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COMMENTS ON THE DRAFT MAC PROTOCOL

(Submitted by the MAC Working Group)

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

This position paper expresses the MAC WG's support for the proposed Protocol to the Cape Town Convention (the CTC) on Matters Specific to Mining, Agricultural and Construction Equipment (the MAC Protocol), an extension of the CTC's scope to include mining, agricultural and construction (MAC) equipment. This paper further provides comments on certain aspects of the current version of the MAC Protocol¹ so that the MAC Protocol may be adapted to better reflect the realities and needs of the MAC industries as best understood by market participants.

I. Expression of support

Key points of support:

1. Increase of credit availability in connection with MAC equipment: Finance for the acquisition of MAC equipment varies widely depending on the relevant market. In fact, while in some developed countries most machinery is acquired with a finance package, in other countries, credit, if available at all, may cover as little as 20% of product value and, in high risk markets, most sales have to be predominantly self-financed. Lack of availability of credit for acquisition of MAC Equipment is determined, among other factors, by the risks of the relevant credit market and the laws related to secured transaction in which such market exists. This reduces the resources available to invest and purchase MAC equipment. The MAC Protocol, if implemented in the form recommended by the MAC Working Group, would result in the creation of a more predictable legal system providing more effective protection of creditors, reducing the risk of credit and, in turn, reducing cost of credit and increasing its availability. Lower credit cost and increased availability would then allow more buyers to

¹ Diplomatic Conference DCME-MAC – Doc. 3: "TEXT OF THE DRAFT PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO MINING, AGRICULTURAL AND CONSTRUCTION EQUIPMENT as approved by the UNIDROIT Committee of Governmental Experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment at its second session, held in Rome from 2 – 6 October 2017, and authorised for transmission to a diplomatic Conference, for adoption, by the UNIDROIT Governing Council at its 97th session, held in Rome from 2 – 4 May 2018", available at <https://www.unidroit.org/english/documents/2018/study72k/dc/s-72k-dc-03-e.pdf> (last visited October 3, 2019).

purchase new or more advanced MAC equipment, such equipment being vital for the development of, and improvement of productivity in, critical sectors of the world economy.²

2. Savings and growth: The MAC Protocol will apply to equipment accounting for over US\$100 billion a year in international trade. Once implemented, the MAC Protocol will generate growth and increase efficiency in MAC industries for lenders, borrowers, equipment manufacturers and purchasers in developed and emerging countries alike, by reducing the risks and costs of asset- based financing. In fact, the MAC Protocol is expected to have a positive impact on annual global GDP of US\$30 billion a year. Furthermore, the MAC protocol is also expected to have a material impact on terms of loans connected with investment in MAC equipment, by extending loan durations up to 2 years and reducing the average interest rate applicable to such loans of 100 base points (bps). Due to these better terms and conditions, within ten years from the implementation of the MAC protocol, the stock of MAC equipment in developing countries is estimated to increase by US\$90 billion (which corresponds to an increase of 12%).³
3. Benefits for developing economies: The MAC Protocol will enable emerging economies to finance and acquire sophisticated, high-value MAC equipment in a cheaper and more efficient manner. This will provide advantages and benefits for developing countries by not only allowing cheaper financing and better access to modern MAC equipment, but also by acting as an important modernization tool of the entire MAC sector for economies which are mostly based on primary industries such as agriculture and mining. In fact, the MAC protocol is expected to boost the GDP of developing economies by US\$23 billion per year.⁴
4. Benefits for developed economies: Developed economies are expected to benefit from the implementation of the MAC protocol as well due to the lower costs and better conditions of credit agreements for MAC equipment, as well as due to the increased export of MAC equipment. The result is that the MAC protocol is projected to increase the GDP of developed economies by US\$7 billion per year.⁵

Therefore, the MAC WG urges countries to sign the MAC Protocol at the Diplomatic Conference. The MAC WG hopes and trusts that the comments in this paper will be duly considered by attendees of the meeting to ensure that the MAC Protocol reflects the realities and needs of the MAC industries.

² MAC Protocol Economic Assessment An Economic Assessment of the Fourth Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, available at <https://www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf> (last visited [October 3, 2019), pp. 6 and ff.

³ MAC Protocol Economic Assessment An Economic Assessment of the Fourth Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, available at <https://www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf> (last visited October 3, 2019), pp. 10 and ff.

⁴ MAC Protocol Economic Assessment An Economic Assessment of the Fourth Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, available at <https://www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf> (last visited October 3, 2019), p. 11.

⁵ MAC Protocol Economic Assessment An Economic Assessment of the Fourth Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, available at <https://www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf> (last visited October 3, 2019), pp. 12.

II. Comments: improving the MAC Protocol to better meet the mac industries' realities and needs

The MAC Protocol will be most effective if (1) its terms bring certainty and clarity to transactions involving covered MAC Equipment, (2) it remains consistent with the prior Protocols, especially the Aircraft Protocol, to the greatest extent possible, and (3) flexibility is maintained for the MAC Protocol to adapt itself to the fast- changing reality of the MAC industries without the need for impractical and/or time-consuming procedures. As the MAC WG has stated previously, the members of the MAC WG are looking for the *right* MAC Protocol, not just a MAC Protocol. While the members of the MAC WG are very appreciative of the serious consideration given to the input of the MAC WG thus far in the development of the MAC Protocol, there are three key provisions that need to be corrected in the final text of the MAC Protocol produced at the Diplomatic Conference in order for the MAC WG to continue to voice its support for the MAC Protocol. We have also included certain other revisions that we feel would constitute improvements to the text, but that aren't necessary for the MAC WG's continued support.

A. Changes necessary for the continued support of the MAC Working Group

1. Administrative Authorities

The MAC WG agrees with Germany that Article VIII(5) is the only provision of the draft MAC Protocol concerning administrative authorities that applies irrespective of a declaration made pursuant to Article XXVII. Thus, we begin by expressing our agreement with the implicit position of Germany that Article IX(6), Article X Alternative A(8) and Article X Alternative C(9) of the draft MAC Protocol should be retained in their existing forms (*sans* brackets) as they are the subject of declaration. The MAC WG also notes that these provisions are consistent with prior Protocols. Turning to Article VIII(5), the MAC WG appreciates the various concerns expressed by China, Germany, the United States and the United Kingdom. If Article VIII(5) cannot be retained in its current form with the bracketed text removed as recommended by Canada, and as consistent with the Rail Protocol, the MAC WG is of the view that Article VIII(5) must be deleted in its entirety so that, consistent with the Aircraft Protocol, the only provisions concerning administrative authorities are subject to declaration. For avoidance of doubt, the MAC WG will not support the deletion of Article VIII(5) if it is proposed that Article IX(6), Article X Alternative A(8) or Article X Alternative C(9) be amended other than removing the brackets around such provisions in the current draft MAC Protocol.

2. Search Criteria

The MAC WG agrees with the United States that consistency with the prior Protocols should be sought when the MAC Protocol seeks to achieve the same outcome. One such Article where the MAC Protocol seeks to achieve the same outcome as the prior Protocols is Article XVIII(1). Article XVIII(1) of the current draft of the MAC Protocol contains an odd, and impractical, deviation from prior Protocols when defining the search criteria. The Aircraft Protocol sets forth the criteria and then goes on to provide that such criteria may be "supplemented as necessary to ensure uniqueness" and that "[s]uch supplementary information shall be specified in the regulations." The Rail Protocol goes one step further and defers the search criteria in its entirety to the regulations. The MAC WG is of the continuing view that the approach taken by the Aircraft Protocol is the best mechanism to allow the search criteria to be supplemented over time to reflect advancements in unique identifiers for equipment. The failure of Article XVIII(1) to include language consistent with the Aircraft Protocol allowing for the regulations to supplement the search criteria not only creates an inconsistent approach to that taken in Article XVII,⁶ but also unnecessarily limits the ability of the MAC Protocol

⁶ "A description of equipment that contains its manufacturer's serial number **and such additional information as required to ensure uniqueness** is necessary and sufficient to identify the object for the

to evolve with the industry without the need for a review conference pursuant to Article XXXIII. The lesson from the Aircraft Protocol, which is now on the eighth edition of its regulations, is that it is necessary to allow the regulations the ability to alter these sorts of technical provisions in order to have an optimally functioning registry.

3. Article XII/Buyer Take Free Rule

During CGE2, the MAC Working Group asked the experts to consider the inclusion of a declaration mechanism that would allow Contracting States to opt-out of the Protocol in its entirety for inventory. While this proposal was accepted on the floor and the policy reflected in Article XII of the current draft of the MAC Protocol, the current drafting of Article XII of the MAC Protocol also introduced a global “buyer take free” rule that was not supported by the MAC WG and that relies on non-Convention law to determine the priority of a registered interest in respect of inventory even in a Contracting State that has agreed that the MAC Protocol will apply in full to inventory.⁷ Consistent with the policy proposed by the MAC WG and adopted at CGE2, the MAC WG confirms that we are in complete agreement with Japan’s position on Article XII. Contracting States should be able to opt-out of the Protocol in its entirety for inventory. Furthermore, the CTC priority rules should apply in full in Contracting States that have agreed that the MAC Protocol will apply to inventory. The resulting system of rules will be more certain and more predictable, thus maximising the positive impact of the MAC Protocol for inventory financing whether or not a Contracting State chooses to have the MAC Protocol apply to inventory.

To be clear, the MAC WG will not support any attempt to create half measures, including the creation of additional declarations so that portions of the MAC Protocol either apply or don’t apply to Contracting States that have declared that the MAC Protocol will or won’t apply to inventory located in such jurisdiction. Such attempted half-measures, including any “buyer take free” rules, unnecessarily inject uncertainty, complexity and significant additional costs into finance and lease transactions involving inventory without providing any appreciable commercial benefit.

B. Other supported revisions to the MAC Protocol

1. Inclusion of HS Code 8434.10 (Milking Machines)

The MAC WG supports the inclusion in Annex 2 of HS Code 8434.10 covering certain milking machines as proposed by Germany on the basis that the equipment covered by HS Code 8434.10 meets the criteria established to evaluate other HS Codes for inclusion in the MAC Protocol.

2. Certain Revisions Proposed by the United Kingdom

The MAC WG supports the revisions proposed by the United Kingdom in its official comments under the headings “Preamble”, “Article I(2)”, “Annexes 1 and 3”, “All Annexes” and “Interpretation”.

3. Article X (Alternatives B and C)

Of the 76 Contracting States that have ratified the Aircraft Protocol and the 3 Contracting States that have ratified the Rail Protocol, only one Contracting State (Mexico) has made a

purposes of Article 18(1)(a) of the Convention. The Regulations shall specify the format of the manufacturer’s serial number and provide what additional information is required to ensure uniqueness.”

⁷ UNIDROIT 2019 – DCME-MAC – Doc. 4 corr. contains alternative draft language that rectifies many of the drafting issues with the current formulation of Article XII, but it still contains the global “buyer take free” rule.

declaration for insolvency Alternatives B or C⁸. As such, the MAC WG is of the view that Alternatives B and C to Article X could be removed for the sake of simplifying the MAC Protocol (i.e. the MAC Protocol would be consistent with the prior Protocols in practice despite not including lengthy declarations that, while included in one or more of the prior Protocols, are not actually being declared by Contracting States).

⁸ It should be noted that efforts are underway for Mexico to re-ratify the Aircraft Protocol with insolvency Alternative A.

Schedule 1**Members of the MAC Working Group**

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