



MAC Protocol
Committee of Governmental Experts
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**COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT
FOURTH PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN
MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AGRICULTURAL,
CONSTRUCTION AND MINING EQUIPMENT**

COMMENTS

(Submitted by the Government of the United Kingdom)

Introduction

1. The United Kingdom would like to congratulate all those involved in the preparation of the draft Protocol on agricultural, construction and mining equipment - particularly the Study Group, the Working Group, the Unidroit Secretariat and Dr Marek Dubovec of the National Law Center for Inter-American Free Trade - on the high quality of the text, supporting documents and research and the prodigious amount of work involved in their production. Two problems that had long seemed intractable, notably limitation of the Protocol to equipment of high value and unique identification criteria, have now been largely solved.

2. There remain four issues which we discuss in more detail below. One concerns the alternative provisions relating to immovables most of which entail reference to the *lex situs* (*lex rei sitae*) as the applicable law. This departs from the autonomous concept of mobile equipment which is the fundamental basis of the Convention and earlier Protocols. We can see good reasons for this but they should be articulated to justify what should be acknowledged in the *travaux* as a major departure from this underlying concept. The second relates to the treatment of parts, which are currently neither expressly excluded or expressly included. The third issue relates to Article VII. We agree with the general principle but Article VII raises various questions that we consider need to be addressed. The final issue concerns amendments to the Annexes by the Depositary. This is a complex and technical matter to be resolved by experts. We do not believe that the Depositary is equipped for such a major task unless acting on the recommendations of an expert group. In that connection we would draw attention to paragraphs 24-37 of the illuminating Study by the National Law Center for Inter-American Free Trade and the UNIDROIT Secretariat.¹ We also have relatively minor amendments to suggest on other issues. Our comments on the specific Articles are as follows:

¹ The Harmonized Commodity Description and Coding System, Study 72K-SG2-Doc. 2, March 2015.

General comment

3. The policy hitherto in work on other Protocols has been to follow the text of the Aircraft Protocol wherever possible, in the interests of consistency, and only to deviate from this where necessary in order to reflect the specific needs of the industry sector concerned. We recommend adherence to this policy.

Article I

Parts

4. In contrast to the definitions of equipment in the other three Protocols the definitions in the draft MAC Protocol do not include accessories, parts, etc. Parts are specifically mentioned in codes 871620 (all three Annexes) and 820713 (Annexes 2 and 3) and some of the codes may include items that constitute parts though not expressly designated as such. In order to ensure that all accessories and parts are picked up, including those incorporated after the making of the agreement, we consider that, in line with all previous Protocols, reference should be made to them in the definition of each category of equipment (see paragraph 5).

5. It is important that accessories and parts not included in a code should be treated as components of the principal object, because otherwise the rights of the creditor vis-à-vis the debtor and third parties as regards such parts will be governed not by the Convention and Protocol but by the applicable law, thus depriving the creditor of the benefit of the Convention in relation to them and enabling the debtor to treat those parts as its own and enabling third parties to take an interest in them, to the detriment of the creditor holding the international interest.

6. Finally, we recommend that data, manuals and records relating thereto should be included for consistency with the other Protocols.

7. We therefore propose that at the end of Article I(2)(a), (b) and (h) there should be added language to the following effect:

“, including all installed, incorporated or attached accessories, components and parts which do not fall within a separate Harmonised System code listed in that Annex, and all data, manuals and records relating thereto.”

Definition of "agricultural equipment"

8. The Study Group had also proposed that the definition of "agricultural equipment" should be consistent with the definition provided by the Food and Agriculture Organization, which includes (a) forestry and (b) fisheries to the extent that "fisheries" covers aquaculture equipment. But while forestry machinery is covered in Annex 1 aquaculture equipment is not. Accordingly it remains to be determined whether aquacultural equipment should be included and, if so, whether this should be limited to equipment used in the cultivation stage.

We have not detected any enthusiasm for this extension and would be content if aquaculture equipment was expressly excluded.

9. It is suggested that in line 3 of Article I(2)(f) the phrase "may extend" should be substituted for "extends." The current wording presupposes the question in issue, which is whether the association of the equipment to the land has any effect at all on the status of the equipment as mobile equipment.

Article II

10. It is suggested that in paragraph 3 the words “the entirety of” be inserted before “one or two”.

Article VII

11. This Article needs careful review:

(1) We think it important to articulate the reasons for having the various alternatives instead of simply leaving everything to be determined by the *lex situs* as provided by what is currently Alternative C.

(2) It has generally been accepted that the concept of mobile equipment is an autonomous concept of the Convention and is not to be determined by the *lex situs*; indeed, that is an important principle of the Convention. No doubt attachment of equipment to land is a special case, given that it is very unlikely to apply to the classes of equipment covered by other Protocols and that the *lex situs* of the land is controlling. But the case needs to be made and as stated earlier it should be expressly acknowledged in the *travaux* that it is an exception to the general principle.

(3) We consider that as currently drafted Alternative A goes too far. National laws typically provide some limitation on the power of removal of equipment affixed to land or buildings, for example, that the equipment is “readily removable” or that it can be removed without material damage to the immovable or the equipment or that it has not lost its individual legal identity. Alternative A overrides all such limitations and would give priority to the international interest regardless of the fact that (a) severance of the equipment from the immovable could cause serious damage both to the immovable and to the equipment itself, in which the debtor retains an interest and in which other creditors may hold an international interest, and (b) the equipment has lost its individual legal identity, which in either case should mean that the international interest is extinguished, with the result that Article 29 ceases to apply except as regards a competition between pre-affixation interests. So if Alternative A is to be retained we consider that it should not apply in cases within (a) or (b).

(4) We understand that it is intended that a Contracting State which has not made a declaration under Article II(3) limiting the application of the Protocol to a single Annex should be free to make different declarations under Article VII in relation to the other Annex or Annexes. This needs to be expressly stated to avoid doubt and could be covered either by an additional sentence at the end of Article VII(2) or in Article XXVI. There may, indeed, be some merit in extending this to all declarations under the Protocol (see paragraph 14).

(5) We suggest that at the end of Alternative B of paragraph 3 and after the words “individual legal identity” in the third line of paragraph 4 there should be added the words “under the applicable domestic laws”. We also wonder whether the more normal reference to “law” should not be used in place of “domestic laws”. See, for example, the Convention, Articles 5(3), 12, 16(1)(c), and the draft Protocol itself, Article X, Alternative A, paragraphs 10(5)(c), 11.

(6) The Article does not appear to cover cases where the equipment is already affixed at the time of the agreement, though paragraph 33 of the earlier annotated text states that the timing of the association between the object and the immovable property is irrelevant, which suggests that it is intended to cover cases where the association exists at the time of the agreement. If that is the case then some redrafting will be necessary, because the effect of the *lex situs* may be that no international interest ever comes into existence.

(7) The draft Protocol contains no provision governing attachment of an item of equipment to other equipment. Article 29(7) of the Convention deals with this as regards items other than objects. This could be extended to cover objects attached to other objects. An alternative would be to say nothing and leave the matter to be dealt with by the applicable law, which is our preference.

Article XVIII

12. This follows the Luxembourg Protocol in providing for the registration of notices of sale as opposed to sales. Such a provision is unique to the Luxembourg Protocol and the rationale has always been unclear. Registration of a notice of sale has no effect under the Convention. It may be effective under national law to give notice of the existence of the international interest but this depends on whether the law in question attaches significance to a voluntary registration that lacks Convention effects. Thus the protection of the Convention priority rules is lost. By contrast, for no greater formality registration of a sale protects the registrant against loss or subordination of its interest because of a wrongful double sale, or the wrongful grant of an international interest, by a seller who has remained in possession or otherwise retains a power of disposal under the applicable law. Further, this priority protection encourages registrations and thereby helps fee income for the registry. It has been suggested that a buyer may not be aware of the need to register, but buyers will need to acquaint themselves with the registration system anyway in order to avoid loss of priority under Article 29(3)(a) of the Convention. We therefore strongly recommend following the Aircraft and Space Protocols in providing for a registration of a sale.

Article XXIII

13. The reference to the Secretariat features only in the Luxembourg Protocol and that is because OTIF was designated as such in the Luxembourg Protocol. In Article XXIII “the Secretariat” is not defined and there may not be one. We therefore suggest that Article XXIII should follow Article XXXVIII(1)(b) of the Space Protocol, which provides for deposit of the certificate by the Supervisory Authority. Obviously the Supervisory Authority will consult the Registrar.

Article XXVII bis

14. We suggest the inclusion of an Article after Article XXVII to the effect that any declaration under the Protocol may be made in relation to the entirety of any one or more of the Annexes.

Article XXXII(3)

15. A provision should be added to the effect that a State Party may not vote on any amendment affecting equipment the subject of an Annex not covered by that State’s declaration under Article II(3).

Article XXXII(4)

16. The objective of this paragraph is laudable but as drafted it creates several problems. In the first place it is optional - the Depositary “may” add or retain ... What factors are to influence the decision? Secondly, if it is intended to reflect changes to an HS Code it needs to be borne in mind that the Annexes are not simply taken raw from the HS but have been the subject of adjustment by the Working Group and Study Group to ensure that the criteria of high value and unique identifiability are satisfied so far as possible. Thirdly, following from the second point, any decision by the Depositary should be based on a recommendation by an expert group, by which we mean a group such as the working group responsible for the work leading to the current Annexes, which

can satisfy itself both that the requirements of Article XXXII(4) are fulfilled and that the criterion of high value is satisfied. Fourthly, we feel that it is too burdensome for the Depositary to have to undertake the review exercise after each annual report and that “a” should be substituted for “the” before “report” in the first line. The Depositary may, for example, find it preferable to link its review to the quinquennial revision of the HS System and the ensuing publication of the WCO Secretariat’s correlation tables. Finally, there needs to be a mechanism for resolving doubtful cases, so that there is clarity as to whether a new type of equipment is or is not within the Protocol (see also paragraph 18 below). Substantial sums may be advanced for the acquisition of such equipment on the basis that the Protocol applies. It is therefore imperative that there should be certainty on this issue. The Committee of Governmental Experts may wish to consider setting up a working group to examine these issues, and those arising from Article XXXII(5), during the forthcoming meeting.

Article XXXII(5)

17. Again, we feel that any action based on this paragraph should be taken only on the recommendation of an expert group.

Annexes

18. These are based on the HS Codes. However, as previously mentioned the Annexes have been adjusted to reflect the criteria for high value and unique identifiability. Further, the HS Codes themselves are governed by General Rules for the Interpretation of the System and Chapter Notes, including Sub-Heading Notes. Is it intended that the Annexes shall be subject to these rules of interpretation? If so, provision needs to be made to that effect. We consider that such a provision would be useful in dealing with doubtful cases.

19. The same code number may apply to different Annexes, depending on which of the three categories applies, but presumably this does not matter, as the sole purpose of Annexes is to identify what is and what is not registrable.