflict Between the Legal Interests of the Original Owner and the Good Faith Acquirer of Movables – A Comparative Overview of the Solutions*, p. 98-102, LESIJ NO. XXII, VOL. 1/2015.

searched the International Registry or the court found that it acted with gross negligence in the failure to do so.¹⁹⁶

16. The application of Article 933 of the Civil Code could also be affected by a registered notice of sale. Under this article, the subsequent buyer may acquire equipment but leave it in possession of the seller. Accordingly, both Buyer 1 and 2 acquired ownership but left the equipment in possession of the seller. For the subsequent buyer to qualify for the good faith protection, s/he may not acquire any knowledge before s/he takes delivery. Accordingly, if the first buyer registers a notice of sale before the subsequent buyer takes delivery this could affect the knowledge element of the good faith purchaser protection if Buyer 2 actually searched the International Registry or was grossly negligent in failing to do so before taking delivery of the equipment.

Mexico

17. Under Article 2014 of the Mexican Federal Civil Code, ownership of the equipment can be transferred at the time the sales contract is entered into, regardless of whether the equipment is delivered to the buyer. Article 2284 provides that when the seller remains in possession of the asset sold pursuant to a sales contract, s/he is vested with the rights of a bailee with respect to the asset. Furthermore, Article 2511 provides that the sale of another's property has no legal force or effect. As a general rule, since the person in possession of the equipment lacks ownership rights or other power to transfer rights over the equipment, s/he cannot transfer an interest to a subsequent buyer. However, Article 799 provides for an exception by creating a presumption of acquired ownership by the subsequent buyer in good faith. Under this article, the subsequent buyer who took possession in good faith is presumed to have acquired ownership as if from the actual owner of the equipment.

18. According to Article 806, a possessor in good faith is one that takes without knowledge that the transferor lacked ownership to the equipment. Article 807 establishes that there is a presumption of good faith in favour of the possessor and the person who alleges the existence of the possessor's bad faith has the burden of proof. Therefore, the registration of a notice of sale could have an effect on the subsequent buyer's good faith but the burden is on the initial buyer to prove that the subsequent buyer took with knowledge of its interest referenced in the registered notice of sale. However, Mexican case law has established that only knowledge of the fact that the seller had no ownership rights over the asset overrides the good faith presumption. It is unlikely that discovery of a registered notice of sale would impact such knowledge of the subsequent buyer as such registration is not determinative of the seller's rights in the equipment.¹⁹⁷ Unless Buyer 1 proves Buyer's 2 bad faith within three years, Buyer 2 would acquire full ownership to the asset by prescription.

Spain

19. Article 1463 of the Spanish Civil Code allows the transfer of ownership of equipment from the seller to the buyer without the actual delivery of equipment (*i.e., constitutum possessorium*). Spanish law also recognizes the general principle "*nemo plus iura alium transferre potest quam ipse habet*" (nobody can transfer property that is not its own).¹⁹⁸ Thus, as a general rule, since equipment remains in possession of the seller and ownership is transferred to the buyer, the seller has no interest that may be transferred to a subsequent buyer. However, Article 464 protects buyers

¹⁹⁶ See further Howard Rosen & Benjamin von Bodungen, *The Luxembourg Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock – Overview and Current Status*, 46 No. 4 UCC L.J. ART. 3 at 6 (November 2015).

¹⁹⁷ Buena Fe. Para usucapir es necesario mantenerla permanentemente durante el plazo de cinco años, Tribunales Colegiados de Circuito [TCC] [Collegiate Circuit Courts], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Tomo XXVIII, Septiembre 2008, Pag. 1191 (Mex.).

¹⁹⁸ José Manuel de Torres Perea, Acquisition from a non-domino in Spanish civil law, Papers of the Private Law of the Philippines and Spain International Scientific Congress, available at <http://www.eumed.net/libros-gratis/2015/1458/spanish-civil-law.htm>.

in good faith of movable property by stating that the possessor of movable property has the right equivalent to title that it may pass to a good faith purchaser. Registration of a notice of sale could have an impact on the good faith status of the subsequent purchaser.

The United Kingdom

20. In the United Kingdom, if a person sells machinery to a buyer but remains in possession, the seller retains a legal interest as a bailee. However, once the seller's intention changes, *i.e.* to sell the asset, s/he acquires a full possessory title subject to the right of the buyer.¹⁹⁹ The exception to the *nemo dat* principle is founded on the estoppel concept which puts the risk of a double sale on Buyer 1 because it was s/he who allowed the seller to remain in possession.²⁰⁰ Under Section 24 of the Sale of Goods Act, a seller who remains in possession may pass good title "to any person receiving the same in good faith and without notice of the previous sale." Section 24 creates a presumption that the seller was expressly authorised by the owner of the goods to transfer ownership. The subsequent buyer must take delivery of the asset, either actually or constructively. Section 8 of the Factor's Act includes a parallel provision that allows sellers to pass good title to subsequent good faith purchasers. Registration of a notice of sale in the International Registry would seem to have an effect: (i) if the subsequent buyer actually discovered such registration by searching the International Registry so that s/he would not be without notice of the previous sale, or (ii) if the court interpreted the good faith element of the protection as requiring a search that the subsequent buyer failed to conduct.

21. These two Sections apply only in a situation in which the seller has in fact sold the equipment. In contrast, in a situation in which the seller merely entered into an agreement to sell and the buyer has registered a notice, the normal rules for the passage of title will apply. In this situation, the subsequent buyer could be liable to the person who originally agreed to purchase the equipment only if s/he took with notice of the breach of the agreement.²⁰¹ Discovery of the registered notice of sale is unlikely to impart such notice on the subsequent buyer unless the registration also indicated that the rights of Buyer 1 would be breached. In any case, the priority of Buyer 2 would not be affected because Buyer 1 would have not acquired any rights in the equipment.

The United States

22. Under the U.S. Uniform Commercial Code (UCC) 2-401, ownership to equipment may pass "in any manner and on any conditions explicitly agreed on by the parties." However, for an agreement between the two parties to transfer ownership, the equipment must be identified in a manner set forth in UCC 2-501. Under UCC 2-403, a person with voidable title has power to transfer a title to a good faith purchaser for value. The seller may also have power to transfer title to a good faith purchaser for value under the principles of law or equity, such as estoppel.²⁰²

23. Overall, a buyer of equipment must: (i) qualify as a purchaser, which is defined in UCC 1-201; (ii) act in good faith which is defined in the same section; and (iii) take for value, as defined in UCC 1-204. The second element of the good faith for value purchaser protection may be affected by a notice of sale registered under the MAC Protocol. The judicial decisions that have interpreted this element under similar circumstances have reached different outcomes. On the one hand, a buyer may be disqualified from the protection if: (i) s/he had a "notice of facts that would put a reasonably prudent person on inquiry," or (ii) "failed to inspect records of title and prior ownership that would put the buyer on notice that the seller is not the true owner and would raise doubts concerning the

¹⁹⁹ Roy Goode, *Commercial Law* 58 (3rd ed. 2004).

²⁰⁰ *Id.*, at 59.

²⁰¹ Michael G. Bridge, *Sale of Goods* 451.

²⁰² Hawkland UCC Series § 2-403:2.

seller's authority to transfer title."²⁰³ On the other hand, other court cases also indicate "a buyer's failure to investigate, or inquire into, the seller's title does not deprive the buyer of good-faith purchaser status."²⁰⁴ In any case, the buyer's knowledge or notice of facts is measured as of the time of sale and any knowledge/notice acquired thereafter is immaterial. Overall, the commercial reasonable standards, applicable in the particular circumstances, would determine whether any inquiry is necessary and whether the inquiry should include a search of the International Registry.

Conclusion

24. At its fourth meeting, the Study Group decided that the draft MAC Protocol should adopt the Luxembourg Rail Protocol approach of allowing the registration of notices of sale. In making this decision, the Study Group noted that not inserting such an article would constitute a further deviation from the previous Protocols (which either allowed the registration of notices of sales without any substantive effect, or required such registrations for the purposes of applying the priority rules). The Committee of Governmental Experts affirmed this approach.

²⁰³ 77A C.J.S. Sales § 413.

²⁰⁴ *Id.*

Appendix VII – Research on potential candidates for Supervisory Authority

1. During CGE1 in March 2017, the Committee requested that the Secretariat undertake further research to identify appropriate international organisations that could perform the role of Supervisory Authority for the MAC Protocol. The following research was prepared by the UNIDROIT Secretariat between June and August 2017, with assistance from NatLaw.

2. This Appendix presents a detailed list of organisations that could theoretically perform the role of SA of the future MAC Protocol. To present the most extensive list of candidates possible, the paper has considered organisations with connections to international commercial trade, development and the agricultural, construction and mining sectors. It does not consider regional organisations.

3. This paper divides the list of potential candidates into two sections:

- (i) International Public Entities
- (ii) Single sector international Public Entities

4. The purpose of providing an extensive list is to present an exhaustive range of options. However, majority of the listed organisations are not well-suited to perform the role of SA for several reasons. Those entities listed in section (ii) would find it challenging to perform the role of SA, due to having expertise related to only one of the categories of equipment that the future MAC Protocol will apply to. As such, this paper suggests that section (ii) entities are not viable options for the role of SA.

(iv) International Public Entities

A. The International Finance Corporation/World Bank (IFC)²⁰⁵

5. The IFC, a member of the World Bank Group, is the largest global development institution focused exclusively on the private sector in developing countries. The IFC provides financing and advice to private sector clients in different industries, with a focus on infrastructure, manufacturing, agribusiness, services and financial markets. Its products and services include the provision of loans, equity investments, trade and supply chain finance, syndications, treasury client solutions, blended finance, venture capital, advice and asset management.

6. The IFC has a longstanding engagement with the MAC Protocol project. The possibility of the International Finance Corporation (IFC) being the Supervisory Authority was first raised during Study Group negotiations. At the third Study Group meeting, the representative of the IFC noted that the Supervisory Authority issue would be discussed internally at the IFC, to determine whether it was feasible for the IFC to perform such a role. In January 2016, the UNIDROIT Secretariat provided additional information to the IFC in relation to the nature of the Supervisory Authority role to assist with their discussions. At the fourth Study Group meeting the representative of the IFC noted that the IFC was exploring the possibility of the IFC acting as the Supervisory Authority to the Protocol. He mentioned a number of considerations, namely whether such a role would fall within the sphere of activity of the IFC and its articles of agreement, given that IFC's exclusive focus was on investment in the private sector. However, he noted that parts of the IFC's mandate was to promote the development of the private sector, which could possibly be read to allow for a slightly broader range of activities. He also noted that from a practical perspective, if the IFC was to perform the role of Supervisory Authority, actions would have to be taken to avoid possible conflicts of interest, as the IFC would be both a user of the International Registry and its Supervisory Authority.

7. The UNIDROIT Secretariat continues to liaise with the IFC regarding this issue.

²⁰⁵ See http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home.

B. The World Customs Organization (WCO)²⁰⁶

8. The World Customs Organization, established in 1952 as the Customs Co-operation Council (CCC) is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations. The WCO represents 182 Customs administrations across the globe that collectively process approximately 98% of world trade. The WCO provides leadership, guidance and support to Customs administrations to secure and facilitate legitimate trade, realize revenues, protect society and build capacity.

9. The WCO maintains the HS and would have unrivalled expertise in managing changes to the HS and assessing how they may affect the Annexes to the future MAC Protocol. However, the WCO does not have any expertise in secured transactions or international electronic registries, and has not expressed an interest in performing the function.

C. Asian Infrastructure Investment Bank (AIIB)²⁰⁷

10. The AIIB is a multilateral development bank, founded in 2016, to address Asia's infrastructure needs. Headquartered in Beijing, China, AIIB provides sovereign and non-sovereign financing for sustainable projects in, among others, rural infrastructure and agricultural development, urban development, as well as energy and power.²⁰⁸ According to its Articles of Agreement, the AIIB will "provide or facilitate financing to any member, or any agency, instrumentality or political subdivision thereof, or any entity or enterprise operating in the territory of a member, as well as to international or regional agencies or entities concerned with economic development of the Asia region."²⁰⁹

11. The AIIB have not been closely engaged with the development of the MAC Protocol.

D. United Nations Conference on Trade and Development (UNCTAD)²¹⁰

12. UNCTAD is a United Nations agency established in 1964. It provides analysis, consensus-building, and technical assistance to developing countries. UNCTAD developed the highly successful Generalised System of Preferences (GSP) under which developed countries accord tariff concessions to exports from developing countries. UNCTAD works to:

- Diversify economies to make them less dependent on commodities
- Limit their exposure to financial volatility and debt
- Attract investment and make it more development friendly
- Increase access to digital technologies
- Promote entrepreneurship and innovation
- Help local firms move up value chains
- Speed up the flow of goods across borders
- Protect consumers from abuse
- Curb regulations that stifle competition
- Adapt to climate change and use natural resources more effectively

13. The role of SA does not neatly fit within the scope of UNCTAD's mandate and activities. However, given its status as a UN agency, it could possibly function as such. The UNIDROIT Secretariat

²⁰⁶ See <http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx>.

²⁰⁷ See <https://www.aiib.org/en/about-aiib/index.html>.

²⁰⁸ See <https://www.aiib.org/en/about-aiib/who-we-are/our-work/index.html>.

²⁰⁹ See <https://www.aiib.org/en/about-aiib/who-we-are/financing-operations/index.html>.

²¹⁰ See <http://unctad.org/en/Pages/aboutus.aspx>.

has not engaged with UNCTAD and it is unknown whether UNCTAD would have an interest in performing this role.

(v) Single Sector International Public Entities

A. International Fund for Agricultural Development (IFAD)²¹¹

14. IFAD is an international financial institution and a specialized agency of the United Nations established in 1977. Since its establishment, IFAD “has focused exclusively on rural poverty reduction, working with poor rural populations in developing countries to eliminate poverty, hunger and malnutrition; raise their productivity and incomes; and improve the quality of their lives.”²¹² IFAD operates in 120 countries and territories around the world. It provides loans to member states and grants “to institutions and organizations in support of activities to strengthen the technical and institutional capacities linked to agricultural and rural development.”²¹³ “IFAD works in partnership with others – borrowing-country governments, poor rural people and their organizations, and other donor agencies. Its focus on local development has given it a role in bridging the gap between multilateral and bilateral donors on the one side, and civil society represented by NGOs and community-based organizations (CBOs) on the other.”²¹⁴ The nine areas supported by IFAD’s work are:²¹⁵

- agricultural development
- financial services
- rural infrastructure
- livestock
- fisheries
- capacity-and institution-building
- storage/food-processing/marketing
- research/extension/training
- small and medium scale enterprise development

15. IFAD’s sole focus on agriculture does not make it a suitable candidate for the Supervisory Authority.

B. Food and Agriculture Organization (FAO)²¹⁶

16. The FAO is a specialized agency of the United Nations, established in 1945. Its main goals are “the eradication of hunger, food insecurity and malnutrition; the elimination of poverty and the driving forward of economic and social progress for all; and, the sustainable management and utilization of natural resources, including land, water, air, climate and genetic resources for the benefit of present and future generations.”²¹⁷ Its strategic objectives include the elimination of hunger and food insecurity, making agriculture more productive, reducing rural poverty, enabling inclusive and efficient agricultural and food systems, and increasing the resilience of livelihoods to threats and crises.²¹⁸ FAO also works to strengthen political will and share policy expertise with

²¹¹ See <https://www.ifad.org/what/overview>.

²¹² See <https://www.ifad.org/en/what/tags/1818309>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See <http://www.fao.org/home/en/>.

²¹⁷ See <http://www.fao.org/about/en/>.

²¹⁸ *Id.*

member countries “in devising agricultural policy, supporting planning, drafting effective legislation, and creating national strategies to achieve rural development and hunger alleviation goals.”²¹⁹

17. FAO’s sole focus on agriculture does not make it a suitable candidate for the Supervisory Authority.

C. The World Farmers Organization (WFO)²²⁰

18. The WFO is an organization that works to bring together farmers’ organizations and agricultural cooperatives around the world with the objective of developing policies that support farmers’ causes in developed and developing countries. It represents small and large scale farmers. “By advocating on behalf of farmers and representing their interests in international policy forums, WFO supports farmers in better managing extreme price volatility, leveraging market opportunities, and timely access to market information.”²²¹ “WFO’s work covers all agriculture related thematic areas including forestry, aquaculture and fisheries, environment, trade, extension, research and education. WFO encourages farmers’ involvement in sustainable rural development, the protection of the environment and facing other emerging challenges, such as climate change, generational renewal, and gender equality.”²²² To achieve its goals, WFO:

- “Represent its members in governmental, non-governmental and inter-governmental venues, with a view to encouraging the world’s farming community to establish and develop contacts, relations and partnerships.
- Promote and advocate on behalf of farmers, encouraging the creation of adequate agricultural policies.
- Encourage partnerships among its members, as well as with international organisations, executing agreements, protocols and conventions with other bodies and third parties in general.
- Conduct and promote research, in-depth analysis and studies, as well as support and organise conferences, meetings and seminars on topics and arguments of interest to the Organisation.”²²³

19. WFO’s sole focus on agriculture does not make it a suitable candidate for the Supervisory Authority.

D. World Mining Congress (WMC)²²⁴

20. The World Mining Congress established in 1958 after the first International Mining Congress, is a Poland-based international organization affiliated with the United Nations. The Preamble to the Statutes of the WMC stipulates that the objective of the WMC is to promote and support scientific and technical co-operation, for national and international progress in the fields of mining of solid minerals and the development of natural mineral resources.²²⁵

21. WMC’s sole focus on mining would not make it suitable for the Supervisory Authority.

²¹⁹ See <http://www.fao.org/about/how-we-work/en/>.

²²⁰ See <http://www.wfo-oma.org/>.

²²¹ See <http://www.wfo-oma.org/about-wfo.html>.

²²² *Id.*

²²³ *Id.*

²²⁴ See <http://www.wmc.org.pl/?q=node/1>.

²²⁵ See <http://www.wmc.org.pl/?q=node/3>.

Appendix VIII – Research on amendment procedures in other international instruments

1. This appendix contains a survey of amendment mechanisms in 17 different international treaties. This research was undertaken by the UNIDROIT Secretariat in 2018 and 2019 to assist in the development of an amendment mechanism for the MAC Protocol that is widely acceptable to negotiating States and reflects accepted treaty practice.

2. The following 17 treaties were examined in the preparation of this analysis:

- (i) [Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction \(CWC\) \(1993\)](#)
- (ii) [Single Convention on Narcotic Drugs \(1961\)](#)
- (iii) [Convention on Psychotropic Substances \(1971\)](#)
- (iv) [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances \(1988\)](#)
- (v) [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal \(1989\)](#)
- (vi) [Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade \(1998\)](#)
- (vii) [Stockholm Convention on Persistent Organic Pollutants \(POPS\) \(2001\)](#)
- (viii) [Convention on Facilitation of International Maritime Traffic \(FAL Convention\) \(1965\)](#)
- (ix) [Vienna Convention for the Protection of the Ozone Layer \(1985\)](#)
- (x) [Montreal Protocol on Substances that Deplete the Ozone Layer \(Montreal Protocol\) \(1987\)](#)
- (xi) [The International Convention for the Prevention of Pollution from Ships \(MARPOL Convention\) \(1973\)](#)
- (xii) [Convention on International Trade in Endangered Species of Wild Fauna and Flora \(CITES\) \(1973\)](#)
- (xiii) [Agreement on Trade in Civil Aircraft \(1980\)](#)
- (xiv) [Comprehensive Nuclear-Test-Ban Treaty \(1996\)](#)
- (xv) [The International Convention for the Safety of Life at Sea \(SOLAS Convention\) \(1974\)](#)
- (xvi) [Energy Charter Treaty \(1994\)](#)
- (xvii) [Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity \(the Biosafety Protocol\) \(2000\)](#)

3. The treaties surveyed were selected on the basis that they are widely adopted (most instruments considered have at least 150 States Parties), contain both substantive and technical parts (in most instances, divided between the Convention containing the substantive rules and an Annex or Schedule containing the technical parts) and illustrate a variety of different amendment mechanisms.

4. Table 1 of this appendix provides a summary of the amendment mechanisms surveyed and indicates the most important features of their amendment mechanisms. Table 2 provides a more detailed examination and explanation of the amendment mechanisms in the 17 international treaties surveyed. The instruments are listed according to the relevance of their amendment mechanisms in relation to what will be required for the MAC Protocol amendment mechanism, taking into account issues such as (i) whether the instrument has entered into force; (ii) the number of State parties; (iii) the amendment mechanism's flexibility; (iv) the amendment mechanism's ability to prevent fragmentation of the international regime; and (v) whether there have been successful amendments and revisions.

5. The treaties examined in the Tables of this Appendix demonstrate that there is large variation in the amendment mechanisms contained in existing international treaties. Amendments

mechanisms are generally tailored to suit the purpose and needs of the part of the instrument to which they relate. In many instances, the surveyed treaties adopt flexible amendment mechanisms when dealing with technical, procedural or practical matters, as opposed to substantive rules. The Secretariat's proposed alternative amendment mechanism discussed in Part 6X of the Legal Analysis is modelled on provisions in several of the treaties examined in this Appendix.

Table 1 – Summary of amendment processes in selected international treaties				
Treaty	Article	Subject of amendment process	Amendment approval mechanism	Does the mechanism require ratification to bind Contracting States or allow for an opt-out?
1. Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction (CWC) (1993)	Art. XV(2)	Convention	CoP (Conference of Parties): consensus or two-thirds majority.	Requires ratification (by each Contracting State for entry into force in relation to that State).
	Art. XV(5)	Annex	Tacit adoption of the Executive Council's recommendation unless a State Party (SP) objects.	Binding on all SPs, no opt-out permitted.
2. Single Convention on Narcotic Drugs (1961)	Art. 47	Convention	CoP UN ECOSOC (United Nations Economic and Social Committee): two-thirds majority.	Requires ratification. An objection by a SP will lead to the meeting of a CoP.
	Art. 3	Schedules of substances and preparations	Commission on Narcotic Drugs of the UN ECOSOC: two-thirds majority.	No opt-out. a SP can request the review of this decision by the UN ECOSOC.
3. Convention on Psychotropic Substances (1971)	Art. 30	Convention	CoP UN ECOSOC: two-thirds majority.	Requires ratification. An objection will lead to the meeting of a CoP.
	Art. 2	Schedules of substances	Commission on Narcotic Drugs of the UN ECOSOC: two-thirds majority.	No opt-out. A SP can request the review of this decision by the UN ECOSOC.
	Art. 3	Schedule of preparations	Commission on Narcotic Drugs of the UN Eco Soc: two-thirds majority.	No opt-out.
4. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)	Art. 31	Convention	Tacit adoption unless a SP objects during a 24 months period. CoP: two-thirds majority.	Requires ratification. Requires ratification.
	Art. 12	Tables of substances	Commission on Narcotic Drugs of the UN ECOSOC: two-thirds majority.	No opt-out. A SP can request the review of the Commission's decision by the UN ECOSOC.
5. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)	Art. 17	Convention and protocols	CoP: consensus or otherwise a three-fourths majority for amendments to the Convention or a two-thirds majority for amendments to a protocol.	Requires ratification. At least three-fourths (Convention) or two-thirds (protocol) of the SP must opt in.
	Art. 18	Annexes	CoP: consensus or otherwise a three-fourths majority for amendments to an annex to the Convention or a two-thirds majority for amendments to an annex to a protocol.	No opt-out. A SP unable to implement the amendment is allowed to ignore it.

6. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)	Art. 21	Convention	CoP: consensus or otherwise a three-fourths majority.	Requires ratification. At least three-fourths of the SP.
	Art. 22	Most annexes	CoP: consensus or otherwise a three-fourths majority.	No opt-out. A SP unable to implement the amendment is allowed to ignore it.
		Annex III	CoP: consensus.	Binding on all SPs.
7. Stockholm Convention on Persistent Organic Pollutants (POPS) (2001)	Art. 21	Convention	CoP: consensus or otherwise a three-fourths majority.	Requires ratification by at least three-fourths of the SP.
	Art. 22	Annexes	CoP: consensus or otherwise a three-fourths majority.	No opt-out. A SP unable to implement the amendment is allowed to ignore it.
	Art. 8	Lists of chemicals in Annexes A, B and C.	CoP: consensus or otherwise a three-fourths majority.	No opt-out.
8. Convention on Facilitation of International Maritime Traffic (FAL Convention) (1965)	Art. IX	Convention	CoP: two-thirds majority.	Requires ratification by at least two-thirds of the SPs but the CoP can make the amendment binding on all SPs.
	Art. VII	Annex	Majority of SPs without a formal meeting. CoP, if requested by at least one-third of the SPs: two-thirds majority.	No opt-out.
9. Vienna Convention for the Protection of the Ozone Layer (1985)	Art. 9	Convention	CoP: consensus or otherwise a three-fourths majority for amendments to the Convention or a two-thirds majority for amendments to a protocol.	Requires ratification. At least three-fourths (Convention) or two-thirds (protocol) of the SPs must opt in.
	Art. 10	Annexes	CoP: consensus or otherwise a three-fourths majority for amendments to an annex to the Convention or a two-thirds majority for amendments to an annex to a protocol.	Express opt-out is allowed.
10. Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) (1987)	Art. 11	Protocol	CoP: two-thirds majority on all matters of substance (Rules of procedure of Meetings of Parties, article 39), two-thirds majority for procedural matters.	No opt-out.
11. The International Convention for the Prevention of Pollution from Ships (MARPOL Convention) (1973)	Art. 16(3)	Convention, protocols and if deemed necessary	CoP, if requested by at least a third of the SPs: adoption by a two-thirds majority.	Requires ratification.
		Annexes and Protocol II		Opt-out is possible. If more than a third of the SPs representing at least 50% of the gross world tonnage of merchant fleets object, the amendment is refused.

		Appendix to an annex		No opt-out.
	Art. 16(2)	Convention, protocols and if deemed necessary	Appropriate body: two-thirds majority.	Requires ratification by at least two-thirds of the SPs, representing at least 50% of the gross world tonnage of merchant fleets.
		Annexes and Protocol I		Opt-out possible. If more than a third of the SPs representing at least 50% of the gross world tonnage of merchant fleets object the amendment is refused.
Appendix to an annex	No opt-out.			
12. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973)	Art. XVII	Convention	Amendment Conference, if at least half of the SPs request it: majority in favour and no negative vote.	Requires ratification.
	Art. XV	Appendixes I and II	CoP: two-thirds majority.	Express opt-out possible.
	Art. XVI	Appendix III	State-specific list recognized by the Convention.	A State may make a reservation against the enforcement of another SP's list.
13. Agreement on Trade in Civil Aircraft (1980)	Art. 9(5)	Agreement and annex	WTO Aircraft Committee	Requires ratification.
14. Comprehensive Nuclear-Test-Ban Treaty (1996)	Art. VII	Most of the treaty	Amendment conference, if requested by a majority of the SP: majority of the SP without a negative vote.	Requires ratification.
	Art. VII	Parts I and III as well as annexes 1 and 2 of the protocol.	Tacit adoption of an Executive Council recommendation on the amendment if no SPs objects. If there is an objection an Amendment Conference is convened.	No opt-out.
15. The International Convention for the Safety of Life at Sea (SOLAS Convention) (1974)	Art. VIII(c)	Convention and chapter I of the annex	CoP, if requested by at least a third of the SPs: two-third majority.	Requires ratification.
		Rest of the annexes		No opt-out. The amendment will not be enforced if one-third of the SPs or a group of SPs representing at least 50% of the gross tonnage of the world's merchant fleet object.
	Art. VIII(b)	Convention and chapter I of the annex	Maritime Safety Committee (IMO): two-thirds majority of the SPs if at least a third of the SPs are present.	Requires ratification.

		Rest of the annexes		No opt-out. The amendment will not be enforced if one-third of the SPs or a group of SPs representing at least 50% of the gross tonnage of the world's merchant fleet object.
16. Energy Charter Treaty (1994)	Art. 34(3)(l)	Treaty	Charter CoP: unanimity.	Requires ratification.
	Art. 33 / Art. 34(3)(h) / Art. 36(1)	Protocols	Charter CoP: unanimity.	Requires ratification.
	Art. 34(3)(m)	Annexes	Charter CoP: unanimity.	Requires ratification.
17. Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity (the Biosafety Protocol) (2000)	Art 29(4)(e)	Whole convention	CoP: consensus or otherwise two-thirds majority.	Requires ratification.

Table 2 – Analysis of amendment processes in selected international treaties

Treaty	SPs 226	Summary	Amendment mechanism(s)	Amendment process(es)	Time periods	Thresholds	Comments
1. Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction (CWC) (1993)	193	<p>The CWC is an arms control treaty that outlaws the production, stockpiling, and use of chemical weapons and their precursors.</p> <p>The CWC has a two part hybrid amendment mechanism for its annexes: (i) an initial tacit process that binds all States unless any single SP objects, followed by (ii) a conference process that requires either consensus or a two-thirds majority. The outcomes of</p>	Art. XV(2): conference process.	<ol style="list-style-type: none"> Proposed by any SP and submitted to the DG²²⁷ for circulation to the SPs and the Depositary; At least 60 days after and if no less than one-third of the SP request it, an Amendment Conference is convened; Entry into force 30 days after all the SP that cast a positive vote at the conference have deposited their instrument of ratification or approval or after the conference when the amendment was adopted by a majority of SP and no negative vote was cast. 	60 days information period.	<p>Amendment Conference:</p> <ul style="list-style-type: none"> Quorum: majority of the members of the Organisation (art. VIII(16)); Adoption (art. VIII(18)): emphasis on consensus. If it cannot be achieved, the decision is deferred for 24 hours. If at the end of this period reaching a consensus is still impossible, a two-thirds majority of those present and voting is required. 	<p>The Schedule of Chemicals (Part B of the Annex on Chemicals) lists toxic chemicals and their precursors that are subject to certain verification measures under the Convention. The Schedule performs a similar role as the lists of HS codes in the MAC Protocol annexes since it defines the physical materials to which the Convention will apply.</p> <p>Adoption of an amendment of an annex makes it binding on all SPs.</p>

²²⁶ State Party.

²²⁷ Director-General of the Technical Secretariat (Art. VIII(41)).

		either process is binding on all SPs.	Art. XV(5): tacit process.	The Executive Council ²²⁸ is responsible for examining proposals on annex amendments submitted by a SP and then recommends that it be either adopted or rejected. The Council should notify its recommendation to all the SPs, together with the reasons for its findings. If no SP objects to the recommendation within 90 days after receipt, the Executive Council's recommendation is considered to be approved and to take effect for all the SPs. If the Executive Council's recommendation is objected to by one or more SPs, then the tacit mechanism fails and the decision is deferred to the CoP. ²²⁹	Tacit process: objection period: 90 days. (XV(5)(g)). Entry into force: 180 days after communication to the SPs, unless another time period is recommended by the Executive Council or Conference (XV(5)(g)).	Tacit process: a single objection constitutes failure.	
2. Single Convention on Narcotic Drugs²³⁰ (1961)	186	Aims to limit the use of narcotic drugs to medical and scientific use, and to promote international cooperation in the pursuit of this goal. The Single Convention has two amendment mechanisms. The first is to amend the Convention and	Art. 47: amendment of the Convention.	1. Amendment proposal by a SP. It is communicated to the other SP and the Council ²³¹ ; 2. The Council decides to either: a. Conference procedure: call a conference according to art. 62(4) of the UN Charter ²³² ; b. Tacit acceptance: ask the SPs their position on the proposal, including whether they accept it or not. If no SP rejects the proposal within 18 months of its circulation, it shall enter into force. If a SP rejects it, the Council may decide to convene a conference.	Tacit amendment: 180 days objection period.	The Convention does not provide for the voting requirements in the Commission nor the Council. Implicitly, this is a reference to the rules of procedure of the Council, ²³³ the Commission being one of its subsidiary bodies:	The controlled substances are listed in Schedules ²³⁵ I, II, III and IV ²³⁶ ; they differ in the amount of control the SP have to implement over the substances and preparations (art. 2). Their function is similar to that of the annexes to the MAC Protocol in that they determine the scope of the convention. Allowing for changes in the Schedules is an essential

²²⁸ The Executive Council is a made up of 41 SP selected on a rotating for mandates of two years (Art. VIII(C)).

²²⁹ Conference of the Parties: it refers to plenary meetings of all the SP.

²³⁰ Under the auspices of the UN Office on Drugs and Crimes (UNODC).

²³¹ Economic and Social Council of the United Nations.

²³² Article relating to the powers and functions of the Economic and Social Council.

²³³ <https://www.un.org/en/ecosoc/about/pdf/rules.pdf>

²³⁵ Defined as: "Schedule I', 'Schedule II', 'Schedule II' and 'Schedule IV' mean the correspondingly numbered list of drugs and preparations annexed to the Convention, as amended from time to time in accordance with Article 3" (art. 1(1)(u)). So the evolving nature of these Schedules is accepted from the start.

²³⁶ Also included in Schedule I. Drugs with a particularly dangerous properties.

	<p>can be conducted either through a tacit process or a conference. The SPs have to ratify the amendment for it to be binding against them.</p> <p>The second relates to the Convention's scope, i.e. the substances and preparations that are subject to control. It involves a variety of actors to ensure the scientific and medical legitimacy. The amendment, either on the first reading or after a review of the first decision requested by a SP, will bind all the SPs.</p>				<ul style="list-style-type: none"> • A quorum of one-third of the members is required to open the debates and one-half to take a decision (Rule 41); • Decisions are taken by a simple majority of the members present and voting²³⁴ (Rule 60). <p>The World Health Organization (WHO) has an implicit veto since it decides whether the procedure advance at several stages.</p>	<p>aspect of the treaty introduced in Art. 3. This is different from most treaties, where amendment mechanisms are presented in the final clauses.</p> <p>There is no opting-out of the amendments to the Schedules.</p> <p>For amendments to the convention, each SP has a veto power to prevent tacit acceptances that will enter into force for all SPs.</p> <p>The contrast between the limited time periods for the amendment procedures of art. 3 and the lengthy objection period of art. 30 underlines that the Schedules are supposed to easily adapt to evolving circumstances. This is similar to the MAC Protocol whose annexes are supposed to adapt to evolving circumstances.</p> <p>The convention provides for the organisation and functioning of these bodies and relies on the institutional framework of the UN.</p>
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²³⁴ In all of the instruments mentioned in this table, present and voting means members casting a positive or negative vote. Members which abstain from voting are not considered to be presents. See, for example Eco Soc Council Rules of Procedure Rule 60(2).

			<p>Art. 3: changes in the "scope of control".</p>	<ol style="list-style-type: none"> 1. A SP, or WHO, considers that the Schedules must be amended. It notifies the SG²³⁷ and provides supporting information; 2. The SG communicates the notification and all relevant information to the SPs, the Commission²³⁸, and, if necessary, WHO. The SP determine whether provisional application of control measures is necessary; 3. Options: <ol style="list-style-type: none"> a. The notification relates to a substance not already in Schedules I²³⁹ or II²⁴⁰: <ol style="list-style-type: none"> i. If the WHO finds the substance to be similar to Schedule I or II drugs or to be convertible into a drug, the Commission may add the substance to Schedule I or II; ii. The Commission may, on the WHO's recommendation, add the substance to Schedule III²⁴¹; b. The substance is already in Schedule I and WHO considers that there is particular risk of abuse and ill effects, the Commission may include it in Schedule IV; c. The drug or preparation is already mentioned in Schedules I, II, or III, the Commission transfers it from one Schedule to the other or erases it; 4. The decision is communicated to the SP, the member States of the UN, the WHO and the Board²⁴²; 5. Entry into force on receipt of the notification by the SPs. A SP may request a review of the decision by the Council within 90 days of the receipt. The decision remains in force during the pendency of the review; 6. WHO, other SP, and the Commission may make their position known; 7. The Council may confirm, alter or reverse the decision. Its decision is final. It shall 	<p>Objection period of 90 days after the notification of the decision.</p>		
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237 Secretary-General. In this Convention this is a reference to the Secretary-General of the UN.

238 Commission on Narcotic Drugs of the Economic and Social Council of the UN.

239 Category of drugs under a regime of control measures that constitute the standard regime of the Single Convention.

240 Slightly less controlled than Schedule I drugs.

241 Preparations benefitting from a less strict regime than other preparations.

242 International Narcotics Control Board.

				be notified as in step 4.			
<p>3. Convention on Psychotropic Substances (1971)²⁴³</p>	184	<p>Aims to build upon the framework created by the 1961 Single Convention by including newly developed drugs.</p> <p>The Convention on Psychotropic Substances has two amendment mechanisms. The first is to amend the Convention and can be conducted either through a tacit process or by conference. Each SP must ratify the amendment to be bound by it. The second relates to the Convention's scope, the substances and preparations that are to be controlled by the SP. It involves a variety of actors to ensure the scientific and medical legitimacy. The amendment, either on the first reading</p>	<p>Art. 30: amendment of the Convention.</p>	<p>1. Amendment proposal by a SP. It is communicated to other SP and the Council;</p> <p>2. The Council decides either:</p> <p>a. <u>Conference amendment</u>: calling a conference according to art. 62(4) of the UN Charter;</p> <p>b. <u>Tacit amendment</u>: asking the SP their position on the proposal, including whether they accept it or not. If no SP rejects the proposal within 18 months of its circulation, it shall enter into force. If any SP rejects it, the Council may decide to convene a conference.</p>	<p><u>Tacit amendment</u>: 18 months objection period.</p>		<p>Similar to the 1961 Single Convention. There is no opting out of amendments to the Schedules. However a SP can, if local conditions justify it, use less stringent enforcement mechanisms. A SP can also request the review of the decision to adopt the amendment of a Schedule. Individual acceptance by SP is even more restricted in regards to preparations.</p> <p>The contrast between the limited time periods for the amendment procedures of art. 2-3 and the lengthy objection period of art. 30 underlines that the Schedules are supposed to easily adapt to evolving circumstances. This is similar to the MAC Protocol whose annexes are supposed to adapt to evolving circumstances.</p>
			<p>Art. 2: amendment of the Schedules.</p>	<p>1. If a SP or the WHO considers that a substance should be added to a Schedule, transferred from one to the other or deleted, it will notify the SG;</p> <p>2. The notification and the relevant</p>	<p>180 days period during which a SP can request a review of the</p>		

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Under the auspices of the UNODC.

		or after a review of the first decision requested by a SP, will bind all the SPs.		<p>information is communicated to the SP, the Commission²⁴⁴ and, if necessary, to the WHO. If the proposal is for inclusion in Schedules I or II, the SP may decide the provisional application of control measures:</p> <p>3. If WHO finds that the substance can produce a state of dependence and psychotropic effects and lead to similar abuses or ill effects as substances already in a Schedule, and that it is being, or likely to be, abused, it will provide a report on the substance and a recommendation;</p> <p>4. The Commission may add the substance to one of the four Schedules;</p> <p>5. The decision will be communicated to all SPs, all UN member States, the WHO and the Board. It enters into force 180 days after the date of this communication except for a SP to notify, within this period, the SG that it cannot give effect to the required control measures²⁴⁵;</p> <p>6. Any SP may request the review of the decision by the Council within the 180 days period. During the pendency of review the decision remains in force;</p> <p>7. The Council may alter, confirm or reverse the decision. Its decision is final.</p>	Commission's decision.	The Commission decides with a two-thirds majority (Art. 17(2)). The Council follows its Rules of Procedure.	
			Art. 3: amendment to the control of preparations.	Same procedure as in art. 2 except with no possibility of review of the Commission's decision and a SP may not make an individual declaration stating that it cannot implement the amendment.		WHO has an implicit veto throughout the process.	The Commission decides with a two-thirds majority (Art. 17(2)).
4. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic	190	The purpose of this convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in	Art. 31: amendment of the Convention.	<p><u>Amendment without a conference:</u></p> <p>1. Any SP may propose an amendment</p> <p>2. Communication of the draft amendment to all SPs;</p> <p>3. If there is no objection within a 24 months period, it will be deemed accepted;</p> <p>4. It will enter into force for each SP 90 days after an instrument expressing acceptance to be bound by the amendment was deposited to the SG.</p>	<p><u>Amendment without a conference:</u></p> <ul style="list-style-type: none"> • 24 months objection period; • entry into force 90 days 	<ul style="list-style-type: none"> • A quorum of one-third of the SP is required to open the debates and one-half to take decisions (Rule 41, Economic and 	<p>The amendment mechanisms rely on the institutional framework of the UN.</p> <p>This convention uses amendments mechanisms similar to those of the Single Convention of 1961 and the 1971 Convention on</p>

²⁴⁴ The Commission on Narcotic Drugs of the UN Economic and Social Council (art. 1(b)).

²⁴⁵ Art. 2(7)(a) then provides for minimal control measures that even this SP has to implement.

<p>Substances (1988)²⁴⁶</p>	<p>narcotic drugs and psychotropic substances having an international dimension.</p> <p>This Convention has two amendment mechanisms. The first is to amend the Convention and can be conducted either through a tacit process or by conference. A SP must ratify the amendment to be bound by it. The second is to amend the Tables of substances subject to the control regime it enacts. The amendment is adopted by a majority vote. The SPs cannot opt out but may request a review of the decision.</p>		<p><u>Amendment by a conference:</u></p> <ol style="list-style-type: none"> 1. If a proposed amendment has been rejected by any SP and a majority requests it, the SG will bring the matter to the Council; 2. The Council decides whether to convene a conference (art. 62(4) UN Charter); 3. A SP must individually ratify or accept a protocol to be bound by it. 	<p>after a SP deposits its instrument of ratification or approval.</p>	<p>Social Council Rules of Procedure²⁴⁷);</p> <ul style="list-style-type: none"> • Decisions are taken by a simple majority of the SP present and voting (Rule 60, <i>ibid</i>). 	<p>Psychotropic Substances but without the involvement of WHO.</p> <p>a SP may opt out from amendments to the Convention but not from amendments to the Tables.</p> <ul style="list-style-type: none"> • The contrast between the limited time periods for the amendment procedures of art. 12 and the lengthy objection period of art. 31 underlines that the Schedules are supposed easily adapt to evolving circumstances. This is similar to the MAC Protocol whose annexes are supposed to adapt to evolving circumstances.
		<p>Art. 12: amendment of the Tables presenting the substances subject to the Convention.</p>	<ol style="list-style-type: none"> 1. A SP or the Board²⁴⁸ with information warranting the inclusion or the deletion of a substance from the Tables or its transfer from one Table to the other shall communicate the information to the SG; 2. The notification and relevant information is communicated to the other SPs, the Commission and, if necessary, the Board; 3. The Board shall assess the substance and recommend monitoring measures and SPs may comment on the amendment proposal; 4. The Commission decides by a two-thirds majority to place a substance in Table I or II; 5. The decision is communicated to all SPs and to the Board. It becomes effective 180 days after this notification; 6. Any SP may file a request for review of the decision by the Council during the 180 days period; 	<p>180 days period to request the review of the adoption decision.</p>	<p>Two-thirds majority.</p> <p>The Council follows its Rules of procedure²⁴⁹.</p>	

²⁴⁶ Under the auspices of the UNODC.

²⁴⁷ See 1961 Single Convention.

²⁴⁸ The International Narcotics Control Board established by the Single Convention of 1961 (art. 1(a)).

²⁴⁹ See Single Convention of 1961.

				7. The Council may alter, reverse or confirm the decision. Its decision is final.			
<p>5. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)²⁵⁰</p>	187	<p>This Convention participates in the management of the transnational movement of hazardous waste and their disposal.</p> <p>It has two amendment mechanisms. The first is to amend the Convention and its protocols. It requires a consensual or majority decision by a CoP. A SP must ratify the amendment to be bound by it. The second is for the annexes. It also requires a consensual or majority decision by a CoP but will bind all the SPs.</p>	<p>Art. 17: amendment of the Convention and its protocols.</p>	<p>1. Any SP may propose an amendment;</p> <p>2. At least six months after communication of this proposal to the other SPs, a CoP will be convened;</p> <p>3. The CoP should strive for consensus, otherwise a three-fourths majority of the SPs present and voting is required to amend the Convention or two-thirds majority to amend a Protocol;</p> <p>4. The amendment will enter into force in the accepting SP 90 days after receipt by the Depositary of their instruments of ratification, approval, formal confirmation or acceptance²⁵¹ and if at least three-fourths of the SPs that voted in favour of the amendment (two-thirds for amendments to protocols) deposited an instrument of ratification.</p>	<ul style="list-style-type: none"> • Six months information period • Entry into force 90 days after an instrument of ratification or approval is deposited. 	<ul style="list-style-type: none"> • Adoption: <ul style="list-style-type: none"> - Amendment of the Convention: three-fourths majority SP present and voting; - Amendment of the protocols: two-thirds majority SP present and voting; • Entry into force: same majorities as for the adoption of the amendment must ratify or approve. 	<ul style="list-style-type: none"> • The Convention's scope will necessarily evolve since it depends on the content of the annexes (art. 1(1)(a)) or on domestic legislations of the SP of export, import or transit (art. 1(1)(b)). Individual SPs acceptance is not required for the technical amendments. Local realities are taken into account by allowing a SP to signal an inability to implement the amendment. This is not a formal objection but effectively the amendment will not be enforceable in that SP.
			<p>Art. 18: adoption and amendment of annexes²⁵².</p>	<p>The procedure is the same as for the amendment of the Convention and its protocols without the requirement of individual ratification by a SP. Adoption by the CoP is enough. A SP unable to implement an additional annex can notify the SG within six months of the communication of the adoption of an addition by the CoP. This SP will not have to implement and enforce the amendment. This objection may be replaced by an approval at any time.</p>	<ul style="list-style-type: none"> • Six months information period; • Six months objection period. 	<p>Emphasis on consensus, otherwise a two-thirds majority of the SPs present and voting is required for decisions on matters of substance²⁵³.</p>	

²⁵⁰ Under the auspices of the UN Environment Program (UNEP).

²⁵¹ All of these methods are shortened, for the purpose of this table, under the label of ratification.

²⁵² "Such annexes shall be restricted to scientific, technical and administrative matters" art. 18(1).

²⁵³ Rules of procedure for the Conference of Parties to the Basel Convention, Rule 40.

				Otherwise, the annex comes into force six months after the circulation of the Conference's decision.			
6. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998) ²⁵⁴	161	<p>It seeks to promote a shared responsibility and cooperation among the SPs in the international trade of certain hazardous chemicals.</p> <p>It has three amendment mechanisms. The first is to amend the Convention and its protocols. It requires a consensual or majority decision by a CoP. A SP must</p>	Art. 21: amendment of the Convention.	<p>1. May be proposed by any SP. It will then be communicated to all the SPs by the SG;</p> <p>2. At least six months after communication, a CoP²⁵⁵ is convened. SPs should strive for consensus otherwise a three-fourths majority of the SPs present and voting is required;</p> <p>3. Each SP must ratify, approve or accept the amendment. The amendment will enter into force for those SP 90 days after deposit of the instruments by at least three-fourths of the SP.</p>	<ul style="list-style-type: none"> • At least six months information period; • Entry into force 90 days after deposit of instruments of ratification or approval by at least three-fourths of the SPs that cast positive votes. 	<p>Conference rules of procedure²⁵⁶ provide for a quorum of one-third of SPs to open the session and two-thirds to adopt a decision.</p> <p>The rules of procedure emphasize consensus or a two-thirds majority vote of the SPs present and voting for matters of substance²⁵⁷.</p>	<p>The amending mechanisms rely upon the institutional framework created by the convention.</p> <p>This Convention must be read in conjunction with the 1989 Basel Convention.</p> <p>Individual opt-out of an amendment to an annex is not possible but local realities are taken into account by allowing a SP to not implement the amendment.</p>

²⁵⁴ Under the auspices of the UNEP.

²⁵⁵ Set up by art. 18 of the Convention and required to regularly be convened.

²⁵⁶ Rules of procedure for the CoP to the Rotterdam Convention, Rule 35.

²⁵⁷ *Ibid*, Rule 45.

	<p>ratify the amendment to be bound by it. The second is to amend all the annexes except Annex III. It requires a consensual or majority decision by a CoP and will bind all the SP.</p> <p>The third relates to the list of substances presented in Annex III. It relies on recommendations by a committee and if necessary a decision by the CoP. SP cannot opt out of the amendment but can demonstrate that it is unable to implement it.</p>	<p>Art. 22: amendment to the annexes²⁵⁸.</p>	<p><u>All annexes except Annex III</u>²⁵⁹: Same requirements as for amending the Convention except that its adoption makes it binding on all SPs.</p> <p>A SP unable to implement the amendment can notify the Depositary, within one year of the communication of the amendment, that it will not implement it.</p> <p>The amendment enters into force one year after the communication of the adopted amendment.</p> <p><u>Amendments to Annex III:</u></p> <ul style="list-style-type: none"> • Banned or severely restricted chemicals (art. 5): Each SP may adopt restrictions on chemicals ("final regulatory action") and must notify the Secretariat. The Secretariat will verify this information and notify it to the SPs. When there is at least one notification by SPs from two different regions concerning the same chemical, the Secretariat will forward it to the Chemical Review Committee²⁶⁰. The Committee will review the information and make a recommendation to the CoP. • Severely hazardous pesticide formulations (art. 6): A SP that is a developing country or has an economy in transition may propose the listing of a substance in Annex III if it is experiencing problems due to it. The Secretariat will verify that the required information is included and conduct, if necessary, further research. 		<p>CoP rules of procedure²⁶¹ provide for a quorum of one-third of SPs to open the session and two-thirds to adopt a decision.</p> <p>The rules of procedure emphasize consensus or a two-thirds majority vote of the SPs present and voting for matters of substance²⁶².</p> <p>Adopted amendments of Annex III bind all the SPs except those that claim that they cannot materially implement it.</p> <p>Consensus.</p>	
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²⁵⁸ They can only provide for procedural, technical, scientific or administrative matters (art. 22(2)).

²⁵⁹ This Annex lists the chemicals subject to the prior informed consent procedure. It requires the most flexibility because the scientific community regularly discovers new chemicals. It refers to a classification functionally similar to the HS code: CAS numbers (unique numerical identifiers assigned by Chemical Abstract Services to every chemical substance in the open scientific literature).

²⁶⁰ Art. 18(6): body set up by the CoP. It is composed of a limited number of government-designated experts, in the assessment and management of chemicals, appointed on the basis of equitable geographical distribution. It should strive for consensus but, if necessary, recommendations will be adopted by a two-thirds majority of the members present and voting. The criteria on which it must base its recommendations are listed in Annexes II and IV.

²⁶¹ Rules of procedure for the Conference of Parties to the Rotterdam Convention, Rule 35.

²⁶² *Ibid*, Rule 45.

				<p>The proposal is forwarded to the Chemical Review Committee, which issues a recommendation to the CoP on whether the substance should be listed in Annex III.</p> <ul style="list-style-type: none"> Removal of chemicals from Annex III (art. 9): A SP may forward information previously unavailable justifying the removal of a chemical to the Secretariat. <p>The information is reviewed by the Chemical Review Committee</p>			
<p>7. Stockholm Convention on Persistent Organic Pollutants (POPs) (2001)²⁶³</p>	182	<p>It seeks to protect human health and the environment from persistent organic pollutants.</p> <p>The Stockholm Convention has two formal amendment mechanisms and a mechanism to permit the evolution of its scope.</p> <p>The first mechanism is to amend the Convention and its protocols. It requires a consensual or majority decision by a CoP. a SP must ratify the amendment to be bound by it.</p>	<p>Art. 21: amendments to the Convention.</p>	<p>1. An amendment may be proposed by any SP and communicated to all SPs by the SG;</p> <p>2. At least six months after communication, a CoP is convened. The SP should strive for consensus otherwise a three-fourths majority of the SPs present and voting is required²⁶⁴;</p> <p>3. Each SP must ratify, approve or accept the amendment. The amendment will enter into force for those SPs 90 days after deposit of the instruments by at least three-fourths of the SP.</p>	<p>At least six months information period.</p>	<p>CoP rules of procedure²⁶⁵ provide for a quorum of one-third of SPs to open the session and two-thirds to adopt a decision.</p> <p>The rules of procedure emphasize consensus or a two-thirds majority vote of the SPs present and voting for matters of substance²⁶⁶.</p>	<p>The technical nature of the annexes justifies a very complex amendment procedure which seeks to balance the necessity of regular amendments of the annexes and ensuring scientific legitimacy.</p> <p>This Convention must read in conjunction with the 1989 Basel Convention and the 1998 Rotterdam Convention.</p>
			<p>Art. 22: adoption and amendment of annexes²⁶⁷.</p>	<p>Additional annexes:</p> <p>Same requirements as for amending the convention except that individual acceptance by the SPs is not required.</p> <p>A SP unable to implement the amendment can notify the Depositary, within one year of the communication of the amendment proposal, that it will not enforce it.</p>			

²⁶³ Under the auspices of the UNEP.

²⁶⁴ Abstaining is considered being absent (art. 23(3)).

²⁶⁵ Rules of procedure for the Conference of Parties to the Stockholm Convention, Rule 35.

²⁶⁶ *Ibid*, Rule 45.

²⁶⁷ Art.22(2): "Any additional annexes shall be restricted to procedural, scientific, technical or administrative matters".

		<p>The second is to amend the annexes. Depending on the nature of the annex, this mechanism imposes greater limits on a SP’s ability to object. Lastly, the Convention has created organs specifically to review draft amendments pertaining to the list of chemicals that determine the Convention’s scope. The final decision rests in a majority of SP and will them all.</p>		<p>The amendment enters into force one year after the communication of the amendment proposal.</p> <p><u>Amendments to Annexes A, B and C:</u> Same procedure as for adding annexes. However, a State may only object to the amendment if it has made an art. 25(4) declaration when it ratified, accepted, approved or acceded to the Convention.</p> <p><u>Amendments to Annexes D, E and F:</u> Adoption by the Conference by consensus. The amendment will enter into force on the date specified in the decision.</p>	<p>amendment proposal;</p> <ul style="list-style-type: none"> • Amendments to annexes D, E and F: on the specified date. 	
			<p>Art. 8: amendment of lists of chemicals in Annexes A²⁶⁸, B²⁶⁹ and C²⁷⁰.</p>	<ol style="list-style-type: none"> 1. A SP may submit a proposal for a listing in Annexes A, B or C; 2. If it provides the information required by Annex D, the Secretariat will forward the proposal to the Persistent Organic Pollutants Review Committee²⁷¹; 3. The Committee applies the screening procedure of Annex D: <ol style="list-style-type: none"> a. If the screening criteria are fulfilled, the proposal and the Committee’s evaluation are forwarded to all SPs. They are invited to submit the information specified in Annex E; b. If the Committee is not satisfied, the SP are informed and the proposal is set aside; <ol style="list-style-type: none"> i. A SP may resubmit the proposal. If it is again set aside, the decision may be reviewed by the CoP²⁷² during its next session 4. If the Committee or the Conference has decided that the proposal shall proceed, the Committee will draft a risk profile as provided by Annex E: <ol style="list-style-type: none"> a. The Committee considers that the proposal should proceed it shall collect the considerations specified in Annex F from the 		

²⁶⁸ Chemicals subject to elimination.

²⁶⁹ Chemicals subject to restrictions.

²⁷⁰ Chemicals that are unintentionally produced.

²⁷¹ See art. 18(6). It is appointed by the CoP and composed of government-designated experts, in the assessment and management of chemical, and on the basis of equitable geographical distribution. It strives for consensus but may adopt decisions by a two-thirds majority of the members present and voting.

²⁷² See art. 18.

				<p>SPs. It will then draft a risk management evaluation;</p> <p>b. The Committee can decide to set the proposal aside. A SP can ask the Conference to request that the Committee open a period of maximum one year during which additional information may be submitted to it and to reconsider the proposal. If the proposal is again set aside, the SPs may ask the Conference to review the decision at its next session. If the Conference decides that the proposal should proceed, the Committee will prepare the risk management evaluation.</p> <p>5. The Committee recommends in which Annex the chemical should be listed in;</p> <p>6. The CoP decides.</p>			
<p>8. Convention on Facilitation of International Maritime Traffic (FAL Convention) (1965)²⁷³</p>	123	<p>The Convention's main objectives are to prevent unnecessary delays in maritime traffic, to aid cooperation between Governments, and to secure the highest practicable degree of uniformity in formalities and other procedures.</p> <p>The Convention has two amendment mechanisms. The first is to amend the Convention and relies on a CoP. a SP must ratify the amendment to be bound by it unless the CoP decided that the amendment must be accepted or the whole convention must be denounced.</p>	<p>Art. IX: amendment of the Convention.</p>	<p>1. At least one-third of the SP request an amendment or revision;</p> <p>2. The SG convenes a conference;</p> <p>3. An amendment must be accepted by a two-thirds majority vote of the conference. The conference may also decide with a two-thirds majority, that a SP that declares against the amendment will cease to be party to the Convention;</p> <p>4. The SG certifies and communicates the amendment to all SPs for their acceptance;</p> <p>5. One year after an acceptance by two-thirds of the SP the amendment comes into force. SPs may opt-out of the amendment by making a declaration before the entry into force, unless the conference decided to prevent these declarations.</p>	<p>The amending period is dependent on the time required to convene a conference.</p> <p>One-year period for individual SP acceptances after adoption by the Conference.</p>	<ul style="list-style-type: none"> One-third of the SP to convene the conference; Two-thirds majority to adopt the amendment during the conference; Unless otherwise decided by the Conference, the amendment must be ratified by two-thirds of the SP for it to come into force. 	<p>This procedure is successful since this convention has been regularly amended.²⁷⁴</p> <p>This convention is designed to be a uniform law; the operative provisions of the convention set the SPs' legal obligation of implementing and enforcing the regime provided in the annex.</p> <ul style="list-style-type: none"> This design makes it easier to amend the substantive regime since it is in the annex rather than the body of the convention. Especially, there is no opt-out of amendments to the annexes adopted by a majority of the SPs.
			<p>Art. VII: amendment of the Annex.</p>	<p>Tacit amendment:</p> <p>1. An amendment is proposed by a SP;</p> <p>2. The Secretary-General (SG) forwards the draft amendment to all SPs;</p> <p>3. The SP have one year from the receipt of the communication to accept or refuse the amendment;</p> <p>4. The amendment enters into force six</p>	<p>Tacit amendment: one-year acceptance period after receipt of the draft amendment.</p>	<p>Tacit amendment: explicit majority.</p> <p>Conference amendments:</p> <ul style="list-style-type: none"> One-third of SPs requesting the 	

²⁷³ Under the auspices of the International Maritime Organisation (IMO).

²⁷⁴ [http://www.imo.org/en/about/conventions/listofconventions/pages/convention-on-facilitation-of-international-maritime-traffic-\(fal\).aspx](http://www.imo.org/en/about/conventions/listofconventions/pages/convention-on-facilitation-of-international-maritime-traffic-(fal).aspx)

		<p>The second is to amend the Annex. It can be either tacit or by the organisation of a conference. It will bind all the SPs.</p>		<p>months after a majority of the SPs have accepted it. All the SPs are bound.</p> <p><u>Express amendment:</u></p> <ol style="list-style-type: none"> 1. A conference will be convened to consider an amendment if at least one-third of the SP request it; 2. Adoption of an amendment by a two-thirds majority of the SPs present and voting; 3. Entry into force six months after the SG notifies the SP of the adoption of the amendment by the conference. 	<p><u>Conference amendment:</u> six months between adoption and entry into force to allow the SPs to adapt.</p>	<p>organisation of a conference;</p> <ul style="list-style-type: none"> • Two-thirds majority of the SPs present and voting to adopt the amendment. 	
<p>9. Vienna Convention for the Protection of the Ozone Layer (1985)</p>	<p>197</p>	<p>This Treaty aims to protect the ozone layer by limited the production and use of substances responsible for its depletion.</p> <p>The Vienna convention has two amendment mechanisms. The first is to amend the Convention and its protocols. Amendments must be adopted by a CoP and a SP must ratify it to be bound by it. The second is to amend the annexes. It also requires</p>	<p>Art. 9: amendments to the Convention and its protocols²⁷⁵.</p>	<ol style="list-style-type: none"> 1. Any SP may propose an amendment; 2. Communication of the draft amendment to the SP at least six months before the CoP; 3. Adopted at a CoP. Every effort should be made to reach agreement by consensus, otherwise an amendment to the convention may be adopted by a three-fourths majority of those present and voting and an amendment to a protocol may be adopted by a two-thirds majority of those present and voting; 4. A SP must individually accept amendments. An amendment will enter into force when it has been ratified, accepted or approved by at least three-fourths of the SP to the Convention or two-thirds of the SP to a protocol. 	<p>Six months information period.</p>	<ul style="list-style-type: none"> • Adoption: emphasis on consensus or otherwise three-fourths majority of those present and voting for amendments to the Convention or two-thirds majority of those present and voting for amendments to the protocols. • Entry into force: ratification or approval by at least three-fourths of the SP to the Convention or two-thirds of the SP to a protocol. 	<ul style="list-style-type: none"> • A SP must ratify an amendment to the Convention, a protocol to be bound by it but may opt out of an amendment of the annexes²⁷⁶.

²⁷⁵ The protocols may further detail their own amendment procedure.

²⁷⁶ The Convention has two annexes. Annex I on "Research and Systematic Observations" which identifies some current scientific consensus and issues that require further research. Annex II on "Information exchange" which identifies some of the information that should be exchanged.

		adoption by a CoP. The amendment is considered to apply to all SPs unless one expressly opts out.	Art. 10: adoption and amendment of annexes ²⁷⁷ to the Convention or to a protocol.	The procedure is the same as for amendments to the Convention or to the protocols. The amendment enters into force six months after the communication of the draft amendment. Unless a SP has notified an objection to the secretariat, the amendment applies to all SPs.	Six months objection period.	Adoption: emphasis on consensus or otherwise three-fourths majority of those present and voting for amendments to the convention or two-thirds majority of those present and voting for amendments to the protocols.	
10. Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) (1987) ²⁷⁸	197	This Protocol to the 1985 Vienna Treaty provides a more detailed and legally binding regime to phase out the production of numerous substances that are responsible for ozone depletion. It specifies the amendment mechanisms presented in the 1985 Vienna Treaty by creating a body specifically for deciding on amendments.	Art. 11. <u>Rules of procedure of the Meetings of Parties, art. 29-51.</u>	This is a highly institutionalised mechanism closer to what can be seen in international organisations than to traditional treaty amendment mechanisms. It provides for majority voting, requiring a two-thirds majority "on all matters of substance" (art. 39); as opposed to matters of procedure that require a simple majority. If there is a controversy as to the nature of an issue, the president decides. Its decision can be overturned by a majority of the SPs present and voting.		Two-thirds majority for substantive matters or majority for procedural matters.	It was revised, so-called "adjustments", nine times since it entered into force in 1989: 1990; 1992; 1995; 1997; 1999; 2007; 2016. These have affected the Protocol and its annexes. Art. 9 of the Protocol provides for the obligation of keeping the Protocol, which contains a set of numbered and dated objectives ²⁷⁹ , and the annexes, which primarily aim to describe the controlled substances, up to date. Art. 11 provides for regular meetings of the SP who must, among other obligations, introduce the most recent scientific data into the Protocol ²⁸⁰ .

²⁷⁷ Restricted to scientific, technical and administrative matters (art. 10.1 Vienna Convention of 1985).

²⁷⁸ Protocol to the 1985 Vienna Convention.

²⁷⁹ E.g. art. 2A-2J

²⁸⁰ Art. 11(4) Montreal Protocol

<p>11. The International Convention for the Prevention of Pollution from Ships (MARPOL Convention) (1973)²⁸¹</p>	<p>158</p>	<p>It seeks to prevent pollution to the marine environment by the discharge by ships of harmful substances or effluents containing such substances.</p> <p>The MARPOL Convention provides two amendment mechanisms. The first requires a CoP. A SP must ratify an amendment to be bound by it. The second uses the IMO’s institutional framework. For the most fundamental amendments, an appropriate body, in which all SPs may participate, must adopt it and a SP must ratify it. Otherwise, adoption by the appropriate body will be enforceable against all the SP but a SP may opt out.</p>	<p>Art. 16(3): amendment by a conference.</p>	<ol style="list-style-type: none"> 1. If a SP, supported by at least one-third of the SP, requests it, the IMO will organize a CoP; 2. An amendment is accepted by two-thirds of the SP present and voting at the conference; 3. The IMO’s SG must circulate the amendment to all SPs; 4. The SP must ratify, in accordance with the procedures detailed in art. 16(2). 	<p>Six month information period before convening the appropriate body.</p>	<p>Two-thirds of the SP present and voting.</p>	<p>Amendment procedures have been used: 1978, 1997²⁸², 2010 and 2012 in regards to the Convention itself. The annexes and appendixes have also been regularly updated.</p> <p>The process is reliant on the institutional framework of the IMO.</p> <p>There is not the same number of SPs for the convention, the protocols and the different annexes because opt-out of individual amendments is allowed (art. 16(4)(b)).</p> <p>The determination of whether a regulation, included in the annexes, is substantive and requires individual acceptance by all the SPs is made by the appropriate body rather than the SPs themselves.</p>
	<p>Art. 16(2): amendment by the IMO.</p>	<p><u>Express amendment</u>: necessary to amend of the Convention, to add new annexes, and to amend</p>	<p><u>Express amendment</u>:</p> <ul style="list-style-type: none"> • Six month information period before convening the appropriate body; • Six months adaptation period before entry into 	<p>Use of weighted majorities:</p> <ul style="list-style-type: none"> • Majority of SP: generally two-thirds; • Percentage of gross tonnage of world merchant fleet: generally 50%. This double majority 			

²⁸¹ Under the auspices of the IMO.

²⁸² Addition of a new annex (Annex VI “Regulations for the Prevention of Air Pollution from Ships”).

			<p>Protocol II²⁸³ or the annexes²⁸⁴ if the appropriate body deems it necessary:</p> <ol style="list-style-type: none"> 1. A SP submits an amendment proposal to the IMO; 2. The SG circulates the proposal to all SPs and members of the IMO; 3. At least six months later, the IMO sets up an appropriate body to consider the amendment. All SPs can participate. Adoption of the amendment requires a two-third majority of the SP present and voting; 4. The accepted amendment is circulated to all SPs; 5. Acceptance of the amendment requires a two-third of the SPs whose combined merchant fleets represent at least 50% of gross world tonnage; 6. The amendment will enter into force six months after the date of ratification or approval of the SP that have accepted it. <p><u>Tacit amendment:</u> allowed to amend the Protocol I²⁸⁵ and the annexes for which an express amendment has not been deemed necessary and the appendixes²⁸⁶ to the amendments:</p> <ol style="list-style-type: none"> 1. Same as the express amendment procedure stages 1-4; 2. Acceptance by the SP: <ol style="list-style-type: none"> a. Annexes: deemed accepted at the end of a period determined by the appropriate body, which cannot be less than 10 months. An objection must be raised by at least one third of the SP representing at least 50% of the gross world tonnage of merchant fleets. A SP can notify the IMO's SG that its express acceptance is necessary for the amendment to bind it; b. Appendixes to the annexes: same procedure except that a SP may not declare that its express acceptance will be necessary. 	<p>force after a SP has individually accepted the amendment.</p> <p><u>Tacit amendment:</u></p> <ul style="list-style-type: none"> • Six month information period before convening the appropriate body; • Ten months objection period, or as determined by the appropriate body; • Entry into force six months after adoption. 	<p>requirement is relevant with the subject matter of the convention.</p>
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²⁸³ It relates "Arbitration" between the SP in case of disputes.

²⁸⁴ The annexes contain regulations (art. 2(1)). The Convention sets an obligation for the SPs to enforce the regulations that are determined in the annexes and how to do so.

²⁸⁵ Reports on Incidents Involving Harmful Substances.

²⁸⁶ List of products or model forms, certificates, documents, checklists or diagrams. These are very technical and precise elements that are bound to evolve so need to be easily revised.

				<p>3. Entry into force six months after the acceptance by the SPs or, if applicable, when a SP makes the express declaration.</p>			
<p>12. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973)</p>	<p>183</p>	<p>This Convention aims to prohibit, limit, and/or manage the trade of endangered species.</p> <p>This Convention has three different amendment mechanisms. The first is to amend the Convention. A draft amendment must be adopted by a CoP and a SP must ratify it to be bound by it.</p> <p>The second is to amend appendixes I and II. An amendment can either result from a</p>	<p>Art. XVII: amendment to the Convention.</p>	<p>1. At the request of at least one-third of the SP, the SG convenes an extraordinary CoP; 2. The proposal is communicated to all the SP by the SG at least 90 days before the CoP; 3. Amendments are adopted by a two-thirds majority of the SP present and voting; 4. Amendments will enter into force 60 days after two-thirds of the SP have deposited an instrument of ratification or approval.</p>	<p>90 days information period.</p>	<ul style="list-style-type: none"> • Adoption requires a two-thirds majority of the SPs present and voting; • Entry into force requires that two-thirds of the SPs ratify the amendment. 	<p>The Convention provides the regime. Its scope, i.e. the concerned species, is detailed in the appendixes so that it may easily be updated. This is similar to the MAC Protocol.</p> <ul style="list-style-type: none"> • The Convention organises an institutional framework to support its implementation, including amendment procedures.

	<p>decision by the CoP or by the absence of objection from a SP. The amendment will be binding on all SPs but a SP may expressly opt out. The third is to amend Appendix III. These are state-specific lists that are recognized by the Convention. a SP may opt out of a list or element of a list introduced by another SP.</p>	<p>Art. XV: amendments to Appendixes I and II²⁸⁷.</p>	<p><u>During a CoP²⁸⁸:</u> 1. Any SP may propose an amendment to be discussed at the next CoP at least 150 days before it; 2. A draft amendment will be communicated by the SG to all the SPs and to relevant organizations. The SG will make a recommendation on it; 3. The amendment will be adopted by a two-thirds majority of the SPs present and voting; 4. The amendment enters into force for all SPs 90 days after the meeting unless a SP makes an express reservation. This SP will not be party to the Convention for the trade of this specie.</p> <p><u>Outside of a CoP:</u> 1. Any SP may propose an amendment; 2. The proposal will be communicated by the SG to the SPs and to relevant organizations; 3. The SG will make a recommendation. The SPs have 60 days to communicate their comments to the SG. The SG will communicate its recommendations and the SPs’ comments; 4. Options: a. No objection is received within 30 days of the communication. The amendment will enter into force 90 days later unless a SP makes an express reservation in the 90-days period. This SP will not be party to the Convention for the trade of this specie. b. If an objection is received within the 30 days period: i. If the SG receives votes from at least half of the SPs accepting or refusing the proposal: the amendment will be accepted if a two-thirds majority of these votes support it. It will enter into force for all SPs, but it will not be enforceable against a SP that makes a reservation; or ii. except if one makes a reservation; iii. The amendment will be discussed at the next CoP.</p>	<p><u>During a CoP:</u> • At least a 150 days information period; • 90 days objection period.</p> <p><u>Outside of a CoP:</u> it seeks to provide for speedier amendments: • 60 days information period; • 30 days objection period, starting on the communication of the proposal; • 90 days for a State to reserve application of the amendment.</p>	<p><u>During a CoP:</u> adoption by a two-thirds majority of those present and voting.</p> <p><u>Outside of a CoP:</u> • Individual veto to impose a majority vote. • The vote will be at least two-thirds of one half of the SPs.</p>	
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²⁸⁷ Art. II: Appendix I, all species threatened with extinction which are or may be affected by trade; Appendix II, species not threatened by extinction but the trade of which should be controlled.

²⁸⁸ These must occur at least every two years (art. XI).

			<p>Art. XVI: amendments to Appendix III²⁸⁹.</p>	<p>1. Each SP submits a list of concerned species; 2. The list is circulated by the SG to all the SPs; 3. The list takes effect as part of Appendix III within 90 days of the communication by the SG. During this period, a SP may enter a reservation in regards to any specie on the list. This SP will not be party to the Convention for the trade of this specie.</p> <p>a SP may at any time withdraw species from a list in Appendix III. The withdrawal will take effect 30 days after communication of the withdrawal to all SPs by the SG.</p>	<p>90 days reservation period.</p>	
<p>13. Agreement on Trade in Civil Aircraft (1980)²⁹⁰</p>	<p>32</p>	<p>It seeks to achieve maximum freedom of world trade in civil aircrafts, as well as their parts and related equipment. It especially aims for the elimination of duties, and, to the fullest extent possible, the reduction or elimination of trade restricting or distorting effects.</p> <p>This Agreement provides a single amendment mechanism for its body and its annex. This mechanism takes place inside the WTO's institutional framework. A SP must ratify the amendment to be bound by it.</p>	<p>Art. 9(5): amendment of the Agreement.</p>	<p>The amendment procedure is not determined in the Agreement but by the WTO's Committee associated to it. However, this provision specifies that the SP must individually ratify an amendment for it to be binding against them.</p>		<p>Double definition of the scope of the Agreement (art. 2(1)):</p> <ul style="list-style-type: none"> • Equipment listed under HS codes listed in the Annex, like the MAC Protocol; • These products must be used in a civil aircraft. <p>Amendments have been achieved. Interestingly, in 2001 the goal was specifically to take into account the changes introduced in 1992, 1996 and 2002 to the HS. The 2001 Protocol only came into force for the SPs that accepted it. Another similar amendment was adopted in 2015.</p> <p>This Agreement demonstrates that it is possible to amend an international agreement on the basis of changes to the</p>

²⁸⁹ Appendix III, all species which any SP identifies as being subject to regulation within its jurisdiction to prevent or restrict exploitation and for which international cooperation is needed to control this trade. The content of this appendix is State-specific but it is recognized by the Convention so normally binds all the SP.

²⁹⁰ Under the auspices of the World Trade Organisation (WTO).

							HS. However, it allows the fragmentation of its regime since the SPs must ratify each amendment. Flexibility and adaptability is achieved by having recourse to the WTO's institutional framework but in practice, this mechanism is very similar to the traditional amendment mechanism.
14. Comprehensive Nuclear-Test-Ban Treaty (1996)	168 signatories but has not yet entered into force. ²⁹¹	It seeks to organize and monitor a ban on nuclear explosion tests with the ultimate goal of limiting, if not eliminating, nuclear weapons. The Treaty provides two amendment mechanisms. The first is to amend most of the Treaty and its protocols. An amendment is adopted by an amendment Conference (AC) during which each SP can veto the amendment. A SP must ratify the amendment to be bound by it.	Art. VII: amendment procedure	<ol style="list-style-type: none"> 1. Proposal by a SP; 2. Circulated by the DG²⁹²; 3. If, no later than 30 days after the notification, a majority of the SP wish to further consider the amendment, an AC will be convened to which all SPs are invited; 4. The AC shall be held just after the following CoP or earlier, if requested by the SP supporting the amendment, not earlier than 60 days after the circulation of the draft amendment; 5. The amendment is adopted if a majority of SP support it and if no SP casts a veto; 6. Entry into force 30 days after the deposit of the instruments of ratification or acceptance by the SPs that cast a positive vote. 	<ul style="list-style-type: none"> • At least 60 days information period; • Entry into force 30 days after the SP that cast a positive vote have deposited their instrument of ratification or approval. 	All SPs have a veto against the adoption of amendments.	Tacit acceptance is limited to technical matters. The processes rely on the institutional framework created by the Treaty.
			Art. VII: changes to parts I ²⁹³ and III ²⁹⁴ of the Protocol and	<ol style="list-style-type: none"> 1. A SP proposes a change and transmits it to the DG; 2. Circulation of the proposal to the SP, the Executive Council²⁹⁷ and the Depositary; 3. No later than 60 days after the notification, the DG must release an evaluation of the proposal; 4. The evaluation is examined by the Executive Council, which has 90 days to make a 	Strict time requirements to ensure that amendments on these technical subjects can be adopted and	Executive Council: It adopts decisions on matters of substance by a two-thirds majority, unless otherwise specified in the Treaty.	

²⁹¹ It has not yet entered into force since some of the States listed in Annex 2, whose ratification is necessary for the Treaty to enter into force, have not yet ratified.

²⁹² Director-General of the Technical Secretariat.

²⁹³ "The International Monitoring System and International Data Centre Functions".

²⁹⁴ "Confidence-Building Measures".

²⁹⁷ Composed of 51 members from among the SP (Art. II(27)).

		The second relates to Part I and Part III as well as Annex 1 and Annex 2 of the Protocol. Unless a SP objects, provoking the meeting of an AC, the amendment is tacitly adopted. It will bind all the SP.	annexes 1 ²⁹⁵ and 2 ²⁹⁶ of the Protocol.	recommendation to all the SP, to which the SPs have 10 days to acknowledge receipt; 5. The Executive Council’s recommendation will be adopted after 90 days if no SP objects; 6. If a SP objects, the proposal will be discussed during the following CoP; 7. Entry into force 180 days after the DG notifies SP of the approval of the change unless another time period is decided by the Executive Council or the CoP.	implemented within one year of their proposal.		
15. The International Convention for the Safety of Life at Sea (SOLAS Convention) (1974) ²⁹⁸	165	It sets minimum standards for the construction, equipment and operation of ships. The SOLAS Convention provides two amendment mechanisms. In the first one, a CoP adopts the amendment. A SP may opt out or postpone its implementation. In the second one, the amendment is adopted by the IMO’s Maritime Safety Committee. Tacit acceptance by the SP is only allowed for amendments to Annex I, except its first chapter. Otherwise, a SP must ratify the amendment to be bound by it.	Art. VIII(c): amendment by CoP.	1. A SP, supported by at least one-third of the SP, may request a CoP; 2. The conference adopts an amendment by a two-thirds majority of the SPs present and voting. 3. Individual acceptance and entry into force follows the procedure described below with the conference replacing the Maritime Safety Committee, unless the conference decides otherwise.		Two-thirds majority of the SPs present and voting.	Provides the SPs with the possibility of opting out of certain amendments. The amendment mechanism rely on the IMO’s institutional framework for constant information of the SP and ensuring that they advance.
			Art. VIII(b): amendment after consideration within the Organisation.	1. An amendment proposed by a SP is circulated by the IMO’s SG to all the SP and the members of the IMO; 2. At least six months after the circulation of the draft amendment, it is referred to the IMO’s Maritime Safety Committee, to which all SPs may participate. Amendments are accepted by a two-thirds majority of the SPs present and voting as long as at least one-third of the SPs are present; 3. Amendments are circulated to all SPs; a. Express acceptance: required for the Convention and chapter I of the Annex ²⁹⁹ : deemed to be accepted when two-thirds of the SP declare so; b. Tacit acceptance: allowed for the Annex, except its chapter I: i. Accepted at the end of a two-year period from the date of communication unless one-third	<ul style="list-style-type: none"> • Six months information period; • Tacit acceptance: two-year objection period. Entry into force: six months period or longer if voted by the Committee. A SP may	Maritime Safety Committee: <ul style="list-style-type: none"> • Quorum: one-third of SPs; • Adoption: Two-thirds majority of SP present and voting. Entry into force: <ul style="list-style-type: none"> • Express acceptance: two-thirds of the SP ratify or approve; • Tacit acceptance: objection by one-third of SP or a 	

²⁹⁵ Table of scientific stations participating in the monitoring.

²⁹⁶ ‘List of characterization parameters for international data centre standard event screening’.

²⁹⁸ Under the auspices of the IMO.

²⁹⁹ Provides the “General provisions” for the all the regulations contained in the annexes. The rest of the annexes are more technical and very detailed.

				<p>of the SPs or a group of SPs representing no less than 50% of the gross tonnage of the world's merchant fleet notify the SG that they object to the amendment; or</p> <p>ii. Accepted at the end of another period, no less than one year, determined by a two-thirds majority of the SPs present and voting in the Maritime Safety Committee;</p> <p>4. Entry into force:</p> <p>a. <u>Express acceptance</u>: six months after the individual acceptance of a SP;</p> <p>b. <u>Tacit acceptance</u>: six months after the amendment is deemed accepted except for the SP that have validly objected. A SP may notify the IMO's SG that it postpones the entry into force for a period of maximum one year or longer if a two-third majority of the SP present and voting the Maritime Safety Committee have approved it at the time of adoption of the amendment.</p>	postpone for maximum one year.	group representing at least 50% of the gross tonnage of the world's merchant fleet.	
16. Energy Charter Treaty (1994)	53	<p>This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field in accordance with the objectives and principles of the Charter.</p> <p>It provides three amendment mechanisms. All three rely on convening a Charter Conference that will adopt the amendment.</p>	<p>Art. 34(3)(l): amendments to the Treaty.</p>	<p>The Charter Conference considers and adopts amendments to the Treaty. These amendments must be individually ratified or accepted by each SP or it will not be bound (art. 42(4)).</p>	<p>Art. 42:</p> <ul style="list-style-type: none"> • Information period of at least three months; • Entry into force: 90 days after the deposit of instruments of ratification or approval by at least three-fourths of the SP. 	<p>Art. 36:</p> <ul style="list-style-type: none"> • Unanimity of the parties present and voting is required except for amendments to (Art. 36(1)(a): <ul style="list-style-type: none"> - Articles 34-35³⁰⁰; - Annex T; - Technical changes to the Annexes; - Displacement of items from one annex to the other; • Any other matter is open to consensus or, if it cannot be found, weighted majorities are applied (art. 36(2)-(5)). This 	<p>This Treaty refers to the HS codes; like the MAC Protocol.</p> <p>This Treaty creates institutions to manage and organise the pursuit of its objectives (art. 34).</p>
			<p>Art. 33: addition of protocols</p> <p>Art. 34(3)(h) and 36(1): Amendment of protocols.</p>	<p>Negotiations on new protocols may be authorised by the Charter Conference³⁰². New protocols must pursue the objectives and principles of the treaty. The Charter Conference authorises and approves the terms of reference for the negotiation of protocols and considers and adopts amendments thereto. They only bind a SP that ratifies the amendment.</p>			
			<p>Art. 34(3)(m): amendment of the annexes.</p>	<p>The Charter Conference also considers and approves amendments to the technical annexes.</p>			

³⁰⁰ These articles concern the Charter Conference and the Secretariat.

³⁰² Equivalent to a CoP. It is open to all SPs and observers.

						includes the revision of annexes EM I and EM II ³⁰¹ .	
<p>17. Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity (the Biosafety Protocol) (2000)</p>	171	<p>It aims to ensure the safe handling, transport and use of living modified organisms resulting from modern biotechnology to prevent adverse effects on biological diversity. It follows the traditional amendment mechanism.</p>	<p>Art. 29(4)(e): amendment process with a conference.</p>	<p>The CoP³⁰³ considers and adopts amendments to the Protocol and its annexes as well as the addition of new annexes.</p>		<p>Emphasis on consensus or, if necessary, a two-thirds majority of the SPs present and voting.</p>	<p>Relies on the institutional framework of the 1992 Convention on Biological Diversity.</p>

³⁰¹ These provisions refer to the HS codes to determine their scope.

³⁰³ The CoP to the Convention on Biological Diversity of 1992 serves as the CoP of the Protocol.

GLOSSARY

UNIDROIT INSTRUMENTS

Aircraft Protocol	Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (2001)
Cape Town Convention or CTC	Convention on International Interests in Mobile Equipment (2001)
Luxembourg Rail Protocol	Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (2007)
MAC Protocol	Future Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (incomplete)
Space Protocol	Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (2009)
UNIDROIT Principles or UPICC	UNIDROIT Principles of International Commercial Contracts (editions issued 1994, 2004, 2010, 2016)

OTHER INTERNATIONAL INSTRUMENTS

Civil Aircraft Agreement	Agreement on Trade in Civil Aircraft (1980)
COMTRADE	<i>United Nations International Trade Statistics Database</i>
Energy Charter Treaty or ECT	The International Energy Charter Consolidated Energy Charter Treaty
HS	Harmonized Commodity Description and Coding System
Montreal Convention	Convention for the Unification of Certain Rules for International Carriage by Air (1999)
OAS Model Law on Secured Transactions	Model Law on Secured Transactions
UNCLOS	UN Convention on the Law of the Sea

INTERNATIONAL ORGANISATIONS AND OTHER GROUPS

AEM	Association of Equipment Manufacturers
AWG	Aviation Working Group
CJEU	Court of Justice of the European Union
ELFA	Equipment Leasing and Finance Association
FAO	Food and Agriculture Organization of the United Nations
HCCH	Hague Conference on Private International Law
ICAO	International Civil Aviation Organization
IFC	International Finance Corporation
IMO	International Maritime Organization
NatLaw	Kozolchyk National Law Center
RWG	Rail Working Group
SA	Supervisory Authority for the future MAC Protocol
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
VDMA	Verband Deutscher Maschinen und Anlagenbau (Association representing the engineering industry)
WCO	World Customs Organization
WHO	World Health Organization
WTO	World Trade Organization

GROUPS

CGE1	First session of the Committee of Governmental Experts (Rome, 20-24 March 2017)
CGE2	Second session of the Committee of Governmental Experts (Rome, 2-6 October 2017)

Rail Preparatory Commission	Preparatory Commission for the establishment of the International Registry for Railway Rolling Stock pursuant to the Luxembourg (Rail) Protocol
Space Preparatory Commission	Preparatory Commission for the establishment of the International Registry for Space Assets pursuant to the Space Protocol
UN Eco Soc	United Nations Economic and Social Committee