



**MAC Protocol  
Study Group  
4<sup>th</sup> meeting  
Rome, 7-9 March 2016**

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**Sixth preliminary annotated draft of a fourth Protocol to the Cape Town  
Convention on International Interests in Mobile Equipment on Matters specific to  
agricultural, construction and mining equipment (MAC Protocol)**

(Prepared by the UNIDROIT Secretariat)

<i>Summary</i>	Document providing annotated draft Protocol.
<i>Action to be taken</i>	For discussion.
<i>Related documents</i>	<i>UNIDROIT 2014 – 72K – SG1 – Doc. 3</i> <i>UNIDROIT 2015 – 72K – SG2 – Doc. 5</i> <i>UNIDROIT 2015 – 72K – SG2 – Doc. 7</i> <i>UNIDROIT 2015 – 72K – SG3 – Doc. 3</i> <i>UNIDROIT 2016 – 72K – SG4 – Doc. 3</i>

## **Introduction**

This document provides a sixth version of the preliminary annotated draft MAC Protocol, as refined by the Study Group over its four sessions in December 2014, April 2015, October 2015 and March 2016. The draft has been prepared for consideration by the Governing Council at its 75<sup>th</sup> session in May 2016.

The annotations provide additional analysis and explanation of the provisions, in particular focusing on conclusions made by the Study Group during their four sessions.

Where an article has substantively diverged from existing practice in previous Protocols to the Cape Town Convention, the divergent provisions are *italicised*.

As provided in the Report to the fourth Study Group session (*UNIDROIT 2016 – 72K – SG4 – Doc. 5*, paragraph 160) the Study Group concluded that this sixth annotated draft MAC Protocol was sufficiently developed to warrant consideration by a Committee of Governmental Experts.

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**PRELIMINARY DRAFT PROTOCOL TO THE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AGRICULTURAL, CONSTRUCTION AND MINING EQUIPMENT<sup>1</sup>**

THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING it necessary to implement the UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the Convention), as it relates to<sup>2</sup> *agricultural, construction and mining equipment*, in the light of the purposes set out in the preamble to the Convention,

AWARE of the benefits of extending the Convention to other categories of high value and mobile equipment,

*RECOGNISING the important role that agricultural, construction and mining equipment play in the global economy and in particular for developing countries,*<sup>3</sup>

MINDFUL of the need to adapt the Convention to meet the particular requirements of agriculture, construction and mining equipment and their finance,

HAVE AGREED upon the following provisions relating to agriculture, construction and mining equipment:

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<sup>1</sup> This suggested text for the preamble is taken from the almost uniform text used in the Aircraft Protocol and the Luxembourg Rail Protocol. In the second paragraph, the Railway Protocol shortens the phrase inside the parenthesis to '(the "Convention")', however the Space Protocol subsequently readopted the original phrasing in the Aircraft Protocol '(hereinafter referred to as the *Convention*)'. It is unclear as to why the text in the Rail Protocol diverged in this respect. The Space Protocol contains a significantly longer preamble than the Air and Rail Protocols:

*AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner, RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them, MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally, DESIRING to provide broad and mutual economic benefits for all interested parties, BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions, CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection, TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,*

While the Official Commentary provides very little additional information on why this longer preamble was adopted, it was noted at the second MAC Protocol Study Group meeting that the longer preamble in the Space Protocol was in part due to the involvement of the United Nations Committee on the Peaceful Use of Space, who favoured a longer preamble as consistent with most UN instruments.

<sup>2</sup> At the third Study Group meeting in October 2015 it was discussed whether the wording of the Preamble should be changed so that the Protocol 'applied to' rather than 'related to' agricultural, construction and mining equipment. Ultimately, it was decided to retain the wording 'relates to' to retain consistency with the previous three Protocols.

<sup>3</sup> At the second Study Group meeting in April 2015 it was decided that limited additional wording should be added to the preamble. At the third meeting various wording was discussed, including 'emerging economies', 'developing countries' and 'emerging markets'. The Study Group noted that the terminology should be consistent with that used in the most recent United Nations instruments. Following further analysis of United Nations documents in February 2016, the fourth Study Group meeting in March 2016 decided to use the term 'developing countries'.

**CHAPTER I**  
**SPHERE OF APPLICATION AND GENERAL PROVISIONS**

**Article I**  
Defined terms<sup>4</sup>

1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.
  
2. In this Protocol the following terms are employed with the meanings set out below:
  - (a) *"agricultural equipment"<sup>5</sup> means an object that falls under a Harmonized System code listed in Annex 1 to the Protocol;<sup>6</sup>*
  - (b) *"construction equipment" means an object that falls under a Harmonized System code listed in Annex 2 to the Protocol;*
  - (c) *"guarantee contract" means a contract entered into by a person as guarantor;*
  - (d) *"guarantor" means a person, who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;*
  - (e) *"Harmonized System" means the Harmonized Commodity Description and Coding System governed by The International Convention on the Harmonized Commodity Description and Coding System;<sup>7</sup>*
  - (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;<sup>8</sup>*

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<sup>4</sup> This article is consistent with all previous Protocols, except for subparagraphs 2(a), (b), (e), (f) and (h) which provide new definitions for the MAC Protocol.

<sup>5</sup> At its fourth meeting the Study Group decided that the meaning of 'agriculture' for the preliminary draft Protocol should be consistent with the Food and Agriculture Organization of the United Nations (FAO) definition, which includes forestry and fisheries (to the extent that fisheries covers aquaculture equipment).

<sup>6</sup> It was decided at the first Study Group meeting that the types of agricultural, construction and mining equipment covered by the Protocol should be defined with reference to the list of Harmonised System codes contained in the three Annexes to the Protocol (Annex 1 containing Harmonised System codes for agricultural equipment, Annex 2 for construction equipment and Annex 3 for mining equipment). This approach was reaffirmed at the second Study Group meeting. At the fourth Study Group meeting it was discussed whether the definition should be expanded to provide more details, as consistent with the approach in the Aircraft Protocol. It was decided that further information was required as to whether there would be value in the definition of agricultural, construction and mining equipment being expanded to cover 'data, manuals and records relating thereto'.

<sup>7</sup> This definition was added to the sixth annotated draft Protocol, following the decision at the fourth Study Group meeting that a definition for "Harmonized System" should be added to the Protocol. It was decided that the definition should not be reference to a specific revision of the Harmonized System (for example, the 2016 edition), rather the Official Commentary should provide that it is a reference to the most recent revision produced by the World Customs Organisation as currently in force. The revisions are released at least 12 months before entering into force, which would give the Depositary and Supervisory Authority sufficient time to make any adaptations to the Annexes to the Protocol to ensure consistency with updates to the Harmonized System (see the 'review conferences, amendments and related matters' article for more information).

<sup>8</sup> This definition was inserted in the fifth annotated draft Protocol following the insertion of the article governing 'association with immovable property'. The article does not provide a substantive legal definition of 'immovable-associated equipment', it simply refers to law of the domestic country in which the equipment is situated to determine whether an interest related to immovable property law is created. Similarly, it does not distinguish between different types of immovable property-related interests under the domestic law (i.e. does not distinguish between fixtures and accessories).

- (g) “insolvency-related event” means:
- (i) the commencement of the insolvency proceedings; or
  - (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;
- (h) “*mining equipment*” means an object that falls under a Harmonized System code listed in Annex 3 to the Protocol;
- (i) “primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor’s main interests is situated, which for this purpose shall be deemed to be the place of the debtor’s statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise.

## Article II

### Application of the Convention as regards to agricultural, construction and mining equipment<sup>9</sup>

1. *The Convention shall apply in relation to agricultural, construction and mining equipment as provided by the terms of this Protocol and Annexes 1, 2 and 3.*
2. The Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to agricultural, construction and mining equipment.
3. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will limit the application of the Protocol to one or two of the Annexes.*<sup>10</sup>
4. *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 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.*<sup>11</sup>

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<sup>9</sup> Paragraphs 1 and 2 of Article II are consistent in language and approach to Article II in all three previous Protocols, noting that paragraph 1 also provides a references to the Annexes to the Protocol.

<sup>10</sup> Paragraph 3 is a completely new provision that is not contained in any of the previous Protocols. It allows Contracting States to ‘opt out’ for the application of the Protocol to each annex to the Protocol, and as such opt out of application to the category of equipment (agricultural, construction or mining) covered by the relevant annex. As an ‘opt out’ provision, in ratifying the Protocol a State will be automatically applying it to all three categories of equipment, unless a specific declaration is made in relation to this article. In the first draft Protocol, the provision was contained in a separate article, which was removed after relocating this provision to Article II. The current drafting was adopted at the second Study Group meeting. The second draft read: *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that the Protocol does not apply to one or more categories of equipment, being agriculture, construction or mining equipment, as listed in the Annexes to the Protocol.*

<sup>11</sup> This is a newly drafted article based on the decision at the third Study Group meeting to completely carve out the scopes of the previous Protocols from the scope of the MAC Protocol, for the sake of clarity and legal certainty. In the fifth Annotated Draft Protocol this provision was a standalone Article in Chapter V of the Protocol, however at the fourth Study Group meeting it was decided to move it to Article II. This provision, inserted into the six annotated draft Protocol, is modelled on Article II(3) of the Space Protocol, which dis-applies the Space Protocol to objects falling under the definition of “aircraft objects” under the Aircraft Protocol.

**Article III**  
Derogation<sup>12</sup>

The parties may, by agreement in writing, exclude the application of Article X<sup>13</sup> and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article VIII<sup>14</sup> (3) – (4).

**Article IV**  
Representative capacities<sup>15</sup>

A person may, in relation to agricultural, construction or mining equipment, enter into an agreement, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention in an agency, trust or representative capacity.

**Article V**  
Identification of agricultural, construction or mining equipment<sup>16</sup>

1. For the purposes of Article 7(c) of the Convention and Article XIX<sup>17</sup> of this Protocol, a description of the agricultural, construction or mining equipment is sufficient to identify the agricultural, construction or mining equipment if it contains:<sup>18</sup>

- (a) a description of the agricultural, construction or mining equipment by item;
- (b) a description of the agricultural, construction or mining equipment by type;
- (c) a statement that the agreement covers all present and future agricultural, construction or mining equipment; or
- (d) a statement that the agreement covers all present and future agricultural, construction or mining equipment except for specified items or types.

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<sup>12</sup> This article allows parties to an agreement to expressly derogate from the articles governing insolvency remedies and certain aspects of the default remedies provision. This drafting is consistent with Article IV(3) of the Aircraft Protocol, Article III of the Luxembourg Rail Protocol and Article XVI of the Space Protocol.

<sup>13</sup> 'Remedies on insolvency'.

<sup>14</sup> 'Modification of default remedies provisions'.

<sup>15</sup> This drafting is consistent with the Article VI of the Aircraft and Space Protocols and Article IV of the Rail Protocol.

<sup>16</sup> At the first Study Group meeting, it was decided to follow the description-based approach in Article V of the Rail Protocol. Article V of the Rail Protocol allows any method of description, which enables railway stock to be identified to the agreement creating or providing for the international interest, whether the description is by item, by type or by a statement that the agreement covers all present and future railway rolling stock. This description-based approach to identification partially overrides Article 2(2) of the Convention that requires that an object be uniquely identifiable. In following the Rail Protocol approach, Article V distinguishes the identification requirements for the constitution of an agreement from the more stringent requirements required for registration under Article XV. This more flexible approach will allow a security interest to be created over a fleet of new MAC equipment without the need for a new agreement every time an additional item under the agreement is acquired.

<sup>17</sup> 'Waivers of sovereign immunity'.

<sup>18</sup> At the fourth Study Group meeting it was discussed whether subparagraphs (1)(a),(b) and (c) would allow agricultural, construction and mining equipment described as 'agricultural equipment', 'construction equipment' or 'mining equipment', or a reference to equipment falling under a certain HS code should be sufficient to meet the criteria of this article and thus the formal requirements under Article 7(c) of the Cape Town Convention. No concrete position was reached on the matter.

2. For the purposes of Article 7 of the Convention, an interest in future<sup>19</sup> agricultural, construction and mining equipment identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the agricultural, construction or mining equipment, without the need for any new act of transfer.

### **Article VI**

#### Choice of law<sup>20</sup>

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXVI(1)<sup>21</sup>.
2. The parties to an agreement or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.
3. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

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<sup>19</sup> At the third Study Group meeting Professor de las Heras Ballel (member of the Study Group) queried whether the use of term 'future' should be revised at the third Study Group meeting. She noted that the case that paragraph 2 is describing is not referring to real future equipment since equipment may or may not exist before the perfection of the interest. The use of the term 'future' is consistent with its use in Article V(2) of the Luxembourg Rail Protocol.

<sup>20</sup> This article, which applies only where a Contracting State has made a declaration to that effect, allows the parties to an agreement, or a related guarantee contractor subordination agreement to choose a law governing their relations *inter se* (between themselves). The drafting of this article is consistent with the Choice of Law Provisions in Articles VIII in the Aircraft Protocol and Article VI in the Rail Protocol. Article VIII of the Space Protocols instead reverses the onus of the provision, making it opt out rather than opt in (i.e. under the Space Protocol, the article applies unless expressly excluded in a Declaration made by a Contracting State).

<sup>21</sup> Declarations relating to certain provisions.

## Article VII

### Association with immovable property<sup>22</sup>

1. *This Protocol does not affect the application of any domestic laws that determine whether an international interest in immovable-associated equipment<sup>23</sup> ceases to exist,<sup>24</sup> is subordinated to any other rights or interests in the immovable-associated equipment<sup>25</sup> or is otherwise affected by the association of the equipment with immovable property, where the immovable-associated equipment is situated in a non-Contracting State.<sup>26</sup>*
  
2. *A Contracting State, shall,<sup>27</sup> at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that the entirety of Alternative A, B, or C of this Article is to be applied in relation to an international interest in<sup>28</sup>immovable-associated equipment which is situated in the Contracting State.<sup>29</sup>*

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<sup>22</sup> This is a new article not contained in any previous Protocol to the Cape Town Convention. No guidance can be drawn from the three previous protocols to the Cape Town Convention, as aircraft objects, railway rolling stock and space assets are not affixable to immovable property. The article is required because certain jurisdictions allow the extension of domestic immovable property interests to equipment used in relation to the immovable property, even where there is no physical attachment of the mobile equipment to the immovable. This article was added to the fifth annotated draft Protocol, following consideration of the issues at the first three Study Group meetings and two out-of-session teleconferences. During the fourth Study Group meeting it was also discussed whether this article should contain an additional paragraph modelled on Article XXV(6) of the Luxembourg Rail Protocol, which provides: *in making a declaration under this Article, Contracting States shall take into consideration the protection of the interests of creditors and the effect of the declaration on availability of credit*. Ultimately, it was decided that such a provision was not necessary.

<sup>23</sup> 'Immovable-associated equipment' is defined in Article 1(2), which provides '*immovable-associated equipment' means agricultural, construction or mining equipment that becomes so associated with immovable property that an interest in the immovable property extends to the equipment under the law of the state in which the immovable property is situated.*

<sup>24</sup> The Study Group considered whether this provision should also provide that the domestic law of non-Contracting States also governed whether an international interest in the immovable-associated equipment 'could be constituted'. Article VII of the Cape Town Convention provides that a chargor, conditional seller or lessor must have the power to dispose of the object that is the subject of the international interest in order for the interest to be constituted. Ultimately, no agreement was reached on the matter and the additional language was not inserted.

<sup>25</sup> The intent of this rule is to defer to domestic law to determine the priority of the international interest as against both consensual and non-consensual interests. The language 'rights or interests' is used here for consistency with Article 39 of the Cape Town Convention.

<sup>26</sup> During the second fixtures teleconference in February 2016 the Study Group discussed what would occur in relation to international interests in MAC equipment that became associated with immovable property in non-Contracting States. The prevailing view was that in the absence of an express provision stating otherwise, Article 29 of the Cape Town Convention could apply, and the international interest would take priority over any domestic interest arising out of the equipment's association with immovable property. As Article 29 was not drafted to contemplate an international interest conflicting with an interest arising out of association with immovable property, the Study Group concluded that it would be prudent to consider including a draft Provision providing that international interests in MAC equipment does not interfere with immovable property-related interests in non-Contracting States.

<sup>27</sup> It was decided at the first Study Group fixtures teleconference that the fixtures article should be a mandatory declaration. The benefit of making the fixtures article subject to a mandatory declaration is that it gives states some flexibility in relation to how they implement this aspect of the Protocol, while also requiring them to do so, as failure of a contracting state to make a mandatory declaration would result in the Depositary refusing to accept an instrument of ratification. The language of Paragraph 1 is based upon Article 54(2) of the Cape Town Convention, which requires contracting states to make a mandatory declaration in relation to whether a court's leave is required to exercise certain remedies under the Convention.

<sup>28</sup> Earlier drafts of the Protocol provided that the rules in this Article would apply where MAC equipment 'is, or becomes' immovable-associated equipment. This language aimed to clarify that the timing of the association between the object and the immovable property was irrelevant in determining how potential conflicts between international interests in the object and interests in the immovable property would be resolved. The Study Group subsequently decided that such language was not necessary, although further consideration needs to be given to the legal effect of each of the alternatives under the Article to determine how they would apply to an international interest constituted before and after affixation.

<sup>29</sup> At the fourth Study Group meeting it was decided that this article should be an exception to the status quo of how declarations are made under the Protocol, by allowing a declaration directly under Article VII rather than under Article XXVI (declarations relating to certain provisions).

**Alternative A** (*maintain priority of international interest*)<sup>30</sup>

3. *An international interest in agricultural, construction or mining equipment continues to exist and retains its priority as against any other rights or interests in the immovable-associated equipment and is not otherwise affected<sup>31</sup> by the association of the equipment with the immovable property, notwithstanding that the equipment is immovable-associated equipment.*

**Alternative B** (*distinction between different types of immovable-associated equipment*)<sup>32</sup>

3. *This Protocol does not affect the application of any domestic laws that determine whether an international interest in immovable-associated equipment ceases to exist,<sup>33</sup> is subordinated to any other rights or interests in the immovable-associated equipment or is otherwise affected by the association of the equipment with immovable property to the extent that the equipment loses its individual legal identity.*

4. *Where agricultural, construction or mining equipment subject to an international interest is immovable-associated equipment and to the extent that it has not lost its individual legal identity, an interest in the immovable property that extends to that equipment has priority over the registered international interest in the equipment only if the following conditions are fulfilled:*

- (a) *the interest in the immovable property has been registered in accordance with the requirements of domestic law prior to the time of registration of the international interest in the equipment under this Protocol and registration of the interest in the immovable property continues to be effective; and*
- (b) *the equipment became associated with the immovable property prior to the time of registration of the international interest in the equipment under this Protocol.*

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<sup>30</sup> Alternative A allows States to declare that an international interest in an object associated with immovable property will continue to exist and enjoy priority over domestic interests resulting from its association with immovable property, even where the domestic law would grant a priority interest in the equipment to the owner of the immovable property or a person that has taken a mortgage or similar encumbrance that extends to the equipment. Alternative A does not distinguish between different types of interests arising out of association with immovable property (i.e. 'fixtures' and 'accessories'). At the second teleconference it was discussed whether this Alternative should be framed using the language of Article 2 of the Model Leasing law. Ultimately it was decided that the current drafting provided a higher degree of certainty and clarity.

<sup>31</sup> The language in this provision provides that not only will an international interest retain priority as against domestic immovable property interests, but will remain unaffected by its association with immovable property. The intent of this rule is to ensure Contracting States cannot apply provisions of their domestic immovable property law which would make enforcement more cumbersome than what is available under the Cape Town Convention.

<sup>32</sup> Alternative B is based upon a German Ministry of Justice proposal presented at the first fixtures teleconference in December 2015. Alternative B distinguishes between different types of immovable-associated equipment, and in doing so it restricts the circumstances under which an international interest in an accessory will be de-prioritised as against an interest arising from its association with immovable property. The article distinguishes between the different types of interests by use of the additional criterion of 'loss of individual legal identity'. The article reverts to the national law of the location of the immovable to determine the circumstances under which the loss of individual legal identity occurs.

<sup>33</sup> The Study Group considered inserting additional wording into Alternatives B and C which provided that the Protocol did not affect the application of domestic laws that determine whether 'a chargor, conditional seller or lessor has the power to dispose in relation to immovable-associated equipment'. Ultimately, no agreement was reached on the matter and the additional language was not inserted. The Study Group noted that further consideration needed to be given as to how the cessation of the existence of an international interest would extinguish the debtor's power to dispose.

**Alternative C** (*apply domestic law to immovable-associated equipment*)<sup>34</sup>

3. This Protocol does not affect the application of any domestic laws that determine whether an international interest in immovable-associated equipment ceases to exist, is subordinated to any other rights or interests in the immovable-associated equipment or is otherwise affected by the association of the equipment with immovable property.

**CHAPTER II**  
**DEFAULT REMEDIES AND PRIORITIES**<sup>35</sup>

**Article VIII**  
Modification of default remedies provisions<sup>36</sup>

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter, procure the export and physical transfer of agricultural, construction or mining equipment from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to agricultural, construction or mining equipment. Any remedy given by the Convention in relation to agricultural, construction or mining equipment shall be exercised in a commercially reasonable manner.<sup>37</sup> A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

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<sup>34</sup> Alternative C subordinates an international interest in immovable-associated equipment to domestic law interests arising out of its association with immovable property, to the extent that the domestic law of the Contracting State in which the equipment is situated so provides.

<sup>35</sup> It was decided at the third Study Group meeting to omit ‘assignments’ from the Chapter title as the associated Chapter does not refer to assignments.

<sup>36</sup> This article is adapted from the text of Article VII of the Rail Protocol.

<sup>37</sup> At the first Study Group meeting, the appropriateness of the phrase ‘commercially reasonable manner’ was discussed in its application to the agricultural sector, which in some jurisdictions would be considered a civil rather than commercial sector. It was agreed to continue using the phrase, to keep it consistent with the terminology in the previous Protocols.

4. A chargee giving fourteen or more calendar days<sup>38</sup> prior written notice<sup>39</sup> of a proposed sale or lease to interested persons as provided by Article 8(4) of the Convention shall be deemed to satisfy the requirement of giving the “reasonable prior notice” specified therein. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

5. Subject to any applicable safety laws and regulations, a Contracting State shall ensure that the relevant administrative authorities expeditiously co-operate with and assist the creditor to the extent necessary for the exercise of the remedies specified in paragraph 1.<sup>40</sup>

6. A chargee proposing to procure the export of agricultural, construction or mining equipment under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed export to:

- (a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and
- (b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the export.

### **Article IX**

#### Modification of provisions regarding relief pending final determination<sup>41</sup>

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVI(2)<sup>42</sup> and to the extent stated in such declaration.

2. For the purposes of Article 13(1) of the Convention, “speedy”<sup>43</sup> in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

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<sup>38</sup> Paragraph 4 adopts the 14 calendar day written notice period adopted in the Rail and Space Protocols, rather than the 10 working days adopted in the Aircraft Protocol. This allows for greater certainty and to avoid the need to ascertain what are considered working days in the particular jurisdiction in which the remedy is to be exercised. The first Study Group meeting agreed with the adoption of the approach from the Rail Protocol.

<sup>39</sup> It was suggested at the second Study Group meeting that the Official Commentary should provide that the Protocol adopts the UNIDROIT Contract Principle definition of the term ‘notice’. Article 1.10 of the Contract Principles provide that ‘a notice is effective when it reaches the person to whom it is given.’ This approach reflects the ‘receipt principle’; notice is not effective unless and until it reaches the person to whom it is given. The principles also note that the parties are of course always free to expressly stipulate the application of the ‘dispatch principle’ to a contract, which provides that notice is given once it has been sent from one party to the other, regardless of whether it has been received.

<sup>40</sup> Paragraph 5 provides a general obligation on Contracting States to ensure that the relevant administrative authorities expeditiously assist a creditor exercise remedies under the Protocol. This is a departure from the Aircraft Protocol, which mandates a Contracting State to honour a request for de-registration and export if two conditions are satisfied. Given there may be various administrative authorities responsible for the regulation of MAC equipment, this general obligation seems appropriate for inclusion in the MAC Protocol. Research prepared by the National Law Centre for Inter-American Free Trade on domestic registration and titling regimes for MAC equipment confirmed that the Article VII(5) Rail Protocol approach was most appropriate.

<sup>41</sup> This article is identical to the drafting of Article VIII of the Rail Protocol, and broadly consistent with Article X in the Aircraft Protocol.

<sup>42</sup> Declarations relating to certain provisions.

<sup>43</sup> The second Study Group meeting discussed whether the Protocol should define the word ‘speedy’. It was noted that this could be a fraught issue and it could be very difficult to define ‘speedy’ precisely, as Parliaments in some countries do not have the power to bind the courts, in the context of how quickly they must provide relief. It was further noted that it was not mandatory for Contracting States to make a declaration in relation to specifying the time period for ‘speedy’ relief, however if they do choose to make a declaration, they must specify the time period. Ultimately, it was decided not to define speedy.

3. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):

“(e) if at any time the debtor and the creditor specifically agree, sale of the object and application of proceeds therefrom”,  
and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e)”.

4. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.

5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

6. With regard to the remedies in Article VIII(1)<sup>44</sup>:

- (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days<sup>45</sup> after the creditor notifies such authorities that the relief specified in Article 13 of the Convention<sup>46</sup> is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and
- (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

7. Paragraphs 2 and 6 shall not affect any applicable safety laws and regulations.

### **Article X** **Remedies on Insolvency**<sup>47</sup>

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVI(3).<sup>48</sup>

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<sup>44</sup> Modification of the default remedies provisions.

<sup>45</sup> Sub-paragraph 6(a) provides that relief must be granted by administrative authorities seven calendar days after notification. This is consistent with the Rail Protocol approach, rather than the less exact five working days specified in the Aircraft Protocol.

<sup>46</sup> In the corresponding article of the Rail Protocol, this provision erroneously references Article VII(1) (modification of default remedy provisions). Paragraph 5.23(4) of the Official Commentary to the Rail Protocol provides that this article should reference Article 13 of the Cape Town Convention. The MAC Protocol remedies this drafting error by referring to Article 13.

<sup>47</sup> At the first Study Group meeting it was tentatively agreed that Alternatives A, B and C should be kept in the draft Protocol, pending further discussion. The Study Group agreed that, as a matter of policy, there was benefit in giving Contracting States the widest variety of options in selecting insolvency remedies, as long as they remained consistent with the approaches in the previous Protocols. Given that Alternative B is included in all three previous Protocols, it would be reasonable for it to be included in the MAC Protocol as well. The first Study Group meeting was supportive of also including Alternative C, on the basis that it takes into account the Continental European approach to insolvency. The second, third and fourth Study Group meetings confirmed that the MAC Protocol should include Alternatives A, B and C, as consistent with the approach in the Rail Protocol. The Study Group also discussed the possibility of allowing Contracting States to apply different insolvency remedies to different annexes to the Protocol, however it was ultimately decided that such an approach might add unnecessary complication to the Protocol without addressing a demonstrated need for Contracting States.

2. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.<sup>49</sup>

### **Alternative A**

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the agricultural, construction or mining equipment to the creditor not later than the earlier of:

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the agricultural, construction or mining equipment if this Article did not apply.

4. For the purpose of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 3 :

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the agricultural, construction or mining equipment and maintain it and its value in accordance with the agreement; and
- (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the agricultural, construction or mining equipment under arrangements designed to preserve the agricultural, construction or mining equipment and maintain it and its value.

7. The insolvency administrator or the debtor, as applicable, may retain possession of the agricultural, construction or mining equipment where, by the time specified in paragraph 3, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement and related transaction documents. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8. With regard to the remedies in Article VIII<sup>50</sup>, paragraph (1) :

- (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and
- (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

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<sup>48</sup> Declarations relating to certain provisions.

<sup>49</sup> This is a boiler-plate provision found in the ‘Remedies on Insolvency’ articles in the previous Protocols (Article XI, Alternative A paragraph 4 in the Aircraft Protocol, Article IX paragraph 2 of the Luxembourg Rail Protocol and Article XXI, Alternative A paragraph 5 of the Space Protocol). In the Aircraft and Space Protocols this provision is located in Alternative A, whereas in the Rail Protocol, it is part of the overarching article and not attached to any specific Alternative. On the basis that it is appropriate for this provision to apply to the meaning of Insolvency Administrator in all articles, it appears prudent to follow the example of the Rail Protocol and include the provision in the overarching Provision.

<sup>50</sup> Modification of default remedies Provisions.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 3.
10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.
11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.
12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.
13. The Convention as modified by Article VIII<sup>51</sup> of this Protocol shall apply to the exercise of any remedies under this Article.

**Alternative B**

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXVI(3)<sup>52</sup> whether it will:
- (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or
  - (b) give the creditor the opportunity to take possession of the agricultural, construction or mining equipment, in accordance with the applicable law.
4. The applicable law referred to in subparagraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.
5. The creditor shall provide evidence of its claims and proof that its international interest has been registered.
6. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 3, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the agricultural, construction or mining equipment but fails to do so, the court may permit the creditor to take possession of the agricultural, construction or mining equipment upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.
7. The agricultural, construction or mining equipment shall not be sold pending a decision by a court regarding the claim and the international interest.

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<sup>51</sup> Modification of default remedies Provisions.

<sup>52</sup> Declarations relating to certain provisions.

**Alternative C**

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall within the cure period:
  - (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or
  - (b) give the creditor the opportunity to take possession of the agricultural, construction or mining equipment in accordance with the applicable law.
  
4. Before the end of the cure period, the insolvency administrator or the debtor, as applicable, may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period and ending no later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the "suspension period"). Any such order shall require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate or by the debtor as they become due and that the insolvency administrator or the debtor, as applicable, perform all other obligations arising during the suspension period.
  
5. If an application is made to the court under the preceding paragraph, the creditor shall not take possession of the agricultural, construction or mining equipment pending an order of the court. If the application is not granted within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.
  
6. Unless and until the creditor is given the opportunity to take possession under paragraph 3:
  - (a) the insolvency administrator or the debtor, as applicable, shall preserve the agricultural, construction or mining equipment and maintain it and its value in accordance with the agreement; and
  - (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.
  
7. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the agricultural, construction or mining equipment under arrangements designed to preserve and maintain it and its value.
  
8. Where during the cure period or any suspension period the insolvency administrator or the debtor, as applicable, cures all defaults other than a default constituted by the opening of insolvency proceedings and agrees to perform all future obligations under the agreement and related transaction documents, the insolvency administrator or debtor may retain possession of the agricultural, construction or mining equipment and any order made by the court under paragraph 4 shall cease to have effect. A second cure period shall not apply in respect of a default in the performance of such future obligations.

9. With regard to the remedies in Article VIII(1)<sup>53</sup>:
- (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and
  - (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.
10. Subject to paragraphs 4, 5 and 8, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.
11. Subject to paragraphs 4, 5 and 8, no obligations of the debtor under the agreement and related transactions may be modified in insolvency proceedings without the consent of the creditor.
12. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.
13. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.
14. The Convention as modified by Article VIII<sup>54</sup> of this Protocol shall apply to the exercise of any remedies under this Article.<sup>55</sup>
15. For the purposes of this Article, the “cure period” shall be the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

### **Article XI**

#### Insolvency assistance<sup>56</sup>

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVI(1)<sup>57</sup>.
2. The courts of a Contracting State in which agricultural, construction or mining equipment is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article X<sup>58</sup>.

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<sup>53</sup> Modification of default remedy provisions.

<sup>54</sup> Modification of default remedy provisions.

<sup>55</sup> This provision diverges from the Luxembourg Rail Protocol in that it does not contain a reference to the ‘public service’ article, as the MAC Protocol contains no corresponding article.

<sup>56</sup> The text of this article is identical to Article XII of the Aircraft Protocol and Article X of the Rail Protocol.

<sup>57</sup> Declarations relating to certain provisions.

<sup>58</sup> Remedies on insolvency.

**Article XII**  
Debtor provisions<sup>59</sup>

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the agricultural, construction or mining equipment in accordance with the agreement as against:
  - (a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention unless and to the extent that the debtor has otherwise agreed; and
  - (b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent, if any, that such holder has agreed.
2. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to agricultural, construction or mining equipment.

**CHAPTER III**  
**REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AGRICULTURAL,  
CONSTRUCTION AND MINING EQUIPMENT**

**Article XIII**  
The Supervisory Authority and the Registrar<sup>60</sup>

1. The Supervisory Authority shall be designated at, or pursuant to a resolution of, the Diplomatic Conference for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment, provided that such Supervisory Authority is able and willing to act in such capacity.
2. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise.
3. The Supervisory Authority may establish a commission of experts, from among persons nominated by Signatory and Contracting States and having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.

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<sup>59</sup> The text of this article follows Article XI of the Rail Protocol, which is consistent with Article XXV of the Space Protocol, and Article XVI of the Aircraft Protocol (noting that the Air and Space Protocols contain additional references to buyers of objects).

<sup>60</sup> This provision is adapted from Article XXVIII of the Space Protocol, which allows a degree of flexibility in designating a Supervisory Authority. Paragraphs 2 and 3 are identical in language and approach to the Aircraft and the Space Protocols. The Rail Protocol, in addition, contains several provisions listing the functions and the tasks of a Secretariat established in order to assist the Supervisory Authority. It was noted at the second Study Group meeting that the Rail Protocol adopted additional paragraphs in its corresponding 'Supervisory Authority' article because the Protocol itself was establishing a new body to act as the Supervisory Authority, an approach the MAC Protocol will not adopt.

4. The first Registrar of the International Registry shall be appointed for a period of five years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or reappointed at regular five-yearly intervals by the Supervisory Authority.

#### **Article XIV**

##### First regulations<sup>61</sup>

The first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of this Protocol.

#### **Article XV**

##### Designated entry points<sup>62</sup>

1. A Contracting State may at any time designate an entity or entities as the entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or of a right or interest under Article 40 of the Convention in either case arising under laws of another State. The various entry points shall be operated at least during working hours in their respective territories.<sup>63</sup>

2. A designation made under the preceding paragraph may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of notices of sale.

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<sup>61</sup> The wording of this article is consistent with the text of Article XVIII of the Aircraft Protocol and Article XXIX of the Space Protocol.

<sup>62</sup> This provision is largely based on Article XIII of the Rail Protocol. It was decided at the first Study Group meeting that the MAC Protocol should allow the designation of entry points, as this would make it easier for countries with national personal property registries to ratify the Convention (e.g. Spain). It was further decided that the Rail Protocol approach should be adopted, given that the MAC Protocol will allow for the registration of notifications of sale on the same basis as the Rail Protocol. As provided in the Official Commentary to the Rail Protocol, use of an entry point may be made optional or compulsory, except in the case of information required for registrations of notices of sale, for which use of the entry point cannot be made compulsory. This reflects the fact that such registrations cannot affect the rights of any person, or have any other effects, under the Convention or Protocol. The only substantive change to this provision is that the designation by a Contracting State under paragraph 1 is done without the need for a declaration as consistent with the Aircraft and Space Protocols, whereas Article XIII of the Rail Protocol requires a Contracting State to make a declaration designating an entry point.

<sup>63</sup> The Rail Protocol approach slightly modified the approach in Article XIX of the Aircraft Protocol by including the final sentence of paragraph 1, dealing with operational hours of the national entry points, which the Aircraft Protocol deals with in Article XX(4).

## Article XVI

### Identification of agricultural, construction or mining equipment for registration purposes<sup>64</sup>

A description of agricultural, construction or mining equipment that contains its manufacturer's serial number and the name of the manufacturer, *as supplemented to ensure uniqueness*<sup>65</sup> is necessary and sufficient to identify the object for the purposes of Article 18(1)(a) of the Convention. *The supplementary information required for the identification of the object shall be specified by the regulations.*<sup>66</sup>

## Article XVII

### Additional modifications to Registry provisions<sup>67</sup>

1. For the purposes of Article 19(6) of the Convention, the search criteria for agricultural, construction or mining equipment shall be the name of its manufacturer and its manufacturer's serial number, supplemented as necessary to ensure uniqueness. Such supplementary information shall be specified in the regulations.<sup>68</sup>

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<sup>64</sup> It was decided at the first Study Group meeting that the approach in Article XIV of the Rail Protocol should be followed. However, the provisions in Article XIV of the Rail Protocol relating to the identification of equipment through an affixed national or regional identification number were removed (paragraphs 1(c), 2, 3 and 4), as it was considered unlikely that states would have specific national registries relating specifically to agricultural, construction and mining equipment. As such, the previous draft article based on the Rail Protocol approach read as follows:

*For the purposes of Article 18(1)(a) of the Convention, the regulations shall prescribe a system for the allocation of identification numbers by the Registrar which enable the unique identification of items of agricultural, construction and mining equipment. The identification number shall be: (a) affixed to the item of agricultural, construction or mining equipment; (b) associated in the International Registry with the manufacturer's name and the manufacturer's identification number for the item so affixed.*

At the second Study Group meeting, this issue was revisited. It was decided that the manufacturer serial number should be the primary identifier to be used for registration purposes. As such, it was decided that the drafting of the article should be modelled upon Article VII of the Aircraft Protocol. At the second Study Group meeting it was also decided that a second paragraph should be added under which it would be allowed, until a certain date, to make registrations also for equipment without a unique manufacturer's serial number. The drafting for the provision was, in part, based upon Article XIV(1) of the Rail Protocol. The additional provision read as follows:

*Notwithstanding paragraph 1, for an initial period finishing at a date defined in the regulations, for the purposes of Article 18(1)(a) of the Convention, where agricultural, construction or mining object does not have a manufacturer's serial number, the regulations shall prescribe a system for the allocation of identification numbers by the Registrar which enable the unique identification of the agricultural, construction or mining object, which shall be affixed to the object.*

Following additional advice from the Working Group, on the February 2016 Tier 1 preliminary list of HS codes, only certain types of equipment under two HS codes were not individually serialised. As such, the preceding paragraph was omitted from the sixth annotated draft Protocol.

<sup>65</sup> It was decided at the fourth Study Group meeting to insert this language to be consistent with paragraph 1 of the "Additional modifications to Registry provisions" article. Initially it was decided at the third Study Group meeting that the model designation would remain part of the criteria for registration, subject to further consultation with private industry. Following further input from the Working Group in February 2016 which indicated that model designations were not strictly uniformly used, it was decided to remove the model designation as a Protocol requirement to effect registration in the international registry.

<sup>66</sup> It was decided at the fourth Study Group meeting to insert this language to be consistent with paragraph 1 of the "Additional modifications to Registry provisions" article.

<sup>67</sup> Consideration of this article is complicated by the significantly diverging practices over the three previous Protocols (Article XX of the Aircraft Protocol, Article XV of the Rail Protocol and Article XXXII of the Space Protocol). At the second Study Group meeting it was decided that the Aircraft Protocol approach should generally be followed.

<sup>68</sup> As consistent with Article XX(1) of the Aircraft Protocol, Paragraph 1 specifically details the search criteria that should be available in the International Registry. This is in contrast to the Rail Protocol approach, which allows the Regulations to determine the search criteria. The Space Protocol provides that the search criteria will be those set in the Regulations that are required to describe the object for registration purposes.

2. For the purposes of Article 25(2) of the Convention and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than ten calendar days<sup>69</sup> after the receipt of the demand described in such paragraph.
3. The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 17(2) of the Convention.<sup>70</sup>
4. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.<sup>71</sup>
5. The Registrar shall be liable under Article 28 (1) of the Convention for loss caused up to an amount not exceeding the value of the agricultural, construction or mining equipment to which the loss relates. Notwithstanding the preceding sentence, the liability of the Registrar shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.<sup>72</sup>
6. The preceding paragraph shall not limit the Registrar's liability for damages for loss caused by gross negligence or intentional misconduct of the Registrar and its officers and employees.
7. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the prospective liability of the Registrar.<sup>73</sup>
8. Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.<sup>74</sup>

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<sup>69</sup> Paragraphs 2 follows the approaches of the Rail and Space Protocols, by providing for a 10 calendar day period to discharge a registration, as opposed to 5 working days as provided in the Aircraft Protocol. The 10 calendar day solution appears to be most appropriate for inclusion in the MAC Protocol.

<sup>70</sup> Paragraph 3 is based upon the Aircraft and Space Protocols that provide for the recovery of costs for the International Registry and the Supervisory Authority. Alternatively, the Rail Protocol deals with this in a separate article.

<sup>71</sup> Paragraph 4 diverges from the Aircraft Protocol approach, and instead adopts the Rail Protocol approach by moving the second sentence ('various entry points shall be operated at least during working hours in their respective territories') to Paragraph 1 of Article XIV (Designated entry points).

<sup>72</sup> At the first Study Group meeting, it was noted that during the negotiations for the Aircraft Protocol there was a disagreement on the implementation of the insurance provisions in the Aircraft Protocol and it took time to resolve the issue. At the second Study Group meeting, the Study Group did not settle on a position on this issue. Paragraph 5 is currently based upon the Rail Protocol approach, which provides that the liability of the Registrar is set at the amount not exceeding the value of the MAC equipment to which the loss relates, but shall not exceed 5 million Special Drawing Rights in any calendar year, which is significantly lower than the liability in the Aircraft Protocol, which sets the liability of the International Registry at the maximum value of an aircraft object. Paragraph 6 further provides that the liability cap will not apply for loss caused by gross negligence or intentional misconduct of the Registrar and its officers and employees. The Space Protocol does not explicitly provide for the liability cap for the Registrar, and instead deals with the issue in the Regulations.

<sup>73</sup> Paragraph 7 is based on the Rail Protocol Approach, which provides that the insurance or guarantee shall be determined by the Supervisory Authority, having regard to the prospective liability of the Registrar. The Space Protocol provides that the insurance or guarantee shall cover the Registrar's liability as provided for in the Regulations. The Aircraft Protocol does not have a corresponding provision addressing this issue.

<sup>74</sup> This Paragraph is identical with Paragraph 6 of the Aircraft Protocol provision, Paragraph 8 of Rail Protocol provision and Paragraph 7 of Space Protocol provision and should be adopted in the MAC Protocol.

### Article XVIII

#### Notices of Sale<sup>75</sup>

The regulations shall authorise the registration in the International Registry of notices of sale of agricultural, construction or mining equipment. The provisions of this Chapter and of Chapter V of the Convention, shall, in so far as relevant, apply to these registrations. However, any such registration and any search made or certificate issued in respect of a notice of sale shall be for the purposes of information only and shall not affect the rights of any person, or have any other effect, under the Convention or this Protocol.

## CHAPTER IV JURISDICTION

### Article XIX

#### Waivers of sovereign immunity<sup>76</sup>

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to agricultural, construction or mining equipment under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.
2. A waiver under the preceding paragraph must be in writing and contain a description of the agricultural, construction or mining equipment as specified in Article V(1)<sup>77</sup> of this Protocol.

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<sup>75</sup> At the first Study Group meeting it was decided to include an additional article based on Article XVII of the Rail Protocol in relation to notices of sale. Article XVII of the Rail Protocol allows for the registration in the International Registry of notices of sale covering railway rolling stock. However, such registration of a notice of sale is for information purposes only and does not have any legal effect under the Convention or Protocol. The first Study Group meeting noted that the benefits of this approach were that it allowed for more accessible information on the sales of equipment to be provided, and it generated additional fees for the International Registry. This article has been added to the Protocol in the same location, as it exists in the Rail Protocol (at the end of the Chapter dealing with the International Registry).

The 4th annotated draft Protocol provided an additional new provision in relation to Article 29(3) of the Cape Town Convention. It was an entirely new paragraph not contained in any of the previous Protocols. At the second Study Group meeting it was concluded that if the Rail Protocol approach is adopted in the MAC Protocol, then it should also clarify that national law that allows certain buyers to take free of or subject to an interest should prevail, otherwise secondary buyers could rely on 29(3) to take free of an interest even if they would not qualify for such priority under the domestic law. It provided: *Registration of a notice of sale in conformity with this Protocol does not give the buyer of the equipment to which the registration of notice of sale applies any priority of interest under Article 29(3) of the Convention unless provided for by national law.* Subsequently, it was decided at the third Study Group meeting to omit the paragraph.

<sup>76</sup> The wording of this article is consistent with the text of the corresponding provisions in all previous Protocols (Article XXII of the Aircraft Protocol, Article XVIII of the Rail Protocol and Article XXXIII of the Space Protocol). At the first Study Group meeting the necessity of this provision was questioned, as it was more relevant in the Aircraft and Rail Protocols because many airlines and railways are state owned. At the first Study Group meeting it was decided to retain the provision, pending further consideration by the Committee of Governmental Experts.

<sup>77</sup> Identification of agricultural, construction or mining equipment.

**CHAPTER V**  
**RELATIONSHIP WITH OTHER CONVENTIONS**

**Article XX**

Relationship with the UNIDROIT Convention on International Financial Leasing<sup>78</sup>

The Convention as applied to agricultural, construction or mining equipment shall supersede the Unidroit Convention on International Financial Leasing in respect of the subject matter of this Protocol, as between States Parties to both Conventions.

**CHAPTER VI**  
**FINAL PROVISIONS**

**Article XXI**

Signature, ratification, acceptance, approval or accession<sup>79</sup>

1. This Protocol shall be open for signature in \_\_\_\_\_ on \_\_\_\_\_ by States participating in the Diplomatic Conference to Adopt a Protocol to the Convention on International Interests in Mobile Equipment on matters Specific to agricultural, construction or mining equipment held at \_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_. After \_\_\_\_\_, this Protocol shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article XXIII<sup>80</sup>.
2. This Protocol shall be subject to ratification, acceptance or approval by States which have signed it.
3. Any State which does not sign this Protocol may accede to it at any time.
4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.
5. A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

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<sup>78</sup> This article is consistent with the drafting in Article XXV of the Aircraft Protocol, Article XIX of the Rail Protocol and Article XXXIV of the Space Protocol.

<sup>79</sup> The wording of this article is consistent with the drafting in Article XXVI of the Aircraft Protocol, Article XXII of the Rail Protocol and Article XXXVI of the Space Protocol.

<sup>80</sup> Entry into force.

## Article XXII

### Regional Economic Integration Organisations<sup>81</sup>

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a "Contracting State" or "Contracting States" or "State Party" or "States Parties" in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

## Article XXIII

### Entry into force<sup>82</sup>

1. This Protocol enters into force between the States which have deposited instruments referred to in sub-paragraph (a) on the later of:

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<sup>81</sup> The wording of this article is consistent with the drafting in Article XXVII of the Aircraft Protocol, Article XXI of the Rail Protocol and Article XXXVII of the Space Protocol.

<sup>82</sup> This article governs entry into force of the Protocol. The Study Group concluded that the Protocol should enter into force once five states have ratified the Protocol, and the International Registry was fully operational. As such, the current drafting is modelled on Article XXIII of the Rail Protocol. The Aircraft Protocol required 8 ratifications, whereas the Rail and Space Protocols require 4 and 10 ratifications respectively.

At the first Study Group meeting it was tentatively concluded that the MAC Protocol should enter into force for each specific class of equipment contained in the Annexes to the Regulations of the International Registry (agricultural, construction and mining) once that class had received four ratifications, and the Registry was operational. The Study Group decided that drafting from Article XXIV of the Rail Protocol and Article XXXVIII of the Space Protocol should be adapted to achieve this. The drafting provided to achieve this outcome was as following:

1. *This Protocol enters into force separately for each specific list of equipment contained in [the Annexes to the Regulations of the International Registry] between the States which have deposited instruments referred to in sub-paragraph (a) on the later of:*

(a) *the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance, approval or accession of that specified list of equipment.*

(b) *the date of the deposit by the Secretariat with the Depositary of a certificate confirming that the International Registry is fully operational.*

2. *For other States this Protocol enters into force for each specific list of equipment contained in the [Annexes to the Regulations of the International Registry] on the first day of the month following the later of:*

(a) *the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession of that specified list of equipment; and*

(b) *the date referred to in sub-paragraph (b) of the preceding paragraph.*

At the second Study Group meeting, it was decided that the staggered entry into force approach was ultimately unnecessary, and noted that it was adding additional complication without great benefit.

- (a) the first day of the month following the expiration of three months after the date of the deposit of the *fifth* instrument of ratification, acceptance, approval or accession, and
  - (b) the date of the deposit by the Secretariat with the Depositary of a certificate confirming that the International Registry is fully operational.
2. For other States this Protocol enters into force on the first day of the month following the later of:
  - (a) the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession; and
  - (b) the date referred to in sub-paragraph (b) of the preceding paragraph.

**Article XXIV**  
Territorial units<sup>83</sup>

1. If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Protocol applies.
3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.
4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.
5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:
  - (a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;
  - (b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which the Convention and this Protocol apply; and
  - (c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply.<sup>84</sup>

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<sup>83</sup> The text of paragraphs 1 – 4 is identical to Article XXIX in the Aircraft Protocol, Article XXIV of the Rail Protocol and Article XXXIX of the Space Protocol. At the fourth Study Group meeting it was decided to omit paragraph 6 of the Space Protocol from this article, as consistent with the Aircraft and Rail Protocols.

**Article XXV**  
Transitional Provisions<sup>85</sup>

In relation to agricultural, construction and mining equipment Article 60 of the Convention shall be modified as follows:

- (a) in paragraph 2(a), after “situated” insert “at the time the right or interest is created or arises”;
- (b) replace paragraph 3 with the following:

“3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years and not later than ten years after the date on which the declaration becomes effective, when Articles 29, 35 and 36 of this Convention as modified or supplemented by the Protocol will become applicable, to the extent and in the manner specified in the declaration, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State. Any priority of the right or interest under the law of that State, so far as applicable, shall continue if the right or interest is registered in the International Registry before the expiration of the period specified in the declaration, whether or not any other right or interest has previously been registered.”

**Article XXVI**  
Declarations relating to certain provisions<sup>86</sup>

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply either or both of Articles VI<sup>87</sup> and XI<sup>88</sup> of this Protocol.
2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article IX<sup>89</sup> of this Protocol, wholly or in part. If it so declares, it shall specify the time-period required by Article IX(3)<sup>90</sup>.

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<sup>84</sup> Sub-Paragraph 5(c) is consistent with the Rail Protocol.

<sup>85</sup> This article amends Article 60 of the Cape Town Convention (which deals with the pre-existing rights or interests) to address drafting oversights. The drafting of this article is identical to Article XXVI of the Luxembourg Rail Protocol. The Official Commentary of the Rail Protocol provides that “*Article XXVI amends Article 60 to make explicit various points that are implicit in that Article in its unamended form. Article XXVI does not change the substantive effect of Article 60... The Amendments to Article 60(3) contain express provisions dealing with various points which under the original text had to be arrived at by a purposive interpretation*” (Luxembourg Rail Protocol Official Commentary, 5.83 and 5.86). Article XL of the Space Protocol adopts a different approach to amending Article 60, which takes into account issues unique to the Space Protocol (such as the enforcement of default remedies in a space asset which is physically linked to another space asset which is also subject to a separate international interest). The Aircraft Protocol has no transitional provisions article, as it was drafted simultaneously with the Cape Town Convention itself and the drafting oversights were not identified at that time.

<sup>86</sup> This article allows Contracting States to make declarations to apply certain articles of the Protocol. During all Study Group meetings there was significant discussion as to whether the articles governing declarations should be consistent with the approach in the previous three Protocols to the Cape Town Convention, or whether they should be simplified. The Secretariat completed extensive drafting, providing detailed alternative options in previous iterations of the draft Protocol. At the fourth Study Group meeting, it was decided that the status quo approach to declarations used in the previous three Protocols should be retained. As such, this article is largely consistent with Article XXX of the Aircraft Protocol, Article XXVII of the Luxembourg Rail Protocol and Article XLI of the Space Protocol.

<sup>87</sup> Choice of law.

<sup>88</sup> Insolvency Assistance.

<sup>89</sup> Modification of provisions regarding relief pending final determination.

<sup>90</sup> Modification of provisions regarding relief pending final determination.

3. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of Alternative A, B or C of Article X<sup>91</sup> and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A, B or C. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article X<sup>92</sup>.

4. The courts of Contracting States shall apply Article X<sup>93</sup> in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.

### **Article XXVII**

#### Declarations under the Convention<sup>94</sup>

Declarations made under the Convention, including those made under Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60, shall be deemed to have also been made under this Protocol, unless stated otherwise.

### **Article XXVIII**

#### Reservations and declarations<sup>95</sup>

1. No reservations may be made to this Protocol but declarations authorised by Articles II<sup>96</sup>, Articles VII<sup>97</sup>, XXIV<sup>98</sup>, XXVI<sup>99</sup>, XXVII<sup>100</sup> and XXXIX<sup>101</sup> may be made in accordance with these provisions.

2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

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<sup>91</sup> Remedies on Insolvency.

<sup>92</sup> Remedies on Insolvency.

<sup>93</sup> Remedies on Insolvency.

<sup>94</sup> The article is consistent with Article XXXI of the Aircraft Protocol, Article XXIX of the Luxembourg Rail Protocol and Article XLII of the Space Protocol (noting that Article XLII of the Space Protocol does not reference Article 60, as Article XL of the Space Protocol dis-applies Article 60).

<sup>95</sup> This Provision provides the articles under the Protocol which allow declarations by Contracting States. It is structurally consistent with Article XXXII of the Aircraft Protocol, Article XXVIII of the Luxembourg Rail Protocol and Article XLIII of the Space Protocol, although the Protocols obviously differ in the articles they reference. In particular, it should be noted that the Rail Protocol allows for declarations in relation to designated entry points (whereas the Aircraft and Space Protocols allow for designation of an entry point without a declaration, which is the model that Article XV (designated entry points) of the MAC Protocols follows). This article in the Rail Protocol was elevated above the article governing 'Declarations under the Convention', however the MAC Protocol remains consistent with the order in the Aircraft and Space Protocols.

<sup>96</sup> Application of the Convention as applicable to agricultural, construction and mining equipment.

<sup>97</sup> Association with immovable property.

<sup>98</sup> Territorial units.

<sup>99</sup> Declarations relating to certain provisions.

<sup>100</sup> Declarations under the Convention.

<sup>101</sup> Subsequent declarations.

### **Article XXIX**

#### Subsequent declarations<sup>102</sup>

1. A State Party<sup>103</sup> may make a subsequent declaration, other than a declaration made in accordance with Article XXVII<sup>104</sup> under Article 60 of the Convention, at any time after the date on which this Protocol has entered into force for it, by notifying the Depositary to that effect.
2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.
3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

### **Article XXX**

#### Withdrawal of declarations<sup>105</sup>

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXVII<sup>106</sup> under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.
2. Notwithstanding the previous paragraph, this Protocol shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal of declaration.

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<sup>102</sup> This article provides the rules governing subsequent declarations under the Protocol. It is substantively consistent with Articles XXXIII of the Aircraft Protocol, Article XXX of the Luxembourg Rail Protocol and Article XLIV of the Space Protocol (noting that Article XLIV(1) of the Space Protocol does not reference Article 60, as Article XL of the Space Protocol dis-applies Article 60).

<sup>103</sup> At the fourth Study Group meeting the difference between Contracting State and State Party was noted. 'State party' refers to a State that has consented to be bound by a Convention and for which that Convention is in force (see Art. 2(1)(g) of the Vienna Convention of 23 May 1969 on the Law of Treaties). 'Contracting State' refers to a State which has consented to be bound by a Convention, whether or not that Convention has entered into force for that State (see Art. 2(1)(f) of the Vienna Convention). The Study Group noted that the previous Protocols may not have used the terms 'State party' and 'Contracting State' in perfect conformity with the Vienna Convention, but nevertheless decided that the MAC Protocol should remain consistent with the usage of Contracting State and State Party as used in the previous three Protocols to the Convention.

<sup>104</sup> Declarations under the Convention.

<sup>105</sup> This article provides the rules governing the withdrawal of declarations under the Protocol. It is substantively consistent with Articles XXXIV of the Aircraft Protocol, Article XXXI of the Luxembourg Rail Protocol and Article XLV of the Space Protocol (noting that Article XLV(1) of the Space Protocol does not reference Article 60, as Article XL of the Space Protocol dis-applies Article 60). It should also be noted that Article XXXII (Reservations and Declarations) of the Aircraft Protocol allows for the making of a declaration under Article XXXIV (withdrawal of declarations), whereas the Rail and Space Protocols do not allow for the making of declarations under their corresponding 'withdrawal of declarations' articles. The MAC Protocol is consistent with the approach of the Rail and Space Protocols, as it is understood that the withdrawal of a declaration does not constitute the making of a new declaration.

<sup>106</sup> Declarations under the Convention.

**Article XXXI**  
**Denunciations**<sup>107</sup>

1. Any State Party may denounce this Protocol by notification in writing to the Depositary.
2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the Depositary.
3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.
4. *A subsequent declaration made by a State Party under Article II declaring that the Protocol does not apply to one or more Annexes, shall be considered a denunciation of the Protocol in relation to that Annex.*<sup>108</sup>

**Article XXXII**  
**Review conferences, amendments and related matters**<sup>109</sup>

1. The Depositary, in consultation with the Supervisory Authority, shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.<sup>110</sup>
2. At the request of not less than twenty-five per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:
  - (a) the practical operation of the Convention as amended by this Protocol and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;
  - (b) the judicial interpretation given to, and the application made of the terms of this Protocol and the regulations;

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<sup>107</sup> This drafting is consistent with all previous Protocols (Article XXXV of the Aircraft Protocol, Article XXXII of the Luxembourg Rail Protocol and Article XLV of the Space Protocol), noting the insertion of the newly drafted paragraph 4.

<sup>108</sup> It was decided at the first Study Group meeting that an additional paragraph should be added to this article, clarifying that a subsequent declaration from a State that dis-applies the Protocol to a certain category of equipment under an Annex to the Protocol is, in effect, a denunciation of the Protocol in relation to those categories of equipment that the State subsequently opts out of. The Study Group approved the drafting of this provision at its second meeting.

<sup>109</sup> As agreed at the fourth Study Group meeting in March 2016, Article XXXII establishes three amendment procedures for the MAC Protocol. Paragraph 3 provides the amendment procedure for the Protocol itself, which is consistent with the amendment procedure established for the three existing Protocols to the Cape Town Convention. Paragraph 4 creates a second process for adding new Harmonised System codes to the Annexes to the Protocol which cover materially similar types of agricultural, construction and mining equipment that are covered by the existing Harmonised System codes in the Annexes. This approach is based upon Article 24 of the Montreal Convention. Paragraph 5 creates a third process for changing the Annexes to the Protocol to realign the codes in the Annexes with changes to the Harmonised System which may occur due to the periodic reviews to the Harmonised System.

<sup>110</sup> The drafting of paragraphs 1-3 of this article (aside from subparagraph 2(e)) are consistent with all previous Protocols (Article XXXVI of the Aircraft Protocol, Article XXXIII of the Rail Protocol and Article XLVII of the Space Protocol). Paragraphs 5 and 6 have been added to provide for amendment procedures for the Annexes to the Protocol.

- (c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority;
- (d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable; and
- (e) *whether any changes to the Harmonized System have affected the Harmonized System codes listed in the Annexes, or whether new codes have emerged under the Harmonized System that may warrant inclusion in the Annexes.*

3. Any amendment to the this Protocol other than the Annexes shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States Parties which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by *five* States Parties in accordance with the provisions of Article XXIII<sup>111</sup> relating to its entry into force.<sup>112</sup>

4. *If the report referenced in paragraph 1 identifies additional agricultural, construction or mining equipment that is materially similar to equipment that falls under existing Harmonised System codes contained in the Annexes, the Depositary may add or retain the Harmonised System codes covering such additional equipment to the Annexes. The Depositary shall notify States Parties<sup>113</sup> of a revision to the Annexes under this paragraph. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties notify the Depositary of their objection, the revision shall not become effective. The Depositary shall immediately notify all States Parties of the date that a revision pursuant to this paragraph enters into force.*<sup>114</sup>

5. If the report referred to in paragraph 1 concludes that changes to the Harmonised System have affected Harmonised System codes listed in the Annexes, the Depositary may revise the Harmonized System codes contained in the Annexes to ensure conformity with the Harmonised System. The Depositary shall specify the date as of which such a revision shall apply. The Depositary shall notify States Parties of a revision to the Annexes and the date at which the revision shall become effective.

6. Any revision to the Annexes shall not affect rights and interests arising prior to the date the revision becomes effective or applicable.<sup>115</sup>

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<sup>111</sup> Entry into force.

<sup>112</sup> These words were added to clarify that the amendment procedure set out in paragraph 3 applies to the Protocol itself, whereas paragraphs 4 and 5 provide the amendment procedures for the Annexes to the Protocol.

<sup>113</sup> At the fourth Study Group meeting it was noted that an additional provision should be added to the preliminary draft Protocol that provided that 'State Party', for the purposes of the amendment process for adding or retaining HS codes in a particular annex to the Protocol, would mean a State Party to that annex. This definition would ensure that only States Parties that have acceded to an annex would be able to make decisions in relation to amendments to that annex. The placement and phrasing of the additional provision requires further consideration.

<sup>114</sup> Paragraph 4 provides for a simplified amendment process for the Annexes to realign then with changes to the Harmonized System. This approach is based upon Article 24 of the Montreal Convention.

<sup>115</sup> Paragraph 6 ensures that any existing interest under an HS code that is subsequently deleted, moved or otherwise affected by an amendment process (under either paragraphs 5 or 6) will not be affected by the subsequent changes to the HS code.

**Article XXXIII**  
Depositary and its functions<sup>116</sup>

1. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (Unidroit), which is hereby designated the Depositary.
2. The Depositary shall:
  - (a) inform all Contracting States of:
    - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
    - (ii) the date of the deposit of the certificate referred to in Article XXIII(1)(b);
    - (iii) the date of entry into force of this Protocol;
    - (iv) each declaration made in accordance with this Protocol, together with the date thereof;
    - (v) the withdrawal or amendment of any declaration, together with the date thereof; and
    - (vi) the notification of any denunciation of this Protocol together with the date thereof and the date on which it takes effect;
  - (b) transmit certified true copies of this Protocol to all Contracting States;
  - (c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and
  - (d) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Protocol.

DONE at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, in a single original in the English and French languages, both texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the consistency of the texts with one another.

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<sup>116</sup> This drafting is consistent with all previous Protocols (Article XXXVII of the Aircraft Protocol, Article XXXIV of the Rail Protocol and Article XLVIII of the Space Protocol).

## ANNEXES TO THE PROCOTOL<sup>117</sup>

### ANNEX 1 – AGRICULTURAL EQUIPMENT

1. *As consistent with Article II, the Convention shall apply in relation to agricultural equipment that falls under the following Harmonised System codes in this Annex.*

842481: Mechanical appliances (whether or not hand-operated) for projecting, dispersing, or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines – Other appliances -- Agricultural or Horticultural

842911: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Bulldozers and angledozers -- Track laying

842919: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Bulldozers and angledozers -- Other

842920: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Graders and levelers

842930: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers – Scrapers

842951: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Mechanical shovels, excavators and shovel loaders -- Front-end shovel loaders

842952: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Mechanical shovels, excavators and shovel loaders -- Machinery with a 360° degrees revolving superstructure

842959: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Mechanical shovels, excavators and shovel loaders – Other

843049: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Other boring or sinking machinery – Other

843050: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers – Other machinery, self-propelled

843210: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers – Plows

843221: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers - Harrows, scarifiers, cultivators, weeders and hoes – Disc harrows

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<sup>117</sup> The HS codes currently listed in Annexes 1, 2 and 3 are consistent with the preliminary list agreed to at the fourth Study Group meeting and categorised by the Working Group in April 2016.

As consistent with the Study Group's decision at the second meeting, where a type of MAC equipment has the possibility to be listed under more than one of the classes (agriculture, construction and mining), it has been listed under each Annex independently. The Study Group also confirmed that in the event that a Contracting State opts out of a particular Annex of equipment (agriculture, construction or mining), where a type of equipment is included on that Annex and another Annex, the type of equipment would continue to be covered by the Protocol in that Contracting State, regardless of its final use.

843230: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers - Seeders, planters and transplanters

843240: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers – Manure Spreaders and fertilizer distributors

843340: Harvesting or Threshing Machinery, including Straw or Fodder Balers; Grass or Hay Mowers; Machines for Cleaning, Sorting or Grading Eggs, Fruit or other Agricultural Produce; Other than Machinery of Heading 8437 – Straw or Fodder Balers

843351: Harvesting or Threshing Machinery, including Straw or Fodder Balers; Grass or Hay Mowers; Machines for Cleaning, Sorting or Grading Eggs, Fruit or other Agricultural Produce; Other than Machinery of Heading 8437 – Combine Harvester or Thresher

843680: Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment, poultry incubators and brooders -- Other machinery

870130: Tractors (other than tractors of heading 8709) – Track-laying tractors

870190: Tractors (other than tractors of heading 8709) – Other

871620: Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof -- Self-loading or self-unloading trailers and semi-trailers for agricultural purposes

**ANNEX 2 – CONSTRUCTION EQUIPMENT**

1. *As consistent with Article II, the Convention shall apply in relation to construction equipment that falls under the following Harmonised System codes in this Annex.*

820713: Interchangeable tools for hand tools, whether or not power-operated, or for machine tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screw driving), including dies for drawing or extruding metal, and rock drilling or earth boring tools -- Rock drilling or earth boring tools, and parts thereof --With working part of cermets

842641: Ships' derricks; cranes, including cable cranes; mobile lifting frames, straddle carriers and works trucks fitted with a crane - Other machinery, self-propelled -- On tires

842649: Ships' derricks; cranes, including cable cranes; mobile lifting frames, straddle carriers and works trucks fitted with a crane - Other machinery, self-propelled – Other

842911: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Bulldozers and angledozers -- Track laying

842919: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Bulldozers and angledozers -- Other

842920: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Graders and levelers

842930: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers – Scrapers

842951: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers --Mechanical shovels, excavators and shovel loaders -- Front-end shovel loaders

842952: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers --Mechanical shovels, excavators and shovel loaders -- Machinery with a 360° degrees revolving superstructure

842959: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers --Mechanical shovels, excavators and shovel loaders – Other

843010: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers - Pile-drivers and pile-extractors

843031: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Coal or rock cutters and tunneling machinery – Self-propelled

843039: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Coal or rock cutters and tunneling machinery – Other

843041 - Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Other boring or sinking machinery – Self-propelled

843049: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators;

snow ploughs and snow-blowers -- Other boring or sinking machinery – Other

843050: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers – Other machinery, self-propelled

843061: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers – Other machinery, not self-propelled – Tamping on compacting machinery

843069: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers – Other machinery, not self-propelled – Other

847431: Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry molds of sand -- Mixing or kneading machines -- Concrete or mortar mixers

847432: Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry molds of sand -- Mixing or kneading machines -- Machines for mixing mineral substances with bitumen

847982: Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter -- Other machines and mechanical appliances -- Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines.

847910: Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter -- Machinery for public works, building or the like

870130: Tractors (other than tractors of heading 8709) – Track-laying tractors

870190: Tractors (other than tractors of heading 8709) – Other

870410: Motor vehicles for the transport of goods -- Dumpers designed for off-highway use

870510: Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units) – Crane lorries

870540: Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units) – Concrete-mixer lorries

871620: Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof -- Self-loading or self-unloading trailers and semi-trailers for agricultural purposes

**ANNEX 3 – MINING EQUIPMENT**

1. *As consistent with Article II, the Convention shall apply in relation to mining equipment that falls under the following Harmonised System codes in this Annex.*

820713: Interchangeable tools for hand tools, whether or not power-operated, or for machine tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screw driving), including dies for drawing or extruding metal, and rock drilling or earth boring tools -- Rock drilling or earth boring tools, and parts thereof --With working part of cermets

842911 - Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Bulldozers and angledozers -- Track laying

842919 - Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Bulldozers and angledozers -- Other

842952: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers --Mechanical shovels, excavators and shovel loaders -- Machinery with a 360° degrees revolving superstructure

842959: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers --Mechanical shovels, excavators and shovel loaders – Other

843010 : Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers - Pile-drivers and pile-extractors

843031: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Coal or rock cutters and tunneling machinery – Self-propelled

843039: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Coal or rock cutters and tunneling machinery – Other

843049: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Other boring or sinking machinery – Other

843050: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers – Other machinery, self-propelled

843061: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers – Other machinery, not self-propelled – Tamping on compacting machinery

847431 - Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry molds of sand -- Mixing or kneading machines -- Concrete or mortar mixers

870130: Tractors (other than tractors of heading 8709) – Track-laying tractors

843041 - Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-excavators; snow ploughs and snow-blowers -- Other boring or sinking machinery – Self-propelled

870190: Tractors (other than tractors of heading 8709) – Other

870410: Motor vehicles for the transport of goods -- Dumpers designed for off-highway use

871620: Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof -- Self-loading or self-unloading trailers and semi-trailers for agricultural purposes