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FINAL CLAUSES COMMITTEE – INTERIM REPORT

(Prepared by the Chairs of the Final Clauses Committee)

List of participants

1. Argentina
2. Australia
3. Brazil
4. Canada
5. China
6. Germany
7. Japan
8. Mexico
9. South Africa (Chair)
10. Spain
11. United Kingdom (Chair)
12. Uruguay
13. Uzbekistan
14. United States
15. International Finance Corporation
16. NatLaw
17. World Customs Organisation
18. UNIDROIT Secretariat

Introduction

1. The Final Clauses Committee (FCC) held its first three meetings on 13 November, 14 November and 15 November to review the Secretariat's proposed redrafting of the MAC Protocol's amendment article (Article XXXIII and Article XXXIIIbis¹).
2. Feedback on the proposed articles was generally positive. There was support for:
 - (a) The Protocol amendment mechanism providing for a process that aims to keep MAC Protocol Annexes aligned with the current version of the HS to the greatest extent possible.
 - (b) The balancing of two important competing principles: (a) the need for a Contracting State to have control over changes to its obligations under the treaty with (b) the need to provide a flexible mechanism for adjusting the MAC Protocol Annexes.

¹ Changed to distinguish from existing Article XXXIV (Depositary and its Functions).

- (c) The need to take into account commercial certainty.
- (d) The differentiation between amendments to the Articles of the MAC Protocol under Article XXXIII and technical adjustments to the MAC Protocol Annexes under Article XXXIIIbis.
- (e) The hybrid mechanism in Article XXXIIIbis incorporating a 2-step process. First, an approval process and, in the event of its failure, a second step consisting of a Meeting of Contracting States. This 2-step process provides a flexible mechanism to adjust the MAC Protocol Annexes and is consistent with existing treaty practices.
- (f) No distinction between “substantive” and “technical” changes to the MAC Protocol Annexes deriving from an HS code revision, noting that earlier attempts to draft an amendments mechanism based on such a distinction failed during the Committee of Governmental Experts.

3. However, there were several aspects of the Secretariat’s proposed amendment articles that were not supported by States. The FCC suggested that the amendment articles be revised to reflect the following principles:

- (a) Changes to ensure that Contracting States have sufficient time to adjust their domestic laws to implement agreed upon adjustments to the MAC Protocol Annexes.
- (b) Changes to ensure that Contracting States retain full control over their obligations.
- (c) Changes to allow for a more flexible amendment mechanism for revisions to the HS codes listed in the Annexes unrelated to HS revisions.

Policy Proposal for MAC Protocol amendment mechanism

4. The Final Clauses Committee suggests that the MAC Protocol have a three-tiered amendment mechanism that could be reflected in three separate articles, although this is a matter for the Drafting Committee to consider. Article XXXIII would continue to regulate, among other things, amendments to the Protocol, whereas Articles XXXIIIbis, on technical adjustments deriving from an HS codes revision, and newly proposed Article XXXIIIter, on adjustments to the Annexes not deriving from a HS codes revision, would provide the process for adjustments to the Annexes.²

1. Article XXXIII – the amendment process

5. Article XXXIII is consistent with the amendment articles in the Cape Town Convention and its three existing protocols. It reflects traditional amendment mechanisms in the majority of treaties. While Article XXXIII is generally designed for amendments to the MAC Protocol Articles, it could also be used to make changes to the MAC Protocol Annexes.³

² The Secretariat notes that under the Secretariat’s draft, changes to the MAC Protocol Annexes related to HS revision were referred to as “technical adjustments”. In view of the FCC’s proposed modifications, the Secretariat suggests that all changes made to the MAC Protocol Annexes under Article XXXIIIbis be referred to as “technical adjustments”, changes to the MAC Protocol Annexes under Article XXXIIIter be referred to as “adjustments” and changes to the text of the MAC Protocol under Article XXXIII should continue to be referred to as “amendments”.

³ Article XXXIII(2)(d) provides that it applies to “modifications to the Protocol”, which would include changes to the Annexes. In light of the policy recommendation of the FCC on introducing a new Article XXXIIIter on adjustments to the MAC Protocol Annexes unrelated to HS revisions (see below), the FCC proposes that current Article XXXIII (2)(e) should be deleted.

2. Article XXXIIIbis – the technical adjustment process

6. The FCC confirmed that Article XXXIIIbis should provide an amendment mechanism to align the MAC Protocol Annexes to revisions to the HS. Article XXXIIIbis would generally follow the hybrid structure of the Secretariat's draft as based on the Chemical Weapon's convention, allowing for an approval mechanism followed by Meeting process if the approval process fails. The Article would function as follows:

(a) **Trigger of technical adjustment process:** Article XXXIIIbis is triggered by the adoption of a revision of the HS. "Adoption of a revision to the HS" refers to the time at which the WCO Council formally adopts a revision to the HS. This is typically two years before the revision comes into force (for example, the 2022 revision will be formally adopted by the WCO Council around 1 January 2020). Technical adjustments to the MAC Protocol Annexes should enter into force at the same time as the HS revision enters into force. On the basis of the established WCO timetable, this will allow two years for the Article XXXIIIbis process to be completed.

(b) **Review of HS revision:** Upon an HS revision, the Depositary would have an obligation to consult both the World Customs Organization and the Supervisory Authority in establishing whether the HS codes listed in the MAC Protocol Annexes have been affected by the HS revision. The purpose of these consultations is to (i) verify whether the MAC Protocol Annexes have been affected by an HS revision, and (ii) where they have been affected, receive advice on the necessary adjustments. The WCO publishes "correlation tables" illustrating how HS revisions have affected certain HS codes which will assist this process.

(c) **Nature of a technical adjustment:** Although the nature of technical adjustments will vary depending on whether an HS code listed in the MAC Protocol Annexes has been changed, split, merged or deleted, in most circumstances a proposed technical adjustment will be comprised of the removal of an obsolete code from the MAC Protocol and replacement with one or more codes in which the equipment covered by the obsolete code is now contained.

(d) **Proposal of technical adjustments:** the Depositary must notify all Contracting States of the outcome of an HS revision, regardless of whether the HS codes listed in the MAC Protocol Annexes have been affected. Where HS codes listed in the MAC Protocol Annexes have been affected by an HS revision, the Depositary must propose technical adjustments that (i) ensure that the Annexes remain aligned with the HS while also (ii) avoiding unnecessary changes to the scope of the MAC Protocol. The Depositary would merely be using the WCO's correlation tables to determine which codes were split, merged, renumbered or otherwise affected by an HS revision and proposing technical adjustments to the MAC Protocol Annexes to reflect such changes. The Depositary would not have the power to propose a technical adjustment on any other basis.⁴

(e) **Approval process:**

(i) **Threshold:** A technical adjustment proposed by the Depositary will be deemed to have been approved by Contracting States unless 1/3 of Contracting States notify the Depositary that they oppose the proposed technical adjustment. Such opposition should be lodged by Contracting States on an "adjustment by adjustment" basis.⁵ This

⁴ For example, during the 2017 HS revision, HS code 870190 covering tractors was split into five different HS codes according to the engine capacity of the tractors (870191, 870192, 870193, 870194 and 870195). Under the proposed Article XXXIIIbis process, the Depositary would be required to propose a technical adjustment removing HS 870190 and replacing it with the five "split" codes, even if one or more of the split codes may cover equipment which is not suited for inclusion in the Protocol (on the basis that the equipment covered is low value). However, Contracting States could propose additional adjustments as necessary under the procedure in Article XXXIIIter.

⁵ In WCO terminology, this complete "technical adjustment" would be referred to as a "set of HS changes".

means that Contracting States would not be obliged to object to all adjustments deriving from a specific HS revision, nor could they object to part of an adjustment only.⁶

(ii) **Timeline:** The approval process would finish 9 months after the adoption of the HS revision, but would guarantee Contracting States at least 6 months to consider the technical adjustment proposals and lodge an objection. This would allow the Depositary a maximum of 3 months to undertake the necessary consultations and notify Contracting States of any proposed technical adjustments. Such notification should specify the date within which objections can be lodged.

(f) **Meeting process:**⁷ Should 1/3 or more Contracting States object to a proposed technical adjustment, the approval process under (e) fails and the Depositary must convene a meeting of Contracting States to consider any technical adjustments to which objections were made. The meeting of States is required to try to achieve consensus in relation to the proposed adjustments. However, if consensus cannot be achieved, a 2/3 majority of participating Contracting States is required to approve the proposed adjustment. If it is not approved, the technical adjustment will fail and the MAC Protocol Annexes will remain the same. The Depositary should attempt to convene a Meeting of Contracting States within 3 months of the end of the objection period.⁸

(g) **Entry into force:** If a technical adjustment is successful, either through the approval process or the Meeting process, the Depositary must notify Contracting States of the technical adjustment. The date at which Contracting States are notified about a successful technical adjustment becomes the beginning of the “implementation period”. The technical adjustment will enter into force either 12 months after the start of the implementation period or upon the entry into force of the new HS revision, whichever is later.⁹ The Depositary notification will specify the date of entry into force of the technical adjustment.

(h) **Extension period:** A Contracting State has the right to exercise a temporary extension of the implementation period, in order to (a) gain additional time to undertake the necessary domestic law legislative changes to implement the technical adjustment, or (b) further evaluate an approved technical adjustment in order to determine whether the Contracting State should opt-out of its application.¹⁰ No later than 30 days before the end of the implementation period, a Contracting State shall notify the Depositary that it intends to exercise a 6-month temporary extension to the implementation period. Contracting States would have the right to exercise multiple 6-month temporary extension periods, each time notifying the Depositary no later than 30 days before expiry of the temporary extension period. The proposed set 6-month temporary extension period ensures that any Contracting States exercising a temporary extension would extend the implementation period for a predictable, uniform length of time.¹¹

⁶ For example, if an HS code listed in the MAC Protocol Annexes was split into two codes by an HS revision and the Depositary proposed a technical adjustment removing the now obsolete code and adding the two replacement codes, a Contracting State could not accept the removal of the obsolete code and the addition of one of the replacement codes, but reject the addition of the other replacement code.

⁷ Given the limited time available for the Meeting process to be completed, the Depositary should be able to convene and hold a meeting of Contracting States by electronic means.

⁸ Where an approval process under (e) fails (because the 1/3 threshold of Contracting States is reached) before the end of the 6-month period, the Depositary would not be required to wait until the end of the objection period before beginning preparations for the Meeting.

⁹ This approach does contemplate the possibility of a technical adjustment coming into force after the entry into force of the new HS revision.

¹⁰ The opt-out mechanism is explained below at 2(i).

¹¹ The Depositary must publish information regarding Contracting States exercising their extension periods as soon as possible after the Depositary is notified, to give other Contracting States and commercial parties as much notice as possible. For the FCC proposal to modify existing Article XXXIV on Depositary Functions to include

(i) **Opt-Out:** During the implementation period, Contracting States can notify the Depositary that they are opting out of a particular technical adjustment. The effect of such an opt-out is to freeze its obligations in relation to the HS codes affected by the technical adjustment as they existed before the HS revision.¹² It was agreed that Contracting States should be allowed to make an opt-out regardless of their involvement or decisions during the approval process or Meeting process. A Contracting State would only be able to exercise its opt-out on an adjustment-by-adjustment basis;¹³ it would not be possible to partially accept a technical adjustment and opt-out of its other part.¹⁴ To ensure commercial certainty, a Contracting State would have to notify the Depositary that it was exercising its right to opt-out of a technical adjustment at least 30 calendar days before the end of the implementation period. Contracting States would also be permitted to exercise an opt-out during a temporary extension period, notifying the Depositary at least 30 calendar days before the expiry of the temporary extension period. A Contracting State that has exercised an opt-out should be permitted to withdraw its opt-out at any time in the future by notifying the Depositary. Such a withdrawal would take effect 30 days after notification. The Official Commentary may want to clarify that where a Contracting State opts-out of a technical adjustment, it would be opting-out of that technical adjustment across all the Annexes to which it was a Party.

3. Article XXXIIIter – the adjustment process

7. The FCC decided that to preserve the balance of flexibility with State control in the MAC Protocol amendment process, an additional mechanism should be added to extend the methodology of the Article XXXIIIbis process to other types of changes to the HS Annexes unrelated to technical adjustments required to update the HS codes listed in the Annexes to maintain consistency with the latest HS version.

8. These other types of changes to the HS codes in the MAC Protocol Annexes could be referred to as adjustments. Adjustments would encompass at least four types of changes:

- (i) The addition of existing HS codes not currently listed in the MAC Protocol Annexes
- (ii) The addition of new HS codes created by an HS revision covering new types of MAC equipment (resulting from the development of new technologies)
- (iii) The addition of HS codes already listed in one Annex to other Annexes.
- (iv) The removal of HS codes listed in the Annexes.¹⁵

9. **Trigger and timing:** the adjustment process would be triggered by a proposal by at least 2 Contracting States. The timing of the adjustment process should be linked to the timing of the

specific duties to communicate such information to the Supervisory Authority and the Registrar, see below, para. The regulations should require the Registrar to publicise such information communicated by the Depositary.

¹² For example, if an HS codes listed in the MAC Protocol Annexes was split into two codes by an HS revision and the Depositary proposed a technical adjustment removing the now obsolete code and adding the two replacement codes, a Contracting State opting out would retain the previous obsolete code, and the coverage Contracting State's obligations in relation to that code. This would include any interpretative rules or notes applicable at the relevant date. It should be noted however, that such a change could be proposed by Contracting States under the Article XXXIIIter process detailed below.

¹³ In WCO terminology, this complete "technical adjustment" would be referred to as a "set of HS changes".

¹⁴ For example, if an HS codes listed in the MAC Protocol Annexes was split into two codes by an HS revision and the Depositary proposed a technical adjustment removing the now obsolete code and adding the two replacement codes, a Contracting State could not accept the removal of the obsolete code and the addition of one of the replacement codes, but opt-out of the addition of the other replacement code.

¹⁵ Removals could be in relation to (i) removals of existing codes that have been listed in the MAC Protocol Annexes for prolonged period, or (ii) removals of HS codes that have been added through a technical adjustment due to an HS revision, but for policy reasons are considered by Contracting States to be undesirable.

technical adjustment process, but allow for sufficient flexibility for the Depository to start the process “out of session” if the circumstances so require.¹⁶

10. **Process:** The Article XXXIIIter process for adjustments would then be identical to the Article XXXIIIbis process, but it would only require 1/4 of Contracting States to oppose a proposed adjustment for the approval process to fail, which is a lower threshold than the 1/3 requirement proposed in Article XXXIIIbis. A Meeting process would still occur on the failure of the process and States would still have the right to opt-out and apply for temporary extensions.

Other issues

11. Publication of changes: The FCC discussed how to publicise information regarding adjustments to the HS codes listed in the MAC Protocol Annexes as well as information on whether Contracting States have rejected or accepted these changes.¹⁷ This information should be published not only on the Depository website but also on the International Registry website. The FCC agreed that this matter be dealt with by amending the MAC Protocol “Depository and its Functions” Article (currently Article XXXIV) to explicitly require the Depository to provide the Supervisory Authority and Registrar with information regarding changes to the HS codes listed in the MAC Protocol Annexes and whether Contracting States have rejected or accepted these changes. The regulations to the International Registry should then require the Registrar to make such information is made publicly available in the International Registry.

12. Applicability of amendment articles before entry into force of the Protocol: Currently, all references in the MAC Protocol’s amendment articles are to Contracting States. “Contracting State” means a State which has consented to be bound by a treaty, whether or not the treaty has entered into force.¹⁸ The FCC endorsed Articles XXXIII and XXXIIIbis maintaining the references to “Contracting States”, which would allow those procedures to be utilised regardless of whether the MAC Protocol has entered into force. However, the FCC differentiated the new Article XXXIIIter, which should only be able to be utilised after the treaty has entered into force, to prevent a small number of States from potentially changing the scope of the MAC Protocol by adding or deleting HS codes unrelated to an HS revision.

13. Linguistics: The FCC noted the following linguistic issue: “opt-out” has a very specific meaning under the CTC and MAC Protocol. The FCC suggests that the Drafting Committee consider whether a different term should be used to describe a State’s “refusal to be bound” by an approved change to the MAC Protocol Annexes.

14. Definitions: The FCC suggested that the Drafting Committee may wish to consider whether the current definition of “Harmonized System” in Article I of the MAC Protocol is sufficient to clarify the relationship with the HS codes listed in the MAC Protocol Annexes.

¹⁶ In most circumstances, the “adjustment” process would be aligned with the “technical adjustment” process and thus be run once every 5 years, as aligned with the HS revision timetable. However, if 2 Contracting States proposed an “adjustment” 3 months after the entry into force of a new HS version, it might be unreasonable to postpone the process for three years until the next “technical adjustment” process starts.

¹⁷ Including whether a State has exercised the right to a temporary extension.

¹⁸ Vienna Convention on the Law of Treaties, Article 2 (1)(f).