INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

FR

Protocole MAC
Comité d'experts gouvernementaux
Deuxième session
Rome, 2 – 6 octobre 2017

UNIDROIT 2017
Etude 72K – CEG2 – Doc. 4
Original: anglais
septembre 2017

ANALYSE JURIDIQUE

(Préparée par le Secrétariat d'UNIDROIT)

Introduction

1. L'objet de ce document est de présenter les questions juridiques et techniques concernant l'avant-projet de Protocole portant sur les questions spécifiques aux matériels d'équipement agricoles, de construction et miniers à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles (ci-après "l'avant-projet de Protocole MAC"). Ce document présente la synthèse de recherches menées par le Secrétariat, des délibérations du Comité d'étude au cours de ses quatre réunions, ainsi que des décisions prises par le Comité d'experts gouvernementaux lors de sa première session (CEG1, Rome, 20 – 24 mars 2017).

2. Ce document d'analyse juridique reprend pour l'essentiel la structure des documents d'analyse juridique élaborés au cours de l'élaboration du projet Protocol MAC. Les questions sont regroupées sous les cinq sections thématiques suivantes :

1) Questions concernant le champ d'application
2) Questions concernant les matériels d'équipement MAC rattachés à d'autres biens
3) Questions relatives à l'insolvabilité
4) Questions concernant l'inscription
5) Autres questions

3. Les Annexes à ce document (en anglais) reproduisent des documents de recherche produits par le Secrétariat et les organisations qui l'ont aidé durant la période 2014 - 2017 afin de fournir une analyse plus approfondie sur certaines questions juridiques complexes.

4. Le contenu de ce document est largement conforme à l'Analyse juridique préparée pour le Comité CGE1 (UNIDROIT 2016 - Etude 72K - CGE1 - Doc. 4). Il a été mis à jour pour refléter les délibérations du Comité au CGE1 et pour refléter les questions sur lesquels le Secrétariat a entrepris d'autres recherches [1].

5. Les références dans le présent document à l' "avant-projet de Protocole MAC" se rapportent au document UNIDROIT 2017 - Etude 72K – CEG2 – DOC. 2, tel qu'approuvé par le Comité lors de sa première session CEG1. Durant ses sessions, le Comité d'étude a préparé six versions du projet de texte. Les versions antérieures du projet élaboré durant les sessions du Comité d'étude sont désignées dans ce document comme "projet du Comité d'étude".

[1] En particulier, le Secrétariat a ajouté de nouvelles recherches aux parties 4Q (Autorités administratives et à l'autorisation de radiation et à la demande d'exportation), 5W (Autorité de surveillance) et ajouté l'Annexe X (Recherche sur les candidats potentiels à l'Autorité de surveillance).

QUESTIONS JURIDIQUES

Ière PARTIE - QUESTIONS CONCERNANT LE CHAMP D'APPLICATION

A. Utilisation du système harmonisé

6. Au début du projet de Protocole MAC, certaines préoccupations ont été émises concernant la portée de l'avant-projet de Protocole MAC [2]. La préoccupation qui a été le plus fréquemment soulevée était que le champ d'application de l'avant-projet de Protocole MAC destiné à couvrir tous les matériels agricoles, de construction et miniers était tout simplement trop large et incertain. La question a également été posée de savoir s'il était possible de limiter le champ d'application de l'avant-projet de Protocole MAC à des types de matériels agricoles, de construction et miniers qui sont par nature mobiles et de grande valeur, et s'il était approprié de couvrir les matériels agricoles, de construction et miniers dans un même instrument. Après avoir examiné plusieurs approches différentes visant à limiter le champ d'application de l'avant-projet de Protocole MAC, un mécanisme a été identifié qui pourrait être utilisé pour assurer que le champ d'application du Protocole MAC soit clair et approprié.

7. L'avant-projet de Protocole MAC utilise le Système Harmonisé de Désignation et Codification des Marchandises (Système SH) pour identifier les types de matériels d'équipement agricoles, de construction et miniers devant être couverts par le Protocole. Le Système SH est un système de nomenclature globale développé par l'Organisation mondiale des douanes (OMD) pour obtenir une classification uniforme des produits et des marchandises dans le commerce international. Les pays l'utilisent aussi pour surveiller les marchandises réglementées, calculer et percevoir les taxes de vente et d'accise internes, compiler des statistiques de transport. Le Système SH est utilisé par plus de 200 pays et couvre 98% du commerce international. L'OMD a été consultée pour déterminer comment le Système SH pourrait être utilisé pour déterminer le champ d'application de l'avant-projet de Protocole, et un responsable technique principal de l'Organisation a participé à la troisième réunion du Comité d'étude pour fournir son expertise.

8. Les Annexes à l'avant-projet de Protocole MAC dressent la liste des codes SH qui couvrent les types de matériels d'équipement agricoles [3], de construction et miniers qui relèvent du champ d'application du Protocole (les codes du Système SH pour le matériel d'équipement agricole sont énumérés à l'Annexe 1, ceux du matériel de construction à l'Annexe 2 et ceux du matériel d'équipement minier à l'Annexe 3). L'utilisation du Système SH pour définir le champ d'application de l'avant-projet de Protocole garantit que le Protocole s'appliquera aux matériels d'équipement de grande valeur utilisés principalement dans les secteurs de l'agriculture, de la construction et de l'exploitation minière. En outre, la liste des codes SH couvrant les matériels d'équipement des différents secteurs (agriculture, construction et exploitation minière) dans des Annexes séparées permet aux Etats contractants d'appliquer l'avant-projet de Protocole MAC à des matériels utilisés dans un ou deux seulement des secteurs de l'agriculture, de la construction ou de l'exploitation minière s'ils le souhaitent [4].

---

[2] UNIDROIT 2006 – C.D. (85) 19, page 10; UNIDROIT 2009 – C.D. (88) 17, paragraphes 143 – 147; UNIDROIT 2010 – C.D. (89) 17 paragraphes 33 – 37; UNIDROIT 2011 – C.D. (90) 18, paragraphes 68 – 70; UNIDROIT 2012 – C.D. (91) 15, paragraphes 46 – 47; UNIDROIT 2013 – C.D. (92) 17, paragraphes 44 – 48; UNIDROIT 2014 – C.D. (93) 14, paragraphes 34 – 38.

[3] Le Comité d'étude a décidé que la définition d' 'agriculture' pour l'avant-projet de Protocole devrait être compatible avec celle de l'Organisation des Nations Unies pour l'alimentation et l'agriculture (FAO), qui inclut les forêts et la pêche (où la pêche couvre le matériel d'aquaculture).

[4] Par exemple, en vertu de l'article 2(3) de l'avant-projet de Protocole, les Etats contractants seraient autorisés à faire une déclaration appliquant le Protocole uniquement aux matériels d'équipement agricoles de l'Annexe 1 et aux matériels d'équipement miniers de l'Annexe 3, mais pas aux matériels d'équipement de construction de l'Annexe 2.

9. Un document détaillé sur le fonctionnement du Système Harmonisé, préparé par le *National Law Centre for Inter-American Free Trade (NLCIFT)* et présenté au Comité d'étude à sa deuxième réunion est présenté en Annexe 1 (en anglais). L'Annexe 1 fournit des informations sur l'organisation et la structure du système SH, sur d'autres instruments internationaux qui utilisent le système SH pour définir leur champ d'application et sur des systèmes de classification alternatifs. Le document UNIDROIT 2017 - Etude 72K - CEG2 - Doc. 6 fournit de plus amples informations sur la façon dont est mis à jour le système SH et utilise la modification récente de la nomenclature de 2012 à 2017 du système SH pour examiner comment l'article XXXII de l'avant-projet de Protocole traiterait une telle modification.

Examen lors des réunions précédentes

10. A la première réunion du Comité d'étude, il a été convenu que la meilleure méthode pour définir le champ d'application de l'avant-projet de Protocole MAC serait probablement en utilisant le système SH [5]. La question a été examinée de façon plus approfondie à la deuxième réunion du Comité d'étude, sur la base des recherches effectuées par le NLCIFT. On a souligné qu'alors qu'il existait plusieurs autres classifications de matériels qui sont utilisées au niveau international pour une variété de finalités, le système SH restait le système de référence et celui qui est le plus utilisé, et qu'il était le système le plus approprié pour définir le champ d'application de l'avant-projet de Protocole MAC.

11. Durant la deuxième réunion du Comité d'étude, il a été noté que le système SH est formé de 5205 codes à 6 caractères, couvrant 98% du commerce international. Le processus d'amendement qui intervient tous les cinq ans, porte sur des précisions ainsi que sur une réorganisation structurelle du système SH. Les amendements n'effectuent généralement pas de changements radicaux au système, et 72% des codes SH n'ont jamais été modifiés. Lors des trois derniers processus d'amendement au système SH qui sont intervenus en 2002, 2007 et 2012, seuls 6 des 103 codes SH dont l'inclusion avait été suggérée aux fins de l'avant-projet de Protocole MAC avaient été affectés par des amendements, et ces changements concernaient la structure et non le fond.

12. A la troisième réunion du Comité d'étude, M. Ed de Jong, Administrateur technique principal de l'OMD a fait une présentation détaillée de la façon dont le système SH fonctionne et comment le système pourrait être utilisé par l'avant-projet de Protocole MAC pour définir son champ d'application. Il a noté que l'édition actuelle de 2012 du code SH resterait en vigueur jusqu'à la fin de 2016, étant donné que les révisions intervenaient tous les cinq à six ans.

13. M. de Jong a expliqué différents aspects du système SH est a indiqué que les statistiques portant sur le commerce international de marchandises soumises au système SH sont établies et tenues par COMTRADE (relevant de la Division des statistiques des Nations Unies) [6], les parties contractantes au système SH étant tenues de publier leurs statistiques, et qu'il y avait 155 parties contractantes au 18 janvier 2017. Il a également noté que les amendements au système SH se devaient à des variations dans les échanges commerciaux, à des problèmes de classification ou à l'apparition de nouvelles technologies. Lorsqu'un code était supprimé en raison d'échanges commerciaux faibles, un bien faisant l'objet d'un code supprimé pourrait encore être couvert sous un code à six caractères appartenant à une catégorie résiduelle. À la fin de la troisième réunion, le Comité d'étude a conclu que le système SH continuait d'être le meilleur mécanisme pour définir le champ d'application de l'avant-projet de Protocole MAC.

---

5 UNIDROIT 2015 - Study 72K – SG1 – Doc. 5, paragraphes 6-9 (en anglais).

6 COMTRADE est une base de données des Nations Unies proposant des statistiques sur le commerce mondial des produits de base. COMTRADE est le plus grand dépositaire de données relatives au commerce international, avec 1.7 milliards de données compilées depuis 1962. Plus de 170 pays concernés fournissent à la Division des statistiques des Nations unies chaque année des statistiques internationales détaillées par produits de base et pays partenaires.

14. A la quatrième réunion du Comité d'étude, le Secrétariat a présenté au Comité le fruit de recherches complémentaires portant sur deux autres instruments internationaux qui utilisaient le système harmonisé pour définir certains aspects de leur champ d'application. Le Secrétariat avait effectué une étude sur l'Accord relatif au commerce des aéronefs civils et le Traité sur la charte de l'énergie, afin d'établir si les approches utilisées dans ces instruments pourraient être adoptées par l'avant-projet de Protocole MAC. On a noté que les approches des deux instruments concernant l'utilisation du système SH comme mécanisme de définition du champ d'application étaient limitées, du fait qu'ils avaient tous deux des mécanismes descriptifs de leur champ d'application en plus de l'utilisation des codes SH.

15. On a expliqué qu'un mécanisme potentiellement utile de ces deux instruments était la désignation 'ex' indiquant que certains biens auxquels était attribué un code SH déterminé n'étaient pas compris dans le champ d'application de l'instrument. S'il était décidé d'exclure certains biens de l'avant-projet de Protocole MAC, tels que des pièces couvertes par un code SH inclus dans l'Annexe, alors la désignation 'ex' pourrait être utilisée pour appliquer l'avant-projet de Protocole MAC à des biens d'équipement complets énumérés sous un code SH, tout en excluant les pièces.

B. **Liste préliminaire de codes SH à inclure dans le Protocole MAC**

16. Les Annexes à l'avant-projet de Protocole MAC dressent les listes de codes SH qui couvrent les types de matériels d'équipement agricoles, de construction et miniers qui relèvent du champ d'application du Protocole. Il existe 36 codes SH énumérés dans les annexes de l'avant-projet de Protocole (20 dans l'Annexe 1, 28 dans l'Annexe 2 et 17 dans l'Annexe 3) [7].

17. La liste préliminaire de codes SH a été établie en collaboration avec le Groupe de travail MAC. Le Groupe de travail est constitué de 13 membres [8] provenant de six pays [9]. Font partie du Groupe de travail plusieurs des principaux constructeurs de matériels d'équipement MAC à l'échelle mondiale, ainsi que plusieurs associations professionnelles, dont l'*Association of Equipment Manufacturers (AEM)* qui compte 917 membres dans les secteurs de l'agriculture et de la construction, l'*Equipment Leasing and Finance Association (ELFA)* qui représente plus de 575 sociétés de services financiers, des banques et des constructeurs, et le *Verband Deutscher Maschinen und Anlagenbau (VDMA)* qui est l'une des plus grandes associations industrielles en Europe représentant 3.100 entreprises membres dans le secteur de l'ingénierie. Le Groupe de travail est dirigé par M. Phillip Durham qui est un associé du Groupe de financement structuré du cabinet d'avocats *Holland and Knight* de New York.

18. Les codes SH de la liste préliminaire ont été initialement suggérés par le Groupe de travail et ont été examinés par le Comité d'étude. Le Comité d'étude a considéré les facteurs suivants pour décider s'il était approprié d'inclure un code SH dans les Annexes de l'avant-projet de Protocole MAC :

a) La question de savoir si le code SH couvre le matériel d'équipement utilisé principalement dans les secteurs de l'agriculture, de la construction et de l'exploitation minière. Lorsque le matériel d'équipement est fréquemment utilisé en dehors de ces secteurs, il a été considéré comme du matériel d'équipement à usage multiple et a été exclu des Annexes.

---

[7] Il convient de noter que le même code SH peut figurer dans la liste de plus d'une Annexe, parce que le matériel d'équipement couvert par ce code SH est utilisé dans plus d'un des trois secteurs concernés (par exemple, un code SH pourrait couvrir les excavateurs qui sont utilisés dans la construction et l'exploitation minière et figureraient donc respectivement dans les deux Annexes 2 et 3).

[8] Association of Equipment Manufacturers (AEM), AGCO, Caterpillar, CNH Industrial, Equipment Leasing and Finance Association (ELFA), General Electric, Hitachi, Holland and Knight, John Deer, Komatsu, Pfaandbrief, Tafe, Verband Deutscher Maschinen- und Anlagenbau (VDMA) et Vermeer.

[9] Allemagne, Australie, Etats-Unis d'Amérique, Inde, Italie et Japon.

b) La question de savoir si le code SH couvre le matériel d'équipement de grande valeur. Le Comité d'étude a noté qu'un code SH ne devait pas obligatoirement couvrir exclusivement le matériel d'équipement de grande valeur pour figurer dans les Annexes. Les prix unitaires individuels pour des matériels d'équipement neufs couverts par les codes SH énumérés dans les Annexes de l'avant-projet de Protocole MAC sont compris entre US$ 10.000 et US$ 7.000.000, mais la plupart des codes SH ont une valeur unitaire minimale individuelle de plus de US$ 100.000.

c) La question de savoir si le code SH couvre du matériel d'équipement financé individuellement dans la pratique actuelle de l'industrie. Lorsque ce n'est pas le cas, le Comité d'étude a décidé qu'il était inapproprié de l'inclure dans le champ d'application de l'avant-projet de Protocole MAC.

d) La question de savoir si le code SH couvre du matériel d'équipement qui a un numéro de série du constructeur unique et individuel. La sérialisation individuelle est nécessaire pour l'inscription d'une garantie portant sur un matériel d'équipement dans le Registre international.

e) La question de savoir si le code SH couvre aussi bien des pièces de matériel que le matériel d'équipement dans son ensemble. Le Système SH prévoit explicitement que certains codes SH couvrent des pièces de matériel d'équipement. Le Comité d'étude a décidé que les codes SH qui couvrent explicitement uniquement des pièces devraient être exclus des Annexes, parce que les pièces des types pertinents de matériels d'équipement ne sont généralement pas, de façon individuelle, suffisamment de grande valeur ou financées individuellement dans la pratique.

f) La question de savoir si le code SH couvre des parts importantes du commerce international. Le Comité d'étude a examiné les données globales d'exportation 2014 pour les codes SH dans les Annexes à l'avant-projet de Protocole MAC, qui ont été extraites de la plate-forme COMTRADE. Certains codes SH sont d'une importance particulière pour le secteur privé car ils couvrent une grande part du commerce international de matériel d'équipement agricole, de construction et minier, ce qui rend leur inclusion essentielle à la viabilité économique du Protocole (dès lors qu'ils remplissent les autres critères énumérés aux points a) - e) ci-dessus).

19. Sur la base de ces critères, le Comité d'étude a classé les codes SH proposés par le Groupe de travail en niveaux de codes, appropriés et inadaptés. Ces codes sont présentés dans le document UNIDROIT 2017 - Etude 72K - CEG2 - Doc. 5. La liste contient 36 codes appropriés (surlignés en vert) et 73 codes inadaptés (surlignés en orange). Le Groupe de travail continue de contribuer à l'inscription sur la liste préliminaire pour garantir que les informations qu'elle contient sont aussi précises et détaillées que possible.

Examen lors des réunions précédentes

20. A la première réunion du Comité d'étude, le Comité a examiné une liste de 97 codes SH sélectionnés par le secteur privé lors de consultations tenues à Washington en 2013 et 2014.

21. A la deuxième réunion du Comité d'étude, la liste a été élargie pour inclure six autres codes suggérés par General Electric Mining, et des précisions ont été apportées à la liste pour ce qui est de la nature des biens d'équipement :

a) Exemples de matériels d'équipement typiques couverts par le code SH applicable, au regard de leur utilisation. Les exemples et utilisations ont pris comme référence les règles actuelles des services des douanes et de la protection des frontières des USA auxquels les exportateurs vers les USA demandent la classification SH de leurs produits.

b) Images des matériels d'équipement couverts par les codes SH applicables.

c) Informations statistiques sur le volume commercial pour certains pays qui importent et exportent les types correspondants de matériels d'équipement couverts par les codes SH applicables. Les informations statistiques proviennent de deux bases de données accessibles au public sur Internet et permettant des recherches aisées. Les deux bases de données sont tenues par le Gouvernement du Canada et l'Union européenne.

22. En vue de la troisième réunion du Comité d'étude, le Secrétariat d'UNIDROIT a complété la liste préliminaire:

a) chaque fois que nécessaire, par des sous-titres fournissant des exemples additionnels de codes SH avec plusieurs types de matériels d'équipement;

b) par des descriptions plus développées fournissant davantage d'informations concernant les différents types de matériel d'équipement couverts par les codes SH énumérés;

c) par des commentaires additionnels empruntés aux notes explicatives officielles du système SH;

d) par des colonnes additionnelles indiquant si chaque code SH énuméré couvre un matériel d'équipement qui pourrait être considéré comme un bien accessoire, susceptible d'être rattaché à un bien immobilier, ou bien pourrait être communément utilisé dans d'autres domaines que les secteurs agricoles, de construction ou minier;

e) par une colonne supplémentaire indiquant si chaque code relève du secteur agricole, de construction ou minier, ou bien s'il couvre un matériel d'équipement qui est utilisé dans plus de l'un de ces secteurs.

23. Des consultations avec le secteur industriel allemand en août 2015 ont conduit à l'ajout de sept nouveaux codes SH dans la liste préliminaire, pour examen (codes HS841370, 843049, 847431, 847432, 847982, 870540, 871620).

24. D'autres codes ont été suggérés par des membres du Groupe de travail en septembre 2015, portant ainsi à 113 le nombre total de codes SH présentés au Comité d'étude à sa troisième réunion. Lors de sa troisième réunion, le Comité d'étude a classé les codes SH proposés par le Groupe de travail en trois niveaux de codes : appropriés (niveau 1), possibles (niveau 2) et inadaptés (niveau 3). Les codes du Niveau 1 ont été inclus dans les Annexes de l'avant-projet de Protocole MAC parce qu'appropriés pour relever du champ d'application du Protocole. Les codes du Niveau 2 ont été considérés comme ayant une certaine pertinence, mais ne répondaient pas à un ou deux des critères (énoncés ci-dessus) et le Comité d'étude avait besoin de plus d'éléments pour démontrer qu'ils répondaient à tous les critères retenus pour l'inclusion. Les codes du Niveau 3 ne répondaient pas à plusieurs critères clés et ont été exclus.

25. Entre la troisième et la quatrième réunion du Comité d'étude, le Secrétariat a rassemblé d'autres informations. Celles-ci comprenaient:

a) des données globales concernant les exportations et les importations pour les codes SH de la liste préliminaire provenant de la plate-forme COMTRADE. Cette information fournit une mesure beaucoup plus précise des valeurs commerciales globales pour le matériel d'équipement relevant du champ d'application de l'avant-projet de Protocole MAC, qui était précédemment basées sur des informations statistiques provenant de bases de données tenues par le gouvernement du Canada et l'Union européenne [10].

---

[10] Dans les statistiques commerciales internationales, les exportations peuvent ne pas coïncider avec les importations (ce qui est désigné sous le terme "asymétrie commerciale") pour différentes raisons méthodologiques: a) le moment de l'inscription des données; b) le système commercial [ou la couverture territoriale]; c) une classification incorrecte; d) les importations incluent le fret et l'assurance mais non les exportations, etc. Pour plus d'informations voir: http://unstats.un.org/unsd/trade/events/2014/mexico/documents/session4/Asymmetries%20in%20official%20ITS%20and%20analysis%20of%20globalization%20-%20V%20Markhonko%20-%2018%20Sep%202014.pdf

b) Information fournie par le Groupe de travail:

i) un ordre de grandeur de prix unitaires pour les nouveaux matériels d'équipement sous chaque code (fournis par différents constructeurs et agrégés par le Groupe de travail pour les rendre anonymes);

ii) si le matériel d'équipement sous chaque code est actuellement financé ou loué séparément (information fournie par les financeurs);

iii) d'un point de vue pratique, si le matériel d'équipement sous chaque code doit être fixé à un bien immobilier ou installé sur un autre matériel d'équipement pour fonctionner;

iv) si les matériels d'équipement sous chaque code ont des numéros de série du constructeur uniques et si les numéros de série du constructeur sont réutilisés;

v) si les matériels d'équipement sous chaque code ont des désignations de modèle;

vi) le groupe de travail a demandé d'ajouter dans la Catégorie 1, 5 codes SH qui n'apparaissaient pas précédemment sur la liste (codes SH 842959, 843031, 843049, 843340 and 843351);

vii) Le Groupe de travail a demandé que trois codes SH soient transférés du Niveau 2 au Niveau 1 (codes SH 847982, 843680 and 870190), et a fourni des informations supplémentaires pour justifier le changement demandé.

26. A la quatrième réunion du Comité d'étude, le Groupe de travail a fourni quatre codes SH supplémentaires qui n'apparaissaient précédemment pas sur la liste, qu'ils ont demandé d'ajouter au Niveau 1 (codes SH 843031, 843049, 843340 et 843351). Le Comité d'étude a également examiné des informations supplémentaires fournies par des constructeurs japonais. Les 8 codes SH suggérés par les constructeurs japonais se trouvaient déjà sur la liste ; 6 étaient déjà au Niveau 1 et deux au Niveau 2. Les deux codes du Niveau 2 (843149 and 843141) concernent des pièces et accessoires.

27. A sa quatrième réunion, le Comité d'étude est convenu d'ajouter les codes SH 843031, 843049, 843340, 843351 au Niveau 1, de déplacer les codes SH 847982, 870190 et 843680 du Niveau 2 au Niveau 1 et le code SH 842620 (Grue à tour) du Niveau 1 au Niveau 3. À la fin de la quatrième réunion, sur les 113 codes figurant sur la liste, 38 ont été classés comme codes de Niveau 1 (appropriés), 18 ont été classés comme Niveau 2 (codes possibles) et 57 ont été classés comme codes de Niveau 3 (inappropriés).

C. **Application des critères de l'article 51(1) : grande valeur, mobile, susceptible d'individualisation**

28. Le point de départ naturel lorsque l'on envisage le champ d'application de l'avant-projet de Protocole MAC est l'article 51(1) de la Convention du Cap elle-même qui dispose:

> *Le Dépositaire peut constituer des groupes de travail, en coopération avec les organisations non gouvernementales que le Dépositaire juge appropriées, pour déterminer s'il est possible d'étendre l'application de la présente Convention, par un ou plusieurs Protocoles, à des biens relevant de toute catégorie de matériels d'équipement mobiles de grande valeur autre qu'une catégorie visée au paragraphe 3 de l'article 2, dont chacun est susceptible d'individualisation, et aux droits accessoires portant sur de tels biens.*

29. L'article 51(1) énonce clairement trois éléments que le matériel d'équipement doit présenter pour pouvoir faire l'objet d'un futur Protocole : être i) de grande valeur, ii) mobile et iii) susceptible d'individualisation. Ainsi, l'article 51 limite naturellement le champ d'application de la Convention en assurant qu'elle n'est pas d'application générale aux opérations garanties internationales.

30. Comme indiqué dans la partie 1A de la présente Analyse juridique, le mécanisme essentiel permettant de délimiter la portée de l'avant-projet de Protocole MAC est le système SH, au moyen d'une sélection de codes SH à 6 chiffres couvrant pour la plupart des matériels d'équipement de grande valeur, mobiles et susceptible d'individualisation. Au cours de sa première session, le Comité a décidé d'ajouter au paragraphe 2 du Préambule une référence explicite aux critères de l'article 51(1) de la Convention du Cap. Le Comité a décidé d'ajouter le paragraphe 4 au Préambule, qui fait référence au rôle intégral du Système harmonisé pour déterminer la portée du Protocole pour ce qui est de son application aux équipements MAC.

Critère de la grande valeur

31. A sa première réunion, le Comité d'étude a examiné si une valeur minimum unitaire de prix de vente pourrait être fixée dans l'avant-projet de Protocole MAC. Des préoccupations importantes ont été exprimées concernant cette approche. Principalement, cela aurait constitué un écart par rapport aux Protocoles précédents où un tel mécanisme n'existe pas. En second lieu, la fixation d'un tel prix aurait été extrêmement difficile à appliquer au financement du matériel d'équipement utilisé. En troisième lieu, elle pourrait conduire à des distorsions de marché imprévues et indésirables, par exemple des constructeurs et autres vendeurs pourraient augmenter le prix de certains types de matériels d'équipement MAC pour satisfaire au critère de valeur minimum unitaire et ainsi profiter des avantages du Protocole.

32. L'utilisation du système SH permet de limiter le champ d'application de l'avant-projet de Protocole MAC à certains types de matériels d'équipement MAC, identifiés par des codes SH à 6 chiffres (par exemple 841340 pour les Pompes à béton, ou 842620 pour les Grues à tour). Chacun de ces codes couvre une gamme de matériels d'équipements d'un certain type. Lors de la troisième réunion du Comité d'étude, il a été convenu que le critère de la grande valeur devrait être utilisé pour sélectionner les codes SH pertinents à inclure dans les Annexes à l'avant-projet de Protocole MAC, mais qu'il ne devrait pas constituer une exigence supplémentaire indépendante en vertu du Protocole même.

33. La liste préliminaire des codes SH couvre un type de matériel d'équipement comprenant une gamme de prix unitaires agrégés fournis par les fabricants participant au Groupe de travail. Il reste une grande diversité des prix unitaires (le plus bas étant de 10.000 USD et le plus élevé de 7 millions USD), mais la valeur de la plupart des matériels est de l'ordre de centaines de milliers de dollars.

34. Un petit nombre de types de matériel d'équipements MAC de faible valeur pourrait être couvert par des codes SH, lesquels couvrent principalement des équipements MAC de grande valeur (et sont inclus dans les Annexes à l'avant-projet de Protocole). Cependant, la possibilité que soient enregistrés en nombre limité des types de matériels d'équipement de moindre valeur ne devrait pas empêcher de façon absolue l'inscription d'un code SH donné. La possibilité de financer des matériels d'équipement de faible valeur existe dans le Protocole ferroviaire de Luxembourg. Le Protocole ferroviaire de Luxembourg permet l'enregistrement de tout matériel roulant ferroviaire doté d'un numéro de série individuel qui satisfait à la définition de l'article I(e). Alors que la grande majorité des matériels roulants ferroviaires qui répondent à cette définition est de grande dimension et de grande valeur, la définition couvre également des matériels roulants ferroviaires plus anciens et plus petits, indépendamment de leur valeur.

35. Par ailleurs, une autre façon d'exclure les matériels de faible valeur tient à la condition de l'individualisation. Il est possible que la plupart des matériels de faible valeur couverts par les codes SH énumérés ne portent pas de numéro de série individuel du constructeur et ne pourront donc pas être inscrits dans le Registre international.

Critère de la mobilité

36. Le Comité d'étude a décidé lors de sa première réunion [11], et a réaffirmé lors de réunions ultérieures, qu'aucune définition spécifique de la mobilité n'est nécessaire dans l'avant-projet de Protocole MAC. Il a également été décidé, lors de réunions ultérieures, que le matériel d'équipement MAC dont l'utilisation n'impliquait pas de mobilité ne devrait pas être strictement exclu. Le Comité d'étude a également conclu que la mobilité serait prise en compte dans la sélection des codes SH à inclure dans les Annexes à l'avant-projet de Protocole MAC.

37. Il a également été noté à la première réunion du Comité d'étude que la définition de la mobilité avait également été soulevée lors de la négociation du Protocole ferroviaire de Luxembourg et qu'aucune solution n'avait pu être identifiée. La majorité des garanties internationales inscrites dans le Registre international pour le Protocole aéronautique concerne des biens aéronautiques qui desservent des routes internes plutôt qu'internationales. Dès lors, il est clair qu'une mobilité internationale habituelle avérée pour tous les types de matériels d'équipement n'est pas requise pour assurer le succès d'un Protocole à la Convention du Cap.

38. A la troisième réunion du Comité d'étude, il a été examiné si un matériel d'équipement d'utilisation stationnaire devrait être couvert par l'avant-projet de Protocole MAC. Dans ce contexte, différentes conceptions de la mobilité ont été discutées, notamment:

a) La mobilité comme se référant à des biens qui font l'objet de transactions internationales, et de ce fait identifiés par le système SH;

b) La mobilité comme se référant à des objets qui, dans le cadre des transactions dont ils font l'objet, sont grevés de droits susceptibles de donner lieu à des questions de conflits de lois;

c) La mobilité sous l'angle du fonctionnement, couvant des biens qui ne sont pas physiquement rattachés à des biens immobiliers;

d) La pertinence d'une distinction entre la mobilité nationale et internationale.

39. Il a finalement été conclu à la troisième réunion du Comité d'étude qu'il serait suffisant que les définitions de la grande valeur ou de la mobilité soient considérées tout particulièrement durant la phase de sélection des codes SH à inclure dans les Annexes, et que le futur Commentaire officiel pourrait fournir des détails supplémentaires sur la façon dont des critères ont été pris en compte lors du processus de sélection.

Critère de l'individualisation

40. Il a été décidé à la troisième réunion du Comité d'étude que le numéro de série du constructeur devrait être exigé pour l'inscription d'une garantie portant sur du matériel d'équipement MAC dans le Registre international, conformément à l'approche du Protocole aéronautique.

41. La disposition concernant l' 'Identification du matériel d'équipement agricole, de construction ou minier aux fins de l'inscription' (Article XVI de l'avant-projet de Protocole MAC) prévoit que pour inscrire une garantie dans le Registre international, le nom du constructeur, et le numéro de série du constructeur (de façon à assurer l'individualisation) sont requis.

42. Un avantage supplémentaire de l'approche stricte fondée sur l'Article VII du Protocole aéronautique empêchant l'enregistrement d'un matériel d'équipement MAC sans un numéro de série du constructeur est qu'elle contribuerait aussi à empêcher l'enregistrement de biens et pièces de faible valeur non sérialisés qui seraient couverts par les codes SH énumérés. Des biens de faible

---

11 UNIDROIT 2015 - Study 72K – SG1 – Doc. 5, paragraphes 11-13. (en anglais)

valeur sont moins susceptibles d'avoir des numéros de série individuels uniques que les matériels de grande valeur.

Examen lors des réunions précédentes

43. A sa deuxième réunion, le Comité d'étude s'est demandé s'il convenait de suivre l'approche de l'Article XIV du Protocole ferroviaire de Luxembourg prévoyant la création et l'apposition de numéros de série uniques pour permettre l'inscription des garanties internationales portant sur des biens dépourvus de numéro de série du constructeur. Une solution de compromis a été trouvée, selon laquelle le Règlement prévoirait qu'après une certaine date, seules pourraient être effectuées les inscriptions relatives à des matériels d'équipement pourvus d'un numéro de série unique du constructeur. Le Comité d'étude a décidé à sa deuxième réunion que la disposition pertinente de l'Avant-projet de Protocole MAC devrait être calquée sur l'article VII (Description des biens aéronautiques) du Protocole aéronautique, exigeant la mention du numéro de série du constructeur. Il a été envisagé d'ajouter un deuxième paragraphe en vertu duquel il serait possible - jusqu'à une certaine date – de procéder à des inscriptions aussi pour du matériel sans numéro de série unique du constructeur, et prévoyant une procédure d'attribution d'un numéro d'identification unique par le Conservateur du Registre.

44. A la troisième réunion du Comité d'étude, la préférence a prévalu pour un mécanisme strict de numéro de série du constructeur sur le modèle de l'article VII du Protocole aéronautique. En l'absence d'un besoin avéré de numéros de série attribués par le Registre, l'approche du numéro de série du constructeur serait suffisante aux fins de l'inscription des garanties internationales portant sur des biens dans le Registre international en vertu du futur Protocole MAC.

45. Au cours des consultations tenues entre novembre 2015 et février 2016, le Groupe de travail a noté que tous les matériels d'équipement sous les codes SH du Niveau 1 de la liste préliminaire comportaient des numéros de série individuels du constructeur, sauf 842620 (Bigues; grues et blondins; ponts roulants, portiques de déchargement ou de manutention, ponts-grues, chariots-cavaliers et chariots-grues – Grues à tour) et 842919 (Bouteurs (bulldozers), bouteurs biais (angledozers), niveleuses, décapeuses (scrapers), pelles mécaniques, excavateurs, chargeuses et chargeuses-pelleteuses, compacteuses et rouleaux compresseurs, autopropulsés - Bouteurs (bulldozers) et bouteurs biais (angledozers) -- Autres – A lame droite, à lame en semi-U et à lame en U). Les lames individuelles sont indiquées comme des éléments sous le code SH qui peuvent ne pas avoir de numéros de série individuels. Au vu de ces résultats, le Comité d'étude a décidé à sa quatrième réunion (Rome, 7-9 mars 2016) que le code HS 842620 devait être rétrogradé du Niveau 1 au Niveau 2 et de nouvelles recherches ont été demandées sur le code HS 842919.

46. Sur la base des éléments supplémentaires présentés par le Groupe de travail qui indiquaient que la grande majorité des matériels d'équipement du Niveau 1 de la liste de codes SH avait des numéros de série individuels uniques attribués par le constructeur, il a été décidé à la quatrième réunion du Comité d'étude que la disposition additionnelle permettant la création et l'apposition de numéros de série uniques (basée sur l'approche du Protocole ferroviaire de Luxembourg) pourrait être supprimée de l'avant-projet de Protocole MAC.

D. **Interaction avec les Protocoles précédents à la Convention du Cap**

47. A la première réunion du Comité d'étude, il a été noté qu'il pourrait y avoir un chevauchement entre l'avant-projet de Protocole MAC et le Protocole ferroviaire de Luxembourg, en raison de la définition large de matériel roulant ferroviaire contenue dans le Protocole ferroviaire de Luxembourg [12]. Il y a deux cas dans lesquels cela pourrait se produire:

---

12 UNIDROIT 2015 - Study 72K – SG1 – Doc. 5, paragraphe 25 (en anglais).

a) lorsqu'un matériel d'équipement MAC couvert par un code SH figurant dans les Annexes de l'avant-projet de protocole MAC répond également à la définition de "matériel roulant ferroviaire" dans le Protocole ferroviaire de Luxembourg;

b) lorsqu'un matériel d'équipement MAC couvert par un code SH figurant dans les Annexes de l'avant-projet de protocole MAC est ensuite fixé à un matériel d'équipement qui répond à la définition de "matériel roulant ferroviaire" dans le Protocole de Luxembourg.

48. Le premier cas est peu susceptible de se présenter. Le Système SH couvre des "Véhicules et matériel pour voies ferrées ou similaires et leurs parties; Matériel fixe de voies ferrées ou similaires et leurs parties; appareils mécaniques (y compris électromécaniques) de signalisation pour voies de communications" en vertu du Chapitre 86. Au mois d'août 2016, le Niveau 1 de la liste préliminaire de codes SH dont l'inclusion est suggérée aux fins du champ d'application de l'avant-projet de Protocole MAC ne comprend aucun élément du Chapitre 86.

49. A sa quatrième réunion, le Comité d'étude a conclu que l'interaction entre l'avant-projet de Protocole MAC et les Protocoles antérieurs à la Convention du Cap devrait être traitée comme relevant du champ d'application. Le Comité d'étude a également conclu que la règle devrait être calquée sur l'article II du Protocole spatial.

50. L'article II, paragraphe 4 de l'avant-projet de Protocole MAC dispose :

> *"Le présent Protocole ne s'applique pas aux biens qui relèvent de la définition de 'biens aéronautiques' en vertu du Protocole portant sur les questions spécifiques aux biens aéronautiques à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles, au "matériel roulant ferroviaire" en vertu du Protocole de Luxembourg portant sur les questions spécifiques au matériel roulant ferroviaire à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles ou au 'bien spatial' en vertu du Protocole portant sur les questions spécifiques aux biens spatiaux à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles"* [13]*.*

51. Cette décision visait à assurer la clarté et la sécurité juridique, et à éviter la possibilité que des garanties internationales concurrentes soient constituées sur un même matériel d'équipement en vertu de différents Protocoles à la Convention du Cap. L'inscription de garanties internationales concurrentes sur un même matériel d'équipement en vertu de différents Protocoles serait problématique, car elle exigerait aux parties intéressées de faire des recherches dans tous les registres internationaux afin de s'assurer qu'une inscription dans le registre MAC aurait la priorité, et cela pourrait signifier que les différentes Variantes concernant l'insolvabilité pourraient s'appliquer à un même objet, selon les déclarations faites par les Etats contractants pour chaque Protocole.

52. Bien qu'il soit très peu probable que des biens couverts par le Protocole aéronautique relèvent aussi du champ d'application du Protocole MAC, il semble prudent d'étendre la règle au-delà du Protocole ferroviaire de Luxembourg afin de couvrir tous les Protocoles précédents, ce qui offre une sécurité supplémentaire aux parties prenantes des Protocoles précédents que leurs garanties ne seront pas affectées par le Protocole MAC.

---

[13] Ceci est un article récemment rédigé suite à la décision prise à la troisième réunion du Comité d'étude d'exclure complètement du champ d'application du protocole MAC les matériels soumis aux champs d'application des Protocoles précédents, dans un souci de clarté et de sécurité juridique. Dans le cinquième projet du Comité d'étude, cette disposition apparaissait comme un article autonome dans le chapitre V du Protocole, mais à la quatrième réunion du Comité d'étude, il a été décidé de le déplacer à l'article II. Cette disposition, insérée dans l'avant-projet actuel de Protocole MAC, est calquée sur l'article II(3) du Protocole spatial, qui exclut l'application du Protocole spatial pour les matériels d'équipement relevant de la définition des "biens aéronautiques" en vertu du Protocole aéronautique.

Examen lors des réunions précédentes

53. Lors de sa première réunion, le Comité d'étude a proposé deux approches alternatives pour traiter du chevauchement entre les deux Protocoles: i) limiter le champ d'application de l'avant-projet de Protocole MAC ou ii) insérer une règle de priorité dans l'avant-projet de Protocole MAC. Il a été noté qu'en délimitant son champ d'application par l'identification des types de matériels d'équipement au moyen du Système SH, l'avant-projet de Protocole MAC a une approche plus restreinte que le Protocole ferroviaire de Luxembourg dont la portée est définie par la description du matériel. Il a également été suggéré que si l'avant-projet de Protocole MAC devait retenir cette approche plus restrictive, il devrait prévaloir sur le Protocole ferroviaire de Luxembourg en cas de conflit entre les champs d'application des deux Protocoles. Lors de la deuxième réunion du Comité d'étude, plusieurs façons de résoudre cette question ont été discutées [14]. Le Professeur Mooney a noté qu'étant donné que le champ d'application du Protocole ferroviaire de Luxembourg est plus certain, il pourrait être souhaitable que l'avant-projet de Protocole MAC laisse priorité au Protocole ferroviaire de Luxembourg.

54. La Professeure de las Heras a demandé si le matériel roulant ferroviaire pourrait être exclu du champ d'application de l'avant-projet de Protocole MAC, par le biais d'une référence spécifique dans les Annexes à l'avant-projet de Protocole MAC, disposant "'matériel d'équipement agricole' désigne tout type de matériel d'équipement qui relève d'un code SH figurant à la présente Annexe, qui n'est pas un 'matériel roulant ferroviaire'" [15]. Le Professeur Mooney a noté qu'en vertu de cette approche, un matériel MAC qui serait par la suite fixé à un autre matériel d'équipement lui permettant d'opérer sur des rails devrait être traité comme un matériel rattaché.

55. M. Deschamps a noté que l'article 29(7) de la Convention du Cap ne fournit pas une solution efficace pour le chevauchement potentiel entre le Protocole ferroviaire de Luxembourg et l'avant-projet de Protocole MAC. M. Deschamps a noté qu'en appliquant l'article 29(7) du Protocole ferroviaire de Luxembourg, une grue attachée à un matériel roulant ferroviaire serait considérée comme un objet, alors que le matériel roulant ferroviaire lui-même serait considérée comme un bien. M. Böger a noté que l'article 29(7) pourrait régler le cas de la fixation ultérieure du matériel d'équipement MAC à un matériel roulant ferroviaire.

56. Le Comité d'étude a décidé provisoirement que les Annexes à l'avant-projet de Protocole MAC devraient prévoir que celui-ci s'applique aux types de matériels visés par les codes SH dans les Annexes, sauf s'ils sont susceptibles d'être considérés comme des biens en vertu du Protocole ferroviaire de Luxembourg et si le Protocole ferroviaire de Luxembourg est déjà en vigueur dans l'Etat contractant. Le Comité d'étude a également conclu que tout conflit dérivant de la fixation ultérieure du matériel d'équipement MAC à un matériel roulant ferroviaire serait traité par l'article 29(7) de la Convention du Cap.

57. Lors de la troisième réunion du Comité d'étude, il a été décidé que l'avant-projet de Protocole MAC devrait contenir un article prévoyant expressément que tout bien grevé d'une garantie internationale susceptible d'inscription en vertu des Protocoles aéronautique, ferroviaire de Luxembourg et spatial ne pourrait pas être inscrit en vertu du Protocole MAC. Le Comité d'étude a examiné d'autres règles d'exclusion plus limitées, par exemple permettant l'inscription en vertu du Protocole MAC si le Protocole ferroviaire de Luxembourg n'est pas en vigueur dans l'Etat contractant

---

[14] UNIDROIT 2015 - Study 72K – SG2 – Doc. 6, paragraphes 33-43.

[15] 'Matériel roulant ferroviaire 'ayant la même définition que celle en vertu de l'article I(e) du Protocole ferroviaire de Luxembourg: "'matériel roulant ferroviaire' désigne des véhicules pouvant se déplacer sur des emprises de voies ou directement sur, au-dessus ou en dessous de rails de guidage, avec les systèmes de traction, moteurs, freins, essieux, bogies, pantographes, accessoires et autres composants, pièces et équipements qui sont installés ou intégrés aux véhicules, ainsi que tous les manuels, les données et les registres y afférents".

concerné, mais il a été conclu qu'il serait plus simple et plus efficace de laisser complètement la priorité aux Protocoles précédents.

58. Un projet d'article XXI a été inséré dans le Chapitre V (Relations avec d'autres Conventions) du cinquième projet du Comité d'étude. L'article disposait "Les garanties susceptibles d'inscription en vertu du Protocole portant sur les questions spécifiques aux biens aéronautiques, du Protocole de Luxembourg portant sur les questions spécifiques au matériel roulant ferroviaire ou du Protocole portant sur les questions spécifiques aux biens spatiaux, à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles, ne peuvent pas être inscrites en vertu de la présente Convention."

59. Cette approche a été modifiée à la quatrième réunion, où le Comité d'étude a décidé que l'Article devrait empêcher la constitution d'une garantie en vertu de l'avant-projet de Protocole MAC, et non pas empêcher l'inscription d'une telle garantie. Un examen plus approfondi pouvait être nécessaire pour savoir si l'Article devait être modifié pour couvrir le cas où une pièce d'un matériel d'équipement MAC se trouverait ensuite fixée sur un matériel roulant ferroviaire [16].

E. **Un ou plusieurs Protocoles**

60. Il avait été suggéré au cours des consultations au début des travaux sur le projet de Protocole MAC qu'il pourrait être utile de scinder l'avant-projet de Protocole MAC en trois protocoles distincts, portant sur les matériels agricoles, de construction et miniers respectivement. Le fondement de ce point de vue était que les trois domaines sont très différents les uns des autres, et impliquent des parties prenantes et des catégories de matériels d'équipement différents. En outre, le Questionnaire national rempli par les différents pays en 2008 avait révélé que certains Etats sont favorables à la création d'un Protocole réglementant les opérations garanties pour l'un des trois domaines, mais pas nécessairement pour les autres.

61. A la première réunion du Comité d'étude, il a été décidé que l'avant-projet de Protocole MAC devrait être maintenu comme un seul Protocole, tout en permettant aux Etats d'exclure son application pour l'une ou l'autre des trois catégories de matériels d'équipement (agricoles, de construction et miniers) [17]. Cette possibilité pour les Etats contractants de limiter l'application du Protocole (par opt-out) se trouve à l'article II, paragraphe 3 de l'avant-projet de Protocole MAC. Lors de sa première session, le Comité a apporté un petit amendement au paragraphe 3 précisant qu'une déclaration d'un Etat contractant limitant l'application du Protocole à une certaine Annexe devrait s'appliquer à la totalité du matériel d'équipement couvert par cette Annexe, de sorte que les Etats contractants ne pourraient pas limiter l'application du Protocole à certains codes SH couverts par une Annexe.

62. A sa deuxième réunion, le Comité d'étude a noté que le traitement séparé de l'une des trois catégories de matériel d'équipement de l'avant-projet de Protocole MAC ne devrait être envisagé que si, plus tard dans le processus, il devait apparaitre clairement que l'une ou plusieurs des catégories de matériels d'équipement est radicalement différente et s'il s'avérait très difficile de traiter les différentes catégories ensemble. Bien qu'ait été identifiée une spécificité possible concernant le régime du matériel d'équipement agricole en ce qui concerne l'insolvabilité (voir la IIIème Partie,

---

[16] Une méthode possible de traiter cette question serait de préserver toute garantie internationale sur le matériel constituée en vertu du Protocole MAC, à condition qu'elle ait été inscrite avant que le matériel ait été fixé sur le matériel roulant ferroviaire. Cette solution serait conforme à la règle selon laquelle le matériel d'équipement MAC ne devait pas être un matériel roulant ferroviaire au moment où la garantie internationale a été créée en vertu du Protocole MAC (et l'inscription serait donc valable). Cependant, il y aurait tout de même des garanties concurrentes en vertu des deux Protocoles, ce qui est indésirable. Cette question pourrait être traitée dans le Commentaire officiel.

[17] UNIDROIT 2015 - Study 72K – SG1 – Doc. 5, paragraphe 19 (en anglais).

sections M et N), une telle divergence ne justifie pas d'exclure le matériel agricole de l'avant-projet de Protocole MAC.

F. **Matériel d'équipement à usages multiples**

63. A la première réunion du Comité d'étude, il a été décidé qu'en principe, l'avant-projet de Protocole MAC ne devrait pas couvrir le matériel d'équipement qui est par nature générique [18]. Pour déterminer la nature du matériel, on a suggéré qu'il faudrait prendre en considération sa conception plutôt que son utilisation. Dans une large mesure, le recours au système SH résout ce problème, parce que le matériel de nature générique (par exemple, les camions) ne seront pas inscrits en vertu de codes SH associés aux domaines de l'agriculture, de la construction et de l'exploitation minière. Dès lors, le Système SH servira lui-même de filtre pour empêcher que soient couverts des matériels d'équipement à usage générique par l'avant-projet de Protocole MAC.

64. A la deuxième réunion du Groupe d'étude, il a été décidé que, lorsqu'un type de matériel d'équipement MAC est susceptible d'être inscrit dans plus d'une des catégories de biens (agriculture, construction et exploitation minière), alors il devrait être répertorié dans chaque catégorie indépendamment. Le Groupe d'étude a également confirmé que, dans le cas où un Etat contractant exclut une Annexe relative à une catégorie de matériel d'équipement (agricole, de construction ou minier), et qu'un type de matériel est inclus dans cette Annexe et une autre Annexe, ce type de matériel continuerait d'être couvert par le Protocole MAC dans cet Etat contractant, quelle que soit son utilisation finale.

65. Le Comité d'étude a décidé qu'il faudrait procéder prudemment pour ce qui est de l'inclusion dans le champ d'application de l'avant-projet de Protocole MAC de types de matériels d'équipement MAC susceptibles d'être utilisés dans tous les trois domaines (agricole, de construction ou minier). La liste provisoire de codes SH destinés à être couverts par l'avant-projet de Protocole MAC contient une colonne indiquant si chaque code relève des catégories de matériel agricole, de construction ou minier, ainsi que l'a suggéré le Groupe de travail en avril 2016.

66. Au mois d'août 2016, des 36 codes SH de Niveau 1 de la liste provisoire de codes SH, neuf codes sont énumérés dans les Annexes 1, 2 et 3 (codes SH 842911, 842919, 842951, 842952, 842959, 843049, 843050, 870130 et 871620).

G. **Stocks**

67. En principe, l'inclusion dans le champ d'application de l'avant-projet de Protocole MAC des matériels d'équipement MAC détenus en stocks et la possibilité d'inscrire dans le Registre international des garanties internationales sur ces matériels ne posent pas de problème particulier. Cependant, la question devient un peu plus complexe lorsque l'on considère des matériels d'équipement MAC inachevés détenus par le constructeur, qui peuvent également constituer des stocks sur lesquels le constructeur peut chercher à obtenir un financement garanti.

68. Lors de sa première réunion, le Comité d'étude a examiné la question de savoir si l'avant-projet de Protocole MAC devrait contenir des dispositions supplémentaires relatives au financement de matériels d'équipement détenus en stock. Il a été suggéré que l'avant-projet de Protocole MAC ne devrait pas créer de distinction entre les stocks et le matériel d'équipement. Pour qu'une garantie puisse être inscrite en vertu de l'avant-projet de Protocole MAC, le matériel d'équipement lui-même doit pouvoir être individualisé. Il était peu probable qu'un matériel inachevé en stock soit individualisé et dès lors, des garanties portant sur un tel matériel ne pourraient pas être inscrites en vertu de l'avant-projet de Protocole MAC. Le bien pourrait faire l'objet d'une inscription après qu'il ait été

---

[18] UNIDROIT 2015 - Study 72K – SG1 – Doc. 5, paragraphes 20-24 (en anglais).

individualisé par le numéro de série du constructeur. A sa première réunion, le Comité d'étude a conclu qu'il n'était pas nécessaire que l'avant-projet de Protocole MAC contienne des dispositions supplémentaires couvrant les stocks.

69. Lors de la troisième réunion du Groupe d'étude, M. Bazinas, Conseiller juridique principal du Secrétariat de la Commission des Nations Unies pour le droit commercial international (CNUDCI) a noté que les biens en stock, même lorsqu'ils sont individuellement sérialisés, sont identifiés en vrac. Ces biens ne sont normalement pas soumis à un système d'immatriculation particulier mais à un système d'immatriculation général. Il a fait valoir que les critères généraux de grande valeur, d'individualisation (à distinguer de l'identification en vrac), ainsi que la mobilité transfrontalière devraient tous être préservés aux fins de la classification.

70. Le Comité d'étude a noté qu'il ne serait pas possible d'avoir un régime qui serait applicable à un type spécifique d'actif lorsque l'actif est détenu et utilisé comme du matériel d'équipement, mais qui ne lui serait pas applicable quand il fait partie d'un stock. Il a été rappelé que "l'utilisation effective" n'était pas un critère retenu dans le cadre de l'avant-projet de Protocole MAC. Si une grue est destinée à être donnée à bail à des entrepreneurs, elle pourrait être considérée comme faisant partie du stock, mais si la même grue est achetée par un constructeur, alors elle deviendrait "matériel d'équipement" et non un bien détenu en stock.

71. Sur le plan pratique, on a noté que lorsque des éléments de matériel d'équipement entrent en stock, ils doivent être identifiés par leur marque, le modèle et le numéro de série. Lorsque le bien entrerait ou sortirait du stock, l'inscription des garanties internationales devrait être effectuée et radiée pour chaque opération, si possible avant que l'opération ait effectivement lieu. Les tiers seraient alors en mesure d'acquérir leurs droits sur le bien libre de toute garantie. Le Comité d'étude a noté que certaines questions pourraient se poser quant à la façon dont ce système fonctionnerait en pratique.

H. **Cumul de biens remis en garantie**

72. Une pratique bien connue dans le secteur du financement est de fournir un financement à des clients pour un nouveau matériel d'équipement sous la forme d'un crédit-bail en vertu duquel le créancier constitue une sûreté à la fois sur le nouveau matériel et sur d'autres actifs du client en tant que garantie supplémentaire. La garantie supplémentaire porte généralement sur d'autres machines.

73. Lorsque tous les matériels d'équipement impliqués dans l'opération (à la fois le nouveau matériel d'équipement et celui utilisé comme garantie supplémentaire) sont des matériels d'équipement relevant du champ d'application de l'avant-projet de Protocole MAC, les garanties pourront toutes être enregistrées au niveau international, et auront priorité sur toute garantie inscrite antérieurement en vertu du droit national. En revanche, lorsque le matériel d'équipement accessoire fourni en garantie ne relève pas du champ d'application de l'avant-projet de Protocole MAC, il pourrait être difficile pour le créancier de se conformer aux exigences de deux régimes distincts pour parfaire sa garantie sur l'ensemble des actifs (en effet, les créanciers devraient inscrire dans le Registre international leur garantie internationale portant sur le nouveau matériel d'équipement MAC, mais le matériel d'équipement fourni en garantie accessoire nécessiterait l'inscription d'une sûreté conformément au droit national sur les opérations garanties).

74. En fin de compte, le Comité d'étude a conclu à sa première réunion que le cumul des biens remis en garantie n'était pas un problème spécifique au financement des matériels d'équipement MAC et qu'il n'y avait pas besoin de s'écarter de l'approche des Protocoles précédents.

I. Matériels d'équipement pour l'aquaculture

75. A sa quatrième réunion, le Comité d'étude a examiné si le matériel d'équipement pour l'aquaculture devrait être inclus dans le champ d'application de l'avant-projet de Protocole MAC. Pour aider le Comité d'étude dans ses délibérations, le Secrétariat a préparé un rapport sur la question. Le rapport présente la pratique de l'aquaculture, discute son importance économique et aborde certaines des questions juridiques liées à l'exploitation du matériel pour l'aquaculture en mer. Le rapport présente également certains des principaux constructeurs produisant des matériels d'équipement pour l'aquaculture. Le rapport est disponible à l'Annexe II (en anglais) du présent document.

76. A la quatrième réunion, il a été noté en particulier que, pour des raisons de politique seul le matériel utilisé pour la culture, et non pour les opérations qui ont lieu après (comprenant le matériel de transformation) devraient potentiellement être couverts. Le Comité d'étude a également noté des risques de complications ce qui concerne l'exécution et la reprise de possession du matériel pour l'aquaculture au large des côtes.

77. Le Comité d'étude a conclu que l'aquaculture pourrait être couverte dans la définition de l'agriculture aux fins du champ d'application de l'avant-projet de Protocole MAC.

78. Lors de la session du CEG1, les Gouvernements participants n'ont pas manifesté d'intérêt à inclure les codes SH couvrant les matériels d'équipement d'aquaculture dans les Annexes de l'avant-projet de Protocole.

IIème PARTIE – QUESTIONS CONCERNANT LES MATERIELS D'EQUIPEMENT MAC RATTACHES A D'AUTRES BIENS

J. Rattachement à des biens immobiliers [19]

79. Des problèmes peuvent survenir lorsque le matériel d'équipement MAC est rattaché à un bien immobilier, de telle sorte que les sûretés portant sur l'immeuble en vertu du droit interne s'étendent au matériel d'équipement MAC. Les matériels rattachés à un immeuble soulèvent des questions sensibles du fait que les Etats considèrent souvent le régime applicable à leur territoire comme une question de souveraineté, ce qui rend particulièrement difficile d'harmoniser au niveau international les sûretés qui ont trait à des biens immobiliers. En dépit de ces sensibilités, cette question peut devoir être directement réglée dans l'avant-projet de Protocole MAC. Aucune indication ne peut être tirée des trois précédents Protocoles à la Convention du Cap, du fait que les matériels d'équipement aéronautiques, ferroviaires et spatiaux ne peuvent pas être rattachés à des biens immobiliers.

80. Dans un premier temps, le rattachement à des biens immobiliers semblait être une question d'importance limitée, du fait qu'il était entendu qu'elle n'aurait de pertinence que pour les types de matériels d'équipement MAC qui ont été matériellement fixés à des biens immobiliers (par exemple, certains types de grues et instruments de forage). Cependant, suite à une analyse de droit comparé réalisée par le Secrétariat, il est apparu que certains pays permettent que des sûretés constituées sur des biens immobiliers soient étendues à des matériels d'équipement mobiles utilisés pour l'exploitation économique de l'immeuble, même lorsqu'il n'y a pas de rattachement physique entre le matériel et le bien immobilier [20].

81. La question a été examinée en détail au cours des troisième et quatrième sessions du Comité d'étude, et a fait l'objet de deux téléconférences en décembre 2015 et février 2016. En vue de préparer un projet d'article pour résoudre le problème, le Comité d'étude a adopté les principes suivants:

a) Le rattachement à un bien immobilier devrait être traité directement par un article spécial dans l'avant-projet de Protocole MAC.

b) L'article traitant du rattachement à un bien immobilier devrait faire l'objet d'une déclaration obligatoire, laissant aux Etats contractants la possibilité de régler la question de façon flexible, mais leur demandant aussi de se prononcer positivement quant à la solution qu'ils préfèrent.

c) En raison de la nature complexe et sensible de la question, l'avant-projet de Protocole MAC devrait présenter plusieurs options quant à la façon de régler les effets que pourraient avoir des garanties internationales sur des matériels d'équipement MAC au regard des garanties nationales en vertu du droit de la propriété immobilière.

d) L'article et les différentes options devraient prendre en compte tous les droits pouvant dériver du rattachement à un bien immobilier (à savoir les droits dérivant d'un rattachement physique entre le matériel et le bien immobilier, désigné comme une "incorporation" dans certains systèmes juridiques, et les droits dérivant de l'utilisation du matériel mobile pour l'exploitation économique du bien immobilier, visé comme "accessoire" dans certains systèmes juridiques).

e) Si possible, l'article devrait éviter de définir au fond les concepts de "biens incorporés" et "biens accessoires". S'ils devaient être définis, cela devrait se faire par référence aux règles de droit interne du pays dans lequel se trouve le matériel.

---

[19] Dans les documents précédents du Comité d'étude, cette question a été examinée sous l'intitulé "biens incorporés".

[20] Voir l'étude *Jurisdictional analysis on association with immovable property* en Annexe IV (en anglais) du présent document.

f) L'article devrait appliquer la déclaration faite par l'Etat contractant où le bien immobilier est situé, et non pas à la déclaration de l'Etat contractant où le débiteur est situé (comme c'est classiquement le cas pour ce qui est de l'application de la Convention du Cap).

82. L'article VII de l'avant-projet de Protocole MAC traite de la question du rattachement à un bien immobilier. L'Article VII prévoit qu'un Etat contractant doit appliquer l'une des trois variantes pour résoudre les conflits qui pourraient surgir entre les garanties internationales portant sur le matériel d'équipement MAC et les droits nationaux sur le bien immeuble auquel le matériel d'équipement MAC a été rattaché:

Variante A: Une garantie internationale portant sur du matériel d'équipement MAC conserve son rang par rapport à tous les autres droits ou garanties portant sur le matériel d'équipement rattaché à un bien immobilier, qui existent en raison du rattachement du matériel à un bien immobilier.

Variante B : Une distinction est faite entre le matériel d'équipement MAC qui est rattaché à un bien immeuble au point d'en perdre son identité juridique individuelle (en vertu de la législation nationale du pays dans lequel se trouve le matériel) et le matériel MAC qui conserve son identité juridique. Les garanties internationales sur du matériel d'équipement MAC qui perd son identité juridique individuelle sont subordonnées aux garanties nationales (lorsque la législation nationale prévoit une telle subordination), tandis que les garanties internationales sur du matériel d'équipement MAC qui conserve son identité juridique individuelle ne perdent leur priorité que si i) la garantie sur le bien immobilier est inscrite en vertu du droit national avant l'inscription de la garantie internationale et ii) le matériel d'équipement a été rattaché au bien immobilier avant l'inscription de la garantie internationale sur le matériel d'équipement.

Variante C: Les règles de droit interne de l'Etat contractant où se trouve le matériel déterminent si la garantie internationale est subordonnée à des droits ou garanties existant par suite du rattachement du matériel avec le bien immobilier.

83. Le paragraphe 1 de l'article VII prévoit également que les règles de droit interne déterminent si la garantie internationale est subordonnée à des droits ou garanties de droit interne portant sur le bien immobilier lorsque le matériel d'équipement est situé dans un Etat non contractant.

84. Le Comité d'étude a estimé que les options juridiques et politiques des trois variantes donnent aux Etats contractants une flexibilité suffisante pour équilibrer la primauté des garanties internationales sur les droits nationaux et la protection des droits portant sur la propriété immobilière, tout en reconnaissant que des travaux plus approfondis sur le libellé exact de l'article VII pourraient être nécessaires pour assurer que les objectifs recherchés sont pleinement atteints.

Définition de "matériel d'équipement rattaché à un bien immobilier" et question de savoir si l'avant-projet de Protocole MAC doit distinguer entre les différents types de matériels d'équipement rattachés à un bien immobilier

85. Ainsi que cela est discuté de façon approfondie dans l'étude juridique de fond sur cette question à l'Annexe III (en anglais) et dans l'analyse de droit comparé à l'Annexe IV (en anglais), il n'y a pas de définition universellement acceptée de "incorporation" et "rattachement" qui ont des significations très différentes à travers le monde. En outre, les éléments retenus dans les différents systèmes juridiques afin de déterminer si un bien a été rattaché à un bien immobilier et dans quelle mesure une garantie en vertu du droit interne s'appliquera aussi au bien, varient aussi considérablement.

86. Compte tenu de ces complexités, l'avant-projet de Protocole MAC tente de fournir une définition de base applicable seulement au "matériel d'équipement rattaché à un bien immobilier".

87. L'article 1(2)(f) de l'avant-projet de Protocole MAC prévoit: "matériel d'équipement rattaché à un bien immobilier" désigne le matériel d'équipement agricole, de construction ou minier qui est rattaché à un bien immobilier de telle sorte qu'une garantie portant sur le bien immobilier s'étend au matériel d'équipement en vertu du droit de l'Etat où le bien immobilier est situé. L'article ne fournit pas une définition au fond du "matériel d'équipement rattaché à un bien immobilier", il renvoie simplement au droit interne du pays dans lequel se trouve le matériel pour déterminer si une garantie en vertu du droit de la propriété immobilière s'étend au matériel d'équipement. Le terme "rattaché" est utilisé parce que d'autres termes similaires tels que "connecté", "incorporé" et "fixé" impliquent tous un degré de connexion physique constant entre le matériel d'équipement et l'immeuble, condition qui n'est pas toujours requise dans certains systèmes juridiques pour qu'une garantie sur un bien immobilier s'étende au matériel d'équipement (ainsi que cela a été indiqué ci-dessus). L'Article 1(2)(f) ne distingue pas non plus entre les différents types de droits et garanties portant sur le matériel d'équipement rattaché à un bien immobilier en vertu du droit interne (c'est-à-dire qu'il ne distingue pas les droits portant sur des biens incorporés ou des biens accessoires).

88. Cependant, la Variante B vise tout de même à distinguer entre les différents types de matériels d'équipement rattachés à un bien immobilier. La Variante B est basée sur une proposition du Ministère allemand de la Justice présentée à la première téléconférence en décembre 2015 [21]. L'avantage de la Variante B est qu'elle établit une distinction entre les différents types de matériels d'équipement rattachés à un bien immobilier sans employer expressément les termes de "biens incorporés" ou "biens accessoires" et ainsi, limite les cas où une garantie internationale sur un matériel d'équipement rattaché à un bien immobilier perdra sa priorité au regard d'un droit dérivant du fait que le bien est rattaché au bien immobilier. Le problème susceptible de se poser avec cette Variante est qu'elle repose sur le critère de la perte totale de l'identité juridique propre, alors même qu'elle renvoie au droit national de l'emplacement de l'immeuble afin de déterminer les circonstances dans lesquelles la perte d'identité juridique propre se produit.

Application des règles aux Etats non contractants

89. L'article VII(1) dispose:

> *Lorsqu'un matériel d'équipement rattaché à un bien immobilier est situé dans un Etat non contractant, le présent Protocole ne porte pas atteinte à l'application des règles de cet Etat qui déterminent si une garantie internationale portant sur du matériel d'équipement rattaché à un bien immobilier cesse d'exister ou est subordonnée à d'autres droits ou garanties portant sur ce matériel ou est autrement affectée par son rattachement au bien immobilier.*

90. Au cours de la deuxième téléconférence, le Comité d'étude a examiné ce qui se produirait pour les garanties internationales portant sur des matériels d'équipement MAC qui ont été rattachés à des biens immobiliers dans des Etats non contractants. L'opinion dominante était que, sauf disposition expresse contraire, l'article 29 de la Convention du Cap serait applicable, et la garantie internationale primerait les garanties nationales découlant du rattachement du matériel d'équipement au bien immobilier. Ce résultat serait globalement conforme aux Protocoles antérieurs à la Convention du Cap dans le sens de conserver la priorité de la garantie internationale sur les garanties nationales. Un avantage supplémentaire serait qu'il inciterait les pays à devenir Etats contractants afin de protéger les droits portant sur les biens immobiliers.

91. Toutefois, comme l'article 29 n'a pas été rédigé pour régler la situation où une garantie internationale se trouve en conflit avec un droit découlant du rattachement avec un bien immobilier, le Comité d'étude a conclu qu'il serait également prudent d'envisager d'inclure un projet de

---

[21] La proposition du Ministère allemand de la Justice est reproduite en Annexe III (en anglais)

disposition prévoyant que les garanties internationales portant sur des matériels d'équipement MAC n'interfèrent pas avec les garanties portant sur des matériels d'équipement rattachés à un bien immobilier dans les Etats non-contractants. Le libellé de cette disposition dans le cinquième projet d'étude a été fondé sur l'article 29(7), mais cette approche a été modifiée dans l'avant-projet actuel de Protocole MAC.

92. Lors de la deuxième téléconférence, le Comité d'étude a également examiné une approche fondée sur l'application aux Etats non contractants des règles de priorité de l'Etat contractant où le débiteur est situé, dans des cas où le matériel d'équipement a été déplacé dans l'Etat non contractant et où il existe un conflit entre des garanties portant sur un matériel d'équipement rattaché à un bien immobilier et des garanties internationales en vertu de l'avant-projet de Protocole MAC. Cependant, cette approche n'a pas été retenue car il n'existe pas de véritable justification de politique de fond pour expliquer pourquoi l'Etat où le débiteur est situé devrait avoir le pouvoir de déterminer quel droit devrait prévaloir, entre le droit de la propriété immobilière de l'Etat non-contractant ou bien les règles de l'avant-projet de Protocole MAC.

Examen lors des réunions précédentes

93. L'analyse de fond et les projets d'articles antérieurs concernant le rattachement à un bien immobilier examinés par le Comité d'étude sont reproduits dans l'Annexe III (en anglais) au présent document. Une analyse de droit comparé de l'opération pour ce qui concerne les biens incorporés et les biens accessoires en vertu des régimes juridiques internes préparés pour le Comité d'étude avant la troisième réunion est reproduite à l'Annexe IV (en anglais).

K. **Rattachements**

94. Dans la terminologie de la Convention du Cap, les "biens rattachés" sont des éléments de matériel d'équipement qui ne peuvent pas faire l'objet d'une garantie internationale (puisqu'ils ne sont pas des "biens"), mais qui peuvent être posés, intégrés ou fixés à un bien grevé d'une garantie internationale.

95. L'article I(2)(e) du Protocole ferroviaire de Luxembourg dispose: "matériel roulant ferroviaire" désigne des véhicules pouvant se déplacer sur des emprises de voies ou directement sur, au-dessus ou en dessous de rails de guidage, avec les systèmes de traction, moteurs, freins, essieux, bogies, pantographes, accessoires et autres composants, pièces et équipements qui sont installés ou intégrés aux véhicules, ainsi que tous les manuels, les données et les registres y afférents.

96. L'article I(2)(k) du Protocole spatial dispose: "bien spatial" désigne... avec tous accessoires, pièces et équipements qui y sont posés, intégrés ou fixés, ainsi que tous les manuels, les données et les registres y afférents.

97. Le Protocole aéronautique comprend trois définitions différentes pour les moteurs d'avion, les cellules d'aéronef et les hélicoptères qui constituent tous des biens aéronautiques distincts en vertu du Protocole. A la différence des autres Protocoles, il traite les moteurs comme des biens distincts. L'article I(2) dispose: *b) "moteurs d'avion" désigne … et s'entend en outre de tous modules et autres accessoires, pièces et équipements qui y sont posés, intégrés ou fixés, ainsi que de tous les manuels, les données et les registres y afférents; e) "cellules d'aéronef" désigne … et s'entend en outre de tous les accessoires, pièces et équipements (à l'exclusion des moteurs d'avion) qui y sont posés, intégrés ou fixés, ainsi que de tous les manuels, les données et les registres y afférents; l) "hélicoptère" désigne… et s'entend en outre de tous les accessoires, pièces et équipements (y compris les rotors) qui y sont posés, intégrés ou fixés, ainsi que de tous les manuels, les données et les registres y afférents.*

98. A la première réunion du Comité d'étude, il a été noté que durant la négociation du Protocole ferroviaire de Luxembourg, il avait été décidé de ne pas reconnaître les moteurs de matériel roulant ferroviaire comme des biens distincts. S'il peut y avoir des cas où les moteurs de matériel roulant ferroviaire sont enlevés et mis sur d'autres trains, cette pratique n'était pas assez répandue pour les identifier comme des biens de matériel roulant ferroviaire. La première réunion du Comité d'étude a distingué ce cas de la longue pratique dans l'industrie aéronautique du financement distinct pour les moteurs d'avion.

99. Lors de la session du CEG1, le Comité a décidé de modifier les définitions des matériels d'équipements agricoles, de construction et miniers à l'article I(2), alinéas a), b) et h), pour couvrir "tous les accessoires, composants et pièces qui y sont installés, intégrés ou fixés et qui ne relèvent pas d'un code distinct du Système harmonisé figurant dans cette Annexe, ainsi que tous les manuels, données et registres y afférents".

Exclusion des codes SH couvrant expressément les biens rattachés

100. A la troisième réunion du Comité d'étude, l'Administrateur technique principal de l'OMD, M. de Jong, a expliqué que la plupart des pièces étaient couvertes par des codes SH spécifiques prévoyant expressément qu'ils s'appliquent aux pièces. Toutefois, il a noté que la classification des pièces est difficile, et il est possible que, dans certaines circonstances, des pièces de matériel d'équipement soient commercialisées sous des codes se rapportant à des biens d'équipement complets.

101. Pour déterminer les critères d'inclusion des codes SH dans la liste préliminaire, le Comité d'étude a décidé que tous les codes couvrant spécifiquement et exclusivement les pièces devaient être exclues du Niveau 1 (codes appropriés), car ils ont peu de chances de couvrir des biens de grande valeur, pouvant être financés de façon distincte, et susceptibles d'individualisation. Lors des consultations initiales avec le Groupe de travail sur le Protocole MAC concernant la catégorisation, il ne s'est pas dégagé d'opposition particulière à l'exclusion du Niveau 1 des codes SH couvrant spécifiquement les pièces.

102. Si l'on devait déterminer à l'avenir que certains codes SH couvrant des matériels d'équipement de grande valeur mais aussi des pièces, devraient être inclus dans l'avant-projet de Protocole MAC, un article pourrait être inséré dans l'avant-projet de Protocole MAC prévoyant l'exclusion des pièces, et la mention "ex" pourrait être insérée devant chacun des codes pertinents, conformément à la pratique dans d'autres instruments internationaux qui utilisent le système SH pour définir leur champ d'application. La mention "ex" indiquerait que le code SH en question n'est pas entièrement couvert par le Protocole, et que certaines des pièces couvertes par le code ne seraient pas des biens distincts dans le cadre du Protocole.

Inclusion de codes SH qui couvrent en partie des biens rattachés

103. Au mois d'août 2017, le Niveau 1 de la liste préliminaire contient trois codes SH qui, selon les indications fournies par le Groupe de travail, visent à couvrir en partie des biens rattachés:

> 820713 - Outils interchangeables pour outillage à main, mécanique ou non, ou pour machines-outils (à emboutir, à estamper, à poinçonner, à tarauder, à fileter, à percer, à aléser, à brocher, à fraiser, à tourner, à visser, par exemple), y compris les filières pour l'étirage ou le filage (extrusion) des métaux, ainsi que les outils de forage ou de sondage -- Outils de forage ou de sondage, et les parties -- Avec partie travaillante en cermets
>
> 842641 - Bigues; grues et blondins; ponts roulants, portiques de déchargement ou de manutention, ponts-grues, chariots-cavaliers et chariots-grues - Autres machines et appareils, autopropulsés – Sur pneumatiques (par exemple, grues de pont et grues auxiliaires)

842919 - Bouteurs (bulldozers), bouteurs biais (angledozers), niveleuses, décapeuses (scrapers), pelles mécaniques, excavateurs, chargeuses et chargeuses-pelleteuses, compacteuses et rouleaux compresseurs, autopropulsés - - Bouteurs (bulldozers) et bouteurs biais (angledozers) -- Autres (par exemple, à lame droite, à lame en semi-U et lame en U).

104. Le secteur du financement a indiqué que les types de matériel d'équipement complet sous les codes SH 820713 et 842641 peuvent être financés séparément, et que seules les lames de tracteurs sous le code HS 842919 ne peuvent pas être financées séparément. A sa quatrième réunion, le Comité d'étude a décidé que dès lors que les biens couverts par ces codes peuvent être financés séparément dans la pratique, ils devraient continuer à être couverts par l'avant-projet de Protocole MAC.

Différences entre les biens rattachés et l'outillage

105. Le Niveau 1 contient cinq codes SH qui couvrent des éléments distincts de matériel d'équipement qui doivent être rattachés à d'autres matériels d'équipement pour être utilisés (dans la plupart des cas tirés par des tracteurs):

843210 - Machines, appareils et engins agricoles, horticoles ou sylvicoles pour la préparation ou le travail du sol ou pour la culture; rouleaux pour pelouses ou terrains de sport – Charrues

843221 - Machines, appareils et engins agricoles, horticoles ou sylvicoles pour la préparation ou le travail du sol ou pour la culture; rouleaux pour pelouses ou terrains de sport - Herses, scarificateurs, cultivateurs, extirpateurs, houes, sarcleuses et bineuses – Herses à disques (pulvérisateurs)

843230: Machines, appareils et engins agricoles, horticoles ou sylvicoles pour la préparation ou le travail du sol ou pour la culture; rouleaux pour pelouses ou terrains de sport – Semoirs, plantoirs et repiqueurs

843240 - Machines, appareils et engins agricoles, horticoles ou sylvicoles pour la préparation ou le travail du sol ou pour la culture; rouleaux pour pelouses ou terrains de sport – Epandeurs de fumier et distributeurs d'engrais

843340 - Machines, appareils et engins pour la récolte ou le battage des produits agricoles, y compris les presses à paille ou à fourrage; tondeuses à gazon et faucheuses; machines pour le nettoyage ou le triage des œufs, fruits ou autres produits agricoles, autres que les machines et appareils du n° 84.37. – Presses à paille ou à fourrage, y compris les presses ramasseuses

106. Il est entendu que ces matériels ne sont pas installés sur d'autres matériels d'équipement, et dès lors ne seraient pas considérés comme rattachés de la même manière que les moteurs d'avion, mais plutôt comme de l'outillage indépendant utilisé en conjonction avec d'autres matériels d'équipement. Leur situation serait analogue à des éléments de matériel roulant ferroviaire reliés ensemble pour une utilisation sur une ligne de chemin de fer, ce fait étant sans incidence sur des droits et garanties portant sur les différents éléments du matériel roulant.

107. A sa deuxième réunion, le Comité d'étude a examiné la question de savoir si une distinction doit être faite entre des rattachements concernant des biens installés comme faisant partie d'un autre bien (comme un moteur), et de l'outillage qui est simplement relié à d'autres biens d'une manière temporaire et limitée, tels qu'une charrue reliée à un tracteur. Il a été conclu qu'une distinction doit être établie entre les biens rattachés et l'outillage, car des garanties portant sur l'outillage devraient rester susceptibles d'être inscrites dans le Registre international sans qu'il soit nécessaire d'insérer des règles spéciales dans l'avant-projet de Protocole MAC.

Rattachements et installations prévues à l'article 29(7) de la Convention du Cap

108. L'article 29 de la Convention traite du rang des garanties concurrentes. Le paragraphe 7 de l'article 29 dispose :

> *La présente Convention:*
>
> *a) ne porte pas atteinte aux droits qu'une personne détenait sur un objet, autre qu'un bien, avant son installation sur un bien si, en vertu de la loi applicable, ces droits continuent d'exister après l'installation; et*
>
> *b) n'empêche pas la création de droits sur un objet, autre qu'un bien, qui a été préalablement installé sur un bien lorsque, en vertu de la loi applicable, ces droits sont créés.*

109. Le paragraphe 7(a) traite de l'installation d'un objet qui n'est pas couvert par la Convention (comme un ordinateur ou une pièce de rechange) sur un bien qui est couvert par la Convention. Il prévoit que l'installation ou l'incorporation ne porte pas atteinte aux droits préexistants, s'ils sont préservés par la loi applicable. En revanche, si la loi applicable prévoit que le droit sur l'élément installé ou incorporé est transféré en vertu du principe de l'incorporation au propriétaire du bien enregistré internationalement comme actif principal, le droit préexistant sera éteint [22]. Le paragraphe 7(b) dit que lorsque la loi applicable le prévoit, il est possible de créer des garanties sur des objets qui ont été préalablement installés, après qu'ils ont été enlevés du bien.

110. L'article 29(7) renvoie à la loi nationale applicable pour déterminer comment traiter les installations sur des biens grevés d'une garantie internationale en vertu de la Convention du Cap. Selon cet article, le renvoi à la loi applicable pour les objets ne modifie pas le rang de la garantie internationale sur le bien même.

---

22 Commentaire officiel sur le Protocole aéronautique (3ème édition), paragraphe 4.197.

IIIème PARTIE – QUESTIONS RELATIVES A L'INSOLVABILITE

L. Variantes en matière d'insolvabilité

111. Les précédents Protocoles à la Convention du Cap permettent aux Etats contractants de choisir les mesures en cas d'insolvabilité à appliquer dans le cadre de l'exécution des garanties internationales en vertu de la Convention contre une partie qui est insolvable. La Variante A (généralement considérée comme étant la plus favorable au créancier) permet des mesures rapides pour les titulaires de garanties internationales. La Variante B (généralement considérée comme étant la plus favorable au débiteur) attribue un rôle plus important au tribunal dans les procédures d'insolvabilité. Les trois Protocoles précédents à la Convention du Cap contiennent les Variantes A et B. Le Protocole ferroviaire de Luxembourg comprend en outre la Variante C, qui a été ajoutée comme option qui reflète mieux la législation européenne sur l'insolvabilité. Alternativement, les Etats contractants sont autorisés à ne choisir aucune des Variantes, auquel cas leur droit national de l'insolvabilité s'appliquera.

112. A la première réunion du Comité d'étude, il a été provisoirement convenu que les Variantes sur l'insolvabilité A, B et C telles que figurant dans le Protocole ferroviaire de Luxembourg devraient être conservées dans l'avant-projet de Protocole MAC, en attendant un examen plus approfondi. Cette décision a été réaffirmée lors des deuxième, troisième et quatrième réunions du Comité d'étude ainsi que par le Comité lors de sa session CEG1.

113. Etant donné que les Variantes A et B sont incluses dans les trois Protocoles précédents, il serait raisonnable de les inclure dans l'avant-projet de Protocole MAC également. La première réunion du Comité d'étude était favorable aussi à l'inclusion de la Variante C, au motif qu'elle prend en compte l'approche continentale européenne de l'insolvabilité.

114. La Variante C qui ne figure que dans le Protocole ferroviaire de Luxembourg, a été conçue comme un compromis entre les Variantes A et B. Comme dans la Variante A, l'obligation de l'administrateur de l'insolvabilité dans la variante C est déclenchée par la survenance d'une situation d'insolvabilité (c'est-à-dire qu'une demande du créancier soit requise). Et comme le fait la Variante B, la Variante C exige que l'administrateur soit remédie aux manquements, soit donne au créancier, au cours de la période de remède, la possibilité de prendre possession du matériel roulant ferroviaire, "conformément à la loi applicable". Toutefois, l'administrateur peut demander au tribunal une suspension de l'obligation (prenant effet au plus tard à l'expiration du contrat), à condition que toutes les sommes qui deviennent exigibles au cours de la période de suspension soient payées au créancier, et que le matériel roulant soit préservé et sa valeur maintenue [23].

115. Après l'expiration de la période de remède, ou d'une nouvelle période de suspension si elle a été prescrite, l'exécution par le créancier des mesures en cas d'inexécution en vertu de la Convention et des Protocoles ne peut plus être empêchée ou retardée, comme le prévoit la Variante A. Cette disposition exige le report (à partir de la fin de la période de remède ou d'une période supplémentaire de suspension) des restrictions de procédure, comme une suspension, qui pourraient autrement interdire la mise en œuvre des mesures pour inexécution en cas d'insolvabilité. En conséquence, la différence essentielle entre les Variantes A et C est la possibilité de retards dans la mise en œuvre des mesures pour inexécution en vertu de la Variante C lorsqu'est prise une ordonnance de suspension [24].

---

[23] Kristin Van Zwieten, 'The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives', *Cape Town Convention Journal* (2012) Volume 1, page 69.

[24] Kristin Van Zwieten, 'The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives', *Cape Town Convention Journal* (2012) Volume 1, page 69.

116. Sous la perspective politique, il est également bénéfique de donner aux Etats contractants la plus grande variété d'options dans le choix des remèdes en cas d'insolvabilité, dès lors qu'elles restent compatibles avec les approches des Protocoles précédents. Aussi, l'article X de l'avant-projet de Protocole MAC comprend les Variantes A, B et C, conformément à l'approche du Protocole ferroviaire de Luxembourg.

117. En raison de la relative similitude dans la nature des aéronefs et des biens spatiaux, le Comité d'étude sur le Protocole spatial avait estimé comme position de principe que les dispositions du Protocole aéronautique devraient être suivies (à la différence de celle du Protocole ferroviaire de Luxembourg), sauf en présence d'une justification solidement établie pour s'en écarter.

Examen lors des réunions précédentes

118. Lors de sa session CEG1, le Comité a inséré le paragraphe 4 dans l'article XXVI de l'avant-projet de Protocole afin de préciser que les déclarations des Etats contractants concernant les biens immobiliers (article VII) ou les mesures en cas d'insolvabilité (article X) ne peuvent être faites de façon différentiée pour chacune des annexes. Dès lors, selon le libellé actuel, un Etat contractant ne pourrait pas faire une déclaration selon laquelle la Variante A de l'article X s'appliquera aux matériels d'équipement agricoles visés à l'Annexe 1 tandis que la Variante B de l'article X s'appliquera aux matériels d'équipement de construction visés à l'Annexe 2 et aux matériels d'équipement miniers visés à l'Annexe 3.

119. A sa troisième réunion, le Comité d'étude a décidé de permettre aux Etats contractants d'appliquer différentes options en matière d'insolvabilité aux différentes Annexes de l'avant-projet de Protocole MAC. La raison de donner aux Etats cette flexibilité a résulté de l'examen des régimes d'insolvabilité spéciaux pour l'agriculture (voir l'analyse sur les régimes spéciaux d'insolvabilité affectant les agriculteurs et les entreprises agricoles et les restrictions à l'exécution des garanties portant sur le matériel d'équipement agricole à l'Annexe V du présent document – en anglais). En conséquence, le cinquième projet de Comité d'étude a permis aux Etats contractants de choisir la solution applicable à l'insolvabilité pour le matériel d'équipement de construction et minier, mais de ne pas appliquer de déclaration et donc de laisser application au droit interne de l'insolvabilité au matériel d'équipement agricole.

120. Le projet d'Article (Article X - Mesures en cas d'insolvabilité, paragraphe 3) dans le cinquième projet de Comité d'étude prévoyait que lorsqu'un Etat contractant fait une déclaration prévoyant l'application de différentes Variantes aux différentes Annexes, l'Etat contractant doit également déclarer quelle Variante s'appliquera aux codes SH contenus dans plus d'une Annexe. Cette déclaration obligatoire visait à éliminer tout risque d'incertitude concernant le régime d'insolvabilité qui s'applique à un élément donné d'un matériel d'équipement MAC.

121. Lors de la discussion à la quatrième réunion du Comité d'étude, il a été décidé d'abandonner la disposition permettant aux Etats contractants d'appliquer différents régimes d'insolvabilité aux différentes Annexes de l'avant-projet de Protocole MAC. Elle a été considérée introduire une complexité inutile ne devant être retenue que si elle recueillait un fort soutien de la part des Etats qui négocient l'instrument, ou si son inclusion devait permettre à plus d'Etats contractants de devenir parties au Protocole sans sacrifier leur droit local en matière d'insolvabilité en agriculture.

M. **Régimes spéciaux d'insolvabilité concernant les agriculteurs et les entreprises agricoles**

122. A sa première réunion, le Comité d'étude a demandé que soient faites des recherches sur les régimes d'insolvabilité spéciaux pour les agriculteurs ou d'autres entreprises qui sont susceptibles de posséder du matériel d'équipement MAC, en tenant compte essentiellement du matériel agricole.

123. A sa troisième réunion, le NLCIFT a fait rapport sur la question (voir l'analyse détaillée à l'Annexe V – en anglais). La recherche a révélé qu'il y a certains régimes d'insolvabilité spéciaux qui pourraient s'appliquer aux agriculteurs. Les lois nationales en général ont tendance à donner aux agriculteurs plus de droits que les autres débiteurs insolvables. Dans certains systèmes juridiques, certaines machines agricoles peuvent être soustraites à la repossession, certains actifs peuvent être protégés dans le cadre de la protection de la propriété des agriculteurs sur la terre même, certaines mesures prises par les créanciers peuvent être suspendues, et dans certains régimes les agriculteurs ont aussi accès à des fonds spéciaux pour restructurer leur entreprise. La plupart des mécanismes juridiques protégeant les agriculteurs et les entreprises agricoles sont principalement destinés aux agriculteurs individuels et familiaux, ce qui exclurait le matériel d'équipement de grande valeur économique puisque les petits agriculteurs ne possèdent généralement pas de tels matériels. Le rapport a conclu qu'il n'y aurait pas de besoin de Variantes supplémentaires puisque les opérations couvertes par les régimes spéciaux d'insolvabilité nationaux seraient en premier lieu tout simplement en dehors du champ d'application de l'avant-projet de Protocole MAC.

124. A sa troisième réunion, le Comité d'étude a également examiné si un article additionnel s'inspirant soit de l'Article 25 (Exemption de service public ferroviaire) du Protocole ferroviaire de Luxembourg soit de l'article 40 (Droits ou garanties non conventionnels susceptibles d'inscription) de la Convention du Cap pourrait être rédigé à cet effet. Son objet serait de régler la situation où il existe un conflit entre la loi nationale existante et les mesures en cas d'insolvabilité prévus par l'avant-projet de Protocole MAC, en permettant aux Etats de déclarer qu'ils appliqueront leur législation nationale en vigueur. Selon l'approche de l'article 40, les Etats seraient tenus de fournir précisément des informations sur la façon dont leur déclaration affecterait les droits en vertu de la Convention et de l'avant-projet de Protocole MAC. Il a été noté que si la rédaction de l'article 25 du Protocole ferroviaire de Luxembourg pourrait être un modèle utile, il serait important de distinguer cette question de la disposition sur le service public dans le Protocole ferroviaire de Luxembourg, car l'inclusion d'un tel article pourrait causer d'importantes controverses.

125. Finalement, le Comité d'étude a souscrit aux vues du Professeur Mooney, selon lesquelles les options actuelles dans le cadre de l'avant-projet de Protocole MAC devraient être laissées telles qu'elles étaient et qu'il ne fallait pas introduire d'exceptions pour le secteur agricole. Il a expliqué que la version forte des dispositions sur l'insolvabilité reflétait à bien des égards la section 1110 du Code de la faillite des Etats-Unis qui a été limitée au matériel d'équipement de transport. Le principe présidant à l'article 1110 était que les entreprises protégées avaient une partie extraordinairement élevée de leurs actifs immobilisée dans des matériels d'équipement très couteux par rapport à la plupart des types d'entreprises. Pour cette raison, une protection spéciale en faveur des bailleurs et des prêteurs était nécessaire pour qu'ils soient en mesure de fournir du financement.

N. **Restrictions concernant l'exécution des garanties internationales sur le matériel d'équipement agricole**

126. A la troisième réunion du Comité d'étude, le NLCIFT a présenté une analyse de droit comparé concernant les restrictions nationales sur l'exécution des sûretés portant sur le matériel d'équipement agricole (voir l'analyse de droit comparé à l'Annexe VI – en anglais).

127. Le rapport a noté que les lois qui imposent certaines restrictions sur les droits d'exécution se trouvent généralement dans des textes de loi distincts des régimes des opérations garanties, comme en Australie, au Canada et aux Etats-Unis. Certaines lois spécifiques sur les opérations garanties, comme au Kenya et au Nigeria, incluent expressément de telles limitations. Cependant, dans le contexte de ces deux derniers pays, il a été noté que les régimes des opérations garanties se trouvaient actuellement soumis à des projets de réforme sous l'égide de l'IFC, et ces lois à la fois au Kenya et au Nigéria ont été réformées en 2017. Il était expliqué en outre que certains Etats et provinces en Australie, au Canada et aux Etats-Unis ont adopté des lois qui exigent que le règlement des dettes des agriculteurs soient soumises à des procédures de médiation, ce qui aura

essentiellement pour effet de retarder l'exécution des droits des créanciers garantis. L'agriculteur a le droit d'entamer une médiation pour tenter de régler une dette, ce qui suspend le processus d'exécution, généralement pour une période de trente jours. Si la médiation est infructueuse, les droits du créancier peuvent alors être exécutés en vertu de la loi pertinente. Le Mexique a une approche particulière. En règle générale, les lois d'exception protègent les actifs seulement à l'encontre de créanciers munis d'un titre exécutoire [25]. Pourtant, au Mexique, il existe une situation particulière concernant l'exemption des biens immobiliers, qui permet à un agriculteur familial d'exempter certains matériels d'équipement agricoles même à l'encontre de créanciers garantis. Cependant pour que l'exemption soit efficace, l'inscription dans un registre public est une condition préalable. Ainsi, un créancier devrait savoir à l'avance qu'un certain actif pourrait ne pas pouvoir faire l'objet d'une exécution.

128. L'étude a également examiné les onze contributions reçues de correspondants d'UNIDROIT. La plupart des systèmes juridiques ne disposent pas d'une protection spécifique pour les agriculteurs et les équipements agricoles, à l'exception de la Hongrie, du Japon et de la Turquie. En Hongrie, il y a une liste restreinte de définitions de l'agriculteur, avec des critères d'éligibilité pour l'exemption des mesures d'exécution des créanciers garantis. Hors les entreprises agroalimentaires et les grandes entreprises agricoles, la législation turque prévoit une protection juridique spéciale pour les agriculteurs, à condition que le matériel d'équipement soit jugé essentiel pour la subsistance de l'agriculteur débiteur et de sa famille. L'approche japonaise, d'autre part, prévoit une exemption de saisie s'agissant du "matériel d'équipement indispensable" au secteur agricole à certaines conditions. Selon le régime de protection japonais, le matériel agricole n'est protégé que contre la saisie matérielle, tandis que le transfert de droits sur le matériel n'est pas interdit. En conséquence, la cession en garantie est juridiquement valable et opposable s'agissant de matériel d'équipement agricole.

129. L'IFC a noté à la troisième réunion que, dans les marchés émergents où l'IFC a travaillé aux réformes du droit des opérations garanties, aucune opposition de la part du secteur agricole ne s'était fait jour en ce qui concerne l'application des régimes d'insolvabilité ou d'exécution au matériel agricole. En outre, le représentant de l'IFC a rappelé que dans le cas de petits agriculteurs individuels ou d'agriculteurs familiaux que les Gouvernements visaient à protéger, il serait peu probable que des matériels d'équipement de grande valeur soient concernés.

130. En fin de compte, le Comité d'étude a conclu qu'il n'était pas nécessaire d'inclure un article spécifique dans l'avant-projet de Protocole MAC pour traiter des restrictions à l'exécution des garanties internationales portant sur du matériel d'équipement agricole.

[25] Un créancier muni d'un titre exécutoire est une personne qui est titulaire d'une créance et qui l'a fait valoir dans une procédure judiciaire et a obtenu un titre exécutoire pour recouvrer la créance.

IV^{ème} PARTIE – QUESTIONS CONCERNANT L'INSCRIPTION

O. Interaction avec les régimes nationaux pour les opérations garanties

131. Les biens couverts par la Convention du Cap et ses trois Protocoles existants sont généralement exclus des régimes nationaux généraux pour les opérations garanties, ainsi que le préconise l'article 1(3)(e) de la Loi type de la CNUDCI sur les sûretés mobilières. Toutefois, lorsque ces biens sont couverts par un régime national qui prévoit la création et l'inscription des sûretés nationales sur ce même matériel d'équipement, il y a un risque de chevauchement entre ces sûretés nationales en vertu du droit national et une garantie internationale en vertu du système du Cap. Dans cette situation, l'article 29 de la Convention du Cap prévoit que la garantie internationale prime.

132. A sa première réunion, le Comité d'étude a affirmé que les garanties inscrites en vertu du futur Protocole MAC devraient en principe primer les droits et garanties valables en vertu du droit national, conformément à la solution des Protocoles précédents.

P. Immatriculation et inscription des garanties pour le matériel d'équipement MAC

133. A la deuxième réunion du Comité d'étude, il a été demandé que le Secrétariat fasse une recherche pour établir si le matériel d'équipement MAC est généralement soumis à immatriculation dans différents types de registres nationaux.

134. A sa troisième réunion le Comité d'étude a été saisi d'un document préparé par le NLCIFT (voir le document à l'Annexe VII - en anglais). Le rapport a noté que l'immatriculation du matériel d'équipement MAC dans des registres nationaux est possible dans plusieurs systèmes juridiques, mais seulement dans des cas limités. Les lois qui régissent généralement l'immatriculation de la propriété ont différents domaines d'application selon la classification du bien en question. Il y est expliqué que la définition de "véhicule à moteur" est important à cette fin. Outre les véhicules à moteur, certains Etats nécessitent également qu'une catégorie de "véhicules spéciaux" soit enregistrée. Le document du NLCIFT a également noté qu'aux Etats-Unis, par exemple en Arizona et au Texas, les autorités l'immatriculation ont le pouvoir d'émettre des numéros de série.

135. En présentant le rapport à la troisième réunion du Comité d'étude, M. Dubovec a noté que certaines lois nationales en matière d'opérations garanties prévoient spécifiquement une "déclaration de transfert" par laquelle le créancier garanti est habilité à présenter une déclaration à l'autorité administrative compétente pour les véhicules à moteur, par laquelle est transférée la propriété du véhicule au cessionnaire ou à l'acheteur en vertu d'une vente judiciaire. Il voyait donc une certaine utilité que l'avant-projet de Protocole MAC envisage ces situations, dans certains cas dans les Etats concernés, mais non pas sous la forme d'une disposition concernant l'autorisation immédiate de demande de radiation de l'immatriculation et de permis d'exportation ainsi que le prévoit l'Article XIII du Protocole aéronautique.

136. Le Comité d'étude s'est dit favorable à l'inclusion d'une obligation directe et simple pour les Etats contractants de coopérer avec les créanciers pour la mise en œuvre de leurs droits d'exécution, au moyen d'une disposition portant sur la coopération plutôt que d'essayer d'arriver à une obligation précise. Il a été convenu que l'article VII, paragraphe 5, du Protocole ferroviaire de Luxembourg suffisait dans ce contexte et pourrait être incorporé dans l'avant-projet de Protocole MAC.

137. En fin de compte, le Comité d'étude a décidé que l'avant-projet de Protocole MAC devrait continuer d'inclure une disposition calquée sur l'article VII(5) du Protocole ferroviaire de Luxembourg (Modification des dispositions relatives aux mesures en cas d'inexécution des obligations). Cette approche est reflétée à l'article VIII paragraphe 5 de l'avant-projet de Protocole MAC.

Q. **Autorités administratives, demande de radiation et de permis d'exportation**

138. L'article VIII(5), l'article IX(6), l'article X, paragraphe 8 Variante A, et l'article X, paragraphe 9 Variante C, de l'avant-projet de Protocole MAC contiennent des références aux "autorités administratives" et demandent leur coopération pour la mise en œuvre des droits des créanciers.

139. Par exemple, l'article VIII(5) de l'avant-projet de Protocole prévoit:

> *Sous réserve de toute loi et réglementation applicables en matière de sécurité, l'Etat contractant assure que les autorités administratives compétentes fournissent rapidement au créancier la coopération et l'assistance requise dans la mise en œuvre des mesures prévues au paragraphe 1.* [Le paragraphe 1 se réfère au droit du créancier dans certaines circonstances, de faire exporter et faire transférer physiquement le matériel d'équipement MAC]

140. Ces dispositions imposent aux Etats contractants l'obligation, sous réserve de toute loi et réglementation applicables en matière de sécurité, d'assurer que les autorités fournissent rapidement au créancier la coopération et l'assistance requise pour faire exporter et faire transférer physiquement un matériel d'équipement MAC. L'article XXIV(5) alinéa c) (Unités territoriales) du Protocole prévoit que, lorsqu'un Etat contractant fait une déclaration étendant l'application du Protocole à une ou plusieurs de ses unités territoriales, "toute référence aux autorités administratives dans cet Etat contractant sera comprise comme visant les autorités administratives compétentes dans une unité territoriale à laquelle la Convention et le présent Protocole s'appliquent."

141. Dans le Protocole aéronautique, les "autorités administratives" sont mentionnées dans le contexte de l'article X(6) alinéa a) (Modification des dispositions relatives aux mesures provisoires), l'article XI(8) Variante A (Mesures en cas d'insolvabilité), et de l'article XIII (Autorisation de demande de radiation de l'immatriculation et de permis d'exportation). Ces articles exigent des "autorités administratives" dans des circonstances variées de fournir rapidement coopération et assistance au créancier pour obtenir la radiation de l'immatriculation, le permis d'exportation et de transfert physique du bien aéronautique. Dans le contexte du Protocole aéronautique, les autorités administratives» comprennent toutes les autres entités publiques impliquées dans l'exportation d'un aéronef. Dans une procédure particulière, il pourrait y avoir plusieurs "autorités administratives" impliquées dans l'exportation d'un aéronef en vertu du Protocole, et les entités concernées varient selon le pays.

142. Dans le Protocole ferroviaire de Luxembourg, les "autorités administratives" visent les entités responsables de l'attribution des capacités d'infrastructure ferroviaire.

143. Dans le contexte du Protocole MAC, il existe un plus grand nombre d'"autorités administratives" potentielles qui pourraient être appelées à fournir une assistance aux créanciers:

- Les ministères des transports au niveau fédéral ou des états (MT): lorsque le déplacement d'un matériel d'équipement MAC implique le transport du matériel vers un port, impliquant parfois le passage de frontières étatiques ou l'utilisation de routes fédérales, ce qui pourrait nécessiter une autorisation du MT. Les règles du MT applicables au transfert de matériels d'équipement MAC pourraient concerner la circulation routière par certains véhicules lourds, des règles de sécurité routière, etc.

- Les services de l'administration de la sécurité routière: ces autorités peuvent autoriser ou bloquer l'importation ou le déplacement de véhicules tels que certains matériels d'équipement MAC comme des camions à benne basculante.

- Les services d'immatriculation des véhicules à moteur au niveau national ou local: ces autorités délivrent des plaques d'immatriculation aux véhicules, y compris à certains véhicules utilitaires (par exemples camions, remorques, tracteurs et bulldozers). Le créancier garanti peut devoir faire transférer à son profit la propriété sur le matériel et obtenir de nouvelles plaques, ou peut devoir obtenir des permis spéciaux pour déplacer de matériels d'équipement MAC lourds par des routes nationales ou provinciales.

- Les services des autorités maritimes et portuaires: étant donné que le matériel d'équipement MAC sera probablement déplacé par voie maritime, la coopération rapide de ces autorités peut être nécessaire, en particulier pour obtenir un permis d'amarrage.

- Les services des autorités centrales ou locales chargées des installations, de la construction et des infrastructures, ou des aires de stationnement: des permis peuvent être requis auprès des autorités locales pour réserver une zone de chargement afin de charger ou de décharger le matériel d'équipement lourd. Ces services peuvent être compétents pour la délivrance de permis en vue du montage, de l'assemblage, du démontage ou de l'utilisation de certains équipements.

- Les Autorités environnementales: les services locaux en matière d'environnement peuvent être chargés d'appliquer les réglementations environnementales (par exemple, en matière d'émissions) qui peuvent avoir une incidence sur l'utilisation d'un matériel d'équipement MAC. Par exemple, des lois peuvent réglementer l'utilisation de certains équipements de forage dans certaines zones en raison des conditions du sol ou des risques de pollution des ressources hydriques.

- Les Autorités fiscales et douanières: des lois locales peuvent exiger des permis d'exportation pour l'enlèvement de certains équipements MAC.

144. Étant donné le grand nombre d'autorités dont l'assistance pourrait être sollicitée par le créancier en vertu du Protocole MAC, il pourrait être difficile aux Etats contractants d'assurer que cette assistance sera fournie rapidement. Ces difficultés augmentent dans les Etats fédéraux du fait que des autorités à plusieurs niveaux, fédéral, étatique et local, pourraient être appelées à fournir cette assistance.

145. Cependant, si l'on se base sur la pratique actuelle dans le cadre du Protocole aéronautique, l'interprétation de "autorités administratives" pourrait ne pas poser un réel problème. Le Groupe de travail aéronautique a reporté que les références à "l'autorité du registre et les autres autorités administratives compétentes", n'ont pas soulevé de problèmes pour la ratification. Dès lors, il pourrait être prudent que l'avant-projet de Protocole MAC maintienne la même ligne que les Protocoles précédents dans son approche des "autorités administratives".

146. Des indications supplémentaires quant à l'interprétation des "autorités administratives" pourraient être fournies par le Commentaire officiel du futur Protocole MAC. Cependant, si l'on devait établir que la rédaction actuelle impose un fardeau trop lourd aux Etats contractants, il existerait plusieurs options pour modifier l'approche actuelle:

a) Modifier les dispositions concernées afin d'exiger des Etats contractants qu'ils fassent une déclaration pour identifier les "autorités administratives" concernées, chargées de fournir l'assistance nécessaire. Cette approche obligerait les Etats contractants à examiner la question en détail avant de ratifier le Protocole, mais apporterait des éclaircissements dans la façon dont opèrent les dispositions correspondantes.

b) Préciser davantage l'étendue de l'obligation des Etats contractants, qui est actuellement subordonnée aux lois et réglementations applicables en matière de sécurité. Les dispositions pourraient être reformulées pour imposer une obligation à l'Etat contractant

dans la mesure où l'Etat contractant est en mesure de l'exécuter. Cependant, une telle formulation rendrait ces dispositions facultatives et dépourvues d'effet. En outre, cette approche créerait une incertitude lorsque l'assistance n'a pas été fournie quant à savoir si l'Etat contractant était effectivement en mesure de s'acquitter de son obligation d'assurer qu'elle le serait.

c) Définir les "autorités administratives" avec des références à des entités spécifiques, telles que les autorités fiscales et douanières, et les autorités portuaires, qui sont généralement susceptibles d'être impliquées dans l'exportation et le transfert de matériel d'équipements MAC. Cette approche permettrait de définir de manière étroite et claire les obligations des Etats contractants.

d) Supprimer les dispositions concernées du Protocole MAC. L'exportation et le transfert physique international des matériels d'équipement MAC devraient se produire moins fréquemment que pour les biens aéronautiques et le matériel roulant ferroviaire, car le plus souvent, les matériels d'équipement MAC seraient vendus sur les marchés locaux. En l'absence de ces dispositions, le créancier pourrait toujours demander l'intervention du tribunal pour mettre en œuvre une mesure disponible en vertu de la loi interne applicable, tel que le prévoit l'article IX(6). Le tribunal pourrait ordonner à une autorité administrative donnée de fournir assistance au créancier, dans un délai approprié. Une telle décision du tribunal aurait un effet semblable à celui de l'article IX(6). De même, le tribunal de l'insolvabilité pourrait ordonner à une autorité administrative donnée de fournir une assistance au créancier, complétant les mesures prévues par l'article X. Toutefois, cela ne serait possible que lorsque le droit interne applicable prévoit une telle mesure. En outre, rien ne garantit qu'en ce cas la loi nationale demanderait à l'autorité administrative de fournir assistance de façon rapide.

147. Afin d'établir dans quelle mesure la rédaction actuelle pourrait imposer un fardeau important aux Etats contractants, les Gouvernements qui participent à la négociation du Protocole MAC pourraient entreprendre des consultations internes, et déterminer quelles "autorités administratives" nationales pourraient être concernées par la rédaction actuelle de l'article VIII(5), de l'article IX(6), de l'article X(8) Variante A et de l'article X(9) Variante C.

Radiation et demande de permis d'exportation

148. A sa première réunion, le Comité d'étude a examiné s'il est nécessaire d'inclure un article dans l'avant-projet de Protocole MAC sur l' "autorisation de demande de radiation de l'immatriculation et de permis d'exportation" conformément à l'article XIII du Protocole aéronautique. On a noté que les deux facultés distinctes concernant la radiation de l'immatriculation et l'exportation sont parmi les mesures les plus fortes dans le Protocole aéronautique. On a en outre noté qu'une semblable faculté d'exportation existe dans les Articles VII(5) et IX(8) du Protocole ferroviaire de Luxembourg qui prévoient que sous réserve de toute loi et réglementation applicables en matière de sécurité, l'Etat contractant assure que les autorités administratives compétentes fournissent rapidement au créancier la coopération et l'assistance requise pour faire exporter et faire transférer physiquement le matériel hors du territoire où il se trouve si le débiteur n'a pas exécuté ses obligations ou est devenu insolvable.

149. A sa première réunion, le Comité d'étude a noté qu'il semblait n'y avoir aucune nécessité d'une disposition expresse relative à la radiation de l'immatriculation dans l'avant-projet de Protocole MAC, car les pays ne maintiennent pas de registres pour les droits portant sur le matériel MAC de la même manière que pour les aéronefs, et il n'existe pas de façon certaine une "autorité administrative compétente" pour le matériel d'équipement MAC à laquelle une partie pourrait demander de coopérer.

150. A sa première réunion, le Comité d'étude a estimé que même lorsqu'il n'est pas possible d'identifier une autorité administrative compétente particulière, l'aide des autorités autres que les autorités d'exportation et de douane pourrait être nécessaire pour le transfert de certains types de matériels d'équipement hors du territoire national. Il a été conclu que l'approche à l'article VII du Protocole ferroviaire de Luxembourg devrait être conservée pour l'avant-projet de Protocole MAC, mais que le sens d' "autorité administrative compétente" devrait être précisé dans le futur Commentaire officiel sur le Protocole MAC. Cette approche est reflétée dans l'article VIII(5) de l'avant-projet de Protocole MAC.

V^{ème} PARTIE – AUTRES QUESTIONS

R. Application aux ventes

151. Les Protocoles précédents à la Convention du Cap diffèrent dans leur traitement des ventes des types d'équipements qu'ils couvrent. Le Protocole aéronautique et Protocole spatial s'appliquent aux ventes et permettent à une vente d'être inscrite dans le Registre international, car cela reflète les pratiques commerciales existantes dans ces secteurs. Le Protocole ferroviaire Luxembourg ne permet que l'enregistrement des avis de vente dans le Registre international, ce qui n'a pas d'effet juridique au fond en vertu du Protocole même, mais peut affecter les garanties en droit interne.

152. Le Commentaire officiel sur le Protocole ferroviaire de Luxembourg fournit l'analyse suivante de l'article XVII du Protocole ferroviaire de Luxembourg régissant les avis de vente:

> *5,70 :... l'article XVII du Protocole de Luxembourg, permettant l'inscription des avis de vente, prévoit que toute inscription et toute consultation ou certificat concernant un avis de vente est faite ou émis à des fins d'information seulement et ne porte pas atteinte aux droits de toute personne, et est dépourvue de tout autre effet, en vertu de la Convention et du Protocole. Le seul but de la procédure d'inscription est de donner publicité de l'opération de vente en vue d'assurer une priorité en vertu du droit national. Il appartient, bien sûr, à la loi applicable de déterminer si une inscription volontaire dans le Registre international produit des effets pour ce qui est de l'application de ses règles de priorité.*

153. A sa troisième réunion, le Comité d'étude a demandé que le Secrétariat entreprenne de nouvelles recherches sur les effets des avis de vente en vertu des régimes de droit interne, en utilisant des exemples concrets. Un rapport de recherche sur l'effet de l'enregistrement des avis de vente en droit interne préparé par le NLCIFT figure à l'Annexe VIII (en anglais) du présent document.

154. Le rapport précise qu'il existe deux cas limités dans lesquelles l'inscription d'un avis de vente peut avoir une incidence sur les droits des parties, concernant tous deux le conflit entre un premier acheteur et un acheteur subséquent. Le rapport examine ensuite les effets juridiques possibles de l'inscription d'un avis de vente dans sept pays différents. En règle générale, l'avis de vente est susceptible d'avoir un effet sur les droits des parties dans les régimes juridiques qui exigent à l'acheteur secondaire d'agir de bonne foi. Le rapport conclut que l'inscription d'un avis de vente n'affecterait pas les droits des parties en Colombie, mais pourrait affecter leurs droits en Allemagne, en Espagne, aux Etats-Unis, en France, au Mexique et au Royaume-Uni.

155. A sa quatrième réunion, le Comité d'étude a décidé que l'avant-projet de Protocole MAC devrait adopter l'approche du Protocole ferroviaire de Luxembourg qui permet l'inscription des avis de vente. En prenant cette décision, le Comité d'étude a noté que le fait de ne pas inclure un tel article constituerait un écart par rapport aux Protocoles précédents (lesquels soit permettent l'inscription des avis de vente, sans aucun effet de fond, soit exigent l'inscription aux fins de l'application des règles de priorité).

156. L'article XVIII (Avis de vente) de l'avant-projet de Protocole MAC reflète l'approche du Protocole ferroviaire de Luxembourg.

Examen lors des réunions précédentes

157. A sa première réunion, le Comité d'étude a examiné si l'avant-projet de Protocole MAC devrait s'étendre aux ventes, conformément à l'approche des Protocoles aéronautique et spatial. On a noté que le Protocole aéronautique avait été étendu aux ventes en raison de la pratique courante dans le secteur commercial d'inscrire les ventes dans un registre de propriété. On a noté en outre que

l'inscription des ventes est également importante dans le secteur aéronautique en raison de la très grande valeur des avions et que le paiement est souvent fait au vendeur avant la vente.

158. A sa première réunion, le Comité d'étude a examiné l'approche adoptée dans l'article XVII du Protocole ferroviaire de Luxembourg en ce qui concerne les avis de vente. L'Article XVII du Protocole ferroviaire de Luxembourg permet l'inscription dans le Registre international des avis de vente concernant le matériel roulant ferroviaire. Toutefois, cette inscription d'un avis de vente sert uniquement à des fins d'information et ne produit pas d'effet juridique en vertu de la Convention ou du Protocole. A sa première réunion le Comité d'étude a noté que les avantages de cette approche sont qu'elle permet une information plus accessible concernant les ventes de matériel, et qu'elle génère des redevances supplémentaires pour le Registre international.

159. A la deuxième réunion du Comité d'étude, le Professeur Mooney a noté que la connaissance d'un droit antérieur pourra être pertinente pour les régimes nationaux en dehors de la Convention du Cap, et qu'en outre la possibilité d'inscrire des avis de vente sans effet juridique fournirait des informations utiles aux marchés. A moins qu'il ne soit démontré que l'approche du Protocole ferroviaire de Luxembourg est préjudiciable, elle devrait être suivie.

160. En revanche l'argument avancé par M. Deschamps lors de la première réunion du Comité d'étude est que le but de l'avant-projet de Protocole MAC est de mettre en œuvre la Convention pour un certain type de matériel d'équipement, et non pas d'aider les règles de droit interne. Le Professeur Mooney a également noté à la première réunion que le principe présidant au système d'inscription international établi par la Convention du Cap était que la connaissance d'un droit antérieur est sans effet pour déterminer la priorité, et que si l'on permettait l'inscription d'un avis de vente susceptible d'affecter les règles de priorité nationales fondées sur la connaissance du droit antérieur, on encouragerait une position de principe opposée.

161. A sa troisième réunion, le Comité d'étude a débattu la question de savoir laquelle des deux approches adopter, celle visant à assurer le "moindre mal" ou bien celle reposant sur les "avantages avérés". Il a finalement décidé de conserver l'approche du Protocole ferroviaire de Luxembourg et de renvoyer la question au Comité d'experts gouvernementaux.

162. Avec l'entrée en vigueur escomptée du Protocole ferroviaire de Luxembourg dans un proche avenir, il peut être instructif de voir combien d'avis de vente seront inscrits dans le Registre ferroviaire, si ces inscriptions sont nécessaires pour assurer la viabilité économique du Registre, et si l'on peut constater les effets que produisent ces inscriptions dans les régimes juridiques nationaux.

S. Interaction entre l'Article 29(3)(b) de la Convention du Cap et l'avant-projet de Protocole MAC

163. A la deuxième réunion du Comité d'étude, au cours des discussions quant à savoir si le protocole MAC devrait s'appliquer aux ventes, M. Deschamps a demandé comment l'inscription d'un avis de vente interagirait avec l'article 29(3) de la Convention du Cap.

164. L'article 29 (Rang des garanties concurrentes) dispose:

> *3. L'acheteur acquiert des droits sur le bien:*
>
> *a) sous réserve de toute garantie inscrite au moment de l'acquisition de ces droits; et*
>
> *b) libres de toute garantie non inscrite, même s'il avait connaissance d'une telle garantie.*

165. A la deuxième réunion du Comité d'étude, le professeur von Bodungen a noté qu'il n'y avait pas de conflit entre l'article XVII (Avis de vente) du Protocole ferroviaire de Luxembourg et l'article

29(3) de la Convention du Cap, puisque la position de l'acheteur n'est pas protégée en vertu du Protocole ferroviaire de Luxembourg, et l'article XVII du Protocole ferroviaire de Luxembourg n'a pas vocation à l'emporter sur ou interférer avec l'article 29(3).

166. Le Professeur Mooney a noté que lorsqu'un avis de vente est inscrit dans le registre, indépendamment du fait que l'acheteur a ou non un droit sur le bien, ce droit serait une garantie non inscrite. Le Professeur Mooney a recommandé que si l'approche du Protocole ferroviaire de Luxembourg était adoptée dans l'avant-projet de Protocole MAC, alors il faudrait également préciser que le droit national qui permet à certains acheteurs d'acquérir le bien libre de toute garantie ou sous réserve de toute garantie inscrite devra prévaloir, sinon les acheteurs secondaires pourraient invoquer l'article 29(3) pour acquérir le bien libre de droit alors même qu'ils n'auraient pas qualité pour bénéficier d'une telle priorité en vertu du droit interne.

167. Le Commentaire officiel sur le Protocole ferroviaire de Luxembourg fournit l'explication suivante pour l'article 29(3) :

> *4.186. Le paragraphe 3 introduit la première des deux exceptions à la règle générale selon laquelle même une garantie qui n'est pas susceptible d'inscription est primée par une garantie inscrite postérieurement. Le cas de l'achat simple est considéré tellement courant et important qu'il justifie une règle spéciale conférant au droit de l'acheteur priorité sur une garantie qui n'était pas inscrite lors de l'acquisition par l'acheteur du bien. L'application de l'article 29(3) repose toutefois sur la condition implicite que le vendeur avait le pouvoir de disposer de l'objet. Lorsque l'acheteur acquiert priorité en vertu de cette règle, l'effet est d'éteindre toute garantie non inscrite sur le bien, et, lorsque la garantie internationale se rapporte à une vente conditionnelle ou un contrat de bail, d'éteindre tout droit du vendeur conditionnel ou du bailleur qui n'avait pas été inscrit, car l'extinction du droit ne tient pas à la qualité de vendeur conditionnel ou de bailleur, mais au fait qu'il s'agissait de droits dont il était titulaire lorsqu'il a conclu le contrat de vente conditionnelle ou le contrat de bail.*

168. Ce paragraphe est illustré à la page 309 du Commentaire officiel de la manière suivante:

> *O, propriétaire d'une locomotive, la donne à bail à L. Avant que O ait inscrit sa garantie, L vend fautivement la locomotive à B. B supplante O en tant que propriétaire, et ce, même si B avait connaissance de la garantie internationale de O.*

169. Dans l'illustration ci-dessus, il est entendu que la "garantie internationale" de O est une garantie internationale soumise à inscription, qui n'a pas été inscrite.

170. Comme les Protocoles aéronautique et spatial permettent l'inscription du droit d'un acheteur, l'article 29(3) de la Convention est remplacé par l'article XIV(1) et (2) du Protocole aéronautique et par l'article XXIII du Protocole spatial, qui disposent:

> *Modification des dispositions relatives aux priorités*
>
> *1. Un acheteur d'un bien [aéronautique/spatial] en vertu d'une vente inscrite acquiert son droit sur ce bien libre de tout droit inscrit postérieurement et de toute garantie non inscrite, même s'il a connaissance du droit non inscrit.*
>
> *2. Un acheteur d'un bien [aéronautique/spatial] acquiert son droit sur ce bien sous réserve d'un droit inscrit au moment de l'acquisition.*

171. Cette question a été longuement débattue lors de la troisième réunion du Comité d'étude. Il a été décidé que l'article 29(3) ne vise pas à faire face à la situation d'acheteurs concurrents, et qu'il ne faudrait pas en déduire qu'un acheteur secondaire pourrait acquérir son droit sur le bien libre d'un droit antérieur non inscrit d'un premier acheteur. Le Comité d'étude a décidé qu'il n'y avait pas besoin d'insérer un Article dans l'avant-projet de Protocole MAC sur cette question, mais le futur

Commentaire officiel sur Le protocole MAC devrait prévoir expressément que l'article 29(3) ne s'appliquerait pas à des situations impliquant des acheteurs concurrents.

T. Modification des dispositions relatives aux cessions

172. A sa première réunion, le Comité d'étude a examiné s'il était nécessaire que l'avant-projet de Protocole MAC modifie les dispositions relatives aux cessions de la Convention du Cap, comme le font l'article XV du Protocole aéronautique et l'article XXIV du Protocole spatial. On a noté que l'article XV du Protocole aéronautique modifiait l'article 33 de la Convention du Cap en ajoutant l'exigence supplémentaire que soit obtenu préalablement le consentement par écrit du débiteur pour que le cessionnaire puisse exiger du débiteur le paiement ou l'exécution de toute autre obligation. On a en outre noté que cette exigence supplémentaire a été introduite dans le Protocole aéronautique car elle reflète la pratique établie dans le financement aéronautique et que l'industrie du transport aérien tenait à ce qu'elle y figure. Le Protocole ferroviaire de Luxembourg n'a pas suivi cette approche car une telle pratique n'est pas suivie dans le secteur ferroviaire.

173. A sa première réunion, le Comité d'étude a conclu qu'il y avait lieu de suivre le précédent du Protocole ferroviaire de Luxembourg et qu'il n'était pas nécessaire de modifier dans l'avant-projet de Protocole MAC les dispositions relatives aux cessions de la Convention du Cap.

U. Exemption de service public

174. L'article XXV du Protocole ferroviaire de Luxembourg et l'article XXVII du Protocole spatial prévoient une dérogation à l'application de certains aspects de la Convention du Cap et des Protocoles pertinents en ce qui concerne la fourniture de services publics. Si la façon de traiter cette question dans les deux Protocoles est sensiblement différente, le principe qui y préside est le même: l'Etat a un intérêt naturel à assurer qu'un créancier qui exerce ses droits en vertu de la Convention / Protocole ne provoque pas l'arrêt brutal d'un service d'importance publique [26].

175. L'article XXV du Protocole ferroviaire de Luxembourg prévoit qu'un Etat contractant peut déclarer à tout moment qu'il continuera d'appliquer ses règles de droit en vigueur au moment de la déclaration, qui interdisent, suspendent ou réglementent l'exercice sur son territoire des mesures prévues par la Convention / Protocole concernant le matériel roulant ferroviaire utilisé pour fournir un service d'importance publique. L'Article XXV s'applique tant aux véhicules de transport de passagers qu'aux véhicules de transport de marchandises, qui doivent habituellement être utilisés pour fournir un service d'importance publique (ainsi, un véhicule de transport de passagers transportant habituellement un nombre important de passagers sur une ligne principale devrait normalement être considéré fournir un service d'importance publique) [27]. Si le service public est exercé par l'Etat contractant, il a le devoir de préserver et d'entretenir le bien et de faire paiement au créancier soit du montant en vertu des règles de droit de l'Etat contractant qui fait la déclaration, soit des loyers de marché dans un délai de dix jours à compter de la date de prise de possession du bien (et par la suite, le premier jour de chaque mois consécutif). Il n'y a aucune limite de temps sur la période pendant laquelle l'Etat contractant peut empêcher le créancier de mettre en œuvre une mesure portant sur du matériel roulant affecté au service public.

176. En vertu de l'article XXVII du Protocole spatial, un débiteur qui conclut un contrat prévoyant l'utilisation d'un bien spatial pour la fourniture d'un service public peut convenir avec les autres parties au contrat de fourniture du service public et avec l'Etat contractant, que sera inscrit un avis de service public en vertu du Protocole. Techniquement, cela ne nécessite pas le consentement du créancier, puisque le créancier n'est pas partie au contrat pour la fourniture de service public.

---

[26] Commentaire Officiel du Protocole spatial, page 194.

[27] Commentaire Officiel du Protocole ferroviaire de Luxembourg, page 181.

Toutefois, le créancier peut imposer des restrictions contractuelles au consentement du débiteur à l'inscription d'un avis de service public au moment de la constitution de la garantie internationale, et donc dans la pratique, il prendra souvent part aux négociations [28]. Sous réserve de certaines exceptions, un créancier ne peut exercer aucune des mesures en vertu de la Convention / Protocole en cas d'un manquement du débiteur concernant un actif qui fait l'objet d'un avis de service public. La période pendant laquelle le créancier ne peut pas exercer les mesures est limitée à 3 - 6 mois. Au cours de la période de suspension, le créancier, le débiteur et le fournisseur de services publics doivent coopérer de bonne foi en vue de trouver une solution commercialement raisonnable permettant la continuation du service public. L'approche à l'Article XXVII apparait plus complexe que l'approche dans le Protocole ferroviaire de Luxembourg.

177. Les types de services publics importants relatifs au transport ferroviaire (transport de personnes et de marchandises) et des biens spatiaux (sécurité nationale, sécurité des transports, communications) sont évidents. Les secteurs de l'agriculture, de la construction et de l'exploitation minière, eux, ne fournissent pas de services publics. En revanche, ils fonctionnent dans des domaines où l'intérêt public est important.

178. A sa première réunion, le Comité d'étude est convenu d'adopter une approche prudente pour cette question, étant donné la difficulté des négociations à ce sujet dans les Protocoles précédents. La première réunion du Comité d'étude a mis en évidence la distinction importante entre les biens qui fournissent effectivement un service public couverts par le Protocole ferroviaire de Luxembourg et le Protocole spatial, et les biens qui sont utilisés pour des fonctions ayant un intérêt public significatif. Par exemple, le matériel de construction peut être utilisé dans la construction de projets d'infrastructure importants qui sont au cœur des intérêts publics d'un pays; toutefois, l'équipement de construction ne fournit pas lui-même un service public continu. Il a en outre été noté que les types les plus communs de projets d'importance nationale liés à l'industrie MAC auraient un certain degré de financement public et dès lors seraient peu susceptibles d'être financés par des accords de financement privés couverts par la Convention du Cap.

179. Le Comité d'étude est convenu qu'il n'était pas nécessaire d'inclure un article d'exemption de service public dans l'avant-projet de Protocole MAC, du fait que les secteurs de matériel d'équipement MAC ne fournissent pas de services publics continus.

V. Procédures d'amendement

180. En raison de l'utilisation du Système harmonisé pour définir le champ d'application de l'avant-projet de Protocole MAC, l'avant-projet de Protocole MAC devra adopter une approche différente pour ce qui est des procédures d'amendement de celle des Protocoles précédents à la Convention du Cap. Cela est dû au fait que la liste des codes SH inclus dans les Annexes peut avoir besoin d'être modifiée périodiquement afin de la rendre conforme aux modifications au système SH lui-même, et pourrait également devoir être mise à jour pour tenir compte du développement de nouvelles technologies ou répondre à des changements dans les secteurs agricole, de la construction et minier ou dans les mécanismes du commerce international.

181. La disposition concernant les procédures d'amendement est identique dans les trois Protocoles précédents (Article XXXVI du Protocole aéronautique, Article XXXIII du Protocole ferroviaire de Luxembourg et Article XLVII du Protocole spatial).

182. Pour aider à l'examen de cette question, le Secrétariat a mené des recherches supplémentaires en 2016 concernant les procédures de modification d'autres instruments internationaux pertinents, qui figure à l'Annexe IX du présent document (en anglais).

---

[28] Commentaire Officiel du Protocole spatial, page 196.

Projet de disposition

183. L'article XXXII de l'avant-projet de protocole MAC énonce la procédure de modification du Protocole et de ses Annexes. L'article XXXII a été élaboré par un groupe de travail informel au cours de la session du CEG1 en mars 2017 et a ensuite été approuvé par le Comité. Les modifications à l'article XXXII ont été conçues pour répondre au besoin de clarté et d'efficacité dans la modification des Annexes par suite des modifications apportées au Système harmonisé avec la nécessité pour les Etats contractants d'avoir le choix de consentir ou non aux modifications apportées aux Annexes qui affecteraient la portée du Protocole.

184. La façon dont opère l'article XXXII est expliquée en détail aux paragraphes 140 à 148 de l'avant-projet de Protocole annoté dans le document UNIDROIT 2017 - Etude 72K - CEG2 - Doc. 3.

Examen lors des réunions précédentes

185. Lors de la troisième réunion du Comité d'étude en Octobre 2015, le Comité d'étude a exprimé une préférence pour traiter de la procédure d'amendement des Annexes dans le corps même de l'avant-projet de Protocole MAC.

186. À sa quatrième réunion, le Groupe d'étude est convenu que l'avant-projet de Protocole MAC devrait contenir une procédure d'amendement à trois niveaux. Tout d'abord, un amendement de fond à l'avant-projet de Protocole MAC exigerait la procédure d'amendement habituelle reflétée dans les trois Protocoles précédents à la Convention du Cap, impliquant une Conférence d'évaluation à part entière. Deuxièmement, lorsque des codes SH supplémentaires sont introduits dans la nouvelle édition du Système SH couvrant des matériels d'équipements "matériellement semblables" aux matériels d'équipements contenus dans les Annexes au Protocole MAC, le Dépositaire peut ajouter les "codes matériellement semblables". Une telle révision entrerait en vigueur dans un délai de six mois, à moins que la majorité des Etats parties ne notifient leur objection. Cette procédure permettrait que les nouvelles technologies émergentes soient introduites dans le Protocole MAC sans qu'il soit nécessaire de procéder à un processus complet de révision. Au cours de la quatrième réunion du Groupe d'étude, l'exemple hypothétique qui a été considéré était une machine d'extraction minière utilisant des lasers. Comme cette technologie est utilisée pour le forage et qu'il n'y a aucune raison de principe pour ne pas inclure la machine d'extraction à laser dans le Protocole MAC, l'ajout d'un code SH relatif à un tel matériel d'équipement ne constituerait pas un ajout matériel impliquant une expansion de la portée du Protocole MAC. Troisièmement, lorsqu'une nouvelle nomenclature est adoptée par l'OMD (comme c'est périodiquement le cas environ tous les cinq ans), le Dépositaire consultera l'OMD. Une fois que l'OMD aura informé le Dépositaire que la numérotation figurant dans les Annexes peut être modifiée pour conserver la cohérence avec la nomenclature mise à jour sans élargir le champ d'application du Protocole, les Annexes pourraient être modifiées par le Dépositaire sans l'intervention des Etats contractants. L'article XXXII de l'avant-projet de Protocole MAC reflète cette approche à trois niveaux (le paragraphe 3 s'applique aux modifications de fond à l'avant-projet de Protocole MAC, le paragraphe 4 s'applique à l'ajout de codes «matériellement similaires» et le paragraphe 5 permet le réalignement des Annexes pour refléter les modifications apportées au Système harmonisé sans l'approbation des Etats contractants). Au cours de la session du CEG1, les Gouvernements participants ont estimé que cette approche ne donnait pas aux Etats contractants suffisamment de pouvoir et de souplesse pour adopter des modifications aux Annexes du Protocole MAC.

W. Autorité de surveillance

187. En vertu du système de la Convention du Cap, l'Autorité de surveillance (AS) a les principales responsabilités suivantes:

- l'établissement du Registre international

- la nomination et la supervision du Conservateur
- l'établissement du règlement pour le fonctionnement du Registre international
- fixer la structure tarifaire et le montant de l'assurance ou de la garantie financière à obtenir par le Conservateur pour couvrir sa responsabilité en vertu de la Convention
- Effectuer d'autres activités énoncées à l'article 17 de la Convention du Cap, y compris des rapports périodiques aux Etats contractants sur l'exécution de ses obligations en vertu de la Convention et du Protocole.

188. L'AS s'occupe uniquement du Registre international. Elle n'est pas responsable de l'interprétation du Protocole, de sa mise en œuvre dans des matières qui ne concernent pas le Registre ni d'autres fonctions ou activités non liées au Registre. De même, l'AS n'a pas compétence pour statuer sur une inscription particulière, et elle ne peut donner d'instructions au Conservateur pour modifier les données relatives à une inscription particulière.

189. L'article XIII de l'avant-projet de Protocole MAC régit la création et le fonctionnement de l'AS. L'article XIII prévoit que l'AS sera désignée à la Conférence diplomatique et que l'AS et ses employés jouissent de l'immunité juridique attachée au statut d'entité internationale.

Candidats au rôle d'Autorité de surveillance

190. Contrairement à l'approche adoptée par le Protocole ferroviaire de Luxembourg, le Groupe d'étude a adopté la position qu'il n'était pas souhaitable de chercher à créer un nouvel organe international pour agir en tant qu'AS. Dès lors, il est nécessaire d'identifier un organisme international existant pour remplir les fonctions d'AS. Cependant, il existe une difficulté à identifier une AS pour le Protocole MAC, en raison de la diversité des trois catégories de matériels d'équipement – agricole, de construction et minier.

191. Au cours de la session du CEG1 en mars 2017, le Comité a demandé au Secrétariat d'entreprendre d'autres recherches pour identifier des organisations internationales appropriées qui pourraient remplir les fonctions d'AS pour le Protocole MAC. Les recherches entreprises par le Secrétariat sont reflétées à l'Annexe X du présent document.

192. L'Annexe X explique qu'il existe un certain nombre d'organisations internationales qui pourraient théoriquement être envisagées. Cependant, la majorité de ces organisations se concentrent sur une catégorie particulière de matériels d'équipement (matériels d'équipement agricole, de construction ou minier), ou sont des organisations internationales du secteur privé et, en tant que telles, ne jouissent pas des immunités internationales. Dès lors, la liste des candidats potentiels est limitée.

193. Une autre possibilité serait qu'UNIDROIT lui-même remplisse le rôle de AS, conjointement avec une commission d'experts établie en vertu de l'article XIII(3) de l'avant-projet de Protocole.

Examen lors de réunions antérieures

194. Au cours des discussions du Comité d'étude, la question a été posée de savoir qui de l'Organisation mondiale des douanes ou de la Société financière internationale (SFI), du Groupe de la Banque mondiale, pourrait être l'AS. Lors de la troisième réunion du Comité d'étude, le représentant de l'IFC a noté que la question de l'AS serait discutée en interne à l'IFC, du Groupe de la Banque mondiale, pour déterminer s'il serait possible pour l'IFC d'assumer une telle fonction. En janvier 2016, le Secrétariat d'UNIDROIT a fourni des informations supplémentaires à l'IFC concernant la nature du rôle de l'AS pour aider les discussions.

195. Lors de la quatrième réunion du Comité d'étude, le représentant de l'IFC a noté que l'IFC travaillait avec UNIDROIT pour explorer la possibilité que l'IFC devienne l'AS du Protocole. Il a exposé

un certain nombre de considérations tenant à la question de savoir si un tel rôle relèverait de la sphère d'activité de l'IFC et de ses statuts, étant donné que l'activité de l'IFC est centrée sur l'investissement dans le secteur privé. Toutefois, il a noté qu'une partie du mandat de l'IFC est de promouvoir le développement du secteur privé, ce qui pourrait éventuellement être compris comme permettant une gamme légèrement plus large d'activités.

196. Il a également noté que, d'un point de vue pratique, si l'IFC devait assumer les fonctions d'AS, il faudrait prendre les mesures nécessaires pour éviter tout risque de conflits d'intérêt, puisque l'IFC serait à la fois un utilisateur du Registre international et son AS.

ANNEXES

Appendix I – Research on the Harmonized System

1. The following section contains an analysis of the HS system conducted by the NLCIFT and provided to the Study Group at its second meeting in April 2015.

Organisation of the HS System

2. The HS System is divided into 21 Sections which contain a total of 97 Chapters. The Chapters are further sub-divided into 1,224 headings identified by 4-digit codes. Most headings are further subdivided into 5 and 6-digit subheadings. The 2012 version, currently in effect, is divided into 5,205 groups identifiable by a 6-digit code. The previous 2007 version contained 5,051 groups.

3. The four digits that identify a heading have a particular significance – the first two digits identify the Chapter in which the heading appears and the latter two indicate the position of the heading within the Chapter. If a heading has not been subdivided, it is identified as follows: 0707.00 – with the fifth and sixth digits indicating that there is no subheading. For headings that are further subdivided, the sequence of digits may read as follows: (heading) 20.08 Fruits and nuts; (sub-heading) 2008.30 Citrus fruit. The Preliminary List of HS Codes for Inclusion under the MAC Protocol (List) includes only 6-digit subheadings in which the last two digits are not separated by a full stop.

4. 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 country's 6-digit HS codes may have been further subdivided. In the European Union, the Combined Nomenclature of the EU integrated the HS System but also included additional 8-digit subheadings to address its own needs. In the United States' implementation of the HS System, 8424.81 (Other Appliances: Agricultural and Horticultural) is subdivided into 8424.81.10 (Sprayers) and 8424.81.90 (Others). The subdivision 8424.81.90 is further subdivided into 8424.81.90.10 (Self-propelled, center pivot), 8424.81.90.20 (Other), 8424.81.90.40 (Sprayers, self-contained having a capacity not over 20 liters) and 8424.81.90.90 (Other). Since the 8424.81 code has been included in the List, it is assumed that any items identified by countries in their 8 or 10-digit subheadings would be automatically included within the scope of the MAC Protocol. Since the codes for 8 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.

5. Chapter 77 is reserved for possible future use. Chapters 98 and 99 are not part of the HS at all, but they may be used by member countries. Only a handful of countries utilise Chapters 98 and 99 for special purposes, including Canada, the EU, India and the United States.

6. Chapters are 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.

Structure of the HS System

7. The HS system is composed of:

(i) General Rules for the Interpretation of the System

(ii) Section and Chapter Notes, including Subheading Notes

(iii) A list of headings

8. The General Rules contain 6 guidelines that apply hierarchically i.e., Rule 1 takes precedence over Rule 2. For instance, Rule 3 provides classification guidelines applying to goods that seemingly

fall under more than one heading. According to Rule 3(a), goods should be classified in the heading giving them the most specific description. Rule 4 applies to goods that have not been previously classified because, for instance, they are new on the world market. This Rule dictates that such goods be classified under the heading appropriate to the goods to which they are most akin. From the perspective of the MAC Protocol, if a new item of equipment enters the market and has not been previously classified under an HS code, applying this interpretation rule, it may fall under the scope of the MAC Protocol if it is classified under a code that already falls under the scope of the MAC Protocol. Accordingly, the scope of the MAC Protocol may be expanded through this mechanism even before a new edition of the HS System enters into force.

9. The main function of the Notes is to delineate the scope and limits of each heading and subheading. Contracting States 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.

Amendment Process and the Harmonized System Committee

10. The current 5th edition of the HS System became effective January 1, 2012. It replaced the 2007 version, incorporating 234 amendments which reflected primarily social and environmental issues. The majority of amendments were included based on the recommendations of the Food and Agriculture Organisation of the United Nations (FAO). For instance, FAO suggested revisions with respect to the codes relating to fish and fishery products in order to enhance their monitoring for food security purposes. Some amendments also resulted from changes in international trade patterns (e.g., the separate headings 69.07 for unglazed ceramic products and 69.08 for glazed ceramic products in the 2007 version were merged into a single heading in the 2012 version).

11. In order to facilitate the implementation of the HS amendments and to ensure common interpretations, the WCO Secretariat publishes correlation tables for each HS amendment that are to be used as a guide to facilitate the implementation of new editions of the HS System[29] In some circumstances, rather than amending the Convention and, thus the entire HS System, merely the Explanatory Notes are modified.

12. The WCO Council, at its 123rd/124th Sessions in June 2014, adopted a Recommendation that includes a list of proposed amendments to the 2012 HS nomenclature. This Recommendation was issued under Article 16 of the Convention that regulates the amendment process. At its March 11-20, 2015 meeting, the Harmonized System Committee (HS Committee) considered the scope for the 6th edition and adopted a draft Article 16 Recommendation relating to the 2017 edition.

13. The HS Committee is responsible for amending and updating the HS System. Established pursuant to Article 6 of the Convention, the Committee includes a representative from every member country. The Committee is vested with the power to continuously update the HS System reflecting the changes in and emergence of new technologies as well as new patterns of international trade. The HS Committee has established the HS Review Sub-Committee to systematically and regularly review the HS System.

14. Amendments to the Convention, including the HS System, may be adopted pursuant to Article 16 of the Convention upon recommendation of the WCO Council. First, the Council will make the amendment available for public comment. Second, member countries will be given a period of six months within which they may file objections. If, at the end of the six-month period, no objections have been filed, the amendment will deem to be adopted. After an amendment has become effective, no country may accede to the Convention without adhering to the amendment. However, because

---

[29] See http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_nomenclature_2012/correlations-tables.aspx.

of the changes that countries will need to implement to reflect the amendment, amendments enter into full force about two years after their adoption. Accordingly, the entire procedure to amend the HS System takes at least two and a half years from the moment the Council adopts an amendment Recommendation.

15. In general, the nature of the amendments reflected in the previous editions was two-fold: i) clarifications and ii) structural reorganisation. For instance, different codes for similar goods that are not traded heavily on a cross-border basis have been merged or when an asset gains importance, the relevant code has been split. The product categories related to each amendment vary. The HS 1996 amendments included some major structural changes to food, tropical woods, steel and electronic products; the HS 2002 amendments were mainly related to wood, paper, waste of chemicals and pharmaceuticals, and metals; and the HS 2007 amendments focused on information technology and communication products. In addition to the clarifying and structural changes, amendments typically include a number of less significant changes, such as the deleting of subheadings that cover products with low trade volumes and the correcting of errors in previous HS editions. Of all subheadings, 72 percent have never been changed by any amendment.

Value of Exports

16. Information on the values of individual types of MAC equipment considered for inclusion under the MAC Protocol is not publicly available. Such prices, including the lows, medians and highs, may be obtained only by contacting manufacturers and dealers. However, a few databases exist that compile the aggregate values for particular HS codes.

17. One such database has been built by the World Bank. It is known as the Exporter Dynamics Database and it uses datasets based on six main variables including: i) year of exports; ii) HS 6-digit code; and iii) value of exports in $USD.[30] The data contained in the database was provided by customs agencies from 38 developing and 7 developed countries. An update of the Database should be issued in 2015.

18. Other publicly available sources of information also do not include the individual values of equipment. The trade data in the 2013 International Trade Statistics Yearbook, published by the UNSD's Department of Economic and Social Affairs, includes the aggregate export/import values for many kinds of equipment from the Private Sector Recommendations but is calculated on a global basis. For instance:

- For **SITC Code 713** Internal combustion piston engines and parts thereof, that corresponds to the **8407 HS Code**, the four subheadings of which were included in the Private Sector Recommendations, the total value of global exports was US$ 163.

- For **SITC Code 721** Agricultural machinery excluding tractors, that corresponds to the **8432 and 8433 HS Codes**, the 17 subheadings of which were included in the Private Sector Recommendations, the total value of global exports was US$ 39.5 billion.

- For **SITC Code 722** Tractors that corresponds to **8701.90 HS Code**, the total value of global exports was US$ 23.3 billion.

The HS System as the basis to determine the scope of the MAC Protocol

19. The List includes items of equipment from Chapters 82, 84, 85 and 87 of the HS System. The WCO Handbook notes that Section XVI, that includes Chapters 84 and 85 covering machinery,

---

[30] See further Cebeci, T., Fernandes, A., Freund, C. and M. Pierola, "Exporter Dynamics Database" World Bank Policy Research Working Paper 6229 (2012).

mechanical appliances and electrical equipment, is one of the most important in terms of the number of headings and subheadings.

20. The Study Group considered the HS System as the basis to establish the scope of the MAC Protocol identifying the relevant codes from an edition of the HS System. As a baseline to determine the scope of the MAC Protocol, the 2017 edition may be chosen. The List was prepared according to the nomenclature of the currently effective 2012 edition and will need to be verified, and if necessary adjusted, to correspond to the 2017 edition.

21. Since the HS System is periodically revised, a question arises as to whether and how the scope of the MAC Protocol should be initially established and then periodically adjusted, if necessary.

22. One approach would be for the MAC Protocol to include a list of HS codes that could not be altered. The advantage of this approach would be the initial certainty it provides to the users and elimination of the risks and costs associated with adjusting the scope. However, the disadvantages of this approach seem to outweigh the advantages. Such a rigid approach would essentially foreclose the possibility of new types of equipment being added to the MAC Protocol. Furthermore, with new editions of the HS System, the codes identified in the MAC Protocol may no longer correspond to the codes actually utilised in export/import transactions and the MAC Protocol would then refer to obsolete items of equipment that are no longer being manufactured, etc. Accordingly, the MAC Protocol may have to include a mechanism for the periodical revisiting of its scope in light of potential changes in the patterns of international trade, emergence of new technologies and items of equipment, amendments to the HS System, etc.

23. At least two approaches for the adjustments of the scope of the MAC Protocol may be considered: (i) automatic adjustments based on future amendments to the HS System itself, or (ii) adjustments made independently from the periodic amendments to the HS System. The first approach may entail a mechanism included in the MAC Protocol itself for its automatic updates based on amendments to the HS System. Accordingly, the MAC Protocol may initially identify a list of HS codes from a particular edition and then automatically incorporate any changes to those codes from future editions of the HS System.

24. If this approach to adjust the scope of the MAC Protocol is not adopted, there will be a need to appoint an Authority to: (i) determine whether the new edition of the HS System has affected the scope of the MAC Protocol, and (ii) to actually implement the changes reflected in the new edition. The logical solution in regards to appointing an Authority would be to have the Supervisory Authority established under Article 17 of the Cape Town Convention (responsible for the establishment of the International Registry, appointing Registrars, making Regulations etc) perform this role. However, this will ultimately depend on whom is appointed to be the Supervisory Authority of the MAC Protocol. Since the scope of any international instrument is one of its most important aspects, ceding the authority to determine the scope of the MAC Protocol to an international organisation (i.e., the WCO that has no interest in facilitating access to credit secured with MAC equipment) may not be practical or politically feasible. It is also possible that Contracting States may want the Authority to be a diplomatic body of Contracting States. As such, the formation and constitution of the 'Authority' will require further consideration.

25. Once such body is established, the functions of the Authority may go beyond simply determining whether the new edition affects the scope of the MAC Protocol and implementing those changes. Instead, this body could be tasked with a function to assess the changes in the HS System from the perspective of the users of the MAC Protocol and determine whether, and to what extent, the changes should be implemented.

26. This Authority established under the MAC Protocol may review the scope periodically when the HS System itself is revised or do so independently of the WCO process (e.g., every three years).

The advantage of this approach is that the interested parties themselves, appointed to the Authority, will retain control over the scope of the MAC Protocol. This approach may reduce the need to adjust an Annex to the MAC Protocol every time the HS System is amended, if, for instance, the new edition of the HS System has not affected the list of MAC codes.

27. If the Authority is given expansive functions which go beyond simply determining whether the new HS System affects the list of HS codes, it might have the power to reject changing the scope of the MAC Protocol even if some of the HS codes have changed. Accordingly, this Authority rather than the WCO would dictate and determine which assets should fall under the scope of the MAC Protocol. These powers may be useful given the nature of the HS System amendment processes whereby the WCO does not, and is not expected to, take into account the interests of those involved in the financing of MAC equipment. For instance, the WCO may hypothetically delete a particular HS code or merge it with some other code which would take an asset previously covered by the MAC Protocol outside its scope. The Authority may disagree with this approach if it determines, from the standpoint of the MAC equipment financiers and users, the code should not have been deleted or merged. The disadvantages of this approach may be the relative detachment of the scope of the MAC Protocol from an objectively determinable, reliable and widely-accepted nomenclature and the potential confusion as to the difference between the codes that form the scope of the MAC Protocol and those presently used for other purposes, as well as the potential risk in questioning the decisions of the Authority.

28. This Authority may also be given the power to identify certain codes for elimination from or addition to the MAC Protocol independently of the HS System amendments. For instance, in the first five years of operation of the International Registry, no notices relating to transactions covering a particular HS code have been recorded which may indicate that those items of equipment have become obsolete, are not traded internationally or are acquired without any form of financing. Based on input from the industry, the Authority could then decide that another code should be added to the List because the items of equipment covered by the relevant HS code, at that time, satisfy the relevant requirements for inclusion under the MAC Protocol.

29. Any measures allowing for the elimination of codes covering certain types of equipment must be treated with extreme caution, as users of the system must be able to have confidence that their international secured interest under the Protocol will not be jeopardised by future alterations made by the Authority. Further, any decision to eliminate an existing code from the system should only have prospective effect in preventing new registrations in that type of equipment (i.e. prior security interests created under the Protocol in the type of equipment covered by the eliminated code would continue to have effect).

30. Overall, there does not appear to be a viable alternative to establishing the scope of the MAC Protocol according to a list of HS codes covering different types of MAC equipment. However, since these HS codes may change in the future, the MAC Protocol should also contemplate a procedure for periodical review of and changes to the scope. Affixing the scope to the future editions of the HS System that would be automatically incorporated into the MAC Protocol presents a number of risks, the chief of which is the ability of an international organisation to essentially dictate the scope of the MAC Protocol.

31. A preferable approach may be to appoint an Authority to assess the need to revise the scope of the MAC Protocol, either concurrently with or independently from the taking effect of a new HS System.

Effect of HS Amendments on the MAC Protocol

32. The Study Group considered designing the scope articles of the MAC Protocol to refer to an Annex which would contain a list of HS codes covering individual types of MAC equipment. In

connection with this consideration, several questions, particularly of drafting nature, would need to be addressed.

33. First, should the list of HS codes refer to a particular edition of the HS System? Referring to a specific edition (e.g., the 6th edition) may have the disadvantage that every time the HS System is amended, the Annex would need to amended as well. Including just the list of HS codes may not require an amendment to the Annex because the HS nomenclature for the MAC equipment may not be modified. Annex I to this document summarizes the effect of the last three HS System amendments on the list of HS codes preliminary selected by the industry to predict how significant the future changes to the Annex could be.

- *An amendment deletes a code that covers some MAC equipment*: codes are deleted only when the assets covered thereunder have become obsolete and no longer trade internationally. The question is whether the Annex should be revised to delete the relevant code(s). The advantage of deleting the code(s) from the Annex, the deletion being effective only prospectively, is clarity for the users who will be able to readily identify that the MAC Protocol no longer covers certain codes. The disadvantage of this approach is that in the case that a new edition of the HS System affects the MAC Protocol only by deleting a single code, depending upon how cumbersome the procedure to amend the Annex is, it might not be practicable to revise the entire Annex to delete a single code which has anyway become obsolete.

- *An amendment adds a new code that covers some new MAC equipment*. The first question is whether the new code does in fact cover some MAC equipment and whether that equipment satisfies the requirements of the Cape Town Convention. In other words, an Authority will need to determine whether the scope of the MAC Protocol should be expanded. Such determination could be done by the Authority against a set of pre-established minimum criteria, the satisfaction of which would justify the addition of the new code to the Annex of the MAC Protocol. Setting forth such criteria rather than leaving the decision entirely up to the Authority would minimize the arbitrariness and subjectivity elements from the decision-making process.

- *An amendment merges two pre-existing codes*. Such amendments potentially affect the scope of the MAC Protocol in at least two ways. First, a code that was included in an Annex to the MAC Protocol is merged with a non-MAC Protocol code (this is very unlikely to happen). If the MAC Protocol adopts the first approach for its adjustments, which is to automatically reflect the changes from a new edition of the HS System, complications could arise with respect to the implementation of these new "merged codes." The second approach, under which adjustments to the scope of the MAC Protocol are made by an Authority, has the advantage of the Authority deciding that the previous code should be retained rather than replaced with this new merged code. The second kind of merger that could affect the scope of the MAC Protocol may happen when two MAC Protocol codes are merged. The implementation of this change would raise the same questions as with the previous type of merger.

- *An amendment that splits an existing code*. Again, at least, two possible situations affecting the scope of the MAC Protocol could arise. First, an existing MAC Protocol code could be split into two separate codes, both covering MAC equipment. This kind of amendment does not seem to present any complications with implementation, and the two new codes could replace the existing single code. Second, an existing code is split into two codes, only one of which covers MAC equipment. This is very unlikely to happen as long as the codes selected initially to establish the scope of MAC equipment do not inadvertently include non-MAC equipment. Second, how should changes be implemented if a new edition of the HS System does effect

the MAC equipment previously included within the scope of the MAC Protocol? To answer this question, the nature of amendments needs to be addressed first.

34. A related issue is presentation of deletions and merged codes. The Study Group may want to consider how the deleted, new and merged codes will be presented in the Annex itself. At least, two approaches are possible: (i) every time the HS System is revised the Annex would be opened and all the relevant codes from the new edition restated; or (ii) only the changes from the new edition that affect the MAC Protocol would be included. Both approaches have their advantages and disadvantages. The disadvantage of the second approach is the need for an Authority to identify the changes in the new edition which may entail some cost and present a risk that certain changes may not be restated accurately. The disadvantage of the first approach is that the user would need to determine on its own what has been changed. However, since the user will most likely be the creditor, who considers extending secured credit to the borrower, they might not be concerned with the previous status of HS codes and their modifications.

Other international instruments using the HS System to define their scope

35. Following the conclusion of the third Study Group meeting, at which Mr Ed de Jong (Senior Technical Officer from the WCO) presented in detail on the operation of the Harmonized System, the Secretariat conducted further research on the use of the Harmonized System as a mechanism for defining the scope of other international instruments.

Agreement on Trade in Civil Aircraft

36. The Agreement on Trade in Civil Aircraft entered into force in January 1980 and currently has 32 signatories (as of February 2016). It is a plurilateral WTO agreement (whereby any reservation submitted by any signatory would require the consent of all other signatories) which aims to eliminate import duties for civil aircraft products as covered by its scope.

37. 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.

38. 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.

39. Article 1.2 distinguishes the denomination 'military' aircraft from 'civil' aircraft whereby the former would fall outside the scope of coverage of the Agreement. All other products as set out in Article 1.1 would be covered. Article 1.1, however, neither provides any explicit reference to the HS coding nor to the Annex to the Agreement.

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

41. Finally, 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.

42. 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 agricultural, construction and mining 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.

The Energy Charter Treaty

43. The Energy Charter Treaty (hereinafter, the ECT) entered into force on April 1994 and has 54 signatories (as of February 2016). The ECT provides for a multilateral framework for cooperation in the field of energy and the promotion of energy security. The treaty focuses on making energy markets more competitive, stimulating investments in the energy sector and minimising, or eliminating, barriers to trade.

44. Article 1(5) provides that the Treaty applies to 'Economic Activity in the Energy Sector', which is defined as economic activity related to the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing and sale of Energy Materials and Products.

45. Part I of the ECT covers definitions and purposes. Article 1(4) provides that the Treaty applies to 'Energy Materials and Products', as set out in Annexes EM I and EM II. EM I and EM II are based on the HS of the WCO[31] as well as the Combined Nomenclature of the European Communities.

46. Article 31 of the 1998 text of ECT foresaw the potential inclusion of energy-related equipment in trade-related provisions, subject to prior assessment of the Charter Conference at its first meeting. Article 1(4bis) of the amended text[32] therefore refers to Annexes EQ I and EQ II which provide for a list of energy-related equipment covered by the Treaty and which is compatible with the HS of the WCO.

47. HS codes covering types of energy materials and energy equipment that do relate to 'economic activities in the energy sector' but are explicitly excluded from the scope of the treaty are listed in Annex NI. The extension 'ex' has been added to the HS codes in Annex EQ I to indicate that the HS codes listed do not exclusively exhaust the entire range of products within the WCO nomenclature headings or the HS codes listed in the Annex. As such, in order for an item to be

---

[31] Modifications to the original text based on Article 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty adopted in 1998.

[32] *Supra note 1*

covered by the scope of the Treaty, not only is the object required to be covered by a specific HS code but it must be used for economic activities in the energy sector.

48. As such, the approach of the ECT to scope of application is one which explicitly refers to four Annexes which all refer to HS codes, coupled with the requirement that the objects be used in economic activities in the energy sector. The other restricting mechanism is the listing of certain parts of codes in Annex NI, which is a mechanism that has only been utilised sparingly (to exclude certain types of oils under code 27.07, wood fuels 44.01 and wood charcoal under 44.02).

Relevance to the MAC Protocol

49. As discussed in the preceding paragraphs, the approach to scope of the Civil Aircraft Agreement is not particularly useful for the MAC Protocol scenario, due to its reliance on using a description-based scoping mechanism. Similarly, the ECT requires the objects covered by the HS codes listed in its Annexes to be used in economic activities in the energy sector.

50. The potentially useful mechanism utilised by both instruments in the 'ex' designation placed before HS codes to indicate that not all items that fall under a certain HS code are within the scope of the instrument. If it was decided to exclude certain items from the MAX Protocol, such as parts, that were listed under an HS code that was listed in the Annex, then the 'ex' designation could be used to continue to apply the MAC Protocol to the completed equipment listed under an HS code, but exclude parts (on the basis there was a provision inserted in the Protocol explicitly providing that it did not apply to parts).

Alternative Classification Systems

51. There are a number of goods classification systems that are utilised globally by international organisations for a variety of purposes. The following paragraphs briefly describe the most internationally significant classification systems that could potentially be considered alternatives to the HS System for the purpose of establishing the scope of the MAC Protocol.

52. The United Nations Statistics Division (UNSD) uses the following commodity classification systems: SITC, ISIC and CPC.[33] All three of these systems have been fully correlated to the 6-digit level of the HS System. Accordingly, one can easily convert a SITC code to the relevant HS code. UNSD has also made the conversion and correlation tables available on its website.[34]

53. SITC stands for the Standard International Trade Classification. Currently, the 4th revision of SITC is in effect, adopted in 2006. SITC is divided into 10 sections which are further sub-divided into 67 two-digit divisions. The main difference between the SITC and the HS System is that the SITC is focused more on the economic functions of products at various stages of development, whereas the HS System deals with a precise breakdown of the products individual categories.

54. CPC stands for the Central Product Classification. Currently, the 2nd revision of CPC is in effect, adopted in 2008. CPC presents categories for all products that can be the object of domestic or international transactions. It includes products that are an output of economic activity, including transportable goods, non-transportable goods and services. CPC was developed to serve as an instrument for assembling and tabulating all kinds of statistics requiring product details. Such statistics may cover production, intermediate and final consumption, capital formation, foreign trade and prices. They may refer to commodity flows, stocks or balances and may be compiled in the

---

[33] The COMTRADE database of the UNSD also uses the HS System.

[34] See http://unstats.un.org/unsd/trade/conversions/HS%20Correlation%20and%20Conversion%20tables.htm.

context of input/output tables, balances of payments, and other analytical presentations. The scope of CPC exceeds that of the HS and SITC systems in that it is intended to cover the production, trade and consumption of all goods and services.

55. SITC as well as CPC use the HS headings and sub-headings to structure their own categorizations. The main difference among the HS, SITC and CPC systems is the purpose for which they were created.

56. ISIC stands for the International Standard Industrial Classification of All Economic Activities. Many countries have utilised the ISIC to develop their own national classification systems. Currently the 4th revision adopted in 2006 is in effect. ISIC is used primarily to collect statistics that are subsequently utilised to analyse the country's economic activity. Unlike the HS, SITC and CPC, ISIC is not a product classification system.

57. The European Union uses the Combined Nomenclature (CN), according to which imported and exported goods must be classified.[35] The CN has incorporated the HS System in full but the EU has included further 8-digit subheadings. The EU Commission updates the Annex every year and publishes it in the form of a Regulation.

58. The International Union of Railways has developed its own commodity code (NHM), which is based on the 4-digit level of the HS System. It includes a deviation from the HS System with respect to heading 27.10 that relates to petroleum products. NHM facilitates compilation, comparison and analysis of data exchanged between customers, railway undertakings and administrative bodies.

59. At the third Study Group meeting the Study Group requested that the Secretariat conduct further research on the GS1 mechanism. This research was conducted by the National Law Centre for Inter-American Free Trade.

60. GS1 is a global non-profit standards organization that seeks to bring efficiency and transparency to the global supply chain. Its origins lie in 1973 with the adoption of a single standard for product identification by U.S. industry leaders that came to be known as the GS1 barcode. In 1977, the European Numbering Association (ENA) created an identification system aimed at improving supply chain efficiency. Through the 1980's, the barcodes became used in other products and an international standard for electronic data interchange was created. In 1990, the European, U.S. and other arms of the GS1 joined forces to create a single organization with branches around the globe. Currently, GS1 is present in over 40 countries and has one million members and has expanded its work to create global standards in healthcare, e-commerce, transport and logistics.

61. GS1's reach may be broadly categorized into three categories: (i) retail,(ii) healthcare and transport, and (iii) logistics. In retail, its work involves maximizing efficiency by helping retailers to integrate store operations, delivery and inventory management. In healthcare, it works to increase patient safety through synchronizing health standards, ensuring maximal use of healthcare technology and monitoring medication. With regard to transport and logistics, the work of GS1 is focused on the use of its standards to provide accurate information on the whereabouts, origin, arrival time and destination of goods to manufacturers, retailers and logistics service providers to aid business decision making. To aid transport management, it maintains Logistic Interoperability Model (LIM) standards, which act as a guide to enhance coordination between transport and delivery factors.

---

[35] http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/combined_nomenclature/index_en.htm.

62. GS1 provides the mechanisms to member companies to generate and assign ID keys. ID keys are unique identifiers for products, documents or physical locations where the products are currently situated. GS1 allows its member companies to generate 11 different ID keys that may relate to items such as the following: (i) products, such as cans of soup; (ii) locations, such as warehouses and factories; (iii) assets, such as medical equipment; and (iv) documents, such as shipment forms.

63. The work and products of GS1 appear to have only remote relevance to the MAC Protocol project. It would seem that any connection with MAC equipment will probably revolve around the identification of a MAC equipment manufacturer's country using GS1 country codes or a Global Trade Item Number (GTIN). The GTIN is a number that uniquely identifies trade items as they move through the global supply chain to the ultimate end user. Each item is allocated a unique GTIN. A GTIN can be assigned by a GS1 Company Prefix licensee anywhere in the world. GTINs are encountered most frequently at a retail point of sale and on inner packs, cases, and pallets of products in a distribution/warehouse environment. They are commonly used on purchase orders and in delivery and payment documents.

64. Overall, alternative classifications systems to the HS nomenclature do exist but all of them are either entirely based on the HS System or correlated to it. The largest international organisations, including the UN and the WTO, as well as the EU, all utilise the HS System as the basis for their respective nomenclatures. There does not appear to be a viable alternative to the HS System that could be considered as the benchmark when establishing the scope of the MAC Protocol.

Appendix II – Research on Aquaculture Equipment

1. This report was presented to the Study Group at its fourth meeting (Rome, 7 – 9 March 2016).

Introduction

2. Also known as aquafarming, aquaculture is the practice of actively cultivating (maintenance, production, feeding and surveillance of) freshwater, brackish water, saltwater as well as marine water populations under controlled conditions. It involves aquatic organisms (plants and animals) whereby their production is deliberately enhanced through regular stocking, feeding, fertilising as well as protection from the surrounding environment. Aquafarming can involve individual or corporate ownership of the stock which is being cultivated. Aquaculture is clearly distinguished from commercial or industrial fishing which involves the practice of exclusively catching wild fish carried out for commercial profit purposes.

3. Aquaculture can take different forms, i.e. land-related (inland) and mariculture (offshore/open ocean aquaculture) whereby the latter involves oceans and open waters. Both forms can involve cage farming systems with the latter being supplemented by mooring techniques (or permanent anchor installations). Offshore cage farming has also used the innovative technology of roaming closed cages which are powered by thrusters which are able to take advantage of ocean currents.

4. Technically speaking, aquaculture equipment can vary between different phases of cultivation and post cultivation. Cultivation covers both the maintenance and the production of aquatic organisms, whereas processing equipment would fall into the post cultivation phase. From a policy perspective, it appears that for the purposes of the MAC Protocol scenario, where the scope exclusively covers three industries of agriculture (including aquaculture), mining and construction, processing equipment and the post cultivation phase should be excluded from the coverage of the Protocol (otherwise facilities involved in processing or refining agricultural produce could arguably also be included within the scope of the Protocol).

Economic Significance

5. Global trade in aquaculture equipment is considered to be relatively insignificant compared to agriculture equipment, yet it has seen a rise in recent years due to global demand for seafood cultivation and consumption. According to a recent research,[36] global demand for aquaculture supplies and equipment is expected to experience strong growth of 7.4 percent on an annual basis to reach $63.3 billion in 2017.

6. Asia accounts for 90% of global aquaculture production and approximately around 50% of present global consumption to date. Asia, as the fastest growing aquaculture producing region, together with North America and Europe account for the biggest market share of equipment manufacturing in this industry.

Legal Issues

7. For the purposes of the MAC Protocol under which the global and cross-border trade and investment in mobile equipment is to be carried out within designated borders and the jurisdictional location of prospective debtors is required to be well defined in order to enable the protection of

[36] Freedonia Group Study (2999), World Aquaculture: Feed, Equipment & Chemicals. March 2013.

security interests, offshore aquaculture could potentially fall within the scope of the Protocol provided certain conditions are met.

8. In the context of offshore equipment and the economic exploitation of natural resources, the territorial aspects from a legal point of view under international law should be considered. The *1982 UN Convention on the Law of the Sea* (UNCLOS), a widely ratified treaty, sets the legal framework and foundation for coastal zone management, whereby several jurisdictional zones are designated. The first zone over which coastal states can claim complete sovereignty is the 'territorial sea' zone, which is calculated up to 12 nautical miles (nm) from the coastal baselines of the State in question.[37]

9. The so-called 'contiguous zone' adjoins the 'territorial sea' zone which may in turn not extend beyond 24 nautical miles from the baselines from which the breadth of latter is measured. As far as the 'contiguous zone' of a coastal State is concerned, the State may exercise such control necessary to not only prevent but also punish infringements with regards to its customs, fiscal, immigration or sanitary laws and regulations within its territorial sea zone.[38]

10. In addition, the 'exclusive economic zone' (EEZ) and the 'continental shelf' zone in general overlap whereby both zones are limited to 200 nm (370.4 km) from the baselines from which the breadth of the 'territorial sea' zone is measured.[39]

11. Unlike the 'territorial sea' zone, the EEZ (and the 'continental shelf' zone) does not form part of the territory of the coastal State over which the State enjoys full sovereignty. However, under UNCLOS, the State is granted sovereign exclusive rights on certain matters which include exploration, economic exploitation, conservation and management of the natural resources, whether living or non-living as well as exclusive jurisdiction with regards to the establishment and use of installations and structures.[40]

12. Further, Article 60 of UNCLOS gives exclusive rights to coastal States who have declared their EEZ to construct, authorise and regulate the construction, operation and use of installations and structures. The coastal State in question shall also have exclusive jurisdiction over such installations and structures, in particular jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

13. Aquaculture is not explicitly mentioned, but given the size of offshore facilities in the industry, they would likely qualify as 'structures' that are constructed and operated for the purposes of economic exploitation of natural living resources within the EEZ of coastal States. Such clarification is needed in order to ensure national governance over development and management of facilities as such and to ensure legal protection for prospective investments.

14. Equally, article 60 of UNCLOS is applied mutatis mutandis to installations and structures within the 'continental shelf' zone[41]. Article 81 of UNCLOS explicitly assigns an exclusive right to coastal States to authorise and regulate any kind of drilling for any purposes within the zone.

15. UNCLOS also defines the 'high seas' which is open to all States, coastal or land-locked whereby no part of this zone can be subject to a sovereignty claim by any State.[42]

---

37 Article 3 UNCLOS.

38 Article 33 UNCLOS.

39 Article 57 & Article 76 UNCLOS.

40 Article 56 UNCLOS.

41 Article 87 & Article 89 UNCLOS.

42 Article 87 & Article 89 UNCLOS.

16. Concerning coastal States' jurisdiction over the EEZ and equally over the overlapping 'continental shelf' zone, any kind of licensing as well as the issuing of permits for aquaculture operations would therefore be regulated through the national public laws of the States and assigned authorities. Moreover, commercial law, including contractual rights and obligations would be regulated by the prevailing private laws of the jurisdiction in question, like commercial law.

17. In terms of the EU law stance on this matter, the CJEU 2012 judgement[43] was explicit in stating that any work carried out on fixed or floating installations positioned on the 'continental shelf' zone (and the EEZ to that effect) of a Member State, in the context of exploiting natural resources, shall be considered as work carried out in the territory of that Member State.

18. Given that the 'territorial sea' zone is part of a coastal State's sovereignty, the applicable law for offshore aquaculture equipment located in that zone would generally be the law of the place where the asset in question is located which would then be subjected to the property regime of the coastal State in question.

19. Equally, when an offshore facility is located in the EEZ and 'continental shelf' zone of a coastal State, the State then has exclusive jurisdiction over such structure as well as an exclusive sovereign right for the authorisation and regulation of its construction, operation and use. However, further reflection would be required concerning specific conflict-of-laws provisions relating to different States with regards to offshore installations and structures.

20. Security interests in offshore equipment with a direct connection to the seabed could attract the applicability of the State's immovable property law. The Romanian Civil Code 2009/201144 provides for offshore installations located in the 'continental shelf' zone of a State to be regarded as immovable property whereby the law of that respective coastal State would apply. If the equipment is located in another State other than the State of the forum where the lawsuit is filed, the law of that other State would apply. In countries such as the United States, statutory provisions have extended the scope of application of the country's property regime to offshore equipment located in their EEZ or 'continental shelf' zone.[45] Alternatively, it has been queried whether the home law of the owner of the offshore equipment in question could be referred to in situations where this law would have closer connection to the case.[46]

Aquaculture Equipment Manufacturers: Major Global Market Players

Pentair Aquatic Eco-Systems (Aquatic Eco-Systems Inc. + Point Four Systems Inc.) Merged under single global corporation of Pentair Ltd., Aquatic Eco-Systems Inc. as worlds one of the largest sources of aquaculture systems and supplies, claims over 13,000 products and equipment in aquatic industries. Aquatic Eco-Systems is located in Apopka, Florida, USA.
https://pentairaes.com

AKVA Group
Leading technology both in cage farming and land-based aquaculture operations, AKVA Group corporate headquarters are in Norway and has strong global presence in Chile, Denmark, Scotland, Iceland, Canada, Australia and Turkey.
http://www.akvagroup.com/home

43 Case C-347/10.

44 Article 2613 (2) CC.

45 43 US Code § 1333.

46 UNIDROIT 2013 – C.D. (92) 5 (c)/(d), p.35 para. 131

Faivre
One of the world leaders in conception, manufacture and production of aquaculture machines since 1958 in France.
http://www.faivre.fr/index.php/en

Catvis
Known as a specialised supplier to the international aquaculture industry, Catvis operates from its main office in the Netherlands and from its daughter company Catvis Hellas in Greece. The company has permanent base in Spain, France, Italy, Turkey and the USA. It specialises both in land-based and offshore aquaculture as well as larval feed.
http://www.catvis.nl

Vonin
A major developer and manufacturer of high quality fishing gear and aquaculture equipment both for land-based and offshore industries, Vonin has its headquarters in Faroe Islands. It operates across the globe and has branches in Greenland, Denmark, Canada, Norway, Russia, Lithuania and Iceland.
http://www.vonin.com/en/home

Seafarm Systems
Based in Tasmania, Australia since 1985, the company is Australia's largest supplier of sea cages for aquaculture. The company has a long standing distribution arrangement internationally in particular with Japan, Turkey, Denmark and Norway.
http://www.seafarmsystems.com.au

Murre Techniek
Based in the Netherlands, the company besides its advanced processing lines for the food-processing industry, it also specialises in an innovative harvesting installation system whereby cultivation and harvesting of seed mussels are combined, via floating EasyFarm breeding nets. Additionally, a new multifunctional MZI harvester is on its way to be developed which would maximise the exploitation of mussel breeding. The initiative is carried out via cooperation with the European Regional Development Fund under the South Netherlands Operational Programme (OP – Zuid).
http://www.murre.nl/english

AquaOptima
Since 1993 the company is a well-known supplier of RAS (recirculation aquaculture systems for water filtering purposes) for land-based farms worldwide. The company is located in Trondheim, Norway.
http://aquaoptima.com

HESY Aquaculture B.V.
Founded in 1984, the Dutch company is one of the world's leading suppliers in design and turn-key delivery of RAS.
http://www.hesy.com/home

Aqualine
Worldwide supplier of net cages to the aquaculture industry and specialising in tough maritime areas, the Norwegian company has offices in Australia and Chile.
http://aqualine.no/en

Sterner Aquatech
Based in the UK, the company is a leading name in supplying water treatment solutions to aquaculture industry worldwide. Its sister companies are Sterner FishTech AS in Norway and Sutherlands Electrical and Sutherlands Engineering in Scotland.
https://www.sterner.co.uk/index.php

Inter Aqua Advance
Based in Denmark, the company specialises in commercial and industrial RAS facilities as well as water treatment technologies.
http://www.interaqua.dk/home.php

AQ1 Systems
A world leading supplier of sensor based feeding control technology for aquaculture, the company specialises in acoustic and optical sensing technology. AQ1 Systems head office is located in Tasmania, Australia with offices worldwide in Japan, Thailand, Brazil, Ecuador and Peru.
http://www.aq1systems.com/home

Veolia
Based in Canada, Veolia Water Technologies offers the industry's leading solutions for environmentally responsible and sustainable aquaculture. The company aims at increasing production and reducing water consumption via its 'Kaldnes RAS' technology and claims a significant place in the global market.
http://www.veoliawaterstna.com/markets/food-beverage/aquaculture

Xylem Inc.
This American company mainly focuses on tank-based aquaculture, whether RAS or flow-through, via water quality instrumentation, flow and level monitoring and control, pumping, disinfection as well as heat exchange.
http://www.xyleminc.com/en-us/industries/aquaculture/Pages/default.aspx

Aquafine
The company specialises in ultra violet aquaculture systems for water treatment through disinfection and ozone destruction. Aquafine has its corporate headquarters located in California, whereas its European office is based in Germany.
http://www.aquafineuv.com/Aquaculture

Scanz Technologies Ltd.
The company's particular emphasis is on land-based and offshore aquaculture, as well as intensive recirculation fish farms and hatcheries. It is based in Auckland, New Zealand.
http://www.scanztech.com

Arvo - Tec Oy
Based in Finland, the company specialises in fish feeding systems targeting freshwater farms as well as water recirculation technology.
http://www.arvotec.fi

Atlantium Technologies Ltd.
Established in 2003 the company provides innovative water treatment solutions based on ultra violet disinfection, fiber-optics and hydraulics for the global aquaculture industry.
http://www.atlantium.com/en/markets/aquaculture.html

AgriMarine Technologies Inc.
The Canadian-based producer designs advanced land-based rearing environments as well as hatcheries. It also engineers floating semi-closed containment tanks. The company pioneers in innovative technologies of semi-closed containment tanks which combine the benefits of land-based fish farming with low operational costs of open net pen aquaculture, RAS, semi-closed raceway technology for man-made ponds and rehabilitated gravel pits, deep water injection oxygenation

system (DIOS) in order to oxygenate water at lower power consumption, gas diffusion systems (GDS), autonomous control of aquaculture systems (ACAS), a remote user access system for control and monitoring, the Vacuum Air Lift (VAL) patent for water recycling as well as water circulation – gas exchange and particle extraction.
http://agrimarine.com

BOC, the Linde Group
The company's new SOLVOX technology was launched in 2014 which can be applied to any fish tank in order to optimise environmental conditions. The SOLVOX family of equipment comprises devices for optimised dissolution of oxygen in water, perfect distribution of oxygenated water to the fish as well as a regulation concept for smooth and reliable operation. Any type of aquaculture installation can be served with SOLVOX equipment. BOC Solvox equipment Brochure

Appendix III – Research on Association with Immovable Property

Introduction

1. This document was originally presented to the Study Group in advance of the first teleconference on association with immovable property in December 2015 and an update provided in advance of the second teleconference in February 2016.

2. It provides the original legal analysis underpinning the association with immovable property issue, as well as prior drafting options developed by the Secretariat and refined by the Study Group:

(i) Draft Article from the first teleconference (December 2015)

(ii) Draft Article proposed by the German Ministry of Justice (December 2015)

(iii) Draft Article from the second teleconference (February 2016)

(iv) Draft Article from the Fifth Study Group draft (March 2016)

Background

3. There are a number of types of equipment contained in the preliminary list of HS codes for inclusion under the MAC Protocol that may require some degree of affixation to property in order to operate. In the most recent iteration of the list, of the 113 codes suggested for inclusion by private industry, the Secretariat has identified 26 that are likely to require some degree of connection with immovable property in order to operate. Of the 26 codes, five are on the Tier 1 suitable codes list (see bullet points below), ten are on the Tier 2 possible codes list, and 17 are on the Tier 3 unsuitable list. Further consultation with the MAC Protocol Working Group (which represents private sector interests) is required to confirm whether there are types of machinery under other listed HS codes which require connection with immovable property.

(i) 820713-- Rock drilling or earth boring tools, and parts thereof: With working part of cermets

(ii) 843039-- Coal or rock cutters and tunnelling machinery: Other

(iii) 843049 - Other boring or sinking machinery: Other

(iv) 847431 - Mixing or kneading machines: Concrete or mortar mixers

(v) 847432 - Mixing or kneading machines: Machines for mixing mineral substances with bitumen

4. The first Study Group meeting in December 2014 instructed the Secretariat to conduct further research in relation to how priority between interests in mobile affixable property and domestic interests in immovable property is currently resolved under domestic legal regimes.

(i) As instructed, a comparative analysis was drafted by the UNIDROIT Secretariat. The study was based on both individual submissions by UNIDROIT Correspondents and independent jurisdictional research by the Secretariat. In order to reach the best practice possible for the purposes of the MAC Protocol, the UNIDROIT Secretariat has set forth the two legal queries to its Correspondents.

(ii) 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)?

(iii) How does your jurisdiction treat security interests in equipment that becomes

subsequently affixed / attached to immovable property?

5. A summary of the results of the comparative analysis is at Appendix IV 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) The Japanese Civil Code considers the act of physical connection sufficient for movable equipment to become part of the immovable it has been affixed to. In turn, the Code provides for compensatory measures in favour of creditors whose security interests have been extinguished as a result, whereby it provides for possible parallel claims by way of subrogation on unjust enrichment.

Terminology

6. 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.

7. The comparative analysis confirmed a lack 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 paper will use the terms fixture and accessory, however it such terms will not be used in the draft articles themselves.

8. 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'. It is suggested that the best term may be 'associated with', which would be broad enough to cover the various rules under domestic law.

Legal Framework

9. 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.

10. Article 29 of the Cape Town Convention explicitly stipulates that in cases of conflict between domestic legislation and the Convention, including its Annexed protocols, the international interests take priority. Taken into account this legal basis, and in line with previous protocols as legal precedents, it was initially anticipated that 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 affixation to immovable property.

Policy and drafting options

11. At the third Study Group meeting in October 2015 the fixtures issue was discussed in significant depth. Various options were proposed by Study Group members. The Study Group decided that the Protocol should include a substantive provision addressing fixtures, and that the draft Article should allow Contracting States to make a declaration in relation to the operation of the rule.

12. 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.

13. 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 Study Group may wish to consider allowing parties 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 8 [47] 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.

Declarations structure

14. 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. The article governing fixtures could be structured as a mandatory, opt-in, or opt-out declaration.

(i) Mandatory declaration: This structure would require contacting 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

[47] Cape Town Convention, Article 8 – Remedies of chargee.

of ratification. This is the preferred option in the draft articles below, as it has the benefit of requiring Contracting States to make an active decision in relation to this important issue and places all possible declarations of level footing.

(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 require the Study Group to decide what the status quo situation would be. 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 default rule for the treatment of fixtures. This approach would be appropriate if the Study Group decided that one approach was favourable over other approaches, but still wished to give Contracting States flexibility in regulating the relationship between mobile equipment and immovable property.

Draft Article presented to the Study Group at the first fixtures teleconference

Association with immovable property

1. A Contracting State, shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare which of the following alternatives will apply in relation to the relationship between an object under the Protocol which is, or becomes,1 associated with immovable property:

Alternative A (maintain priority of international interest)
2. An interest under this Protocol in relation to agricultural, construction or mining equipment will continue to exist and enjoy priority as against other interests as provided for by this Convention, despite its association with immovable property.

Alternative B (create an individual identity test)
2. Where agricultural, construction or mining equipment subject to an interest under this Protocol becomes associated with immovable property to an extent that the equipment loses its unique and individual identity (fixture), the law of the State where the equipment is located will determine whether such an interest in the equipment ceases to exist or is subordinated to an interest in the immovable property.

Alternative C (apply domestic law)
2. The Contracting State's domestic law will apply where interests arising in relation to immovable property law would effect interests in agricultural, construction or mining equipment capable of being the subject of an international interest under this Protocol.

3. In applying the state's domestic law under paragraph 2, an international interest in the agricultural, construction or mining equipment may be extinguished, lose its priority to a domestic interest or be otherwise affected, as provided by the Contracting State's domestic law.

Alternative D (create fixture filing rule)
2. An international interest in equipment that becomes associated with immovable property has priority over a conflicting interest of an encumbrancer or owner of the immovable property if the debtor has an interest of record in the immovable property or is in possession of the immovable property and the international interest:

(A) is made effective by registration of a notice substantially complying with the requirements of the Protocol in the immovable property registry before the interest of the encumbrancer or owner is of record; and
(B) has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

Alternative E (priority of readily removable equipment)
2. An international interest in equipment that becomes associated with immovable property has priority over a conflicting interest of an encumbrancer or owner of the immovable property if before the equipment becomes associated with immovable property, the international interest is registered and the equipment is readily removable.

Alternative F (priority based on consent, disclaimer, or right to remove)6
2. An international interest in equipment associated with immovable property has priority over a conflicting interest of an encumbrancer or owner of the immovable property if:
(1) the encumbrancer or owner has consented to the international interest or disclaimed an interest in the associated equipment; or
(2) the debtor has a right to remove the equipment as against the encumbrancer or owner.

Proposal by the German Ministry of Justice and for Consumer Protection presented to the Study Group at the first fixtures teleconference

Rules covering Issues of Fixtures and Accessories to Immovable Property

The UNIDROIT Secretariat invited the Members of the Study Group to submit drafting proposals for rules covering the relationship between interests in movable equipment under the Draft MAC Protocol on the one hand and the national law of immovable property on the other hand. The German Ministry of Justice and for Consumer Protection submitted the following drafting proposal.
For fixtures, the drafting proposal in Article x suggested that the national law of the *situs* should be decisive for the fate of the (former) international interests in the assets that have become a fixture to immovable property.

For accessories, however, Article y suggested a more limited rule: Contracting States should be allowed to retain national schemes of security over immovable property that extend to accessories (especially the German Haftungsverband der Hypothek). Article y provided that the immovable property security interest under national law retained priority over an international interest in the accessory if the international interest had been created and registered only after the assets concerned had become subject to the security under national law over the immovable property. The objective of this rule was to avoid as regards accessories the unfair results described, amongst others, by Professor Riffard in the Second Session of the Study Group:

> 63. *Professor Riffard noted that a provision preserving the priority of an international interest in affixed property over a domestic immovable property interest could result in unfairness in circumstances where the equipment was already affixed to the immovable property at the time the international interest was created, and a mortgagee had reasonably created a domestic immovable property interest over the land, including the already affixed MAC equipment*." (see Report of the Second Session, Study 72K – SG2 – Doc. 6, para. 63).

For all other purposes, accessories would be subject to the rules of the MAC Protocol. This proposal was been drafted in consultation with German Financing and Manufacturers´ Circles and was supported both by the financing side and the manufacturers´ side

Article x – Fixtures to immovable property

1. Where agricultural, construction or mining equipment subject to an interest under this Protocol becomes connected to immovable property to an extent that the equipment loses its unique and individual identity (fixture), the law of the State where the equipment is located determines whether such interest in the equipment ceases to exist or is subordinated to an interest in the immovable property.

2. Where interests in the agricultural, construction or mining equipment under this Protocol cease to exist or are subordinated to interests in the immovable property in conformity with the preceding paragraph due to the application of the law of the State where the equipment is located, the law of that State determines also whether a displaced or subordinated holder of an interest in the equipment obtains a claim (compensatory or other) against a holder of an interest in the immovable property as a consequence.

Explanatory Comments

The proposed Article x is based upon the proposal by the UNIDROIT Secretariat for a rule on fixtures in the fourth Study Group draft (Study 72K – SG3 – Doc. 3, page 30) and on the discussion of the issue of fixtures in the Issues Paper for the third session of the Study Group (Study 72K – SG3 – Doc. 2, paras. 90-98, 165-178).

Article x covers the situation where the movable asset which is subject to an international interest under this Protocol becomes a fixture to immovable property. The use of the term fixture here is based upon the terminology as applied by the UNIDROIT Secretariat in the Issues Paper for the third session of the Study Group (Study 72K – SG3 – Doc. 2, para. 98):

> 98. *Therefore, it is important for this section to set out some basic terminology to prevent inconsistent usage or misunderstandings. For uniformity purposes, the Secretariat has categorised the different terms in two groups. The term 'fixture' is taken to have the equivalent meaning of 'component part', 'essential part', 'integral part' as well as 'fixed accessories', whereas the term 'accessory' is considered to be the equivalent of the common law term of 'chattel'.*

Since the MAC Protocol (as an international instrument) generally takes precedence over national law, the MAC Protocol should contain a rule stating if and under which conditions the Protocol assumes that (i) a piece of equipment loses its legal status as a separate movable asset and (ii) rights in the immovable extend to the piece of equipment that has become a fixture to an immovable asset. Generally, the MAC Protocol could refer this issue to the national law of the situs, but this would have the consequence that the application of the Protocol in different Contracting States could lead to different results. Alternatively, the MAC Protocol could itself define under which circumstances an asset loses its legal status as a separate movable asset, but this requires the application of autonomous criteria under the international law of the MAC Protocol.

Paragraph 1 of Article x contains a combination of these elements. The general idea behind this rule and its legal objective is to provide that for assets that have become fixtures to immovable property, the law of the situs should determine whether any former interest in the equipment ceases to exist or is subordinated to an interest in the immovable property. If a piece of equipment is connected with an immovable asset in such a way as to lose its unique and individual identity, any enforcement of the creditor´s rights under the Cape Town Convention System into the equipment (especially any self-help remedies) would no longer be sensible.

Paragraph 1 of Article x applies a double criterion for the determination of the circumstances under which the law of the situs should be applied: First, there is as an autonomous criterion under the international law of the MAC Protocol the question whether the asset has lost its unique and individual identity. This criterion would have to be defined autonomously under the Protocol and it ensures legal certainty in so far as market participants can rely on the fact that even such national law rules on fixtures that have less stringent criteria cannot lead to the loss of an international interest in the equipment where such equipment has not yet lost its unique and individual identity under the terms of the Protocol.

In addition to this autonomous criterion under the international law of the MAC Protocol, paragraph 1 also refers to the application of national law for the issue where separate rights in the piece of equipment cease to exist or are subordinated to rights in the immovable property. If the national immovable property law does not regard the piece of equipment (even though it has lost its unique and individual identity under the terms of the Protocol) as no longer being subject to separate movable property rights, then the holder of an international interest in the piece of equipment may still seek enforcement of its rights in the courts of the state where the asset is located. National law, however, does only apply where the asset has lost its unique and individual identity under the terms of the Protocol: Thus, there is no risk for the holder of an international interest to lose its rights under such national law rules on fixtures which might provide for less stringent criteria.

Paragraph 2 of Article x deals with issue of claims acquired by the (former) holder of an international interest as against holders of rights in the immovable property to which the piece of equipment has become a fixture. As described by the UNIDROIT Secretariat in the Issues Paper for the third session of the Study Group (Study 72K – SG3 – Doc. 2, para. 177 s.), some legal systems provide for such

claims that can compensate the former holder of an international interest for its losses or that seek to revert an unjust enrichment to the detriment of the former holder of an international interest. Paragraph 2 of Article x provides that such claims are entirely subject to national law and the MAC Protocol does not regulate these issues.

Article y – Accessories to immovable property

Option 1[48]

1. This Article applies only where agricultural, construction or mining equipment is located in a Contracting State which has made a declaration pursuant to Article XXIV(#).

Option 2

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply this Article to agricultural, construction or mining equipment that is located in the Contracting State.

2. Where agricultural, construction or mining equipment subject to a registered interest under this Protocol is an accessory to immovable property under the law of the Contracting State and an interest in the immovable property under the law of the Contracting State extends to the equipment as an accessory, an interest in the immovable property under the law of the Contracting State has priority over the registered interest in the equipment under this Protocol if the following conditions are fulfilled:

(a) the interest in the immovable property has been registered in accordance with the requirements of the law of the Contracting State prior to the time of registration of the interest in the equipment under this Protocol and continues to be effective; and

(b) the equipment has become an accessory to the immovable property prior to the time of registration of the interest in the equipment under this Protocol.

Explanatory Comments

The proposed Article y contains a Contracting State Option for specific rules regarding priority conflicts between an international interest under the Protocol and a national immovable law interest where the piece of equipment concerned has become an accessory to immovable property, i.e. where the piece of equipment may not have lost its unique and individual identity, but is standing in another sort of close relationship to immovable property. In the fourth Study Group draft (Study 72K – SG3 – Doc. 3) as prepared by the UNIDROIT Secretariat, there was a proposed rule on fixtures only, but in the view of the German Ministry of Justice and for Consumer Protection an additional provision is necessary to cover accessories as well. Again, reference is made to the discussion of terminology by the UNIDROIT Secretariat in the Issues Paper for the third session of the Study Group (Study 72K – SG3 – Doc. 2, para. 98):

> 98. *Therefore, it is important for this section to set out some basic terminology to prevent inconsistent usage or misunderstandings. For uniformity purposes, the Secretariat has categorised the different terms in two groups. The term 'fixture' is taken to have the equivalent meaning of 'component part', 'essential part', 'integral part' as well as 'fixed accessories', whereas the term 'accessory' is considered to be the equivalent of the common law term of 'chattel'.*

[48] In line with the approach followed in the fourth Study Group draft (Study 72K – SG3 – Doc. 3), the inclusion of Options 1 and 2 regarding paragraph 1 relates to the issue of how declarations are made under the Protocol.

Conflicts between national immovable property law and the rules of the Protocol on an international interest in movable equipment may not only occur where the piece of equipment concerned has become a fixture to immovable property so as to lose its unique and individual identity. Other conflicts between national immovable property law and the rules of the Protocol can arise where the piece of equipment is an asset that is an accessory to the immovable and national immovable property law provides that – even though the asset concerned retains its separate legal status as a movable asset – security rights over the immovable extend to the movable asset. This is the case under German immovable mortgage law und the rules of the so-called Haftungsverband der Hypothek: The mortgagee can exercise its right not only into the immovable asset, but also into all of its accessories. This rule is of particular importance in the financing industry for the agricultural sector: It is not only the land which is available as collateral for a mortgagee holding a mortgage over the land, but also the movable assets used as farm equipment (unless they are bought under a retention of ownership so that the landowner has not yet become the owner of the movable equipment).
Under the general rule in Article 29 of the Cape Town Convention, such priority conflicts would be solved on the basis of a general priority of the registered international interest over other interests. While this rule is to be supported in general, there are some situations in which its application could lead to unfair results, specifically the situation envisaged in the discussions of the Study Group at its second meeting and reported in relation to affixed property in general in the Report of the Second Session, Study 72K – SG2 – Doc. 6 in para. 63:

> 63. *Professor Riffard noted that a provision preserving the priority of an international interest in affixed property over a domestic immovable property interest could result in unfairness in circumstances where the equipment was already affixed to the immovable property at the time the international interest was created, and a mortgagee had reasonably created a domestic immovable property interest over the land, including the already affixed MAC equipment*."

In such a situation, a holder of a security right over immovable property may hold a position that is perfectly valid under national law also as regards its extension to accessories. It would be very unfair to this holder of a security right over immovable property if his position could subsequently be lost as regards the accessories merely by reason of the fact that a subsequent creditor registers an international interest in the movable equipment.

The rule proposed in Article y contains a specific provision dealing with priority issues as described in the preceding paragraph. The rule is presumably of interest only for such Contracting States that have a system of security rights over immovable property including its accessories similar to the German system of the Haftungsverband der Hypothek; therefore the rule in Article y is proposed as a Contracting State Option that applies only if the Contracting State concerned has made a declaration to this effect when ratifying the Protocol. Since it has not yet been decided which system of declarations the Protocol is to follow, the proposed Article y contains two alternatives for the drafting of paragraph 1.

The substantive content of Article y is contained in its paragraph 2. This rule is specifically tailored at dealing with the priority conflict between the holder of a security in the immovable property and the holder of an international interest in the mobile equipment as described above. It is not the intention of this rule to provide for a general application of the German law system of the Haftungsverband der Hypothek. It is also not intended to allow too broad exceptions from the rules of the Protocol which would allow Contracting States to deviate from its rules in general whenever the assets concerned are accessories to immovable property. Such broad rules would compromise the harmonisation objectives of the Protocol and would go too far in weakening the situation of a holder of an international interest in movable equipment under the Protocol. The only objective of the rule in Article y is to provide that in situations as described above (see the reference to the Report of the Second Session, Study 72K – SG2 – Doc. 6 in para. 63), the rights of the holder of an

international interest should not have priority on the basis of the general rule in Art. 29 over the rights of a holder of a right in the immovable under national law.

This exception to the general priority rule in Art. 29 of the Cape Town Convention shall apply only if the following restrictive conditions are fulfilled:

- First, the movable piece of equipment must be an accessory to an immovable and rights in the immovable must extend to the piece of equipment as an accessory. These conditions are not defined by the Protocol and it is referred to the law of the Contracting State where the asset is located (including both the conditions for the extension and for its termination). This reference to national law should not be a cause for concern: The legal consequences of Article y are so specifically tailored to the regulation of a specific priority issue and apply only if the additional requirements in litt. (a) and (b) are fulfilled, so that the reference to national law should not lead to an overly broad deviation from the rules of the Protocol.

- Second, the additional conditions set out in litt. (a) and (b) must be fulfilled:

(a) The security over the immovable asset must have been registered in accordance with the requirements of the law of the Contracting State prior to the time of registration of the interest in the equipment under this Protocol and continues to be effective (i.e. it must still be on the register). If the international interest in the movable asset has been registered in the international register prior to the registration of the national security over the immovable in the national register, the holder of the security over the immovable does not deserve protection. His rights in the movable pieces of equipment (by way of the extension of his rights in the immovable into its accessories) have been acquired only as a second-ranking security that must give precedence to the international interest.

(b) The piece of equipment must have become an accessory to the immovable before the international interest in the piece of equipment has been registered. If the international interest had already been registered when the movable piece of equipment became an accessory to the immovable, the holder of the security in the immovable could acquire his rights in the accessory at this point of time only subject to the earlier international interest.

Immovable Equipment – Notes for second teleconference

1. The purpose of this paper is to provide the Study Group with an updated draft article setting out possible options addressing the potential effect of international interests in MAC equipment under the Protocol on domestic interests arising out of immovable property law.

2. At the first fixtures teleconference, it was agreed that:

(a) The article(s) governing fixtures/accessories should be a mandatory declaration under the Protocol, giving Contracting States flexibility in their approach to the issue, but also requiring states to make an active selection of the alternative they favoured.

(b) Due to the complex and sensitive nature of the issue, the Study Group should provide the Committee of Intergovernmental Experts an array of options on how to address the potential effect of international interests in MAC equipment under the Protocol on domestic interests arising out of immovable property law.

(c) The draft article(s) and various options need to take into account both fixtures and accessories, as discussed in the paper developed by the German Ministry of Justice and Consumer Protection in advance of the first teleconference.

Regulation of accessories

3. At the first teleconference it was confirmed that several jurisdictions allow rights in immovable property to be extended to accessories that are neither physically attached to immovable property nor had lost their legal nature as a separate movable asset. In Germany, any movable assets used in the operation of a business operated on an immovable could be regarded as accessories and the rights of the holder of a mortgage in the immovable would extend to these assets (e.g., movable equipment used on a farm).

4. The Secretariat is in the process of researching this issue further, in order to determine how many jurisdictions have such laws. However, it is already clear that several major European jurisdictions, including Germany, France and Spain, have such rules. While not all jurisdictions will have such laws, the effect of the laws are profound, as they can extend to all MAC equipment, regardless of whether it is affixable or physically connected to the immovable itself. As such, the Protocol must find an approach for dealing with both fixtures and accessories.

5. The German Ministry of Justice and Consumer Protection paper suggested including separate articles for fixtures and accessories.

6. The fixtures article provides that where MAC equipment becomes connected to immovable property to the extent it loses its unique and individual identity domestic law should apply, and also provides for domestic law to provide compensatory measures for parties who have their international interests in MAC equipment adversely effected.

7. The accessories article provides that interests in accessories under domestic immovable property law will have priority over international interests under the Protocol where (a) the domestic interest in the immovable was registered in accordance with the requirements of the law of the Contracting State prior to the time of registration of the interest in the equipment under this Protocol and continues to be effective; and (b) the equipment has become an accessory to the immovable property prior to the time of registration of the interest in the equipment under this Protocol.

8. In suggesting the accessories provision, the German Ministry deliberately restricted its application, as a broad rule could compromise the harmonisation objectives of the Protocol and would

go too far in weakening the position of a holder of an international interest in movable equipment under the Protocol.

9. The German approaches have been incorporated into the draft article as Alternative C, as a possible declaration that could be exercised by States which recognise immovable property law interests arising in accessories on the same basis as Germany. The outstanding issue remains that this approach requires the Protocol to define what a 'fixture' and an 'accessory' is. During early discussions, the Study Group considered using a 'unique and individual identity' test, however exactly how such a test would operate in practice is problematic, and the test does not provide requisite legal certainty without further definition. As discussed at paragraph 6 in the paper distributed in advance of the first fixtures meeting, the comparative analysis of the legal regimes of 17 different countries highlighted many different factors in determining the effect on existing interests in equipment that is subsequently connected to immovable property, including the relationship between the immovable property and the equipment, the ease of removal of the equipment and the intention of the party in possession of the immovable property.

10. To some extent, the exact formulation of the definition should be left to the committee of intergovernmental representatives for negotiation. However, the intergovernmental negotiations will be in a stronger position to consider issue if the Study Group can provide guidance on the issue. As such, the Study Group is invited to consider the following definitions of fixture and accessory at their second teleconference:

Possible definitions of 'fixture':

> *Alternative 1 (Legal identity)*: 'fixture' means agricultural, construction or mining equipment capable of being subject to an interest under this Protocol that becomes so associated with immovable property that it loses its individual legal identity under the law of the Contracting State in which the immovable property to which it is associated is located.
>
> *Alternative 2 (Physical connection):* 'fixture' means agricultural, construction or mining equipment capable of being subject to an interest under this Protocol that is physically connected to immovable property to the extent that its removal would cause damage to the immovable property.
>
> *Alternative 3 (Relationship with the immovable property):* 'fixture' means agricultural, construction or mining equipment capable of being subject to an interest under this Protocol that is physically connected with immovable property to the extent that its removal would compromise the functionality of the immovable property.

Possible definition of 'accessory':

> 'accessory' means agricultural, construction or mining equipment capable of being subject to an interest under this Protocol that is not a fixture and remains capable of being subject to separate legal rights, but nevertheless becomes associated with immovable property to the extent that that an interest in the immovable property under the law of the Contracting State extends to the equipment.

11. It should be noted that not all of the alternatives for the rules on fixtures and accessories that will be presented on the next pages use these terms (i.e. 'fixture' or 'accessory') and therefore require such definitions. However, if Alternative C is included in the Protocol, even where a Contracting State chooses a different Alternative that does not use the term 'fixture' or 'accessory', the definitions of these terms would still have to be a part of the Protocol since they remain relevant for the other alternatives, even if these are not applicable in the Contracting State concerned. Alternatively, Alternative C could require states making a declaration have to provide their own definition of 'fixture' and 'accessory' as applied in Alternative C.

Draft Article presented to the Study Group at the second fixtures teleconference

Association with immovable property[49]

1. A Contracting State, shall [50], at the time of ratification, acceptance, approval of, or accession to the Protocol, declare which of the alternatives in the following paragraphs will apply in relation to the relationship between an international interest in an object under the Protocol which is, or becomes[51] associated with immovable property and which is situated in the Contracting State[52] [or, if the debtor is situated in the Contracting State, in the Contracting State or in a State that is not a party to this Protocol][53]. As regards such objects situated in a Contracting State, all Contracting States will apply the Protocol subject to the declaration made by that Contracting State.[54] [As regards such objects situated in a State that is not a party to this Protocol, providing that the rules of the Protocol are applicable, all Contracting States apply the Protocol subject to the declaration made by the Contracting State where the debtor is situated.][55]

---

[49] This article provides various draft provisions on dealing with interests in MAC equipment that could arise under domestic immovable property law. The purpose of this article is to provide a wide array of options for discussion during the intergovernmental negotiations. It is not suggested that all listed alternatives should be adopted in the final MAC Protocol.

[50] It was decided at the first Study Group fixtures teleconference that the fixtures article should be a mandatory declaration. The benefit of making the fixtures article subject to a mandatory declaration is that it gives states some flexibility in relation to how they implement this contentious aspect of the Protocol, while also requiring them to do so, as failure of a Contracting State to make a mandatory declaration would result in the Depositary refusing to accept an instrument of ratification. The language of Paragraph 1 is based upon Article 54(2) of the Cape Town Convention, which requires Contracting States to make a mandatory declaration in relation to whether a court's leave is required to exercise certain remedies under the Convention.

[51] This language provides that the timing of the association between the object and the immovable property is irrelevant. The timing of the association is a different issue to the timing of the registration of the international interest, which is considered further in subsequent articles.

[52] A declaration by one Contracting State shall not affect assets located in another Contracting State. If France chooses Alternative A1 and Italy chooses Alternative A2, in any lawsuit regarding assets located in France, both Italian and French courts would have to apply Alternative A1. The declaration by Italy does not have effect as regards assets in France (provided that, as in this example, France is also a Contracting State). For the issue whether a declaration by a Contracting State could affect assets located in a State that is not a party to the Protocol, see the following text in square brackets and the next footnote.

[53] The German Ministry of Justice and Consumer protection has raised for the Study Group's attention the additional matter of what occurs when MAC equipment subject to an International Interest under the Protocol is located in a state not party to the Protocol, and associated with immovable property, and the debtor to the international interest is located in a Contracting State. In such a situation, the Protocol would be applicable but the non-party State would have made no declaration as to the treatment of fixtures and accessories. Therefore, there must be some mechanism to determine the relationship between the non-party State´s immovable property law and the rules of the Protocol as regards the international interest. The Germany Ministry suggested the text in the square paragraphs could clarify this situation: The declaration of the Contracting State where the debtor is situated would then govern also the relationship between the non-party State´s immovable property law and the rules of the Protocol as regards the international interest.

[54] This sentence clarifies that a declaration – as regards assets that are situated in the Contracting State that has made the declaration - has effect not only before the courts of the Contracting State that has made the declaration, but also before the courts of the other Contracting States.

[55] This additional sentence (which stands in relation to the text in square brackets that is accompanied by footnote 4) again covers cases where MAC equipment subject to an international interest under the Protocol is located in a State that is not party to the Protocol, and associated with immovable property, and the debtor to the international interest is located in a Contracting State: In such cases, also the other Contracting States shall respect the declaration made by the Contracting State where debtor is situated.

Alternative A1 (maintain priority of international interest)[56]

2. An interest under this Protocol in relation to agricultural, construction or mining equipment will continue to exist and retain priority as against other interests arising under the law governing immovables despite its association[57] with immovable property.

Alternative A2 (maintain priority of international interest)[58]

2. An interest under this Protocol in relation to agricultural, construction or mining equipment shall not be affected by the equipment becoming a fixture to or incorporated in an immovable.

Alternative B (apply domestic law, do not distinguish between types of associations)

2. Where agricultural, construction or mining equipment subject to an interest under this Protocol becomes associated with immovable property to the extent that the association results in an interest in the equipment being created under the domestic law of the State where the equipment is located,[59] the law of the State where the equipment is located determines whether the interest under the Protocol ceases to exist, is subordinated to or is otherwise affected by the association with immovable property and the interest thereby created in the equipment.

3. Where interests in the agricultural, construction or mining equipment under this Protocol cease to exist, are subordinated to or are otherwise affected by interests in the immovable property in conformity with the preceding paragraph due to the application of the law of the State where the equipment is located, the law of that State determines also whether a displaced or subordinated holder of an interest in the equipment obtains a claim (compensatory or other) against a holder of an interest in the immovable property.[60]

4. Where a Contracting State makes a declaration to apply this alternative, the Contracting State will at the time of making the declaration deposit with the Depositary of the Protocol a list of

---

[56] Alternative A1 allows States to declare that an international interest in an object associated with immovable property will continue to exist and enjoy priority over domestic interests resulting from its association with immovable property, even where that object would cease to be a movable asset under domestic law. Alternative A1 does not distinguish between 'fixtures' and 'accessories'.

[57] 'Association' here is a deliberately broad term that attempts to cover all potential interests that can arise in MAC equipment under domestic immovable property law, including both 'fixtures' and 'accessories'. It is broader than 'connection' as certain rights under domestic immovable property law can still extend to equipment that is not physically connected to, or even touching the immovable property itself.

[58] This provision is intended to have the same substantive effect as Alternative A1, but is based upon the language in Article 2 of the Leasing Model Law. Under Article 2, an 'asset' is defined as '***Asset*** *means all property used in the craft, trade or business of the lessee, including immovables, capital assets, equipment, future assets, specially manufactured assets, plants and living and unborn animals. The term does not include money or investment securities. No movable shall cease to be an asset for the sole reason that it has become a fixture to or incorporated in an immovable.'* Utilising this definition may not clarify whether it covers all interests arising out of MAC equipment becoming associated with immovable property (i.e. it may not clearly cover accessories).

[59] If the text in square brackets in paragraph 1 is not adopted, the reference could be to the law of the Contracting State. The same applies throughout the following paragraphs and alternatives.

[60] This compensatory mechanism in this provision is based on Japanese law. 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. 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.

interests arising in relation to immovable property law which subordinate or otherwise affect interests under this Protocol.[61]

Alternative C (create 'fixtures' rule and 'accessories' rules under national law)[62]

2. Where agricultural, construction or mining equipment subject to an interest under this Protocol becomes associated with immovable property to an extent that the equipment becomes a fixture, the law of the State where the equipment is located determines whether such interest in the equipment ceases to exist, is subordinated to or otherwise affects an interest in the immovable property.

3. Where interests in the agricultural, construction or mining equipment under this Protocol cease to exist or are subordinated to interests in the immovable property in conformity with the preceding paragraph due to the application of the law of the State where the equipment is located, the law of that State determines also whether a displaced or subordinated holder of an interest in the equipment obtains a claim (compensatory or other) against a holder of an interest in the immovable property.

4. A Contracting State, shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether also the rule in the following paragraph will apply.

5. Where agricultural, construction or mining equipment subject to a registered interest under this Protocol is an accessory to immovable property under the law of the State where the equipment is located and an interest in the immovable property under the law of this State extends to the equipment as an accessory, an interest in the immovable property under the law of this State has priority over the registered interest in the equipment under this Protocol if the following conditions are fulfilled:

(a) the interest in the immovable property has been registered in accordance with the requirements of the law of the State where the equipment is located prior to the time of registration of the interest in the equipment under this Protocol and continues to be effective; and

(b) the equipment has become an accessory to the immovable property prior to the time of registration of the interest in the equipment under this Protocol.

6. Where a Contracting State makes a declaration to apply this alternative, the Contracting State will at the time of making the declaration deposit with the Depositary of the Protocol a list of

---

[61] This optional additional paragraph is based upon the mechanism in Article 40 of the Cape Town Convention. Article 40 requires States who make the optional declaration allowing certain non-consensual interests to be registerable in the International Registry to list the non-consensual interests that can be registered. Requiring Contracting States to provide a list will help provide clarity as to how exactly international interests under the Protocol may be affected by interests under arising under domestic immovable property law in Contracting States who decide to make such a declaration, and may also disincentivise states from making a broad declaration. If most Contracting States made a broad declaration under this article, the value and integrity of an international registered interest would be significantly diminished. It is suggested that the declarations memorandum maintained by the Depositary should require states also provide how the interests arising in relation to domestic property law would affect international interests under the Protocol.

[62] Alternative C is based upon Articles x and y from the German Ministry of Justice proposal. The only change from the original German-proposed article x is that Alternative C in para. 2 no longer contains a reference to what a fixtures is, whereas in the original German proposal the article defined a fixture as *agricultural, construction or mining equipment subject to an interest under this Protocol connected to immovable property to an extent that the equipment loses its unique and individual identity*. It is proposed that instead, Alternative C, para. 2 would require definitions of 'fixture' and 'accessory' to be inserted into the definitions section of the Protocol.

interests arising in relation to immovable property law which affect interests under this Protocol for the purposes of paragraphs 3 and 5, if applicable.

Alternative D (create fixture filing rule, priority of readily removable equipment and priority based on consent, disclaimer, or right to remove)[63]

2. An international interest in equipment that becomes associated with immovable property has priority over a conflicting interest of an encumbrancer or owner of the immovable property if the debtor has an interest of record in the immovable property or is in possession of the immovable property and the international interest:

(a) is made effective by registration substantially complying with the requirements of the Protocol in the immovable property registry before the interest of the encumbrancer or owner is of record; and

(b) has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

3. An international interest in equipment that becomes associated with immovable property has priority over a conflicting interest of an encumbrancer or owner of the immovable property if before the equipment becomes associated with immovable property, the international interest is registered and the equipment is readily removable.

4. An international interest in equipment associated with immovable property has priority over a conflicting interest of an encumbrancer or owner of the immovable property if:

(a) the encumbrancer or owner has consented to the international interest or disclaimed an interest in the associated equipment; or

(b) the debtor has a right to remove the equipment as against the encumbrancer or owner.

[63] This provision is modelled on UCC 9-334, and each paragraph was previously listed as separate articles (Alternatives D, E and F) in the paper for the first fixtures teleconference. As these articles are cumulative rather than mutually exclusive in the UCC, the Study Group is invited to consider whether they should appear under once single Alternative in the MAC Protocol.

Association with Immovable Property Article in the 5th Study Group draft

Article VII[64]

Association with immovable property

1. A Contracting State, shall,[65] at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will apply the entirety of Alternative A, B, C, or D of this Article in relation to an international interest in an object under this Protocol which is, or becomes[66], immovable-associated equipment[67] and which is situated in the Contracting State.

2. As regards immovable-associated equipment situated in a Contracting State, all Contracting States will apply the Protocol subject to the declaration or declarations made by that Contracting State.[68]

[3. This Convention does not affect the rights of a person in immovable property located in a non-Contracting State which is, or becomes, associated with immovable-associated equipment.][69]

---

[64] This article was added to the fifth Study Group draft, following consideration of the issues at the first three Study Group meetings and two out-of-session teleconferences.

[65] It was decided at the first Study Group fixtures teleconference that the fixtures article should be a mandatory declaration. The benefit of making the fixtures article subject to a mandatory declaration is that it gives states some flexibility in relation to how they implement this contentious aspect of the Protocol, while also requiring them to do so, as failure of a Contracting State to make a mandatory declaration would result in the Depositary refusing to accept an instrument of ratification. The language of Paragraph 1 is based upon Article 54(2) of the Cape Town Convention, which requires Contracting States to make a mandatory declaration in relation to whether a court's leave is required to exercise certain remedies under the Convention.

[66] This language provides that the timing of the association between the object and the immovable property is irrelevant. The timing of the association is a different issue to the timing of the registration of the international interest, which is considered further in subsequent articles.

[67] 'Immovable-associated equipment' is defined in Article 1(2) as 'immovable-associated equipment' means agricultural, construction or mining equipment capable of being subject to an interest under this Protocol that becomes so associated with immovable property that an interest in the immovable property extends to the equipment under the law of the state in which the immovable property is located.

[68] This sentence clarifies that a declaration – as regards assets that are situated in the Contracting State that has made the declaration - has effect not only before the courts of the Contracting State that has made the declaration, but also before the courts of the other Contracting States. While this type of clarifying paragraph is not present in previous Protocols, the clarification may be useful, as this will be the first Protocol applying the declarations made by a Contracting State in relation to equipment located in that state (as opposed to the location of the debtor as occurs in relation to a declaration applying alternative insolvency remedies). The Secretary-General has queried whether this provision is necessary.

[69] During the second teleconference the Study Group discussed what would occur in relation to international interests in MAC equipment that became associated with immovable property in non-Contracting States. The prevailing view was that in the absence of an express provision stating otherwise, Article 29 of the Cape Town Convention would apply, and the international interest would take priority over any domestic interest arising out of the equipment's association with immovable property. As Article 29 was not drafted to contemplate an international interest conflicting with an interest arising out of association with immovable property, the Study Group concluded that it would be prudent to consider including a draft Provision providing that international interests in MAC equipment does not interfere with immovable property-related interests. This drafting is based on Article 29(7), which provides that priority given under Article 29 does not affect pre-existing interests in items installed on objects. The German Ministry of Justice has suggested that this provision could be moved to the end of the Article.

Alternative A (maintain priority of international interest)[70]

2. An international interest in agricultural, construction or mining equipment will continue to exist and retain its priority as against any other interests arising out of its association with immovable property, notwithstanding that it is or becomes immovable-related equipment.

Alternative B (apply domestic law to immovable-associated equipment)[71]

2. Where agricultural, construction or mining equipment subject to an international interest is or becomes immovable-associated equipment, the law of the Contracting State making the declaration determines whether the international interest ceases to exist, is subordinated to or is otherwise affected by the association with immovable property and any interest thereby created in the equipment.

3. Where an international interest in agricultural, construction or mining equipment ceases to exist, is subordinated to or otherwise affected by any interest in immovable property pursuant to the preceding paragraph, the law of the Contracting State making the declaration determines whether a displaced or subordinated holder of an international interest in the equipment obtains a claim (compensatory or other) against a holder of an interest in the immovable property.[72]

[4. Where a Contracting State makes a declaration to apply this alternative, the Contracting State will at the time of making the declaration deposit with the Depositary of the Protocol a list of interests arising in relation to immovable property law which displace, subordinate or otherwise affect international interests.][73]

---

[70] Alternative A allows States to declare that an international interest in an object associated with immovable property will continue to exist and enjoy priority over domestic interests resulting from its association with immovable property, even where the domestic law would grant a priority interest in the equipment to the owner of the immovable property. Alternative A does not distinguish between different types of interests arising out of association with immovable property (i.e. 'fixtures' and 'accessories'). At the second teleconference it was discussed whether this Alternative should be framed using the language of Article 2 of the Model Leasing law. Ultimately it was decided that the current drafting provided a higher degree of certainty and clarity.

[71] The Study Group may wish to consider redrafting Alternative B as a substantive provision (as consistent with Alternatives A and C) rather than a conflict of laws provision.

[72] This compensatory mechanism in this provision is based on Japanese law. 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.

[73] This optional additional paragraph is based upon the mechanism in Article 40 of the Cape Town Convention. Article 40 requires States who make the optional declaration allowing certain non-consensual interests to be registerable in the International Registry to list the non-consensual interests that can be registered. Requiring Contracting States to provide a list will help provide clarity as to how exactly international interests under the Protocol may be affected by interests under arising under domestic immovable property law in Contracting States who decide to make such a declaration, and may also disincentivise states from making a broad declaration. If most Contracting States made a broad declaration under this article, the value and integrity of an international registered interest would be significantly diminished. It is suggested that the declarations memorandum maintained by the Depositary should require states also provide how the interests arising in relation to domestic property law would affect international interests under the Protocol.

Alternative C (create fixture filing rule, priority of readily removable equipment and priority based on consent, disclaimer, or right to remove) [74] [75]

2. An international interest in agricultural, construction or mining equipment that is or becomes immovable-associated equipment has priority over a conflicting interest in the immovable property to which the equipment is associated if the debtor has an interest of record in the immovable property or is in possession of the immovable property and the international interest:

(a) is made effective by registration substantially complying with the requirements of the Protocol in the immovable property registry before the holder of the conflicting interest is of record; and

(b) has priority over any conflicting interest of a predecessor in title of the holder of the conflicting interest;[76]

3. An international interest in equipment that is or becomes immovable-associated equipment has priority over a conflicting interest in the immovable property if before the equipment becomes immovable-associated equipment the international interest is registered and the equipment is readily removable from or is not physically attached to the immovable property.[77]

4. An international interest in immovable-associated equipment has priority over a conflicting interest of in the immovable property if:[78]

(a) the holder of the conflicting interest has consented to the international interest or disclaimed an interest in the immovable-associated equipment; or

(b) the debtor has a right to remove the equipment from or move the immovable-associated equipment away from the location of the immovable property.

---

[74] Alternative C is modelled on UCC 9-334, and each paragraph was previously listed as separate articles (Alternatives D, E and F) in the paper for the first fixtures teleconference. As these articles are cumulative rather than mutually exclusive in the UCC, the Study Group is invited to consider whether they should appear under once single Alternative in the MAC Protocol.

[75] The Study Group may wish to consider redrafting the language of Alternative C to be more consistent with the language of the Cape Town system, rather than with the language of the United States Uniform Commercial Code.

[76] Subsection two creates a fixture filing rule.

[77] Subsection 3 provides for the priority of readily removable equipment where the international interest existed on the equipment before it became associated with the immovable property. As such, the substantive effect of this provision would be to create a priority rule for accessories, which would always be readily removable from the immovable.

[78] Subsection 4 provides for priority based on consent, disclaimer or the debtor's right to remove.

Alternative D (distinction between different types of immovable-associated equipment) [79] [80]

2. Where agricultural, construction or mining equipment subject to an international interest [under this Protocol] is or becomes immovable-associated equipment to an extent that the equipment loses its individual legal identity under the law of the Contracting State making the declaration, the law of the Contracting State making the declaration determines whether the international interest ceases to exist, is subordinated to or is otherwise affected by any other interest in the immovable property.

3. Where an international interest [under this Protocol] ceases to exist or is subordinated to or is otherwise affected by any other interest in the immovable property pursuant to the preceding paragraph, the law of the Contracting State making the declaration determines whether a displaced, subordinated or otherwise affected holder of the international interest obtains a claim (compensatory or other) against a holder of any other interest in the immovable property.

4. Where agricultural, construction or mining equipment subject to a registered interest under this Protocol is or becomes immovable-associated equipment without losing its individual legal identity under the law of the Contracting State making the declaration, an interest in the immovable property under the law of that State that extends to the equipment by reason of it being immovable-associated equipment, has priority over the registered interest in the equipment [under this Protocol] only if the following conditions are fulfilled:

(a) the interest in the immovable property has been registered in accordance with the requirements of the law of the Contracting State making the declaration prior to the time of registration of the interest in the equipment under this Protocol and registration of the interest in the immovable property continues to be effective; and

(b) the equipment became associated to the immovable property prior to the time of registration of the interest in the equipment under this Protocol.

[5. Where a Contracting State makes a declaration to apply this alternative, the Contracting State shall at the time of making the declaration deposit with the Depositary of the Protocol a list of interests arising in relation to immovable property law which affect interests under this Protocol for the purposes of paragraphs 2 and 4.][81]

---

[79] Alternative D is based upon Articles x and y from the German Ministry of Justice proposal presented at the first teleconference in December 2015. The benefit of Alternative D is that distinguishes between different types of immovable-associated equipment, and in doing so it restricts the circumstances under which an international interest in an accessory will be de-prioritised as against an interest arising from its association with immovable property. The potential issue with this Article is that is dependent upon the use of the additional criterion of the complete loss of individual legal identity, even though it does revert to the national law of the location of the immovable to determine the circumstances under which the loss of individual legal identity occurs.

[80] The Study Group may wish to consider redrafting Alternative D as a substantive provision (as consistent with Alternatives A and C) rather than a conflict of laws provision.

[81] This article is consistent with Alternative B paragraph 4, and likewise requires further consideration from the Study Group.

Appendix IV – Jurisdictional analysis on association with immovable property

Introduction

1. This paper 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 of the treatment of fixtures under domestic law, the UNIDROIT Secretariat researched two key legal 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?*

2. 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 Kingdom, the United States and Uruguay.

Argentina[82]

3. In the Argentine Civil Code, movable and immovable property is distinguished either by nature, or by accession, or by their representative character.[83] 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.[84] As such, the term 'accessory' under Argentinian law is more closely aligned to the meaning of 'fixture' used by this paper.

4. 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.[85] 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.[86] 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.[87]

5. 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.[88] 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.[89]

---

82 This research was conducted by the Unidroit Secretariat.

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

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

85 Ibid, Article 2349 [2315].

86 Ibid, Article 2350 [2316].

87 Ibid, Article 2356 [2322].

88 Ibid, Article 2351 [2317].

89 Ibid, Article 2353 [2319].

6. 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 derivre 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.[90]

Colombia[91]

7. 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.

8. 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.

9. Security interest laws in Colombia were reformed by means of Law 1676, 2013 which set forth the application in Colombia of the UNCITRAL 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 (www.garantiasmobiliarias.org.co).

Canada[92]

10. 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.

11. 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).

12. 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.

---

90 Ibid, Article 2355 [2321].

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

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

13. 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[93]

14. 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 Quebec' 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.[94] Canadian Common law on the other hand incorporates the term 'accessoire fixe' which would literally cover 'fixtures'.

15. 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'.

16. 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.' [95]

17. The 1994 Civil Code of Quebec (CCQ), explicitly mentions that 'anything forming an integral part'[96] 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.[97] 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.[98]

18. 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.[99] 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.[100]

19. 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

---

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

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

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

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

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

98 Ibid, c. 64, a. 902.

99 Ibid, c. 64, a. 903.

100 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[101]

20. 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.[102]

21. 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.[103] As such, the intention of the landowner is a significant determinant both in Syrian and Egyptian jurisdictions.

France[104]

22. 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.

23. 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.

24. 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 (ie 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. Movables that participate in the productive function of an immovable must share its nature.

25. Movables are defined by article 527 which states that things are movables 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. Movables by declaration of the law are incorporeal things to which the law gives the

---

101 This research was conducted by the UNIDROIT Secretariat.

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

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

104 The information on French law was submitted by Professor Jean-Francois 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[105]

26. The relationship between rights in immovable property and rights in movable equipment which becomes affixed is governed by the notions 'Bestandteil' (part) and 'wesentlicher Bestandtiel' (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'.

27. 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).

28. 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/Sturner, 18th ed 2009, 15).

29. 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.

30. 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 opnion and non merely a value relationship, which is determined by examining the objects objective statue, actual use and other external circumstances.

31. 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

---

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

premises can still be an accessory). In the case of a farm, equipment and livestock intended for commercial operations are accessories.

32. 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 s311(c) of the BGB, a contract of sale or mortgage of an immocable will in case of doubt also include accessories, and a mortgage over land will automatically include accessories and non-essential parts (s1120 BGB). Generally, execution against immovables held by a judgment debtor can also be directed against the accesoirse to an immovable (s865 ZPO).

Greece[106]

33. 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 property[107] 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).

34. 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.

35. 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.

36. 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).

37. 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).

38. 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).

---

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

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

39. 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).

40. 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[108]

41. 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.

42. 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.[109] 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.[110] The underlying natural, physical, legal and economic relationship must be taken into consideration.[111]

43. 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.[112]

44. An accessory is an object that is in an economic (economical) relation with the principal property.[113] 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.[114] In the case of an industrial facility machines, tools, row material and equipment are considered equally as accessories if they used to carry out the industrial activity and do not qualify as component part.[115]

---

[108] The information on Hungarian law is a summary of research submitted by UNIDROIT Correspondent Tamás Szabados.

[109] 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.).

[110] 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.

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

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

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

[114] 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.

[115] 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.

45. The accessory may be the subject of a legal transaction separately from the principal thing: it may be transferred or charged separately.[116] However, the legal status of the principal property covers automatically the accessory, unless otherwise agreed by the parties.

Japan[117]

46. 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'.

47. 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.

48. 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[118]

49. 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.[119]

50. 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.

51. 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.

---

116 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.

117 Extracts from the Japan submission to UNIDROIT.

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

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

Spain[120]

52. 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.

53. 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.

54. 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.

55. 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.

56. 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-

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

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 LHMPSD) – 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 LHMPSD). Thirdly, equipment can be encumbered by a specific chattel mortgage of industrial equipment (Article 42 LHMPSD). 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 LHMPSD) 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)

57. 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 LHMPSD 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 LHMPSD 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 LHMPSD 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[121]

58. The 2001 Turkish Civil Code[122] (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.[123]

59. 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.[124]

60. 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.[125]

61. 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.[126] 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.[127]

62. 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.[128] 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 Kingdom

63. To be further revised by the Secretariat.

The United States[129]

64. 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'.

---

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

122 2001 Turkish Civil Code No. 4721.

123 Ibid, Article 684.

124 Ibid, Article 686.

125 2001 Turkish Civil Code No. 4721, Article 940 II.

126 Ibid, Article 862 I.

127 Ibid, Article 862. II.

128 Ibid, Article 862 III.

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

65. 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.

66. 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.

67. 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.

68. 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)."

69. 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.

70. 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.

71. 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.

72. 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[130]

73. 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).

74. 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 an 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.)

75. 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.

76. 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.

77. 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.

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

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

1. This appendix was drafted by the National Law Centre for Inter-American Free Trade in collaboration with the UNIDROIT Secretariat for consideration at the third Study Group meeting in October 2015.

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.[131]

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."[132] Article 1 of the Law states that its rules apply exclusively to businesspersons and business corporations. The Law's reorganisation procedures and requirements were modelled on the United States' Bankruptcy Code Chapter 11.[133] The Law provides

---

131 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.

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

133 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).

for three forms of proceedings: (i) judicial reorganisation; (ii) extrajudicial reorganisation; and (iii) bankruptcy.[134] 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.[135] 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 eligible for reorganisation.[136] The Code of Civil Procedure provides for special insolvency regimes for those debtors not eligible for relief under the Bankruptcy Law.[137]

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.[138] 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.[139] 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.[140]

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 required for 12 months of operations and in Ontario, if the debtor is a farmer, he or she is entitled

---

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

135 Id.

136 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?g=ec88ee9d-98fb-4c0a-a006-c565eb5e64c1.

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

138 See http://laws-lois.justice.gc.ca/eng/acts/F-2.27/.

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

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

to exempt livestock, fowl, bees, books, tools and implements and other chattels not exceeding a prescribed amount, or $28,300.[141]

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.[142] 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.[143] 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)[144] while Law No. 1116 of 2006 governs corporate insolvency.[145] 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.[146]

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 include farmers. The Rescue Act of 2006 specifically mentions farmers as being eligible for rescue

---

141 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.

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

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

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

145 See http://www.secretariasenado.gov.co/senado/basedoc/ley_1116_2006.html.

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

(reorganisation) proceedings.[147] 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.[148]

Mexico

13. The Mexican Insolvency Law of 2000 is applicable to all persons considered merchants under the Commercial Code, which includes farmers.[149] 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 UDIS[150] (near MX$ 2,116,000.00 or US$ 139,210.00).[151]

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.[152] 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.[153] Certain aspects of insolvency for agricultural producers are also governed by the Federal Law on Financial Rehabilitation of Agricultural Producers of 2002.[154]

South Africa

15. Insolvency matters in South Africa are governed by the Insolvency Act No. 24 of 1936.[155] This Act does not entirely codify South African insolvency law and for a number of aspects, related legislation governs.[156] One such legislation is included in Part III of the Agricultural Credit Act No. 28

---

147 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.

148 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.

149 See http://www.diputados.gob.mx/LeyesBiblio/pdf/29.pdf.

150 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.

151 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.

152 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.

153 Id., at 3.

154 Jens Lowitzsch, The Insolvency Law of Central and Eastern Europe, at 386 (INSOL Europe).

155 See http://www.justice.gov.za/legislation/acts/1936-024.pdf.

156 Country Report: South Africa, available at

of 1966 that contains special provisions regarding settlements by farmers (compromise with creditors) who are unable to pay their debts.[157] 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 resolutive 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.[158] 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 items of equipment to be covered by the MAC Protocol. However, MAC

https://www.justiz.nrw.de/WebPortal_en/projects/ieei/documents/public_papers/country_report_sa.pdf.

157 See http://faolex.fao.org/docs/pdf/saf20851.pdf.

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

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 financing of construction and mining equipment with respect to which protections of this kind do not exist or are severely limited.

21. These States may then be interested in applying different insolvency regimes to the three different categories of equipment covered by the MAC Protocol, such as Alternative A to construction and mining equipment, and Alternative B, or their domestic laws to agricultural equipment. A further alternative would be to allow States to declare that a particular insolvency regime (e.g., Alternative C) applies to a defined category of agricultural producers.

22. The Study Group is invited to give further consideration on this issue, especially in regards to whether the existing insolvency provisions in the Protocol require amendment. There is no additional drafting in the current preliminary draft Protocol in relation to this issue.

Appendix VI – Research on restrictions on enforcement of security interests in farming equipment

1. This research was completed by the National Law Centre for Inter-American Free Trade 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.

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).[159] 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.[160]

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.[161] The Victoria statute defines farming equipment to include a harvester, binder, tractor, plough or other agricultural implement.[162] 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.[163] 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 government.[164] 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.

---

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

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

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

162 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/.

163 *Id.*

164 *Id.*

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.[165] 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.[166] 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.[167] 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".[168] This type of transaction is similar to financial leasing that allows lessees (hirers) to acquire assets, mainly equipment. This Act also established the Registrar of Hire-Purchase Agreements.[169] 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.[170] As a result, this Act is inapplicable to transactions covering high-value equipment, the financing of which the draft MAC Protocol seeks to facilitate.

---

165 See http://laws-lois.justice.gc.ca/eng/acts/F-2.27/.

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

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

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

169 *Id.*, art. 5.

170 *Id.,* art. 3(1).

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.[171] 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).[172] 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.[173]

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).[174] Unlike Australia, Canada and the United States, there is no mandatory mediation legislation for farm debt in Latin America.

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),

---

171 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.

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

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

174 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 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).

and subsidiarily by the civil procedure codes of Mexican states.[175] 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.[176] If the debtor refuses to identify any goods, the creditor has the right to make such a selection.[177] The creditor's right to select and seize goods is limited by Article 434 of the FCCP.[178] 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.[179] The interested party must be the owner of the assets at the moment the estate exemption is created.[180] 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.[181] Therefore, debts of the debtor cannot be repaid with the protected assets and a creditor's only defense against an estate exemption is fraud.[182] 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.[183]

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.[184] The estate must not exceed the estimated amount of USD$135,000.[185] However, the Family Code of the State of Sonora

---

175 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).

176 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]

177 *Id.*

178 *Id.*, art. 434.

179 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)

180 *Id.*, p. 39.

181 *Id.*, p. 49-50.

182 *Id.*

183 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).

184 *Id.*, art. 723.

185 *Id.*

(Código de Familia para el Estado de Sonora),[186] 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.[187]

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.[188] The determination of whether the particular equipment is deemed to be "necessary" for farming activities is routinely done by a court appointed expert.[189] 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.[190] This monetary limitation does not apply to motor vehicles.[191] The definition of "motor vehicle" includes mechanically propelled vehicles intended for agricultural purposes.[192] 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.[193] 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.[194] 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.[195]

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.[196] The ELA limits the rights of the lessee to enter into a sub-lease or create a pledge over the leased equipment.[197] 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

---

186 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).

187 *Id*., art. 545.

188 FCCP, *supra* note 176, art. 434 (IV).

189 *Id.*

190 Section 1 (a) HPA.

191 *Id.*

192 Section 20 (1) HPA

193 Section 9 HPA

194 Section 9 (5) HPA

195 Section 3 (a) HPA

196 Section 12 ELA

197 Section 20 (1) ELA

to remedy the default.[198] If the lessee fails to do so, the lessor may terminate the lease agreement.[199] 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.[200] 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,[201] then s/he may issue a warrant to repossess the equipment. The lessor is also entitled to the rents due and may claim damages.[202] 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.[203] 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.[204] Utah also included certain provisions governing the mediation of farm debts in Title V of its Agricultural Credits Act.[205] 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 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 Bankruptcy[206] provides for special legal protection for farmers and agricultural equipment against any potential remedial enforcement brought upon by creditors for their security interests. Debtor farmers and their agricultural equipment and livestock

198 Section 36 ELA

199 Section 37

200 Section 38 (1) ELA

201 Sections 36 and 37

202 Section 38 (3) (4) ELA

203 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).

204 See https://www.revisor.mn.gov/statutes/?id=583.

205 See https://www.govtrack.us/congress/bills/100/hr3030/text.

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

are protected, provided that such equipment is deemed essential for the sustenance of the farmer and his family.[207]

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.[208]

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.

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

---

207 Ibid, Article 82/No 4.

208 Ibid, Article 84.

against farming equipment. While this is a low number of states, most are economically significant states from diverse regions of the world with divergent legal systems. It is also likely there are further jurisdictions with similar laws.

29. It is clear that the various 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. There were two options that were presented to the Study Group. The first was to not address the issue in the Protocol, and simply require Contracting States that have such domestic protections to reform their domestic law to exempt agricultural equipment registerable under the MAC Protocol from the application of the enforcement restrictions. This was the options favoured at the third Study Group meeting.

31. The second option would be to provisionally 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 are protected by existing domestic legislation. This could possibly be an opt-in declaration, requiring States to declare exactly what family farming enterprises would be protected.

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

1. This section was prepared by the National Law Centre for Inter-American Free Trade on request from the UNIDROIT Secretariat and presented at the third Study Group meeting in October 2015, following discussions at the first and second Study Group meeting.

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. Overall, 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.

3. 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 in the future International Registry.

4. 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, 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. Accordingly, consideration might be given to including an article, along the lines of Article XIII of the Aircraft Protocol, empowering the authorised party to procure the de-registration of the item and its export.

5. This section surveys a selection of relevant laws to enable the Study Group to more informatively determine whether a remedy of this kind would be appropriate for the MAC Protocol.

Argentina

6. In Argentina, motor vehicles (automotores) are governed primarily by Decree No. 1.1144/97.[209] 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).[210] Judicial liens and security interests over motor vehicles must also be registered in the National Registry.[211] 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."[212] 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.[213]

---

209 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).

210 *Id.*, art. 1.

211 *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.

212 *Id.*, art. 5.

213 *Id.*, art. 20(c).

Australia

7. 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)[214] and its regulations (Road Act Regulations) are applicable to the registration of vehicles.[215] 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."[216] 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."[217] 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."[218]

8. In order to register a new tractor in Victoria, its owner must submit "the machinery pack which is essentially a vehicle registration form."[219] 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.[220] 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.[221] The certificate of registration can be used as evidence of ownership of the tractor together with a bill of sale.[222]

9. 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,

---

214 *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 (last accessed Sept. 23, 2015).

215 *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 (last accessed Sept. 23, 2015).

216 Road Safety Act, *supra* note 214, §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...".

217 *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_9nhgJCM2.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."

218 Road Safety (Vehicles) Regulations, *supra* note 215, §5 Definitions.

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

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

221 Telephone interview, *supra* note 219.

222 *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).

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.

Canada

10. 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)[223] and its regulations (MVA Regulations).[224]

11. 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."[225] 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."[226] 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."[227] 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."[228] 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.[229] 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."[230]

12. New Brunswick's Personal Property Security Act Regulations (PPSA Regulations)[231] 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,

---

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

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

225 MVA, *supra* note 223, §1.

226 *Id.*

227 *Id.*

228 MVA Regulations, *supra* note 224, §7(6).

229 MVA, supra note 13, § 21(1).

230 MCA Regulations, *supra* note 224, §9.

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

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.[232] The registrant must also indicate the type of serial numbered goods to which the registration relates.[233] 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.[234] 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.[235]

Mexico

13. Registration of vehicles in Mexico is mainly governed by the Law of the Public Registry of Vehicles (Ley del Registro Público Vehicular) (Registry Law)[236] and its regulations (Vehicle Registry Regulations).[237] 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.[238] 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."[239] 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.[240] 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.[241]

Nigeria

14. 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.[242] However, state agencies also have responsibility for vehicle registration. Many state laws classify tractors and bulldozers as "commercial vehicles," thus requiring

---

232 *Id.*, §25(1)(a).

233 *Id.*, §25(1)(c).

234 *Id.*, §25(2)(b).

235 *Id.*, §25(2)(a).

236 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]

237 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/Reg_LRPV.pdf (last accessed Aug 24, 2015).

238 Registry Law, *supra* note 209, art. 12.

239 Registry Law, *supra* note 236, art. 2(X).

240 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).

241 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).

242 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).

their registration.[243] 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."[244] There is no special administrative law or body for the regulation of heavy mobile equipment. The FRSC prescribes certain regulations for the operation and safety of such heavy mobile equipment as a component of its road traffic and management responsibilities.

15. 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

16. 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).[245] 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."[246]

17. The Vehicles Regulations distinguish between the rules (i) applicable to motor vehicles, and (ii) applicable to specialised agricultural vehicles (vehículo especial agrícola).[247] 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)."[248]

18. Agricultural tractor is defined as "self-propelled specialised vehicle, with two or more axels, designed and manufactured to haul, push, or drag agricultural machinery."[249] 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).[250] ROMA Regulations exclude from its scope

---

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

244 *Id.*

245 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).

246 *Id.*, at p. 2.

247 *Id.*, at Annex II.

248 *Id.*

249 *Id.*

250 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,

"construction and service machinery as well as machinery and equipment used in the agri-food industry."[251] Registrations of agricultural machinery at ROMA are immediately and automatically transmitted to the Car Registry.

19. According to the Law of Movable Mortgage and Non-possessory Pledge,[252] vehicles subject to registration in an administrative registry and other motor vehicles may be encumbered by a movable mortgage.[253] 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.[254]

United States

20. U.S. laws require motor vehicles to be registered with the respective State Departments of Motor Vehicles.[255] 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.

21. 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

22. 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

---

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.

[251] 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.

[252] 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).

[253] *Id.* Article 12 and 34.

[254] *Id.* Article 36.

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

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.

23. 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

24. 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;256 and
- cotton and farm trailers, water tanks, oversize feed and seed motor vehicles, automatic bale wagons, and cotton module movers.[257]

25. 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.

26. 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."[258] 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.[259] Several items from the MAC List may fall under this category of special mobile equipment.

Colorado

27. 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

256 California Vehicle Code, §5011.

257 Id., at §36101.

258 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).

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

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 incidentally operated or moved over the public highways."[260] Special mobile machinery includes vehicles commonly used in the construction, maintenance, and repair of roadways, the drilling of wells, and the digging of ditches.[261] 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.[262] 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.[263] Colorado also issues certificates of title for this type of equipment.

Florida

28. 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 option that "earth moving vehicle mounted on pneumatic tires and used solely for off-highway work is not a motor vehicle."[264] 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."[265] 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

29. 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.[266] 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;

---

260 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).

261 C.R.S. 42-1-102(93.5).

262 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).

263 (42-3-103(1)(a) C.R.S.).

264 Op.Att'y Gen. Fla. 055-113 (1955).

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

266 (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.

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

Texas

31. 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.

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

33. 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 VII(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 VIII – Research on the effect of registration of notices of sale under domestic law

1. This paper was drafted by the National Law Centre for Inter-American Free Trade for consideration at the fourth Study Group meeting in February 2016.

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.

3. The Study Group requested further research as to the potential effect of registered notices of sale on the rights that arise under domestic law with the view to assess the impact of including an article on the registration of notices of sale in the MAC Protocol.

Scenarios

4. 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

5. 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.[267] 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.

6. As noted in a paper discussed by the Study Group at its October 2015 meeting, many MAC objects 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 Commercial Codes.[268] These provisions may condition the transfer of ownership on the registration of a title document relating to the equipment irrespective of the

---

267 See UCC 1-201(9).

268 See Arizona Revised Statutes Section 28-2058.

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.

7. 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.

8. This Note 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

9. 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.

10. 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.

11. 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

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

Colombia

13. 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 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

14. 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.[269] 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.

15. 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

16. 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 searched the International Registry or the court found that it acted with gross negligence in the failure to do so.[270]

17. 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

---

269 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.

270 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).

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

18. 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.

19. 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.[271] Unless Buyer 1 proves Buyer's 2 bad faith within three years, Buyer 2 would acquire full ownership to the asset by prescription.

Spain

20. 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 haberet" (nobody can transfer property that is not its own).[272] 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 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.

---

[271] 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.).

[272] 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.

The United Kingdom

21. 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.[273] 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.[274] 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.

22. 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.[275] 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

23. 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.[276]

24. 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 seller's authority to transfer title."[277] 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

---

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

274 *Id.*, at 59.

275 Michael G. Bridge, Sale of Goods 451

276 Hawkland UCC Series § 2-403:2.

277 77A C.J.S. Sales § 413.

purchaser status."[278] 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.

278 *Id.*

Appendix IX – Research on amendment procedures in other international instruments

The Civil Aircraft Agreement

1. The Agreement on Trade in Civil Aircraft (hereinafter, the Agreement) entered into force in January 1980 and has 32 signatories (as of February 2016). It is a plurilateral WTO agreement (whereby any reservation submitted by any signatory would require the consent of all other signatories) which aims to eliminate import duties for civil air-craft products as covered by its scope.

2. Article 9.8 provides that the Annex to the Agreement (which contains the HS codes to which the Agreement applies, see the section regarding using the Harmonized System as a scoping device for more details) forms an 'integral part therein' of the Agreement itself, implying that any amendments to the Annex by the Committee would trigger a formal treaty action.

3. The WTO Analytical Index for the Agreement[279] provides that in 1982 the Civil Aircraft Committee (the Committee) adopted procedures for modifying the Annex of the Agreement.[280] For this, the Committee issued certifications for modifications. Such certifications were respectively issued in 1983, 1984 and 1985. These certificates incorporated 32 new categories of products as approved by the Committee. The WTO Analytical Index for Article 9.5 notes that the Agreement has only been subject to amendments in 1986 and 2001 as consistent with the adopted protocols. It thus appears that the certifications issued by the Committee prior to the adoption of protocols aimed at altering the coverage of the Annexes did not trigger formal treaty actions. Taken into account the actual effect of such certifications in modifying the product coverage through the Annexes, the result would inevitably be at odds with the formal treaty actions required for adoption of protocols on amendments.

4. The initial protocol for amending the Agreement which replaced the original Annex resulted in an expansion of the scope of its product coverage as well as its transposition into the HS nomenclature. This took effect on 1 January 1988. It was later followed by the 2001 Protocol Amending the Annex to the Agreement. It aligned its tariff nomenclature with the 2002 version of the HS and expanded the Agreement's product coverage. On the 5th November 2015, the Committee adopted a Protocol which updated the list of its aviation products in compatibility with the 2007 version of the HS.

5. Article 8 on Surveillance, Review, Consultation, and Dispute Settlement of the Agreement establishes the Committee which is comprised of representatives of all signatories. The Committee is required, among other responsibilities, to determine whether amendments are required to ensure the continuance of free and undistorted trade[281]. The Committee is also required to carry out an annual review of the implementation and operation of the Agreement.[282] A subsidiary body, in the form of the 'Technical Sub-Committee', may also be established by the Committee in order to ensure reciprocity and equivalent results with regards to the implementation of Article 2 which relates to product coverage, end-use systems, customs duties and other charges.[283] Among the terms of reference of the Sub-Committee is the examining of proposals for modifying the product coverage of the Agreement which is then reported back to the Committee.[284]

---

279 https://www.wto.org/english/res_e/booksp_e/analytic_index_e/aircraft_01_e.htm#fnt9.

280 AIR/41; see also Secretariat Note in AIR/W/33

281 Article 8.1

282 Article 8.2

283 Article 8.4

284 The Committee set up the Technical Sub-Committee at its meeting of 20 February 1980.

6. Signatories are required to undertake further negotiations with a view to broadening and improving the Agreement on the basis of mutual reciprocity, a process taken to be achieved under the auspices of the Committee.[285] Article 9.5 stipulates that signatories may amend the Agreement, having regards inter alia to the experience gained from its implementation. It further provides that such an amendment shall not come into force for any signatory until it has been accepted by such signatory.

7. As such, the Civil Aircraft Agreement scenario is one whereby the Committee, a supervisory authority which is constituted by representatives of all signatories, is in charge of reviewing the Agreement and adopting possible modifications and rectifications.

8. Ideally, the MAC Protocol will adopt a simplified mechanism which would allow for amendments and changes to the Annex, but without expanding the scope of the Agreement and without the need for creation of an amending protocol through a formal treaty action. Curiously, the opposite approach appears to have been adopted in the Civil Aircraft Agreement; the expansion of the Agreement to new HS codes was achieved through the Committee issuing certifications, however the realigning of the Annex with updates to the HS System has required the creation of formal Protocols amending the treaty.

The Energy Charter Agreement

9. The Energy Charter Treaty (hereinafter, the ECT) entered into force on April 1994 and has 54 signatories as of February 2016. The ECT provides for a multilateral framework for cooperation in the field of energy and the promotion of energy security. The treaty focuses on making energy markets more competitive, stimulating investments in the energy sector and minimising, or eliminating, barriers to trade.

10. The supervisory authority of the ECT, the Charter Conference (comprised of representatives of all Contracting Parties) is vested with the task of keeping the Treaty under regular review. Article 34(3) of the ECT provides a list of functions assigned to the Charter Conference. The Charter Conference is vested with the task of considering and adopting amendments to the ECT.[286] Additionally, it considers and approves modifications of, and technical changes to the Annexes to the Treaty.[287]

11. Article 42 of the ECT stipulates that any Contracting Party may propose amendments to the Treaty, which would then be considered for adoption by the next Charter Conference. The the text of the amendment shall be communicated to the Contracting Parties by the Secretariat three months prior to the proposal for adoption. The amendments to the Treaty which have been approved by the Charter Conference are then required to be forwarded to the Depositary in order for it to be submitted to all Contracting Parties for ratification, acceptance and approval. The instruments of ratification, acceptance or approval of subject matter amendments shall be deposited by the Depository. The amendments between the relevant Contracting Parties take legal effect 90 days after the receipt of approval from three quarters of the Contracting Parties and after the instruments have been deposited by the Depository.

12. As a supplementary instrument to the ECT, the Trade Amendment (TA) was adopted by the Charter Conference in 1998. It entered into force in 2010 and provides changes to the trade-related provisions and modifies the Annexes of the Treaty.

---

285 Article 8.3

286 Article 34(3)(l) ECT

287 Article 34(3)(m) ECT

13. Ultimately, the TA extended the ECT to cover energy-related equipment, as contemplated by Article 31, and provided for this in the Annexes EQ I and EQ II. Specifically, the TA added pipelines, electric cables and towers, drilling platforms, nuclear reactors, central heating boilers, heat pumps, refrigerators, freezers, electrical transformers, accumulators, and even certain types of motor vehicles to the scope of the ECT trade regime. Importantly, in relation to customs duties, the TA provided for a progressive replacement of the soft law customs tariff pledges with a binding customs tariff standstill regime, as referred to in Article 29(6).[288] To move each type of energy material and energy equipment from soft law pledges to a binding customs regime, each HS code had to be moved from Annexes EM I and EQ I to Annexes EM II and EQ II. To move HS codes from one Annex to another where in the latter legally bound tariffs apply, the Charter Conference is required to examine the potential move in its annual review, and is then subject to a subsequent conference vote, the outcome of which must be unanimous.[289]

14. Unanimity is required not only for adoption of amendments to the Treaty and for approval of modifications to Annexes EM (energy materials and products) and NI (non-applicable energy materials and products). Further, a unanimous vote is required for approval of technical changes to the Annexes to the Treaty.

15. Agreement of any matter falling outside the scope of Article 36(1), on the other hand, can only be reached by the Contracting Parties through consensus. This would also imply the approval of modifications to Annex EQ I (energy-related equipment) whereby adding items to Annex EQ I would not require a unanimous agreement but rather a consensus at the Charter Conference. If consensus is impossible to reach, qualified majority or three-fourth majority voting alternatively applies on specific matters, in particular budgetary matters as well as Treaty review intervals by the Charter Conference. [290]

16. As explained in the preceding paragraphs, the ETC adopts different processes for amending different aspects of the treaty and its Annexes, however all amendment measures are governed through the Charter Conference. Adoption of amendments to the texts of the Treaty, approval of modifications to Annexes EM and NI and approval of technical changes to all the Annexes in general would require a unanimous vote from all the Contracting Parties which are present and are voting at the Charter Conference meeting. Replacement of items from Annexes EM I to EM II and Annexes EQ I to EQ II would also require unanimity. Yet, approval of modifications to Annex EQ I would require the Contracting Parties to reach consensus. In the absence of consensus where there would be explicit objections, three-fourth majority voting would alternatively apply.

Convention for the Unification of Certain Rules for International Carriage by Air (The Montreal Convention)

17. It was suggested by the German Ministry of Justice at the second Study Group meeting that it may be desirable to add an additional provision to the article governing amendments which provides for an alternative amendment procedure for the Annexes listing the MAC equipment covered by the Protocol. It was suggested that this additional provision could be based upon Article 24 of the Montreal Convention.

---

288 ECT, with incorporated TA – last updated: 14 July 2014

289 Article 34(o), 36(1)(g) ECT

290 Article 36(2) to Article 36(5)

18. Article 24 of the Montreal Convention provides:

Article 24 - Review of limits (Montreal Convention)

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 percent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 percent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

19. Paragraph 2 of Article 24 (underlined above) provides that where the Depositary determines during a five yearly review that if the inflation factor has exceeded a certain amount, it can revise the limits of liability under the Convention, which has automatic effect unless a majority of States Parties register their disapproval.

20. Such an approach could be adopted in relation to changes to the Annexes to the MAC Protocol that simply realign the codes in the Annexes to reflect revisions to the Harmonized System, but do not intend to expand the scope of the Protocol to new types of MAC equipment.

Annexe X – Recherche concernant les candidats potentiels pour l'Autorité de surveillance

1. Durant la session du CEG1 en mars 2017, le Comité a demandé au Secrétariat d'entreprendre d'autres recherches pour identifier les organisations internationales appropriées qui pourraient remplir les fonctions d'Autorité de surveillance pour le Protocole MAC. La recherche suivante a été effectuée par le Secrétariat d'UNIDROIT entre juin et août 2017, avec l'aide du NLCIFT.

2. Le présent document présente une liste détaillée des organisations qui pourraient théoriquement remplir les fonctions d'AS du futur Protocole MAC. Afin de présenter au Comité d'experts gouvernementaux une liste aussi complète que possible des candidats éventuels, ce document a examiné des organisations en lien avec le commerce international, le développement et les secteurs de l'agriculture, de la construction et de l'exploitation minière. Il ne considère pas les organisations régionales.

3. Cet article présente la liste des candidats potentiels sous trois sections

i) entités publiques internationales

ii) entités publiques internationales sectorielles

iii) entités internationales privées

4. L'intérêt de fournir une liste exhaustive est de présenter au Comité un éventail complet d'options. Cependant, la majorité des organisations reportées ne sont pas appropriées pour remplir les fonctions d'AS pour plusieurs raisons. Les entités énumérées à la section ii) trouveraient difficile de remplir le rôle d'AS, en raison d'une expertise liée à une seule des catégories de matériels d'équipement auxquelles le futur Protocole MAC s'appliquera. Les entités énumérées à la section iii) sont des entités privées et, en tant que telles, ne jouissent pas des immunités internationales. En outre, les entités de la section iii) pourraient avoir des difficultés à concilier leur mandat du secteur privé avec leurs responsabilités en tant qu'AS. En conséquence, cet article suggère que les entités de la section ii) et de la section iii) ne présentent pas des options viables pour le rôle d'AS.

i) <u>Entités publiques internationales</u>

A. L'IFC / Banque mondiale (IFC) [291]

5. L'IFC, membre du Groupe de la Banque mondiale, est la plus grande institution mondiale de développement axée exclusivement sur le secteur privé dans les pays en développement. L'IFC fournit des financements et des conseils aux clients du secteur privé dans différents secteurs, en mettant l'accent sur les infrastructures, la fabrication, l'agro-industrie, les services et les marchés financiers. Ses produits et services comprennent la fourniture de prêts, de prises de participation en capital, de financement des activités commerciales et de la chaîne d'approvisionnement, la syndication, des financements de trésorerie, des financements mixtes, du capital-risque, des conseils et de la gestion d'actifs.

6. La SFI a un engagement de longue date avec le projet de Protocole MAC. La possibilité pour la Société Financière Internationale (IFC) d'être l'Autorité de Surveillance a d'abord été soulevée au cours des négociations du Comité d'étude, la possibilité a été évoquée que la Société financière internationale (IFC) devienne l'Autorité de surveillance. Lors de la troisième réunion du Comité d'étude, le représentant de l'IFC a noté que la question de l'Autorité de surveillance serait discutée en interne à l'IFC, pour déterminer s'il serait possible pour l'IFC d'assumer une telle fonction. En

---

291 Voir http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home

janvier 2016, le Secrétariat d'UNIDROIT a fourni des informations supplémentaires à l'IFC concernant la nature du rôle de l'Autorité de surveillance pour aider les discussions. Lors de la quatrième réunion du Groupe d'étude, le représentant de l'IFC a noté que l'IFC étudiait la possibilité que l'IFC devienne l'Autorité de surveillance du Protocole. Il a mentionné un certain nombre de considérations, à savoir si un tel rôle relèverait de l'activité de l'IFC en vertu de ses statuts, étant donné que l'activité de l'IFC était exclusivement tournée vers l'investissement dans le secteur privé. Cependant, il a noté que certaines parties du mandat de l'IFC visaient à promouvoir le développement du secteur privé, ce qui pourrait éventuellement être compris comme permettant une gamme légèrement plus large d'activités. Il a également noté que, d'un point de vue pratique, si l'IFC devait assumer les fonctions d'Autorité de surveillance, il faudrait prendre les mesures nécessaires pour éviter tout risque de conflits d'intérêt, puisque l'IFC serait à la fois un utilisateur du Registre international et son Autorité de surveillance.

7. Le Secrétariat d'UNIDROIT continue d'assurer la liaison avec la SFI au sujet de cette question.

B. L'Organisation mondiale des douanes (OMD) [292]

8. L'Organisation mondiale des douanes, créée en 1952, en tant que Conseil de coopération douanière (CCD), est un organisme intergouvernemental indépendant dont la mission est d'améliorer l'efficacité et l'efficience des administrations douanières. L'OMD représente 182 administrations douanières dans le monde entier qui traitent collectivement environ 98% du commerce mondial. L'OMD fournit un leadership, une orientation et un soutien aux administrations douanières pour assurer et faciliter le commerce légitime, réaliser des revenus, protéger la société et renforcer les capacités.

9. L'OMD maintient le système SH et aurait une expertise inégalée dans la gestion des modifications apportées au système du SH et dans l'évaluation de la manière dont elles pourraient affecter les Annexes au futur Protocole MAC. Cependant, l'OMD n'a pas d'expertise dans les opérations garanties ou les registres électroniques internationaux et n'a pas exprimé son intérêt à exercer la fonction.

C. Banque asiatique d'investissement dans les infrastructures (AIIB) [293]

10. L'AIIB est une banque multilatérale de développement, fondée en 2016, pour répondre aux besoins en infrastructures de l'Asie. Basée à Beijing en Chine, l'AIIB fournit des financements souverains et non souverains pour des projets durables, notamment pour les infrastructures rurales et le développement agricole, le développement urbain, ainsi que l'énergie [294]. Conformément à ses statuts, l'AIIB "fournira ou facilitera le financement à un membre ou à toute agence, organe ou subdivision politique de celui-ci, ou à toute entité ou entreprise opérant sur le territoire d'un membre, ainsi qu'à des agences ou entités internationales ou régionales impliquées dans le développement économique de la région Asie. »

11. Le Secrétariat d'UNIDROIT n'a pas contacté l'AIIB et on ignore si l'AIIB aurait intérêt à exercer les fonctions d'AS.

---

292 Voir http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx

293 Voir https://www.aiib.org/en/about-aiib/index.html.

294 Voir https://www.aiib.org/en/about-aiib/who-we-are/our-work/index.html.

D. Conférence des Nations Unies sur le commerce et le développement (CNUCED) [295]

12. La CNUCED est une agence des Nations Unies créée en 1964. Elle fournit des analyses, une plate-forme pour des solutions consensuelles et une assistance technique aux pays en développement. La CNUCED a développé le Système Généralisé de Préférences (SGP) très performant en vertu duquel des pays développés accordent des concessions tarifaires aux exportations des pays en développement. La CNUCED travaille à:

- Diversifier les économies pour les rendre moins dépendantes des produits de base
- Limiter leur exposition à la volatilité financière et à la dette
- Attirer les investissements et rendre plus favorables au développement
- Accroître l'accès aux technologies numériques
- Promouvoir l'esprit d'entreprise et l'innovation
- Aider les entreprises locales à progresser dans les chaînes de valeur
- Accélérer les flux de marchandises à travers les frontières
- Protéger les consommateurs contre les abus
- Infléchir les réglementations qui entravent la concurrence
- Adapter les politiques aux changements climatiques et à une utilisation plus efficace des ressources naturelles

13. Les fonctions d'AS ne s'inscrivent pas de façon évidente dans le cadre du mandat et des activités de la CNUCED. Cependant, compte tenu de son statut d'agence des Nations Unies, il pourrait fonctionner comme tel. Le Secrétariat d'UNIDROIT n'a pas contacté la CNUCED et on ignore si la CNUCED s'intéresserait à ce rôle.

(ii) Entités publiques internationales sectorielles

A. Fonds international de développement agricole (FIDA) [296]

14. Le FIDA est une institution financière internationale et une institution spécialisée des Nations Unies créée en 1977. Depuis sa création, le FIDA "s'est concentré exclusivement sur la réduction de la pauvreté rurale, travaillant avec les populations rurales pauvres des pays en développement pour éliminer la pauvreté, la faim et la malnutrition; augmenter leur productivité et leurs revenus; et améliorer la qualité de leur vie." [297] Le FIDA opère dans 120 pays et territoires du monde entier. Il fournit des prêts aux Etats membres et des subventions "aux institutions et organisations à l'appui des activités visant à renforcer les capacités techniques et institutionnelles liées au développement agricole et rural." [298] "Le FIDA travaille en partenariat avec d'autres acteurs - les gouvernements des pays emprunteurs, les populations rurales pauvres et leurs organisations et d'autres organismes donateurs. L'accent mis sur le développement local a contribué à combler l'écart entre les donateurs multilatéraux et bilatéraux d'une part, et la société civile représentée par les ONGs et les

---

295 Voir http://unctad.org/en/Pages/aboutus.aspx.

296 Voir https://www.ifad.org/what/overview.

297 Voir https://www.ifad.org/en/what/tags/1818309.

298 *Id*.

organisations communautaires (OC) d'autre part." [299] Les neuf domaines soutenus par le travail du FIDA sont:

- "Le développement agricole
- Les services financiers
- Les infrastructures rurales
- L'élevage
- La pêche
- Le renforcement des capacités et des institutions
- Le stockage, la transformation alimentaire, la commercialisation
- La recherche / la vulgarisation / la formation
- Le développement d'entreprise à petite et moyenne échelle"

10. Le fait que le FIDA ne se concentre que sur l'agriculture ne fait pas de cette organisation un candidat approprié pour l'Autorité de surveillance.

B. Organisation pour l'alimentation et l'agriculture (FAO) [300]

15. La FAO est une institution spécialisée des Nations Unies, créée en 1945. Ses principaux objectifs sont "l'éradication de la faim, de l'insécurité alimentaire et de la malnutrition; l'élimination de la pauvreté et l'avancement du progrès économique et social pour tous; ainsi que la gestion et l'utilisation durables des ressources naturelles, y compris la terre, l'eau, l'air, le climat et les ressources génétiques au bénéfice des générations présentes et futures." [301] Ses objectifs stratégiques comprennent l'élimination de la faim et de l'insécurité alimentaire, avec une agriculture plus productive, la réduction de la pauvreté rurale, des systèmes agricoles et alimentaires inclusifs et efficaces et l'accroissement de la résilience des moyens de subsistance aux menaces et aux crises. [302] La FAO travaille également à renforcer la volonté politique et à partager l'expertise politique avec les pays membres dans "la conception de la politique agricole, en soutenant la planification, en élaborant une législation efficace et en créant des stratégies nationales pour atteindre les objectifs de développement rural et de lutte contre la faim".[303]

16. Le fait que la FAO ne se concentre que sur l'agriculture ne fait pas de cette organisation un candidat approprié pour l'Autorité de surveillance.

C. L'Organisation mondiale des agriculteurs (OMA) [304]

17. L'OMA est une organisation qui a pour objectif de rassembler les organisations d'agriculteurs et les coopératives agricoles du monde entier dans le but d'élaborer des politiques qui soutiennent les intérêts des agriculteurs dans les pays développés et en développement. Elle représente les petits et grands agriculteurs. "En portant la voix des agriculteurs et en représentant leurs intérêts dans les forums de politique internationale, l'OMA soutient les agriculteurs pour mieux faire face à la volatilité extrême des prix, tirer parti des opportunités du marché et accéder rapidement à l'information sur le marché." [305] Le travail de l'OMA couvre tous les domaines thématiques liés à l'agriculture, comprenant les forêts, l'aquaculture et la pêche, l'environnement, le commerce, la vulgarisation, la recherche et l'éducation. L'OMA encourage la participation des agriculteurs au développement rural

---

299 *Id*.

300 Voir http://www.fao.org/home/en/.

301 Voir http://www.fao.org/about/en/.

302 *Id.*

303 Voir http://www.fao.org/about/how-we-work/en/.

304 Voir http://www.wfo-oma.org/.

305 Voir http://www.wfo-oma.org/about-wfo.html.

durable, à la protection de l'environnement et à d'autres défis émergents, tels que le changement climatique, le renouvellement des générations et l'égalité des sexes" [306]. Pour atteindre ses objectifs, l'OMA

- "Représente ses membres dans des forums gouvernementaux, non gouvernementaux et inter gouvernementaux dans le but d'encourager la communauté agricole mondiale à établir et développer des contacts, des relations et des partenariats.
- Promeut et défend les intérêts des agriculteurs, en encourager la création de politiques agricoles adéquates
- encourage les partenariats entre ses membres, ainsi qu'avec les organisations internationales, au moyen d'accords, de protocoles et conventions avec d'autres organismes et des tiers en général.
- conduit et promeut des recherches, des analyses approfondies et des études, soutient des conférences et organise des rencontres, des réunions et des séminaires sur des sujets et des arguments d'intérêt pour l'organisation. " [307]

18. Le fait que l'OMA ne se concentre que sur l'agriculture ne fait pas de cette organisation un candidat approprié pour l'Autorité de surveillance

D. Congrès mondial de l'exploitation minière (World Mining Congress) (WMC) [308]

19. Le World Mining Congress, créé en 1958 après le premier Congrès international de l'exploitation minière, est une organisation internationale basée en Pologne affiliée aux Nations Unies. Le préambule des Statuts du WMC stipule que les objectifs de la WMC sont les suivants :

- Promouvoir et soutenir la coopération scientifique et technique, pour les progrès nationaux et internationaux dans les domaines de l'exploitation minière des minéraux solides et du développement des ressources minérales naturelles
- Obtenir un échange d'informations à l'échelle mondiale en ce qui concerne le développement des sciences minières, la technologie, l'économie, la santé et la sécurité des opérations minières et la protection de l'environnement [309].

20. Le fait que le WMC ne se concentre que sur l'exploitation minière ne fait pas de cette organisation un candidat approprié pour l'Autorité de surveillance

(iii) <u>Organisations internationales du secteur privé</u>

A. Confederation of International Contractors' Association (CICA)[310]

21. Créé à Tokyo (Japon) en 1974, le CICA représente l'industrie mondiale de la construction. Trois fédérations régionales, représentant 61 pays, sont membres de l'ICCA, à savoir: la Fédération européenne de l'industrie de la construction (FIEC), la Fédération interaméricaine de l'industrie de la construction (FIIC) et la Fédération des entrepreneurs arabes. Il entretient des relations étroites

306 *Id*.
307 *Id*.
308 Voir http://www.wmc.org.pl/?q=node/1.
309 Voir http://www.wmc.org.pl/?q=node/3.
310 Voir http://www.cica.net/.

avec des fédérations et associations nationales de construction au Brésil, au Japon, en Turquie et au Canada. [311]

"En tant qu'association à but non lucratif, volontaire et mondiale d'associations professionnelles représentant des sociétés de construction membres de leurs régions respectives:

- Le CICA représente et porte la voix du secteur de la construction sur les questions techniques, juridiques et politiques d'intérêt international et fournit un forum de partenariat, de coopération et d'interaction avec les fédérations membres et les institutions liées.

- Le CICA agit également comme un club pour les entrepreneurs de toute taille et comme lobby au niveau international en interaction avec les organismes publics à l'échelle mondiale.

- Le CICA encourage l'échange d'expériences, d'informations et de connaissances techniques.

- Le CICA favorise l'investissement dans l'ingénierie et la construction qui améliore à la fois notre environnement et la qualité de vie pour tous.

- Le CICA promeut l'industrie mondiale de la construction en soulignant notamment son impact fondamental sur l'économie aux niveaux local, régional et mondial. [312]

B. Association of Equipment Manufacturers (AEM) [313]

22. Avec plus de 900 membres et 200 lignes de produits, l'AEM est une association leader d'équipementiers - en Amérique du Nord (Etats-Unis) - qui s'emploie à promouvoir les intérêts des fabricants de matériels d'équipement sur le marché mondial. Fondée en 1894, son siège est situé à Milwaukee, dans le Wisconsin, et elle a des bureaux à Pékin, Chine et à Ottawa, Canada. Elle comprend des entreprises fournissant l'agriculture et la construction ainsi que des secteurs connexes en Amérique du Nord, ainsi que leurs filiales internationales. [314]

C. Independent Distributors Association (IDA) [315]

23. L'IDA est la seule association pour les distributeurs de pièces d'équipement lourd. Créée en 1958, elle compte des membres dans plus de 50 pays répartis en Amérique du Nord, en Asie, en Afrique, en Amérique latine, au Moyen-Orient et en Europe. Basé à Dallas, Texas, l'IDA regroupe les concessionnaires, les fabricants et les distributeurs indépendants.

D. Associated Equipment Distributors (AED) [316]

24. L'AED est une association internationale du secteur commercial qui représente les entreprises impliquées dans la distribution, location et soutien d'équipements utilisés dans "la construction, l'exploitation minière, les forêts, la production d'électricité, l'agriculture et les applications industrielles". Elle regroupe:

---

311 *Id*.

312 *Id*.

313 Voir https://www.aem.org/about-aem/.

314 *Id*.

315 Voir http://idaparts.org/about-ida/.

316 Voir http://aednet.org/about-aed/.

- Des distributeurs indépendants qui vendent, louent et fournissent des services après-vente pour le matériel d'équipement de construction et les matériels et produits connexes;

- Des fabricants de matériels d'équipement et de produits de construction et connexes; et

- Des fournisseurs de services aux entreprises, dans les secteurs de la finance, l'assurance, les systèmes commerciaux / ERP et autres.

E. Committee for European Construction Equipment (CECE) [317]

25. Le CECE est une organisation qui représente et favorise la construction de matériel d'équipement (et secteurs connexes) au niveau européen. Il coordonne les "points de vue des associations nationales et de leurs membres en influençant les institutions européennes / nationales et d'autres organisations dans le monde entier afin de parvenir à un environnement concurrentiel équitable grâce à des normes et des règlements harmonisés". Son secrétariat est situé à Bruxelles, en Belgique. Le CECE "représente les intérêts des associations nationales de constructeurs de matériels d'équipement de construction dans 13 pays européens, dont l'Allemagne, le Royaume-Uni, la France, l'Italie, la Russie et la Turquie. La plupart des travaux du CECE sont menés par ses associations membres (nationales) et des représentants de l'industrie.
Ses membres comprennent les associations de matériel de construction suivantes dans le monde:

Amérique du Nord | AEM - Association des fabricants de matériel d'équipement
Japon | Association des fabricants de matériel de construction CEMA - Japon
Corée | KOCEMA - association de fabricants de matériel de construction en Corée
Inde | ICEMA - Association indienne des fabricants d'équipements de construction
Brésil | Sobratema - Association brésilienne pour la construction et la technologie minière
Chine | CCMA – Association de construction de machines en Chine

F. Conseil international pour la recherche et l'innovation dans le bâtiment et la construction (CIB) [318]

26. Créé en 1953 avec le soutien des Nations Unies, le CIB est "une association dont les objectifs étaient de stimuler et de faciliter la collaboration internationale et l'échange d'informations entre les instituts de recherche gouvernementaux dans le secteur de la construction et de la construction." Actuellement, il compte environ 500 membres "5.000 experts individuels participent à plus de 50 commissions CIB. Celles-ci couvrent l'ensemble de la recherche et de l'innovation en matière de construction et de construction." Le CIB se pose en "plate-forme principale pour la coopération internationale et l'échange d'informations dans le domaine de la recherche et de l'innovation en matière de construction" [319].

G. Conseil international des mines et des métaux (ICMM) [320]

27. L'ICMM est une association internationale qui se consacre à une industrie minière sûre, juste et durable. Il compte 23 grandes sociétés minières et métallurgiques en tant que membres, ainsi que plus de 30 associations nationales, régionales et de matières premières. À l'origine, intitulé "Conseil international des métaux et de l'environnement (ICME)", l'ICME est devenu ICMM en 2001. L'ICMM a été créée pour améliorer les performances sociales et environnementales de l'industrie minière et métallurgique.

---

317 Voir https://www.cece.eu/about.

318 Voir http://www.cibworld.nl/site/about_cib/index.html.

319 *Id*.

320 Voir https://www.icmm.com/en-gb/about-us.

H. Partenariat africain pour l'engrais et l'agro-industrie (AFAP) [321]

28. L'AFAP "est une entreprise sociale africaine indépendante à but non lucratif fondée en 2012 par un partenariat d'organisations africaines de développement" [322]. "L'AFAP apporte de la valeur aux intrants agricoles et à la chaîne de valeur de l'agroalimentaire en renforçant les capacités et en reliant les PMEs et les petits agriculteurs africains aux marchés mondiaux, et aux entreprises des marchés des intrants et des produits, en favorisant l'utilisation de produits nutritionnels provenant de cultures équilibrées de haute qualité et abordables, en partenariat avec des fournisseurs de technologies et de matériels et en facilitant le financement du commerce des installations et des stocks via le mécanisme du Contrat de Partenariat Agroalimentaire (APC).[323]

321 Voir http://www.afap-partnership.org/.

322 *Id*.

323 *Id*.

GLOSSAIRE

INSTRUMENTS d'UNIDROIT

Convention du Cap	Convention du Cap relative aux garanties internationales portant sur des matériels d'équipement mobiles (2001)
Principles d'UNIDROIT	Principes d'UNIDROIT relatifs aux contrats du commerce international (éditions 1994, 2004, 2010, 2016)
Protocole aéronautique	Protocole portant sur les questions spécifiques aux matériels d'équipement aéronautiques à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobile (2001)
Protocole ferroviaire de Luxembourg	Protocole de Luxembourg portant sur les questions spécifiques au matériel roulant ferroviaire à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles (2007)
Protocole MAC	Futur Protocole portant sur les questions spécifiques aux matériels d'équipement agricoles, de construction et miniers à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles (en cours)
Protocole spatial	Protocole portant sur les questions spécifiques aux biens spatiaux à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles (2009)

AUTRES INSTRUMENTS INTERNATIONAUX

Accord sur les aéronefs civils	Accord relatif au commerce des aéronefs civils (1980)
COMTRADE	*United Nations International Trade Statistics Database*
Convention de Montréal	Convention pour l'unification de certaines règles relatives au transport aérien international (1999)
OAS Model Law on Secured Transactions	Loi type interaméricaine relative aux sûretés mobilières
Système SH	Système harmonisé de désignation et de codification des marchandises (Système SH)

Traité sur la Charte de l'énergie	*The International Energy Charter Consolidated Energy Charter Treaty*
UNCLOS	UN Convention on the Law of the Sea/ Convention des Nations Unies sur le droit de la mer

ORGANISATIONS INTERNATIONALES ET AUTRES ORGANISATIONS

AEM	*Association of Equipment Manufacturers*
AWG	Groupe de travail aéronautique
CJEU	*Court of Justice of the European Union*
CNUDCI	Commission des Nations Unies pour le droit commercial international
ELFA	*Equipment Leasing and Finance Association*
FAO	Organisation des Nations Unies pour l'alimentation et l'agriculture
HCCH	Conférence de La Haye de droit international privé
IFC	*International Finance Corporation*/ Société financière internationale
NLCIFT	*National Law Center for Inter-American Free Trade*
OACI	Organisation de l'aviation civile internationale
OMD	Organisation mondiale des douanes
ONU	Organisation des Nations Unies
RWG	Groupe de travail ferroviaire
UNIDROIT	Institut international pour l'unification du droit privé
VDMA	*Verband Deutscher Maschinen und Anlagenbau*
WTO	*World Trade Organization*/ Organisation mondiale du commerce

GROUPES

Commission préparatoire – Protocole ferroviaire	Commission préparatoire pour l'établissement du Registre international pour le matériel roulant ferroviaire conformément au Protocole de Luxembourg (ferroviaire)

Commission préparatoire – Protocole spatial

Commission préparatoire pour l'établissement du Registre international pour le matériel aéronautique conformément au Protocole spatial