

MAC Protocol and Treaty Design: Examination of the Delimitation of Scope and Mechanism of Amendment

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Abstract

The UNIDROIT Convention on International Interests in Mobile Equipment stands as one of the most ambitious and successful international harmonizing instruments on private law. The recent project to apply this Convention to mining, agricultural, and construction equipment (MAC Protocol) has encountered several challenging issues arising from the characteristics of the equipment and associated with the particularities of the finance praxis in the relevant sectors, and in particular, the delimitation of the scope that required formulation of innovative solutions. The aim of this paper is two-fold. Firstly, the paper analyses the delimitation of the scope of application in the MAC Protocol, revealing the underlying intricacies and explaining the resulting scoping mechanism. The solution adopted for the delimitation of the scope implies an original formula to define the covered equipment, an innovative mechanism to delimit the scope based on the use of Harmonised System codes, and relevant decisions on treaty design. As a consequence, the Protocol needs to provide for a very particular amendment mechanism. To that end, the current draft Article XXXIII was created. Therefore, secondly, the paper examines the amendment procedure incorporated in the MAC Protocol to that end in the light of treaty amendment practice and treaty design options, considering underlying policy concerns, and procedural alternatives to set a framework for the discussion of the draft Article XXXIII.

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I. Introduction: The MAC Protocol in the context of the Cape Town Convention system

The 2001 UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter, Cape Town Convention or CTC) stands as one of the most ambitious and successful international harmonizing instruments on private law. Since entering into force in March of 2006¹ together with its first Protocol on matters specific to aircraft equipment, the number of ratifications has rapidly and constantly increased,² revealing wide, varied, and sound international support. As a matter of fact, the combination of the CTC and the Aircraft Protocol – jointly referred to as the Convention on International Interests in Mobile Equipment as applied to aircraft objects (as per Article II(2) of the Aircraft Protocol) – embodies the most visible success of the CTC system, and the purest expression of its tenets, its philosophy, and its solutions.

Using the original modular (Convention-Protocol) structure, the CTC system has progressively grown to cover the other two categories of objects initially contemplated in the Cape Town Convention (Article 2(3)): railway rolling stock and space assets (with the adoption, respectively, of the Luxembourg Protocol³ in 2007 and the Space Protocol⁴ in 2012, which have not yet entered into force).

Beyond the initial material scope of application as defined by the Convention, the CTC system incorporates a powerful tool for expansion. Article 51(1) states:

The Depositary may create working groups, in co-operation with such relevant non-governmental organizations as the Depositary considers appropriate, to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.

Accordingly, the Article 51(1) mechanism in conjunction with the Convention-Protocol architecture confers the CTC system a remarkable expansion potential.

Per Article 51(1), UNIDROIT created a Study Group⁵ to assess the feasibility of developing a fourth Protocol to the Convention aimed at extending the benefits of the CTC to mining, agricul-

¹ The Convention on International Interests in Mobile Equipment was adopted in a Diplomatic Conference that was held in Cape Town, South Africa, on November 16th, 2001, under the auspices of UNIDROIT (International Institute for the Unification of Private Law / Institut International pour l'Unification du Droit Privé) and ICAO (International Civil Aviation Organization). Pursuant to Article 49(1) CTC, the Convention entered into force on March 1st, 2006, together with the Protocol thereto on matters specific to aircraft equipment (hereinafter, Aircraft Protocol).

² In October 2017, 73 Contracting States, together with the European Union as a regional economic integration organisation (Article 48 of the CTC) – updated information on status, Contracting States, and list of declarations at UNIDROIT, 'Convention on International Interests in Mobile Equipment (Cape Town, 2001) – Status' <<http://www.unidroit.org/status-2001capetown>> accessed 18 February 2018.

³ Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (hereinafter, Rail Protocol or Luxembourg Protocol). See UNIDROIT, 'Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg on 23 February 2007)' <<http://www.unidroit.org/instruments/security-interests/rail-protocol>> accessed 18 February 2018. It will enter into force in accordance with its Article XXIII.

⁴ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (hereinafter, Space Protocol). See UNIDROIT, 'Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 9 March 2012)' <<http://www.unidroit.org/instruments/security-interests/space-protocol>> accessed 18 February 2018. It will enter into force as per its Article XXXVIII.

⁵ Study Group members: Michel Deschamps, Partner, McCarthy Tetrault (Canada); Charles Mooney, University of Pennsylvania (USA); Jean-Francois Riffard, Université de Clermont-Ferrand (France); Teresa Rodríguez de las Heras Ballell, Universidad Carlos III de Madrid (Spain), and Benjamin Von Bodungen, Counsel at Bird and Bird LLP (Germany).

tural, and construction equipment. The Study Group discussed a variety of challenges and issues posed by the project, devised innovative solutions to deal with them, and worked on the elaboration of a preliminary draft over four sessions between November 2014 and March 2016. The draft instrument was presented to and approved by the UNIDROIT Governing Council at its ninety-fifth session in May 2016. Subsequently, the draft protocol on mining, agricultural, and construction equipment (MAC Protocol) was considered by a Committee of Governmental Experts in two sessions held in Rome in March (CGE1) and in October (CGE2) 2017. The CGE2 concluded that the text was prepared for a Diplomatic Conference granted that the Governing Council approves.

The MAC Protocol constitutes the first use of the Article 51(1) expansion mechanism and an excellent opportunity to test the feasibility of applying CTC provisions in other sectors. The development of the draft MAC Protocol has encountered several challenging issues arising from the characteristics of the equipment and associated with the particularities of the finance praxis in the relevant sectors, and has produced an original mechanism to manage those complexities.⁶ From the outset of the project, it was realised that, in particular, the delimitation of the scope would entail a significant challenge and would require the formulation of innovative solutions.

The aim of this paper is two-fold. Firstly, the paper analyses the delimitation of the scope of application in the MAC Protocol, revealing the underlying intricacies and explaining the resulting scoping solution. The mechanism adopted for the delimitation of the scope implies an original formula to define the covered equipment, an innovative mechanism to delimit the scope based on the use of Harmonised System codes, and relevant decisions on treaty design. As a consequence, the draft MAC Protocol needs to provide for a very particular amendment mechanism. To that end, Article XXXII – now Article XXXIII under the revised preliminary draft prepared by the secretariat after the CGE2 (UNIDROIT, *Study 72K – CGE2 – Report* (Report (Prepared by the UNIDROIT Secretariat), 2017) Appendix III) – was drafted. Therefore, secondly, the paper examines the amendment procedure incorporated in the instrument to that end in the light of treaty amendment practice and treaty design options, considering underlying policy concerns, and procedural alternatives to set a framework for the discussion of draft Article XXXII. Although a proposal to revise draft Article XXXII was discussed at the CGE2, the Committee decided not to amend the article. The article is now renumbered as Article XXXIII, due to insertion of a new article in the Protocol.⁷ Therefore, in this paper, some undesired consequences of the amendment procedure as currently drafted are identified and drafting alternatives are suggested to mitigate such consequences.

The paper is structured as follows. Part II deals with the delimitation of the MAC Protocol scope of application in the context of the Article 51(1) criteria and in relation to previous Protocols. In Part III, the original scoping formula, based on the selection and inclusion of Harmonised System codes in the Annexes to the Protocol to demarcate the scope, is described and its operation is explained. Part IV is focused on the examination of the amendment procedure provided for by Article XXXIII in light of treaty amendment practices and the alternatives to current draft Article XXXIII considering the possible undesired outcomes of the application of the procedure and its consequences.

II. Delimiting the MAC Protocol scope of application: challenges and intricacies

Since the decision to expand the CTC over mining, agricultural, and construction equipment and

⁶ Charles W Mooney, Marek Dubovec and William Brydie-Watson, 'The Mining, Agricultural and Construction Equipment Protocol to the Cape Town Convention Project: The Current Status' (2016) 21 *Uniform Law Review* 332.

⁷ UNIDROIT, *Study 72K – CGE1 – Doc. 2 corr.* (Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment, 2017).

throughout the elaboration of the draft,⁸ the delimitation of the scope of application of the future MAC Protocol raised concerns and posed difficulties in terms of drafting, treaty design, and policy issues. Expanding the CTC logic to those new sectors proved complex and raised challenging issues that required innovative solutions. A set of original proposals intended to address the complexities arising from the characteristics of the underlying equipment without deviating from CTC philosophy makes the MAC Protocol project a unique component of the uniform system.

Primary concerns were related to the development of a single instrument for three sectors (see (a) below), the fulfilment of CTC guiding criteria (high-value, mobility, unique identifiability) (see (b) below), and the identification of certain descriptive factors to limit the scope and the interaction with previous Protocols (see (c) below). Principal difficulties were associated with the formulation of adequate solutions to deal with all challenges and their effective implementation in the draft instrument (see Part III).

A. A Single Protocol for Three Sectors

Unlike previous Protocols, the draft MAC Protocol results from the decision to cover in a single instrument three different sectoral categories of objects. Such a policy decision had to ponder several considerations. On the one hand, some issues of a technical nature had to be taken into account. First, the convenience of merging in the same instrument equipment associated with three different sectors. Second, the viability of any effort to effectively coordinate in a single instrument rules suitable for each category of objects without inconsistencies. On the other hand, political reasons were also relevant. States' interests in each of the sectors could differ depending on the domestic economic model, involved groups and stakeholders, or other social or strategic causes. Therefore, a unified text could complicate negotiations, dilute States' interests, or even create internal contradictions.

Despite the above considerations, the unitary approach prevailed for reasons such as economy, efficiency, and celerity.⁹ Hence, the adoption of a unitary instrument was softened by the concurrent implementation of a flexibility formula aimed to ensure maximum consensus. Although the draft MAC Protocol covers on a unitary basis three categories of objects (mining, agricultural, and construction equipment), Contracting States may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that they will limit the application of the Protocol to solely one or two categories of equipment (Article II(3) of the preliminary draft MAC Protocol).¹⁰ Technically, due

⁸ UNIDROIT, *C.D. (85) 7(c)* (Governing Council UNIDROIT 2006, Item No. 7(c) on the Agenda: International Interests in Mobile Equipment: Preparation of an Additional Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment (Memorandum Prepared by the Secretariat), 2006) 10; UNIDROIT, *C.D. (88) 5(c)* (Governing Council, UNIDROIT 2009, Item No. 5(c) on the Agenda: Preparation of a Protocol on Matters Specific to Agricultural, Mining and Construction Equipment, 2009) paras 143 – 147; UNIDROIT, *C.D. (89) 17* (Governing Council, UNIDROIT, 2010) paras 33 – 3.7; UNIDROIT, *C.D. (90) 18* (Governing Council, UNIDROIT, 2011) paras 68 – 70; UNIDROIT, *C.D. (91) 15* (Governing Council, UNIDROIT, 2012) paras 46 – 47; UNIDROIT, *C.D. (92) 17* (Governing Council, UNIDROIT, 2013) paras 44 – 48; UNIDROIT, *C.D. (93) 14* (Governing Council, UNIDROIT, 2014) paras 34 – 38.

⁹ According to the consultation launched in 2008, although some States were inclined towards the elaboration of three separate instruments, concerns about time and resource management eventually prompted the unitary approach. UNIDROIT, *Study 72K – SG1 – Doc. 2* (MAC Protocol Study Group, First Meeting, Legal Analysis, 2014) 7.

¹⁰ All references to Protocol provisions, unless otherwise indicated, will be to the version of the Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment prepared for the CGE2 – see UNIDROIT, *Study 72K – CGE2 – Doc. 2* (Text of the Revised Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment as Amended by the UNIDROIT Committee of Governmental Experts for the Preparation of a Draft Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment at its First Session, Held in Rome From 20 – 24 March, 2017).

to the particular mechanism adopted for the delimitation of the scope, as further explained below (see Part III), the declaration of a Contracting State will limit the application of the Protocol to ‘the equipment comprised in one or two of the Annexes.’ Then, the application of the Protocol will be to the ‘entirety of the equipment comprised’ in the selected Annexes. Likewise, Contracting States may subsequently declare that the Protocol does not apply to one or more categories of objects (Annexes) and, thus, denounce partially the Protocol in relation to such equipment (Article XXXI(4)).

Nevertheless, the flexibility formula does not apply to the whole declarations system. Where Contracting States may make declarations to apply or exclude the application of a Protocol provision (*opt-in* or *opt-out* declarations) or choose one of the Alternatives in Articles VII and X, such a declaration will cover the Protocol as applied in the declaring Contracting State in its entirety. In sum, a Contracting State is not allowed to make different declarations or choose different Alternatives, where the text provides them, for each category of objects.¹¹ As further explained below (see Part III), under the particular technique implemented for delimiting the scope, the possibility of making different declarations for each category of equipment would create uncertainties in application and cause undesirable overlaps among Annexes.

B. High-Value, Mobility, and Unique Identifiability Criteria in MAC Protocol

Once the decision to cover the three categories of objects was adopted, one of the most complex tasks during the elaboration process was to devise an adequate formula for the delimitation of the scope. In the design of such formula, two interests,¹² sometimes, in practice, pulling in opposite directions, had to be reconciled. On the one hand, the preservation of the logic of the Cape Town Convention system as an international instrument to apply to certain categories of high-value mobile equipment, each member of which is uniquely identifiable (Article 51(1)). CTC is not meant to be a general instrument governing international secured transactions. Consequently, the system should be extended only to objects likely to meet the high-value, mobility, and unique identifiability criteria. On the other hand, the aspiration to ensure the maximum benefit to those States willing to ratify the future MAC Protocol with the widest and most comprehensive scope of application.

The Article 51(1) criteria paved the way for considering the scope of the preliminary draft MAC Protocol.¹³ Nevertheless, attempts to deploy such a criteria-guided approach in the delimitation of the scope soon proved to be extremely complex and, as a result, unsuccessful. The broad diversity of equipment employed for mining, agricultural and construction activities and the disparities in sectoral financing praxis hindered the consistent application of the delimiting criteria. In the target sectors, none of the three characteristics (high-value, mobility, and identifiability) are inherent to the objects, as they are with equipment covered by the previous Protocols. Similarly, the establishment of bespoke thresholds, parameters or factors specific for the new equipment to verify the meeting of the delimiting criteria did not offer feasible and satisfactory solutions. A stringent application of the delimiting criteria seemed to excessively reduce the potential scope of application and, consequently, deflate the expected benefits of the project; a too generous interpretation of such criteria aiming to expand the natural scope could entail a departure from the CTC system.

Observing mining, agricultural, and construction equipment through the lens of the Article 51(1) criteria and the consolidated experience of the previous Protocols was a challenging task.

¹¹ UNIDROIT, *Study 72K – CGE1 – Report* (MAC Protocol, Committee of Governmental Experts, First Session, Report, 2017) 8, para 69.

¹² UNIDROIT, *Study 72K – SG1 – Doc. 2* (MAC Protocol Study Group, First Meeting, Legal Analysis, 2014).

¹³ UNIDROIT, *Study 72K – CGE1 – Doc. 4* (MAC Protocol Committee of Governmental Experts, First Session, Legal Analysis, 2016) 8.

(i) *High Value*

First, unlike other Protocols where the very selection of covered objects naturally implied high value, the range of prices/value in MAC equipment is immense. Without the implementation of a delimiting factor, the future MAC Protocol would take the risk of applying to very low-value equipment. Although that situation may occur under the Luxembourg Protocol, its relevance is limited. The most obvious solution of setting a minimum unit value sales price threshold was rejected for a number of reasons. Apart from deviating from the previous Protocols, such a technique is inadequate for used equipment sales in the secondary market, and more importantly, can distort pricing decisions by encouraging parties to increase prices to fall under the sphere of application of the MAC Protocol.

Additionally, any effort to define high value poses the basic question of whether high value can be defined on an absolute basis or, alternatively, is a relative and evolving element that has to take into account sectoral, economic, social, or other concurrent circumstances. Thus, a formula based on the quantification of the high-value criteria has been discarded. As further expounded, the meeting of the criterion will be achieved indirectly through the selection of codes and the requirement of unique identification.

(ii) *Mobility*

Second, whereas mobility is easily presumed as inherent to aircraft objects, and space assets, and also widely in railway rolling stock, the ability of MAC equipment to satisfy it was from the outset questioned. Actual mobility is neither defined nor to be verified in each specific transaction. The mobility criterion is not merely a formality, but, on the contrary, it has a substantial impact on the legitimacy of the international instrument and its interaction with domestic laws and other harmonizing texts. Importantly, the internationality assumption of the CTC scope revolves around the mobility criterion. Without providing a definition of internationality, CTC anchors the international character of the covered transactions into the natural mobility of equipment, being either actual or potential. As a consequence, CTC provisions apply equally to domestic and transnational transactions. To temper such an extensive application, the internal-transaction declaration¹⁴ is laid down (Article 50 of the CTC).¹⁵

The observation of MAC industry sectors revealed that not only an actual cross-border element was dubious, but even the very fact that some equipment could be deemed mobile.¹⁶ As the negotia-

¹⁴ The risk of a possible dilution effect on the potential scope of the CTC has not materialized, as the number of Contracting States making declarations under Article 50 of the CTC is notably reduced (as per status data valid on August 17, 2017, only 5 Contracting States made such a declaration).

¹⁵ Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (3rd edn, UNIDROIT 2013) para 2.57, 48; 145; para 4.318, 397.

¹⁶ Such a difficulty arising from dubious mobility was perceived and to a certain extent minimized at the 85th session of the UNIDROIT Governing Council. See UNIDROIT, *C.D. (85) 7(c)* (Governing Council UNIDROIT 2006, Item No. 7(c) on the Agenda: International Interests in Mobile Equipment: Preparation of an Additional Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining equipment (Memorandum Prepared by the Secretariat), 2006). The following extract from paragraphs 7 and 8 is revealing:

Thus, although originally the idea was to cover only equipment which moved from one country to another in the course of its operation – (...) – the possibility of adopting additional protocols covering other types of equipment is left open. (...) Considering that such high-value equipment would often be bought in a country different from the one in which it is intended to be operated, an element of internationality can in such cases be considered to exist, in that an international contract of sale under retention of title or an international lease or other secured transaction will be entered into and the equipment transported from one country to another. (...) If the characteristic of the equipment being movable is no longer strict, then the fact that it should be high-value is perhaps the main characteristic still to be required.

tions of the Rail Protocol have demonstrated, a solution was very hard to identify. If MAC equipment cannot be reasonably considered mobile, the internationality assumption may be greatly debilitated. Then, as a result of a weak internationality along with an uncertain high value, overlaps with domestic rules on security rights in those assets, or possible collision with other harmonizing instruments – such as the recently adopted UNCITRAL Model Law on Secured Transactions – could materialize.

In the preliminary draft MAC Protocol, a solution based on providing a definition of mobility was finally avoided. In the process of selection of HS codes, as explained below, the mobility criterion will be taken into account to minimize the deviation from the CTC system logic. Therefore, mobility considerations, alongside the high-value criterion, were to be integrated in the implementation process of the original mechanism adopted to delimit the scope of the new Protocol.

The mobility issue has to be linked to another distinctive innovation of the MAC Protocol: the immovable-associated equipment. In contrast to the assumption of natural mobility of aircraft equipment, space assets, and railway rolling stock, MAC equipment does not only have less mobility, but it is also affixable to immovable property. Association with immovable property reinforces, firstly, the image of equipment stationary in its operation, and, secondly, requires specific rules in the new Protocol with no guidance in the previous Protocols where association with immovable property was not a relevant issue. The characteristics of MAC equipment and its operation make possible and, in relation to certain assets, even likely, an association of the movable asset with immovable property to such an extent that the movable asset is treated as immovable, the interest in that immovable-associated equipment ceases to exist or becomes subordinated to other rights. Hence, association with immovable property touches the core of the CTC system as a legal framework for movable equipment and aimed to govern asset-based financing transactions. Furthermore, issues relating to immovable property raise appreciable policy sensitivities and sovereignty concerns that explain a very limited international harmonization and hinder the formulation of a common rule for immovable-associated equipment.¹⁷

The preliminary draft MAC Protocol departs from the previous Protocols and articulates another significant innovative solution on immovable-associated equipment, whose final drafting has not completed yet. At the CGE1 in Rome,¹⁸ an Intersessional Working Group on immovable-associated equipment was set up. After deliberations, proposals were newly discussed at the CGE2 and the wording of the relevant provision was significantly amended. The current version of the text includes a definition of ‘immovable-associated equipment’ and a draft article with three options. As per Article I(f) ‘immovable-associated equipment’ ‘means agricultural, construction or mining equipment that is 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 situated’. Draft Article VII, under discussion, addresses the issue of the association with immovable property and its consequences for the international interest – the interest in the equipment under the CTC upon association with the immovable property. The provision is structured to offer three alternative approaches (A, B, and C) to solve the potential conflict between international interests in MAC equipment and domestic interests in immovable property upon the association of the equipment with the immovable property. Each Contracting State shall declare which alternative applies to international interests in immovable-associated equipment situated in its territory.

¹⁷ Teresa Rodríguez de las Heras Ballell, ‘Right of Accession, Ownership of Property, and Extension of Security Interests: Concepts, Conflicts, and Rules’ (2016) III *Philippines Journal of Legal Education* 1.

¹⁸ UNIDROIT, *Study 72K – CGE1 – Doc. 2 corr.* (MAC Protocol Committee of Governmental Experts, First Session, Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment, 2017).

(iii) *Unique Identifiability*

Third, unique identification, based on manufacturer's serial number or other identifier, for the purposes of registration (Article XVI of the preliminary draft MAC Protocol)¹⁹ was considered an effective instrument to indirectly reaffirm the high-value requirement. It is more unlikely that low-value equipment, parts or components are individually serialised by manufacturers. Nonetheless, as explained below in greater detail, parts and components can be deemed objects for the purposes of constituting international interests under the draft MAC Protocol.

An additional provision contemplating the creation and affixation of unique serial numbers, based on the Rail Protocol approach, was deemed unnecessary and removed from the preliminary draft. Essentially, after discussion,²⁰ the concept of a unique individual manufacturer-issued serial number for identification purposes prevailed.²¹ The CGE2 accepted the revised text for Article XVI as proposed by the Intersessional Working Group as follows:

Article XVI — Identification of agricultural, construction or mining equipment for registration purposes

A description of agricultural, construction or mining equipment that contains its manufacturer's serial number and such additional information as required to ensure uniqueness is necessary and sufficient to identify the object for the purposes of Article 18(1)(a) of the Convention. The Regulations shall specify the format of the manufacturer's serial number and provide what additional information is required to ensure uniqueness.²²

C. Definition of MAC equipment and Delimitation of Scope

The original mechanism adopted for the delimitation of scope of the future MAC Protocol – HS-code-based method (as further explained below) – avoids and replaces the highly complex task of defining and classifying MAC equipment to be covered by the instrument. All attempts to describe eligible equipment on the basis of actual or potential use, purpose, design, or effective employment in mining, agricultural or construction activities led to vague, uncertain, and notably ambiguous results. None of those criteria satisfied the test of certainty, consistency, and soundness. Actual use, purpose, or intended design fail to offer objective and invariable factors to delimit the scope, and, consequently, undermine predictability expectations in market transactions. Therefore, there was

¹⁹ UNIDROIT, *Study 72K – CGE2 – Doc. 2* (Text of the Revised Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment as Amended by the UNIDROIT Committee of Governmental Experts for the Preparation of a Draft Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment at its First Session, Held in Rome From 20 – 24 March, 2017):

Article XVI — Identification of agricultural, construction or mining equipment for registration purposes

A description of agricultural, construction or mining equipment that contains its manufacturer's serial number and the name of the manufacturer as supplemented by such additional information as may be provided by the regulations is necessary and sufficient to identify the object for the purposes of Article 18(1)(a) of the Convention.

²⁰ At the CGE1, an Intersessional Working Group on Identification Criteria was set up. Results and proposals prepared by this working group were presented at the CGE2 in October 2017, UNIDROIT, *Study 72K – CGE2 – Doc. 11* (MAC Protocol Intersessional Working Group on Registration Criteria (IWGRC), Conclusions Paper Prepared by the Chair of the IWGRC and Approved by the Group, 2017).

²¹ UNIDROIT, *Study 72K – CGE2 – W.P. 13* (MAC Protocol Committee of Governmental Experts, Second Session, Daily Report for 5 October 2017 Prepared by the UNIDROIT Secretariat, 2017).

²² UNIDROIT, *Study 72K – CGE2 – Doc. 11* (MAC Protocol Intersessional Working Group on Registration Criteria (IWGRC), Conclusions Paper Prepared by the Chair of the IWGRC and Approved by the Group, 2017) 2.

no mention of actual or potential end use in the definitions of the preliminary draft as presented to the CGE1 and the CGE2, except in Article XXXIII to determine whether amendments to Harmonised System codes (hereinafter HS codes) included in the Annexes to the MAC Protocol should be treated under paragraph 4 as changes likely to affect the scope²³ of the application or, contrarily, under paragraph 5 that provides for a simplified procedure to process changes that affect listed HS codes without changing the scope. At the CGE2, one delegation proposed the addition of a clarifying sentence in Article II(1) to remark that the MAC Protocol shall apply as regards HS codes listed in Annexes regardless of the actual or intended use of the equipment. Although an elaborated explanation of the scoping mechanism will be provided below in Part III, it must be simply mentioned here that Harmonised System and HS codes refer to the Harmonised Commodity Description and Coding System (hereinafter, Harmonised System or HS) developed by the World Customs Organization (WCO) as a multipurpose international nomenclature to classify products and goods in the world trade. As further explained, the scope of the MAC Protocol is delimited on the basis of a list of HS codes included in three Annexes to the Protocol. The above-mentioned Article XXXIII establishes procedures to deal with amendments in the HS that might affect HS codes listed in the Annexes to the MAC Protocol.

Likewise, a purpose/end-use-based definition raises the problem of multi-purpose equipment or equipment of a general nature and intensifies the risk of overlapping with the previous Protocols.

On the one hand, the inclusion of multi-purpose equipment (ie trucks) would entail an undesired and uncontrolled expansion of the scope of the draft MAC Protocol beyond the three target sectors. As actual or potential use, design, or effective employment in certain activities are not relevant factors, multi-purpose equipment loses any connection with the expected sector of the draft instrument. Furthermore, the application of the uniform instrument in such cases (as well as in relation to low-cost equipment) could be unexpected and unpredictable for parties involved in the transaction, bring about conflicts with domestic laws, or even encourage intentional actions of parties to manipulate the transactional circumstances (use, design, situation) in order to avoid the application of the MAC Protocol or force its application instead. Therefore, the decision, in the light of the proposed scope-delimiting formula, has been not to include HS codes describing general-purpose equipment in the Annexes. Then, once an object falls under a listed code, a potential or actual general use is irrelevant and will have no effect on the application of the Protocol.

On the other hand, the broadened and imprecise scope of the draft MAC Protocol could overlap with that of the previous Protocols. Even though any conflicting HS codes were excluded, the disparities in the defining factors employed in the adopted Protocols create areas of potential conflict. Whereas a collision with the Aircraft Protocol and the Space Protocol may be less probable, the wide²⁴ and inclusive²⁵ definition of railway rolling stock for the purposes of the Luxembourg Protocol is likely to cause overlaps. Certainly, albeit barely likely, a helicopter could be used for construction activities or a satellite could be involved in modern agricultural production. But the operational description of railway rolling stock in the Luxembourg Protocol as 'vehicle movable on a fixed railway

²³ Paragraph 4 of Article XXXIII reads:

Any amendments to the Annexes that reflect changes to the Harmonised System that have affected the Harmonised System codes listed in the Annexes, or the inclusion of any additional codes covering uniquely identifiable high value mobile equipment of a type that is *used* in the agricultural, mining or construction sector that may warrant inclusion of such equipment in the Annexes. (Emphasis added).

²⁴ The definition of covered equipment is deliberately broad and comprehensive to include any railway rolling stock regardless of size, capacity, velocity, purpose, or territorial scope. See Howard Rosen, 'The Luxembourg Rail Protocol: A Major Advance for the Railway Industry' (2007) 12 Uniform Law Review 427, 430-431.

²⁵ Howard Rosen, 'Creating an International Security Structure for Railway Rolling Stock: an Idea Ahead of its Time?' (1999) 4 Uniform Law Review 313, 319.

track or directly on, above or below a guideway’ could cause overlaps between the new MAC Protocol (especially, but not exclusively, in relation to mining equipment) and the Rail Protocol.

An overlap is not merely a conceptual issue: it may arouse uncertainties, cause problems related to priority, or lead to duplicate registrations. A delimitation solution could be configured as a matter of scope or articulated as a priority issue.²⁶ It was decided²⁷ that the interaction between the draft MAC Protocol and the previous Protocols should be dealt with as a matter of scope by including Article II(4) in the preliminary draft MAC Protocol:

This Protocol does not apply to objects falling within the definition of “aircraft objects” under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, “railway rolling stock” under the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock or “space assets” under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets.²⁸

Hence, as the use or purpose is irrelevant for the delimitation of the scope, the defining factors formulated in the previous Protocols will limit the expansion of the draft MAC Protocol.

With the implementation of a singular mechanism (see Part III) for delimiting the scope of the future Protocol, the above-mentioned complexities associated with the characteristics of the MAC equipment, the interactions with the previous Protocols, and the fulfilment of the guiding criteria were largely overcome, although it represented an appreciable challenge in drafting and treaty design.

III. The Innovative Resort to HS Codes: Three Problems and Three Solutions

Efforts made to manage the complexities arising from the delimitation of the future Protocol scope led to the proposal of a very original and unique formula in the context of the CTC system. After pondering several alternatives, at the meeting Issues Dialogue²⁹ held in 2014, the participants considered the possibility of using the Harmonised Commodity Description and Coding System developed by the World Customs Organization (WCO) as a multipurpose international nomenclature aimed to classify products and goods in the world trade. The HS comprises 6-digit codes identifying 5,000 commodity groups. The system is widely used for different purposes such as the application of customs tariffs or the collection of data for statistics. According to the WCO,³⁰ the HS covers 98% of international trade.

The resort to the HS as a mechanism to demarcate the scope of the draft MAC Protocol represents an effective, reliable, and useful tool to select and define categories of objects susceptible of being covered by the future instrument on the basis of purely objective, uniform, and external factors. Actual or potential use, purpose in design, or other factual elements are discarded and remain totally

²⁶ UNIDROIT, *Study 72K – CGE1 – Doc. 4* (MAC Protocol Committee of Governmental Experts, First Session, Legal Analysis, 2016) para 50, 12.

²⁷ UNIDROIT, *Study 72K – CGE1 – Doc. 4* (MAC Protocol Committee of Governmental Experts, First Session, Legal Analysis, 2016) para 46, 11.

²⁸ UNIDROIT, *Study 72K – CGE2 – Report* (MAC Protocol Committee of Governmental Experts, Second Session, Report, 2017) 32.

²⁹ Second Issues Dialogue celebrated in January 2014. UNIDROIT, *Study 72K – SG1 – Doc. 2* (MAC Protocol Study Group, First Meeting, Legal Analysis, 2014) 3.

³⁰ World Customs Organization, Nomenclature and Classification of Goods, What is the Harmonized System (HS)? <<http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>> accessed 18 February 2018.

irrelevant in the delimitation of the scope. The MAC Protocol would apply only to the objects falling under the HS codes selected and listed in the Annexes thereto. Although in the process of selecting adequate codes in consultations with the industry the Article 51(1) criteria were taken into consideration, no further test of mobility, high value, or unique identification is required once an object is covered by a listed HS code.

From a drafting perspective, the proposed mechanism was articulated into two components: a conceptual component embodied in the definition of MAC equipment and a design decision to enclose Annexes.

Regarding the definition of terms, unlike the previous Protocols, the preliminary draft MAC Protocol does not define the categories of objects falling under the new instrument. Article I describes agricultural (a), construction (b), and mining (k) equipment simply as an 'object that falls under a Harmonised System code listed', respectively, in Annex 1, 2 or 3 to the Protocol. So, the definition directly refers to a list of HS codes included in an Annex to the Protocol with not even a mention of a potential use in the target sectors, the characteristics of the object, its mobility, its value, or any other descriptor. The aim is to prevent difficulties in interpretation, ambiguity of the scope, and any need to verify factual or operational elements to classify an object as effectively covered by the new Protocol. Should any of these references be included in the definition, the objectivity achieved by the use of HS codes would be diluted.

The drafting decision in relation to the definition of terms led to another singular outcome in terms of treaty design. The lists of HS codes comprising those categories of objects falling under the scope of application of the draft MAC Protocol are enclosed to the Protocol in three Annexes. Thus, the extension of the scope is determined by the Annexes that the Contracting State declares to apply, in case a limiting declaration under Article II(3) is made.

The HS-based solution overcomes the difficulties in defining equipment, and manages the main challenges posed by the particularities of the sectors involved - low mobility, wide range of value, variety of assets. Such a singular scope-delimiting solution brings about additional complexities and raises delicate policy concerns that have to be carefully tackled.

The main difficulties and concerns of the implications of the HS-based solution centre on three problems. First, some HS codes selected to be listed in the attached Annexes comprise parts and components. Second, changes in the Harmonised System, which are likely to affect HS codes listed in the Annexes to the Protocol, can be introduced by the WCO by excluding, adding, splitting, or modifying the description of covered items. Third, and as a consequence of the foregoing, the scope of application of the future MAC Protocol may need to be amended to realign it with periodic changes in the HS, incorporate technological developments, or adjust to the evolution in mining, agricultural, and construction world trade practices. As a result, the scope of the MAC Protocol can be widened (or, narrowed as a result of the deletion of codes). Important considerations are raised by the possibility of an international instrument with a changing and imprecise scope of application. On the one hand, Contracting States might be subjected to changes in the Protocol outside their control. On the other hand, such changes in the scope could extend the Protocol to objects failing to fulfil the Article 51(1) criteria.

A. Objects and Accessions under the MAC Protocol: Equipment, Parts, and Components

Upon the selection, in consultation with the industry, of the HS codes suitable for being included in the Annexes attached to the preliminary draft MAC Protocol, it was noticed that certain codes comprise not only complete equipment but also parts and components. HS codes covering only parts, accessories, or components could, in theory, be completely excluded, but a more elaborated solution was required in cases where the same HS code covered both the complete equipment and its parts.

To preserve the rationale behind the CTC system, a double-threshold assessment is conducted. First, one needs to confirm whether those items (parts or components), other than complete equipment, are in practice separately financeable. Second, one must check whether it is likely that such items meet the Article 51 delimiting criteria. In particular, for the purposes of registration in the International Registry, sufficient identification will be needed. Should an approach based on manufacturer-issued serial numbers (solely or in conjunction with other identifiers) be finally adopted for Article XVI, the uniqueness in the identification would clearly differentiate between those parts which are treated as objects and those which should be referred to the interplay of Article 29(7)(a) CTC and the comprehensive definition of objects falling under the preliminary draft MAC Protocol. Then, the combined application of separate financeability and serial-number-based identification would indirectly ensure the exclusion of low value items, which are not normally serialized and are rarely separately financed.

Nonetheless, unlike the previous Protocols,³¹ the preliminary draft MAC Protocol presented to the CGE1³² did not offer a clarifying solution, insofar as the definition of the three categories of objects covered by the future Protocol (Article I(2)(a), (b), and (h) of the referred version of the text) was limited to listing the HS codes without contemplating any installed, incorporated or attached accessories, components and parts, as well as data, manuals and records relating thereto. That omission could have been filled by interpretation; nevertheless, an express wording would be highly desirable and would avoid uncertainties and frustrated expectations concerning the scope of the international interest and the treatment of parts. Hence, at the CGE1, the concise definitions of MAC equipment were supplemented by the following sentence: ‘including all installed, incorporated or attached accessories, components and parts which do not fall within a separate HS code listed in that Annex, and all data, manuals and records relating thereto.’³³ The added wording slightly differs from the previous Protocols to adapt to the peculiar scope-delimiting mechanism implemented in the preliminary draft MAC Protocol. Parts, accessories (implements) or components will be treated as separate objects if they fall within listed HS codes, but they will be included in the object when they are installed, incorporated or attached thereto otherwise.

B. Treaty design: the relationship between the Protocol and the Annexes

The drafting option adopted to implement the scope-delimiting mechanism in the preliminary draft MAC Protocol affects treaty design decisions. Article I does not provide a complete definition of

³¹ Article I(2) of the Rail Protocol provides:

(e) “railway rolling stock” means vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.

Article I(2) of the Space Protocol defines ‘space asset’ adding: ‘together with all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.’

Aircraft Protocol, Article I(2) provides three different definitions for airframes, helicopters, and aircraft engines, comprising in all cases ‘all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.’

³² UNIDROIT, *Study 72K – CGE1 – Doc. 2 corr.* (Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment, 2017).

³³ UNIDROIT, *Study 72K – CGE2 – Doc. 2* (Text of the Revised Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment as Amended by the UNIDROIT Committee of Governmental Experts for the Preparation of a Draft Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment at its First Session, Held in Rome From 20 – 24 March, 2017) 4.

mining, agricultural, or construction equipment independent from the listed HS codes. The intimate relationship between the definition provisions and the Annexes is so close that the legal definitions cannot operate without the help of the Annexes. Additionally, the HS codes are developed, managed, and periodically modified by an organization other than UNIDROIT. These structural and operational circumstances are likely to create policy issues for Contracting States.

First, it should be confirmed that the use of the Harmonised Commodity Description and Coding System as a scoping device is acceptable. Second, it should be assumed that the Annexes to the Protocol form an integral part of the international instrument itself. A Contracting State is entitled only to declare, under Article II(3), that it will limit the application of the MAC Protocol to one or two Annexes, or subsequently denounce the application in relation to certain Annexes. Beyond that, States cannot modify, partially ratify, accede or adhere to the Annexes, or make a declaration, in that respect, other than Articles II(3) and XXXI(4) allow. Third, and more importantly, as the Harmonised System is a 'living system' that evolves and may change beyond the control of UNIDROIT and the Contracting States, it is critical to assess how the future MAC Protocol should interact with those eventualities. The lists annexed to the Protocol could become ossified and remain unaltered by any subsequent modification, or a mechanism of amendment to internalize such changes in the Harmonised System could be deployed. Technological developments, changes in financing practices, and evolution in equipment and models demand flexibility. Therefore, a mechanism of amendment ensuring the control of States and sufficient flexibility in the adaptation and innovation of the scope is indispensable.

C. Mechanism of Amendment – Outline of the Amendment Procedure in the preliminary draft MAC Protocol

Using HS codes as a means for narrowing the definition of the MAC equipment has an advantage of offering a broad but finite list so as to make clear that this Protocol applies only to certain equipment. Thus, there is no room for treating the list as illustrative and open-ended. This leads to a new challenge of finding ways to incorporate and adapt to the changes that occur to the Harmonised System.

Article XXXIII sets out the machinery for the review of the MAC Protocol and the procedures for the amendment of the Protocol and the Annexes. The draft Article XXXIII (then Article XXXII) was discussed at the CGE1 revealing that although there was consensus on the general procedure for the amendment of the Protocol provisions, the Annex revision procedure did not reach sufficient consensus and raised some legal and policy concerns. Due to the singularity of the scope-delimiting solution proposed for the draft MAC Protocol, it was decided that a further analysis was required to devise an adequate procedure of amendment that ensures a balance between sufficient flexibility and celerity, and State control over the revision of the scope of application in conformity with acceptable treaty practice. Then, the issue was referred to a Working Group on Amendment provisions (Amendment WG).

The discussions of the Amendment WG generated two main undisputed policy decisions: (i) that the scope of the MAC Protocol should be determined solely by the HS codes contained in the Annexes to the Protocol and (ii) that the selection of HS codes for inclusion in the Annexes should be conducted with reference to the Article 51 criteria of high value, mobility and unique identification. Departing from this policy framework, the Amendment WG identified three issues that required consideration: (i) that changes in the Harmonised System made by the WCO could affect the scope of the MAC Protocol; (ii) that Contracting States should hold sufficient control over changes to the HS codes likely to affect the scope of the Protocol and (iii) that Article XXXIII as

initially drafted allowed for the expansion of the scope of the MAC Protocol by adding new codes that might cover equipment that may not satisfy the Article 51 criteria of high value, mobility and unique identification.

The proposal of the Amendment WG was limited to paragraphs 4 and 5 of the draft Article XXXIII (apart from removing letter e) from paragraph 2) that deal with the revision of the Annexes. The newly-devised procedure drew a distinction between those changes to the Harmonised System affecting the HS codes listed in the Annex that may entail the change in the scope of the Annexes (paragraph 4) (or the inclusion of any additional codes covering uniquely identifiable high value mobile equipment of a type that is used in the agricultural, mining or construction sector that may warrant inclusion of such equipment in the Annexes); and those changes that do not imply any change in the scope of the Annexes (paragraph 5). Both amendments would be considered at a meeting of Contracting States convened by the Depositary, following consultation with the Supervisory Authority (as per Article 17 CTC, a Supervisory Authority, with the functions and powers there set out, shall be designated for each Protocol at the Diplomatic Conference), after each revision of the Harmonised System, or at such other times as the circumstances may require. In both cases, each amendment shall be approved by at least a two-thirds majority of States participating in the meeting.

Paragraph 4 and paragraph 5 amendment procedures differ in the next step after the approval. As amendments under paragraph 5 are deemed technical or non-substantial in the sense that they do not imply any change in the scope, disparities in the version in force in the different Contracting States would lead to undesirable inconsistency of the system and raise unnecessary complexities. Therefore, should the amendment be approved by the indicated majority, it will become effective for all Contracting States in the stated period without opt-out possibilities. However, the control of States over amendments under paragraph 4, insofar as they entail a change in the sphere of application of the MAC Protocol already ratified with a different scope, is imperative. Accordingly, paragraph 4 sets out an opt-out mechanism during a 12-month period subsequent to the approval of the amendment at the meeting of Contracting States, and fixes an additional threshold (to be determined) of Contracting States objecting that would make the previously approved amendment ineffective. In sum, paragraph 4 amendments would be effective only for those Contracting States which do not opt out during the 12-month period, provided that Contracting States that have notified to the Depositary that they do not accept to be bound represents X% or more. The opt-out mechanism alleviates the policy issues related to the possibility of binding States without their sufficient control, in line with acceptable treaty practice, but could lead to a mosaic of inconsistent application, which will be discussed in detail below. Although a proposal to amend Article XXXIII was discussed at the CGE2, the Committee decided to retain the current drafting (in brackets) for further consideration.

In the subsequent sections of the paper, treaty amendment practice, policy options, and procedural alternatives are discussed to set a framework for the discussion of the proposed Article XXXIII and the underlying policy concerns.

IV. Amendment Procedure and Treaty practice: framework for discussion

A. Defining the scope of Article XXXIII: a first assessment

Because of the particularity of usage of HS codes as a scope-defining mechanism, changes that necessitate amendment of the MAC Protocol are theoretically diverse. Overview of the amendment procedure has been discussed above, thus, in this section, the paper will assess possible changes that may occur and the amendment process they fall into.

Before considering cases that necessitate amendment, it is useful to recall and question the underlying policy of how HS codes work in the MAC Protocol as a scope-defining mechanism. First of all, there is no doubt that the MAC Protocol in relation to the HS codes is subject to the interpretation rules of the Harmonised System. Therefore, any change in the interpretation of the codes should automatically apply to the MAC Protocol. Otherwise, we should assume, and that is not the intent of the drafter, that the Annexes, when approved, would become ‘fossilized’, referring to a specific edition of HS codes as approved and interpreted at a specific date without further updating. That would be a source of uncertainty.

A more problematic aspect is how the HS codes listed in the Annexes operate to determine the scope of the MAC Protocol. It could be understood that the scope is delimited in relation to the equipment covered by the codes, or alternatively, it could be understood that the scope is demarcated as regards the codes themselves, regardless of their coverage. The former approach entails a material interpretation, whereas the latter approach assumes a formal (or formalistic) interpretation of the Annexes. This makes a difference when new equipment is covered by an existing code in the Annexes. If there is no change to a heading or sub-heading of the code, the new equipment is automatically included in the Protocol, as a matter of interpretation of the HS code. However, if there is a change in the heading or sub-heading, the amendment procedure is initiated. If the determining factor of the scope of the Protocol is the code, then the amendment will be merely a technical change, thus the paragraph 5 amendment procedure is invoked. However, if the determining factor is the equipment included in the code, since new equipment is included entailing a change in scope, the paragraph 4 amendment procedure is required (see also section (d)(ii) below).³⁴

Situations entailing reorganization of the Harmonised System likely to necessitate amendment of the MAC Protocol can be divided into two categories. One category can be labelled as technical, meaning that the change does not affect the scope of the MAC Protocol but simply implies a reorganization of the numbers in the HS: for example, a split of the codes,³⁵ a merger of the codes or a simple renumbering of the codes.³⁶ This category is a matter of the paragraph 5 amendment procedure. The other category comprises those changes that could affect the scope of the MAC Protocol: for example, due to a reorganization of the HS codes a necessity arises to add another code to the Annexes,³⁷ or due to a reorganization of the HS codes a necessity arises to delete a code.³⁸ This category is a matter of the paragraph 4 amendment procedure. One must note here that deletion caused by reorganization of the HS codes is different from deletion per se, to the extent that deletion

³⁴ The explanatory report for the preliminary draft presented at the CGE2 mentions title changes as an example of amendment, and specifically, paragraph 5 amendment procedure. See UNIDROIT, *Study 72K – CGE2 – Doc. 3* (Explanatory Report to the Preliminary Draft MAC Protocol, 2017) para 146, 61. If headings and sub-headings are considered as being merely descriptive, it could also lead to the understanding that changes in headings are not even subjected to amendment procedures.

³⁵ It is helpful to determine the changes that occurred to the Harmonised System between 2012 and 2017 to understand possible scenarios for amendments. Increase in no-till farming resulted in a split of code 843230 (‘Seeders, planters and transplanters’) into two codes: 843231 (‘No-till direct seeders, planters and transplanters’) and 843239 (‘Other’). Code 870190 (‘Other Tractors’) was divided into five codes: 870191 (‘Other, of an engine power Not exceeding 18 kW’), 870192 (‘Exceeding 18 kW but not exceeding 37 kW’), 870193 (‘Exceeding 37 kW but not exceeding 75 kW’), 870194 (‘Exceeding 75 kW but not exceeding 130 kW’) and 870195 (‘Exceeding 130 kW’).

³⁶ Code 842481 ‘Agricultural or Horticultural Mechanical Appliances’ has been renumbered to 842482.

³⁷ A case envisaged here may be something as the following: due to a change in the HS codes, a code now covers partially the equipment that was already covered, but also partially new equipment, with another code covering partially the equipment that was already covered, but partially new machines as well.

³⁸ A case envisaged here may be something as following: due to a change in the HS codes, a code now only covers existing equipment that was already covered in small percentage whereas the remaining part of the code entails inclusion of mostly general purpose equipment that is inappropriate for the Annexes.

caused by reorganization of the HS codes is not effectively reducing the material scope as the code is not covering MAC equipment any longer, but simply excluding a code that has become irrelevant for the Protocol.

The amendment procedure is initiated not only when there is a reorganization to the Harmonised System by the WCO but also when there are technological developments or when demands for amendment are made by the industry. This could be a demand for either deletion or addition of HS codes. Deletion may occur in cases when a certain code was included in the Annexes but the code entails equipment that is irrelevant to the MAC Protocol or certain equipment is no longer in trade. Deletion of HS codes is a matter that needs careful consideration since it is likely to affect equipment that is already an object of international interest. Thus, the procedure for deletion will fall under the normal amendment process, which is paragraph 3 of Article XXXIII. On the other hand, any addition of a code will always fall under paragraph 4 amendment procedure since it is a scope-changing matter.

To assess the structure of the amendment process in the MAC Protocol, the paper will delve into treaty practices, by first considering the procedure of updating a list of scope-defining items (for the MAC Protocol, the procedure of updating the Annexes) and second, looking at the process of validation of such an updated list (for the MAC Protocol, for the States to accept the updated Annexes). This will enable us to evaluate the Protocol and draw attention to certain aspects that may require further consideration.

Chart: Application of the Amendment Procedure

Situation covered under Article XXXIII	Paragraph of Article XXXIII
Deletion of a code that already exists in the Annexes (because of irrelevance, diminished trade volume)	3
Addition of an entirely new code covering new equipment not previously included in the HS	4
Addition of a code which has previously been part of the HS, but which has been proposed by relevant industries as suitable for inclusion into one or more of the Annexes	4
Where the revisions have resulted in an existing code being deleted from the HS and the equipment formally included in that code is contained in a new code, together with other equipment not previously included in the Annexes	4
Due to a revision in the HS, there has been a merger of codes without changes in the scope (both codes were listed under the Annexes)	5
Due to a revision in the HS, there has been a split of codes without changes in the scope	5
Due to a change in the HS, there has been a renumbering of the codes	5
Where revisions have resulted in the amendment of a heading or sub-heading with the result that the scope of the equipment falling within a code already included in the Annexes changed. This could be either addition of equipment to, or deletion of equipment from, a certain code.	4 or 5

B. How to Update the List of Scope-Defining Items: Rule Making Procedure

In general, there are two ways to adapt to changes that occur when a treaty is relying on another instrument for defining the scope. One is to automatically apply the changes that have occurred to the other instrument. The other is to independently provide for an amendment process in the treaty when such changes occur in the other instrument.

(i) Automatic Amendment?

An example of the former approach, the automatic amendment, is the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), which was adopted on 3 May 1996. In order to allocate risks that maritime movement of dangerous goods creates, there must be a clear notion of what constitutes such goods. However, the notion of dangerous goods is unclear and has been controversial.³⁹ Thus, the HNS Convention incorporated a definition of HNS (Hazardous and Noxious Substances) that made references to the lists provided for in the existing technical instruments. These technical instruments were regulations aimed at ensuring maritime safety and preventing and minimizing pollution from ships. Thus the definition of HNS in Article 1(5) is based on lists of substances that are identified in different codes.⁴⁰ The wording, 'as amended' is added to include the amendments that occur in the referenced instruments. This approach was adopted for two main reasons. First, it was an opportunity to avoid having to list thousands of substances that would require hundreds of pages of text. Second, it ensured that the HNS Convention would 'keep pace with technical developments and promoting conformity between the technical instruments and the HNS Convention'.⁴¹ There was

³⁹ Meltem Deniz Güner-Özbek, 'Meaning of Dangerous Goods', *The Carriage of Dangerous Goods by Sea* (Springer 2008) 39-87.

⁴⁰ Article 1(5) states as follows:

Hazardous and noxious substances (HNS) means:

- (a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:
 - (i) oils, carried in bulk, as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;
 - (ii) noxious liquid substances, carried in bulk, as defined in regulation 1.10 of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category X, Y or Z in accordance with regulation 6.3 of the said Annex II;
 - (iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;
 - (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;
 - (v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;
 - (vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed-cup test);
 - (vii) solid bulk materials possessing chemical hazards covered by the International Maritime Solid Bulk Cargoes Code, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code in effect in 1996, when carried in packaged form; and
- (b) residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.

⁴¹ Meltem Deniz Güner-Özbek, 'Third-Party Liability for Damage Arising From the Carriage of HNS', *The Carriage of Dangerous Goods by Sea* (Springer 2008) 261.

concern that applying such automatic change to the definition would cause constitutional difficulties since it would mean that States would be bound to substances that they have not agreed to.⁴² However, since there were already treaties (such as the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels) relying on other treaties for updating the list of items defining the scope, this concern did not prevail.

The interconnection between the HNS Convention and other instruments that it relies on is evident: the HNS Convention relies on instruments which aim to prevent maritime incidents, whereas the HNS Convention itself is a response to the aftermath of maritime incidents, providing for financial compensation. The two are like two sides of a coin and thus, automatic amendment makes sense. However, this is not the case for the MAC Protocol. As has been discussed, the Harmonised System is merely a tool to demarcate the scope of the MAC Protocol, in that the MAC Protocol refers to HS codes only as an index to indicate equipment, without any interconnection between the purposes of the two instruments (the HS and the MAC Protocol). It is impossible to build a scheme where there could be an automatic amendment of the Protocol caused by a change in the Harmonised System. Thus, it is necessary to come up with a separate procedure that allows States to reflect upon the changes occurring to the HS and to act independently in response to such changes.

(ii) *Back-up List?*

Without automatic amendment, what are the ways in which the list of HS codes can be kept alive without stagnation? A look at other treaties gives us insights as to what the choices are and where the MAC Protocol stands. The main process would be to include an amendment process, but before we get into this, there is another alternative, that is to provide for a backup list in addition to the list of HS codes to enable updates by interpretation. This paper will briefly touch upon this approach, but such a backup list cannot be adopted for the MAC protocol for obvious reasons, also explained below.

An example of having a back-up list is seen in the international agreements of the WTO. They are the Agreement on Trade in Pharmaceutical Products (Pharma)⁴³ and the Information Technol-

⁴² Magunus Göransson 'The HNS Convention' (1997) *Uniform Law Review* 249-270, 253.

⁴³ This Agreement is part of the Uruguay Round multilateral trade negotiations, concluded in 1994. It is intended for reciprocal tariff elimination for pharmaceutical products and for chemical intermediates used in the production of pharmaceuticals. The products covered under this agreement are delineated in an interesting way: a mixed approach that includes a list of HS codes plus four specialised annexes listing chemical compounds that should receive duty-free treatment however they are classified in the HS. Article 1 provides for the product coverage as follows.

With respect to pharmaceutical products (as defined below), they will eliminate customs duties and all other duties and charges, as defined within the meaning of Article I.1 (b) of the General Agreement on Tariffs and Trade (1994), on ALL items in the following categories:

- (i) items classified (or classifiable) in Harmonized System Chapter 30;
- (ii) items classified (or classifiable) in HS headings 2936, 2937, 2939, and 2941, with the exception of dihydrostreptomycin and salts, esters, and hydrates thereof;
- (iii) pharmaceutical active ingredients as designated in Annex I and that bear an "international non-proprietary name," (INN) from the World Health Organization;
- (iv) salts, esters, and hydrates of pharmaceutical products which are described by the combination of an INN active ingredient contained in Annex I with a prefix or suffix as designated in Annex I to this record, as long as such salt, ester, or hydrates classified in the same HS 6-digit heading as the INN active ingredient;
- (v) salts, esters, and hydrates of INN active ingredients that are separately contained in Annex I to this record and that are not classified in the same HS 6-digit heading as the INN active ingredient;
- (vi) additional products used for the production and manufacture of finished pharmaceuticals as designated in Annex IV to this record.

ogy Agreement (ITA).⁴⁴ The ITA carries an interesting annex that enables inclusion of a product that is not covered by an HS code listed in the annex, by way of interpretation. Products covered under the ITA are listed in two annexes, Attachments A and B. Attachment A is a list of 6-digit HS codes. Attachment B includes product descriptions without any corresponding HS codes, regardless of whether such products are covered in Attachment A. The existence of Attachment B is to solve difficulties in having multi-functioning products,⁴⁵ which may fall under different HS codes. Parties to the ITA are obliged to eliminate tariffs on the products that fall under the two Attachments.

This back-up system to the list of HS codes provides for future addition of new products through a description-based annex (Attachment B) without actual amendment to the list of HS codes (Attachment A). Even if a certain product does not fall under any of the HS codes listed in Annex A, it will be covered by the Agreement if it meets the descriptive narrative in Attachment B. For example, Attachment B mentions '[f]lat panel displays (including LCD, Electro Luminescence, Plasma and other technologies) for products falling within this agreement, and parts thereof'. This means that any new technology created in the future for flat panels will be included under this description. One must keep in mind that inclusion by Attachment B is only a back-up, and that the ITA provides for an amendment procedure for Attachment A, which will be dealt with below.

However, this description-based annex could become a source of divergence in applying tariffs since whether a certain product matches the description in Attachment B is left to the interpretation of the parties. If we imagine a computer printer that can also scan, fax and/or copy, it is easy to see that it could be interpreted either as a printer or as photocopying machine.⁴⁶

The adaptation to future changes via a description-based definition of covered products cannot be the option for the MAC Protocol. Rather, it is counter-intuitive for the MAC Protocol, since the very reason for using HS codes (ie the need to erase any doubts about the product coverage) would be nullified with the addition of such a descriptive annex. Thus, it is necessary to provide for a simplified but structured amendment processes to the list of HS codes.

(iii) *Creating a New List*

We must now consider how the procedure of updating the list of scope-defining items through an amendment procedure is structured in other agreements. The important elements of such an amendment procedure to be compared with the MAC Protocol are the following. Who is empowered to update? In decision-making, does the rule of unanimity apply? What is the time span for updates? To consider these questions and to compare them with the MAC Protocol, the following (non-exhaustive) examples that use HS codes to identify covered products, will be looked at: the Agreement

⁴⁴ The Information Technology Agreement (ITA) is a plurilateral WTO trade agreement that requires participants to eliminate tariffs on a specific list of information technology (IT) and telecommunications products. It went into effect in 1997. The purpose of the ITA is to increase trade and competition through trade liberalization for IT products, and the global diffusion of IT.

⁴⁵ An example of multifunctioning products is computers with multimedia capabilities.

⁴⁶ This was an actual case disputed in 2008, where the United States, Japan and Chinese Taipei brought a dispute against the EU on how to classify computer printers that can also scan, fax and/or copy. Although it was not a dispute on the interpretation of Annex B (but rather on interpretation of which HS code the relevant equipment falls under), this illustrates the difficulty resulting from applying such a description-based annex to identify covered products. The EU had classified the relevant equipment as photocopying machines thus excluding them from the application of the ITA and imposing tariff, whereas the US, Japan, and Chinese Taipei argued that these were printers, and thus products covered under the ITA for the elimination of tariff (see WTO, *WT/DS375/R, WT/DS376/R, WT/DS377/R* (European Communities and its Member States – Tariff Treatment of Certain Information Technology Products, Reports of the Panel, 2010) <https://www.wto.org/english/tratop_e/dispu_e/375_376_377r_e.pdf> accessed 01 March 2018).

on Trade in Civil Aircraft (hereinafter, ATCA), the Energy Charter Treaty (hereinafter, the ECT),⁴⁷ the ITA and Pharma. As the comparison below will indicate, it is safe to conclude that drafting in the MAC Protocol is within the international treaty practice.⁴⁸

Organization in Charge

In order to facilitate the update, decisions are often made by an organization representing Contracting States, stipulated under each treaty. This is the case for all the simplified amendment process in the international agreements considered here. ATCA sets up the Committee on Trade in Civil Aircraft, composed of representatives of all Signatories (Article 8(1)). Pharma and the ITA each establish committees for all participating States (Pharma, Article 3; the ITA, Article 3). The ECT sets up a Charter Conference, whereby each Contracting Party is entitled to have one representative (the ECT, Article 34(1)).

As a general rule, unanimous consent is required of the above decision-making organizations stipulated in the treaties (Pharma, the ITA), with the exception of ECT. The ECT provides for the following procedure. The Charter Conference governs amendments to the annexes that contain lists of HS codes, and different processes are provided for amending different aspects of the annexes (Articles 34(3)(m)(o) and 36(1)(d)(e)(g)). Approval of modifications to the annexes concerning HS codes that define what 'Energy Materials and Products' is (Annexes EMI, EM II and NI) and approval of technical changes to all the annexes require a unanimous vote from all the Contracting Parties which are present and are voting at the Charter Conference meeting (Article 36(1)(d)(e)(g)). Yet, for modifications to one of the annexes concerning HS codes that define what 'Energy-Related Equipment' (EQ I) is, in case Contracting Parties cannot reach a consensus due to objections, a three-fourth majority vote would alternatively apply.

For the MAC Protocol, Article XXXIII stipulates that the Depository takes the initiative of convening a meeting of Contracting States, which is the organ in charge of decision-making. The vote requires a two-thirds majority of participating States. From the limited examples considered here, it can be said that in response to challenges of technical progress, or changes occurring in the Harmonised System, the Protocol is structured to accelerate the procedure of amendment by not relying on the unanimity rule.

Frequency of Updates

The frequency of updates is determined by the relevant sector. It depends on the socio-political background of the necessity to keep up with the pace of innovation. It is natural and easy to imagine that technological development of the IT or energy sectors requires very frequent updates, whereas in the field of civil aviation, maybe not so much. The amendment procedure reflects this thought. For the ITA or the ECT, the frequency of updates is not explicitly stipulated, however, for the ITA, an annual meeting is held to discuss matters including possible amendments of the annex. For the ECT, it is up to the Charter Conference to decide on when to review the changes, but the Charter Conference is also held annually. For Pharma, the update period is 'normally at least once every three years'. This means that the committee meets irrespective of whether there has been an amendment to the

⁴⁷ The ECT entered into force in April 1994. The ECT provides for a framework for cooperation in the field of energy and the promotion of energy security. The treaty focuses on stimulating investments in the energy sector, provides for reliable transit flows, and minimising or eliminating barriers to trade. The ECT is applied to 'Energy Materials and Products' and 'Energy-Related Equipment'. The definitions of Energy Materials and Products and Energy-Related Equipment are set out in the relevant annexes, which are based on the HS as well as the Combined Nomenclature of the European Communities.

⁴⁸ For the purpose of situating the legal structure of the MAC Protocol among treaty practices, the paper will disregard the political background as well as the power that is generally delegated to the organization in charge (not just limited to amendments).

HS. The treaty stipulates that the amendments do not occur as frequently as under the ITA or the ECT: the frequency of amendment reflects the fact that regardless of whether there has been a change to relevant HS codes, there is a need to update the list of codes. Updates to Pharma have occurred 4 times in 1996, 1998, 2006, and 2010, with the 5th one underway.

The MAC Protocol in this regard stipulates that amendments to the Annexes are principally tied to revision of the Harmonised System, with the possibility of holding a meeting when the circumstances require it. Thus, since the HS is revised approximately every five years, the meeting is expected to occur at the same interval. At the CGE1, this interval was considered to be sufficient, but it is up to the sectorial needs of the MAC industries, rather than a matter that can be generalized in contrast to other international agreements.

C. How to Validate the Updated List of Scope-Defining items: ‘Tacit Amendment’ Procedure put forth in the MAC Protocol

After the creation of a new list of scope-defining items, the next step is to implement the list. Thus, consideration must be made as to how such amendments are validated. Once an update of the list is completed, if implementation of the new list must go through the lengthy procedure of formal amendment, the MAC Protocol might risk stagnation. Draft Article XXXII (currently Article XXXIII) put forward at the CGE1 empowered the Depositary to effectuate amendments based on the reports of the Depositary and the Supervisory Authority. A procedure where a treaty provides for a regime in which an international body or conference of the parties make amendments that automatically take effect without further action by the parties is called a ‘tacit amendment’ or ‘tacit acceptance’ procedure.⁴⁹ The preliminary draft presented at the CGE1 stated that amendment would automatically come into force either at a specified date (paragraph 5 amendment, see Part III(C) above); or six months after notification to the Contracting States, unless the majority of the Contracting States objected within 3 months (paragraph 4 amendment, see Part III(C) above), depending on the amendment procedure. The procedure enables the Annexes to be brought up to date promptly, rather than having to go through the difficulty of traditional treaty amendment procedure. However, this procedure generated some concern among the States, which sought greater involvement of the Contracting States into the decision-making process as it regards the important issue of scope delimitation of the Protocol.⁵⁰

The result, after the CGE1, was an innovative procedure of pairing two different forms of tacit amendment process in one treaty, but ensuring State participation at the same time. The procedure ensures that Contracting States have an opportunity to make objections, but still, the procedure is tacit, since the new Annexes will automatically come into force for those Contracting States which have not objected. As part of the paragraph 4 amendment procedure, Contracting States can actively seek to opt-out from the relevant amendment and if a certain number of Contracting States do not agree with the amendment, the amendment may not be adopted altogether (hereinafter this type of amendment will be called the ‘opt-out procedure’⁵¹). As for the paragraph 5 amendment procedure, it is tacit in a more forceful way, since if the number of countries objecting at the meeting of Contracting States were less than one third of the countries participating, these countries would still be bound

⁴⁹ Lei Shi, ‘Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law’ (1999) 11.2 *University of San Francisco Maritime Law Journal* 299; Doris Köning, ‘Tacit Consent/Opting Out Procedure’, *Max Planck Encyclopedia of Public International Law IX* (2012) 730-731; Oona A. Hathaway, Haley Nix Saurabh Sanghvi, and Sara Solow, ‘Tacit Amendments’, <<https://law.yale.edu/system/files/documents/pdf/cglc/TacitAmendments.pdf>> accessed 11 November 2017.

⁵⁰ UNIDROIT, *Study 72K – CGE1 – Report* (MAC Protocol, Committee of Governmental Experts, First Session, Report, 2017), para 136, 15.

⁵¹ The name, ‘opt-out amendment’ or ‘opt-out procedure’ is commonly used. See for example, Köning (n 49).

by the amendment, regardless of the objection they make at the Conference. Since it is binding to all parties, hereinafter this procedure will be called the ‘binding procedure’⁵².

Designing such tacit amendment means striking a balance between efficiency and sufficient deliberation of amendments. The preliminary draft at the CGE1 was leaning towards respecting efficiency. A justification of such a procedure would be that the Contracting States are accepting the system/structure of the MAC Protocol with its amendment process as a whole, *in advance*. However, considering that such change in scope is a substantive issue, the subsequent draft balanced efficiency and deliberation, offering the Contracting States an opportunity to make explicit decisions in each individual case as to which HS codes (and thus equipment) should be included as part of the Protocol, while also making sure that the special process assures efficiency by requiring the Contracting States to actually make positive actions (instead of passively not accepting the changes) within a limited timeframe.

(i) ‘*Tacit amendment*’ in other treaties

The procedure of tacit amendment has been in use for a long time, especially in relation to the International Maritime Organization (IMO). Within the framework of the IMO, the International Convention for the Prevention of Pollution from Ships (MARPOL) and the International Convention for the Safety of Life at Sea (SOLAS) were the first instruments to use this procedure. Nowadays, tacit amendment is incorporated into most of the IMO’s technical conventions. It facilitates quick modification of the conventions to keep pace with changes in technology and techniques in the shipping industry.

The IMO states:

Instead of requiring that an amendment shall enter into force after being accepted by, for example, two thirds of the Parties, the “tacit acceptance” procedure provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of Parties. (...)

As was expected the “tacit acceptance” procedure has greatly speeded up the amendment process. Amendments enter into force within 18 to 24 months, generally. Compared to this, none of the amendments adopted to the 1960 SOLAS Convention between 1966 and 1973 received sufficient acceptances to satisfy the requirements for entry into force.⁵³

The success of tacit amendment is rooted in its speedy operation and the fact that the date when the amendment comes into effect is clearly set. This enables the amendments to become effective without having to wait for individual Contracting States to accept, as is the case for the normal amendment procedure. This simplified process of amendment has spread in the field of many environmental treaties as well,⁵⁴ and has become a ‘common mode of international standard-setting’⁵⁵

In the context of this paper, which is to analyse the amendment procedure of the MAC Protocol, it is both unnecessary and unfeasible to analyse all of the existing mechanisms of tacit amendment in international agreements. However, to compare the procedure put in place by the MAC Protocol,

⁵² This naming comes from Hathaway, Saurabh Sanghvi, and Solow (n 49).

⁵³ International Maritime Organization, ‘Introduction: Adopting a Convention, Entry into force, Accession, Amendment, Enforcement, Tacit Acceptance Procedure’ <<http://www.imo.org/en/About/Conventions/Pages/Home.aspx>> accessed 11 November 2017.

⁵⁴ Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives [e-reader version]* (Edward Elgar Publishing 2017) Chapter 3, 135.

⁵⁵ Köning (n 49) 726.

it is convenient to see examples of the practices that have been adopted so far.

Binding Procedure

A well-known example of a binding procedure is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol). This Protocol states that if the Conference of the parties fails to reach a consensus on decision on reductions of production and consumption of ozone depleting substances, the two-thirds majority rule applies, with the effect of binding all the parties without the possibility of opting-out.⁵⁶ This unique procedure was put in place ‘to respond quickly to new scientific information and agree to accelerate the reductions required on chemicals already covered by the Protocol.’⁵⁷

Another example of such binding procedure is the HNS Convention, which provides for a special procedure for amending the limitation of liability (for the owner of the ship (Article 9) and for the limitation on the HNS Fund (Article 14(5)). Amendments are submitted to the Legal Committee of the Organization (the Legal Committee) for consideration (Article 48(3)) and are adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee (Article 48(5)). All Contracting States are notified of any adopted amendment. The amendments are deemed to have been accepted at the end of a period of 18 months after the date of notification, unless within that period no less than one-fourth of the Contracting States have communicated to the secretary-general of IMO that they do not accept the amendment, in which case the amendment will have no effect (Article 48(8)). The procedure will have effect on States which have objected (unless their number reaches the one-fourth threshold, nullifying the amendment). Because the result could be severe for States, there are limitations to enabling this procedure. First, amendments cannot be considered unless five years have passed since the previous amendment (Article 48(7)(a)). Second, the limitation cannot be ‘increased by six per cent per year calculated on a compound basis from the date on which this Protocol was opened for signature’ (Article 48(7)(b)). Third, ‘No limit may be increased so as to exceed an amount which corresponds to a limit laid down in this Protocol multiplied by three’ (Article 48(7)(c)). Also, for the States to decide on any possible amendments, there must be six months between a proposal for an amendment and the corresponding Legal Committee. In addition, 18 months have to pass after the adoption of the proposal in order for it to become effective (Article 48(3), (8), and (9)).

It is also worth noting that although, in theory, there is a difference between the decision-making process concerning the updated list of scope-defining items and such list’s validation process, the binding procedure integrates these two processes, since only a majority vote is needed to validate the amendment. Thus, concerns arise as to the legal justification of such process in the context of the

⁵⁶ Article 2 (9) stipulates as follows.

- (a) Based on the assessments made pursuant to Article 6, the Parties may decide whether:
 - (i) Adjustments to the ozone depleting potentials specified in Annex A, Annex B, Annex C and/or Annex E should be made and, if so, what the adjustments should be;
 - (ii) Adjustments to the global warming potentials specified in Group I of Annex A, Annex C and Annex F should be made and, if so, what the adjustments should be; and
 - (iii) Further adjustments and reductions of production or consumption of the controlled substances should be undertaken and, if so, what the scope, amount and timing of any such adjustments and reductions should be;
- (b) Proposals for such adjustments shall be communicated to the Parties by the Secretariat at least six months before the meeting of the Parties at which they are proposed for adoption;
- (c) In taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, such decisions shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting representing a majority of the Parties operating under Paragraph 1 of Article 5 present and voting and a majority of the Parties not so operating present and voting.

⁵⁷ Ozone Secretariat, ‘The Montreal Protocol on Substances that Deplete the Ozone Layer’ <<http://ozone.unep.org/en/treaties-and-decisions/montreal-protocol-substances-deplete-ozone-layer>> accessed 11 November 2017.

traditional treaty concept of consensualism: 'the practice of adoption of treaty amendments on the basis of majority voting binding all States parties without a further act of validation risks dispensing with State consent altogether'.⁵⁸

Opt-out Procedure

There are many examples of an opt-out procedure in international agreements. One such example is within the framework of the International Civil Aviation Organization (ICAO). The Council of the ICAO (Council consists of representatives of 36 Member States) has the competence to adopt international aviation standards by a two-thirds majority vote (Convention on International Civil Aviation (Chicago Convention) (1944), Articles 54(l) and 90(a)). Once an amendment is adopted, States that are non-members of the Council are given an opportunity to object: if within three months after the adoption of an amendment the majority of States register their objection (Article 90(a)), such amendment becomes ineffective. After the amendment becomes effective, it is also possible to opt-out by notifying the ICAO (Article 38).

Many of the conventions of the IMO have incorporated the opt-out system (for example, the International Convention for the Safety of Life at Sea (SOLAS) and the Convention on Facilitation of International Maritime Traffic). Opt-out systems in these conventions are intended to change certain technical parts of the conventions contained in the relevant annexes. Each opt-out system is slightly different from the others, but common elements exist.⁵⁹ There is a committee in charge of amendments, which adopts each amendment by a two-thirds majority. After adoption of an amendment, the amendment comes into effect after a certain period, but there is a possibility of amendment becoming ineffective, based on negative quorum technique (usually one-third). There is also the option for an individual opt-out procedure if the quorum is not attained. Taking example of the SOLAS Convention (the amendment process is set out in Article VIII), there is the Maritime Safety Committee (MSC) in charge of amendments. Notifications of proposals to make amendments must be made at least 6 months prior to the MSC (Article VIII(b)(i)). The vote is two-thirds majority (Article VIII(b)(iv)). Once an amendment has been adopted, States are deemed to have accepted it after two years unless another time period has been agreed at the MSC by two-thirds majority (which must be longer than one year – see Article VIII(b)(vi)). The amendment comes into force for States which have accepted after 6 months of the date it is deemed to have been accepted (Article VIII(b)(vii)).

(ii) *Tacit amendment procedure in MAC Protocol*

What can we say about the MAC Protocol in comparison with these examples of tacit amendments? As simplified amendments are there to facilitate the changes to adapt to the fast changing world, this necessity is also the reason for having a simplified amendment procedure for the MAC Protocol. We can safely conclude that having such a simplified amendment procedure is consistent with international practice.

From the brief observations of the other instruments, we identify the following characteristics of a tacit amendment procedure. First, there must be an explicit provision stating the organ (treaty body) to adopt the change with certain voting majorities. Second, all States are bound by this change, unless treaty provisions state that States could opt-out. The MAC Protocol is equipped with both of these elements: having the meeting of the Contracting States and the explicit provisions explaining when and how States are bound under Article XXXIII.

⁵⁸ Pergantis (n 54) 143-145.

⁵⁹ Shi (n 49) 307; Köning (n 49) 726; Pergantis (n 54) 135.

Tacit amendment is generally limited to technical or administrative matters such as regulatory implementation.⁶⁰ However, this procedure is also used as a tool for changing restrictions of liability, such as in the HNS Convention, which is a substantive matter – one that changes the obligations of each State. The MAC Protocol incorporates tacit amendment mechanisms of both types. For the paragraph 4 amendment procedure relating to substantive matters (since this amendment changes the material scope of the Protocol), the possibility for the States to opt-out of the amendment and to maintain the *status quo* is provided for. For the paragraph 5 amendment procedure relating to a technical matter without any effect on the scope of the MAC Protocol, there is no way for the States to opt out, and thus the procedure is binding. We can note that it is both rational and desirable that such a binding procedure is limited to technical changes, which do not affect the obligations of the Contracting States in any way, and is thus less contradictory to the consensual paradigm of treaties.

Since such tacit amendment is a special amendment process distinct from the normal procedure for amending treaties, the obvious remark to make is that the scope of such special amendment procedure must be clearly expressed: an example of having such concrete and substantial criteria is the HNS Convention. In the case of the MAC Protocol, the draft after the CGE1 integrated the necessary requirements, but whether the draft is sufficient must be considered in the context of whether the rules provided for are explicit enough to justify that the Contracting States by ratification, acceptance, approval of, or accession to the Protocol, have consented to initiation of the procedures of tacit amendment, with knowledge of when exactly this procedure will be invoked.⁶¹ Keeping in mind the treaty practices observed here, this issue will be discussed below (see (d) (i)(ii) below).

D. Problems to be Considered in the Amendment Procedure

The innovative procedure of amendment has made it possible to update the MAC Protocol in a timely fashion, but the following questions may be taken for further consideration.

(i) Substantive Requirement or Procedural Requirement?

Article XXXIII, after the CGE1, is structured in a way that criteria for paragraph 4 amendments ('amendments to the Annexes that reflect changes to the Harmonised System that have affected the Harmonised System codes listed in the Annexes' or 'the inclusion of any additional codes covering uniquely identifiable high value mobile equipment of a type that is used in the agricultural, mining or construction sector that may warrant inclusion of such equipment in the Annexes') and for paragraph 5 amendments ('any amendments to the Annexes that reflect changes to the Harmonised System that have affected the Harmonised System codes listed in the Annexes without changing the scope of the Annexes') are substantial, rather than procedural. Paragraph 4 is interesting in that it explicitly states what we have conveyed in the paper: that is, HS codes are chosen by following the CTC guiding criteria (high-value, mobility, unique identifiability). It is also interesting in that, since both paragraphs 4 and 5 require the Depositary to make a substantive decision according to the standards set forth by the article, there is a departure from the preliminary draft proposed at the CGE1,

⁶⁰ At the CGE1, one State proposed listing the HS codes in the Regulation of the MAC Protocol and not the Protocol itself. Apart from the desirability of such structure of the Protocol, this would have clarified the position that the Depositary, administrative agency has exercised its regulatory authority when amending the HS codes (UNIDROIT, *Study 72K – CGE1 – Report* (MAC Protocol, Committee of Governmental Experts, First Session, Report, 2017), para 135, 15).

⁶¹ Pergantis (see n 54 143-145) points out the following:

In order to remain in the treaty making framework, at least two requirements should be fulfilled. First, there should be an enabling clause, that is a clause laying down the power of the designated body to adopt measures on the relevant topic. Second, the clause should clearly provide for the binding nature of the adopted text.

whereby merely a procedural justification of the Depositary judging the necessity of amendment was required. Considering the fact that the decision on whether there has actually been a change in the material scope of the MAC Protocol could be a delicate one (see (ii) below), it may cause the Depositary to be accused of having violated the MAC Protocol by choosing the wrong procedure. Thus, the better structure may be to simply stipulate in the article that the Depositary acts correctly if it follows the procedure indicated in the provision, without having to be empowered with making substantive decisions pursuant to the substantive criteria.

(ii) *Distinction of Paragraph 4 Amendment Procedure and Paragraph 5 Amendment Procedure*

Distinction between paragraph 4 amendment and paragraph 5 amendment rests on whether there is a change of scope. However, a question may arise as to whether it is clear-cut if a change in HS codes is a scope-changing amendment or not. For example, when there is a new HS code that needs to be added to the Annexes, in some cases it may be difficult to assess whether this is purely an addition of a new code (and thus application of paragraph 4 amendment is called for), or whether the equipment falling under the new code was previously included in another code but this code was subsequently split, having been assigned a new code (and thus application of paragraph 5 amendment is required). It is crucial to draw a clear differentiation between the two amendment procedures, since justification of admitting such a strong binding effect for paragraph 5 amendment without causing domestic law issues is that it is limited to technical changes (a similar practice used in other treaties).

As mentioned before (see Part IV(Q) above), changes occurring to headings and sub-headings may be contentious as there are two possible changes. First, all equipment is originally included in the code but the heading or sub-heading is changed, to reflect an increase or decrease in trade volume. Second, a change in heading or sub-heading is due to a change in scope of the code (either adding new equipment, thus widening the scope, or subtracting certain equipment, thus limiting the scope). The former would be a technical change, as it has no effect on the scope of the Protocol. The amendment procedure that the latter change falls into will reflect the underlying policy of whether the codes listed in the Annexes are the defining factors of the scope or if it is the equipment covered by the codes that is the defining factor.

Considering the above situation, a question may arise as to whether it is necessary to provide for a rule stating that, at the Conference convened by Depositary, the participating States may deliberate on which amendment process a certain amendment falls under. The problem would be complex since it would also mean that voting rules for such process must be put in place.

(iii) *Problem of rejecting paragraph 5 amendment procedure: Cause of Out-of-Date List for no rational reason?*

Another problem is that, because the current structure of Article XXXIII allows Contracting States to reject the changes to the Harmonised System and retain old codes, over time, the Annexes will start to contain codes that are no longer in use. It is plausible that the codes in the Annexes will become alienated from the Harmonised System in force at any given date. This is especially irrational for the paragraph 5 amendment procedure where changes are of a technical nature. Thus if a change is rejected, it will only mean that an Annex update has been rejected, when in fact, the equipment covered has not changed at all. This will cause difficulties for Contracting States and private parties utilising the MAC Protocol to determine whether certain equipment is covered under the Protocol. The problem is substantial when we consider the fact that the purpose of utilising the Harmonised System was to adopt a clear-cut and internationally accepted system for determining the scope of the Protocol and that stagnation of the list will defeat the purpose. To prevent such outcome, instead of

the current paragraph 5 amendment procedure, it is worth considering having in place a mechanism where the Depositary takes the initiative to automatically update the list but the Contracting States are empowered to make objections, so as to let the paragraph 4 amendment procedure commence when a certain percentage of Contracting States objects.

(iv) *Problem of Opt-Out Procedure, the Paragraph 4 Amendment Procedure: Cause of Mosaic Application?*

The opt-out procedure is attractive in a way that, from the domestic law perspective, it will not cause any problems of having to accept changes that the States do not approve. However, the sustainability of such a system may be questioned, when we consider the potential of enabling a mosaic-like scope of the MAC Protocol, where different States have opted-out from applying different codes. Although we must keep in mind that the very fact that States must act in order to opt-out is in itself a considerable pressure for the States, the problem of possibly having diverse application of the MAC Protocol is magnified due to the fact that such opting-out will be decided on a code-by-code basis (Article XXXIII(4)).

Following the drafting structure of the MAC Protocol, if a State opts-out of an amendment of a certain code, the old version existing before the amendment will be applied in this State. Thus the categories of eligible equipment covered by the MAC Protocol will be determined in accordance with the code before this amendment. It will be left to the financiers to figure out what was covered by the old HS code in order to make sure that certain equipment is covered under the Protocol and that it is financeable. The expected procedure could be as follows. The financiers will check and see the Annexes to find whether certain equipment is covered. Depending on whether there has been an amendment to the relevant code in the relevant Annex, they will have to make sure that the debtor's country has not opted-out of such amendment. If the debtor's country has opted-out, the financier will refer back to the old HS code and figure out if the equipment was covered under the old code. This means that the financiers must understand the complex applicability of the MAC Protocol in order to make certain that equipment is financeable.

In this regard, though not as substantive as the other matters, such as design of the Protocol, the question of how amendments are addressed still stands. Considering user-friendliness of the MAC Protocol,⁶² questions that need to be answered would include the following. How should the changes be implemented? How could one determine whether a country has opted-out? Would Annexes be rewritten to represent the latest version or should new Annexes be added each time the changes are introduced?

In conclusion, due to the particularities of the scope-delimiting formula adopted for the draft MAC Protocol, the establishment of an amendment procedure is a necessity. This procedure must be suited to the diversity of possible changes and their potential scope-modifying impact. Likewise, it should be easy to apply in a consistent manner, avoiding interpretation uncertainties, arduous procedural requirements, and excessive burden on the Depositary to manage amendments. Finally, provided that sufficient State control is ensured, outcomes from the amendment procedures should provide a consistent, predictable, and uniform application of the Protocol, mitigating to the maximum extent the undesired mosaic-like effect. All these considerations might be pondered in the drafting, the construction, and the application of the amendment provisions.

⁶² As an example, the Energy Charter Secretariat has made a comparison chart, which is separate from the text of the ECT, of application before and after the amendment. See Energy Charter Secretariat, 'Correspondence Table' <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/Correspondence_table_-_HS_nomenclature.pdf> accessed 11 November 2017.