

# If It Ain't Broke, Don't Fix It! The Development of the Draft MAC Protocol

William Brydie-Watson\*

## Abstract

*Once adopted, the MAC Protocol will extend the operation of the Cape Town Convention to the mining, agricultural and construction sectors. In attempting to replicate the outstanding success of the Aircraft Protocol, the draft MAC Protocol has retained the earlier instrument's core legal rules. However, the draft MAC Protocol also contains additional rules to accommodate practices in the manufacture, use and financing of mining, agricultural and construction equipment. This article provides a comparative legal analysis of the Aircraft Protocol and the draft MAC Protocol. By tracking the instrument's development, consideration is given to how the draft MAC Protocol satisfies the criteria set out in Article 51 of the Cape Town Convention which govern the negotiation of future protocols. By retaining a policy of adherence to the Aircraft Protocol, the MAC Protocol is well positioned to provide a stable, clear and predictable international regime for the financing of mining, agricultural and construction equipment.*

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As the fourth protocol to the 2001 Convention on International Interests in Mobile Equipment (the 'Cape Town Convention' or 'Convention'), the MAC Protocol is in many respects the beginning of a new chapter in the treaty's venerable history. Of the existing protocols, the Aircraft Protocol<sup>1</sup> was adopted simultaneously with the mother Convention, while the Luxembourg Rail Protocol<sup>2</sup> and Space Protocol<sup>3</sup> were both expressly recognised in the text of the Convention finalised at the 2001 diplomatic conference in Cape Town.<sup>4</sup> As such, the MAC Protocol is the first expansion of the Cape Town Convention that moves it outside the boundaries initially contemplated at the Convention's inception.

From the outset, the MAC Protocol had to resolve a conflict between two competing principles. First, the instrument needed to create a legal framework that would improve the international landscape for the financing of mining, agricultural and construction (MAC) equipment. Second, it had

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\* Legal Officer, International Institute for the Unification of Private Law (UNIDROIT). The views expressed in this chapter are strictly those of the author. They do not purport to represent the views of UNIDROIT.

<sup>1</sup> Future Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment.

<sup>2</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment adopted on 16 November 2001 in Cape Town.

<sup>3</sup> Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, adopted on 23 February 2007 in Luxembourg.

<sup>4</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, adopted on 9 March 2012 in Berlin.

<sup>5</sup> Article 2(3) of the Convention expressly lists 'airframes, aircraft engines and helicopters', 'railway rolling stock' and 'space assets' as categories over which an international interest can be constituted under the treaty.

to do so without moving too far beyond the conceptual framework of the Cape Town Convention, which has so successfully established an international asset-based financing regime for certain categories of high value, mobile and uniquely identifiable objects.

The fundamental tension between these two goals was carefully negotiated over a period of 13 years by UNIDROIT, resulting in a draft MAC Protocol approved by the UNIDROIT Governing Council ('Governing Council') in May 2018 for transmission to a diplomatic conference for adoption in 2019.<sup>6</sup> In advance of the diplomatic conference, this article provides an examination of both the development of the draft MAC Protocol and an analysis of the articles of the draft instrument through the comparative lens of the Aircraft Protocol. The purpose of this analysis is to scrutinise how the draft MAC Protocol attempts to resolve the two competing goals, and whether the instrument has achieved an appropriate balance.

This article is based upon a presentation delivered at the seventh Cape Town Convention Academic Project Conference at the University of Oxford in September 2018. It provides a comparative legal analysis of the substantive articles in Chapters I and II of the Aircraft Protocol and the MAC Protocol.

Section I provides an analytical framework for this paper, based on Article 51 of the Cape Town Convention. Section II briefly discusses the historical development of the MAC Protocol project, in order to establish the two competing goals in more detail, and to identify the approach adopted to resolve the conflict. Section III provides an article-by-article comparative analysis of Chapters I and II of the two protocols, comprised of 13 provisions in the draft MAC Protocol and 16 provisions in the Aircraft Protocol. The purpose of this analysis is to provide an overview of the major similarities and differences between the substantive provisions of the two instruments. In the few instances where the draft MAC Protocol significantly diverges from the Aircraft Protocol,<sup>7</sup> this article notes the rationale behind the divergence but does not exhaustively explain the operation of each of the relevant provisions. Where appropriate, this article also discusses the corresponding provisions of the Luxembourg Rail Protocol and Space Protocol to provide further context.

This article suggests that by adopting a policy of adherence to the Aircraft Protocol's principles and provisions, the experts involved in the preparation of the draft MAC Protocol have prepared a workable treaty. This policy of adherence, or consistency with the Aircraft Protocol (which can be casually summarised as 'if it ain't broke, don't fix it') has resulted in a draft instrument that fits well within the Cape Town Convention framework. More importantly, this article anticipates that the draft instrument will replicate the success of the Cape Town Convention and Aircraft Protocol in providing a stable, clear and predictable international regime for the financing of mobile equipment.

## I. Analytical framework

This article considers the draft MAC Protocol through two mechanisms. Firstly, it examines its compatibility with the criteria set out in Article 51 of the Convention. Secondly, it considers the draft MAC Protocol's provisions in comparison to the provisions of the Aircraft Protocol.

Article 51 of the Convention expressly contemplates the extension of its applicability through future protocols to objects other than 'airframes, aircraft engines and helicopters', 'railway rolling stock',

<sup>6</sup> The current text of the draft MAC Protocol is reproduced in UNIDROIT, *Study 72k - CGE1 - DC - Doc. 3* (2018) <[www.unidroit.org/english/documents/2018/study72k/dc/s-72k-dc-03-e.pdf](http://www.unidroit.org/english/documents/2018/study72k/dc/s-72k-dc-03-e.pdf)> accessed 10 March 2019. All subsequent references to the draft MAC Protocol are references to this text, unless otherwise stated.

<sup>7</sup> For example, the relationship between international interests and immovable property interests under Article VII or the treatment of inventory under Article XII of the draft MAC Protocol.

and 'space assets'.<sup>8</sup> However, it limits UNIDROIT<sup>9</sup> to creating working groups to assess the feasibility of extending the application of the Convention through additional protocols only to objects of 'high-value mobile equipment... each member of which is uniquely identifiable'.<sup>10</sup>

Accordingly, the three criteria of value, mobility and unique identifiability are broadly considered to be the standard by which to assess whether further extension of the Cape Town Convention is appropriate. This is in part because the Convention was designed with the regulation of aircraft in mind, which are some of the highest value mobile assets conceivable. Evidently, the original drafters of the Convention determined that railway rolling stock and space assets comfortably satisfied the high-value, mobile and unique identifiability criteria by their very nature. In a general sense, trains are generally considered to be high-value, mobile assets. However, on a relative basis trains are significantly less valuable and mobile than aircraft. Accordingly, this conceptual broadening of the Article 51 criteria in the text of the Cape Town Convention itself became an important interpretative tool used in applying the criteria to MAC equipment.

As is explored in Section II, the Article 51 criteria formed the core considerations in ensuring the draft MAC Protocol stayed within the conceptual bounds of the Convention framework. Other key facets of the draft protocol were quickly adopted by the Study Group,<sup>11</sup> such as the creation of an asset-based international registry. This is because divergence on key points would have instantly moved the draft protocol outside the Cape Town Convention framework.

However, the attempt of the experts preparing the draft MAC Protocol to stay within the confines of the Convention structure was not limited to consideration of the Article 51 criteria and a 'if it ain't broke, don't fix it' approach to the substantive rules of the protocol. It was extended to other defining features, such as the use of declarations to give contracting states different options in implementing challenging parts of the protocol, and the entire structure of the instrument.

There were two rationales behind the 'if it ain't broke, don't fix it' policy. The major factor was the outstanding success of the Cape Town Convention and Aircraft Protocol achieved over a relatively short period. As the MAC Protocol project began to take shape in 2010, the Cape Town Convention and Aircraft Protocol had already attracted 31 and 29 contracting states respectively, an astonishing achievement in only nine years. This success has only gained momentum in recent years, as reflected by the 79 and 76 contracting states that the Convention and Aircraft Protocol now have respectively.<sup>12</sup> The rapid success not only inspired UNIDROIT to quickly contemplate additional protocols, but it also provided a protocol with demonstrated success which could be used as a model for future instruments.

Similarly, the second rationale for the policy was that it had already been adopted in relation to the Luxembourg Rail Protocol and the Space Protocol. While there are some significant deviations in legal rules as necessary to accommodate the different categories of equipment and financing practices in the rail and space industries, the core rules, structure of the instruments and drafting con-

<sup>8</sup> Article 2(3) expressly lists 'airframes, aircraft engines and helicopters', 'railway rolling stock' and 'space assets' as categories over which an international interest can be constituted under the Convention.

<sup>9</sup> Article 51 refers to the Depositary as the body which considers extension of the Convention through additional protocols. UNIDROIT is designated as the Depositary under Article 62(1) of the Convention.

<sup>10</sup> Cape Town Convention, Article 51(1).

<sup>11</sup> Under UNIDROIT's working methodology, study groups are committees of experts that are formed to prepare initial drafts of instruments. Generally chaired by a member of the UNIDROIT Governing Council, members of study groups sit in a personal capacity and are selected from different legal systems and geographic regions to ensure the draft text being prepared is appropriately balanced. See UNIDROIT, 'History and Overview' <[www.unidroit.org/about-unidroit/overview](http://www.unidroit.org/about-unidroit/overview)> accessed 15 May 2019. In this article, the 'Study Group' refers to the UNIDROIT study group established for the development of the MAC Protocol.

<sup>12</sup> As at March 2019.

ventions used in the Luxembourg Rail and Space Protocols mirror those in the Aircraft Protocol. In this respect, the MAC Protocol was always destined to follow its elder siblings to the greatest extent possible. As a result of the Aircraft Protocol being used as a blueprint for all of the subsequent protocols to the Convention, many of the draft MAC Protocol's articles are consistent with all the existing protocols. However, for clarity and simplicity, this article focuses primarily on comparing the legal operation of the Aircraft Protocol and draft MAC Protocol.

## II. Development of the MAC Protocol

The history of the MAC Protocol project is already documented in existing literature.<sup>13</sup> Accordingly, this article only summarises the process for context, with a focus on core points where the reconciliation of the MAC Protocol with the Cape Town Convention framework was addressed.

### *Article 51*

The tension between the scope of the draft MAC Protocol and the Cape Town Convention framework encapsulated by the Article 51 criteria was evident right from the beginning of the project. In fulfilling their responsibility of monitoring and reviewing the legislative activity of UNIDROIT, its Governing Council repeatedly insisted that the viability of the MAC Protocol project depended on its ability to stay within the Article 51 criteria. In 2006 at the Governing Council's 85<sup>th</sup> session, following UNIDROIT's first report on the MAC Protocol project, the Irish Government Council member Gerard Hogan noted the difficulties in identifying MAC equipment that was inherently mobile and high-value.<sup>14</sup> In 2009 at the Governing Council's 88<sup>th</sup> session, the Danish member Michael Elmer expressed scepticism regarding the project, on the basis that the scope of the MAC Protocol was much broader than previous protocols and needed to be narrowed down.<sup>15</sup> Similar doubts around the applicability of the Article 51 criteria, particularly the value and mobility aspects were subsequently raised at the Governing Council's 89<sup>th</sup>, 90<sup>th</sup>, 91<sup>st</sup>, 92<sup>nd</sup> and 93<sup>rd</sup> sessions between 2010 and 2014.<sup>16</sup>

At the heart of the issue is how the MAC Protocol identifies the type of MAC equipment to which it applies. In the previous protocols, a descriptive approach of a type of asset (airframe, aircraft engine, helicopter, railway rolling stock, or space asset) was sufficient for defining the applicability of the protocol to a type of asset, on the presupposition that these types of assets inherently met the Article 51 criteria. This is not the case for MAC equipment, especially in relation to the high-value criterion. A small lawn mower could be viewed as MAC equipment, but is clearly outside the realm of high value, commercial equipment that the Cape Town Convention is designed to regulate the

<sup>13</sup> Henry Deeb Gabriel, 'The MAC Protocol: We Aren't There Yet – How Far Do We Have to Go?' (2015) 4 Cape Town Convention Journal 67; Charles W Mooney Jr, 'The MAC Protocol, Some Comments And a Challenge' (2015) 4 Cape Town Convention Journal 76; Charles W Mooney Jr, Marek Dubovec and William Brydie-Watson, 'The Mining, Agricultural and Construction Equipment Protocol to the Cape Town Convention Project: The Current Status' (2016) 21 Unif L Rev 332, 342-347. See also, UNIDROIT, 'The MAC Protocol: Background' available at <[www.unidroit.org/work-in-progress/mac-protocol#a5](http://www.unidroit.org/work-in-progress/mac-protocol#a5)> accessed 1 March 2019.

<sup>14</sup> UNIDROIT, *Governing Council C.D. (85) 19 (2006) 10* <[www.unidroit.org/english/governments/councildocuments/2006session/cd85-19-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2006session/cd85-19-e.pdf)> accessed 10 March 2019.

<sup>15</sup> UNIDROIT, *Governing Council C.D. (88) 17 (2009) para 143* <[www.unidroit.org/english/governments/councildocuments/2009session/cd88-17-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2009session/cd88-17-e.pdf)> accessed 10 March 2019.

<sup>16</sup> See UNIDROIT, *Governing Council C.D. (89) 17 (2010) paras 33-37*; UNIDROIT, *Governing Council C.D. (90) 18 (2011) paras 68-70*; UNIDROIT, *Governing Council C.D. (91) 15 (2012) paras 46-47*; UNIDROIT, *Governing Council C.D. (92) 17 (2013) paras 44-48*; UNIDROIT, *Governing Council C.D. (93) 14 (2014) paras 34-38* <[www.unidroit.org/meetings/governing-council](http://www.unidroit.org/meetings/governing-council)> accessed 10 March 2019.

financing of. As such, the MAC Protocol needed to devise a new approach to delineating its scope in relation to MAC equipment that diverged from the description-based scope mechanisms in the prior protocols.

The breakthrough came during a six-month period in late 2013 and early 2014. The United States Department of State and the International Law Institute organised two Issues Dialogues in Washington in November 2013 and 2014 to examine the adaptability of the Cape Town Convention to MAC equipment.<sup>17</sup> During discussions regarding the scope, a suggestion emerged that the World Customs Organization's Harmonized Commodity and Coding System ('HS System') be utilised to select types of MAC equipment, as identified by six digit codes ('HS Codes'), which satisfied the Article 51 criteria. This suggestion provided a theoretical answer to the fundamental question that had plagued the first seven years of the project, and paved the way for the Governing Council in May 2014 to approve the creation of the Study Group to progress the project.

Composed of various international experts in secured transactions law, the Study Group met four times (15-17 December 2014, 8-9 April 2015, 19-21 October 2015 and 7-9 March 2016) to consider the legal issues associated with the preparation of the MAC Protocol and to prepare a preliminary draft text.<sup>18</sup> To ensure that the Study Group faithfully followed the Governing Council's policy of aligning the MAC Protocol with the Convention's existing framework, the German Governing Council member Hans Georg Bollweg was made chair of the Study Group. Even the composition of the Study Group reflected UNIDROIT's desire to draft an instrument consistent with the existing protocols. The small group of international experts chosen had all participated in the negotiation of the previous protocols to the Cape Town Convention, with the expectation that they would utilise their expert knowledge of the three existing protocols to assist in the preparation of a fourth.<sup>19</sup>

#### *If it ain't broke, don't fix it*

Beyond the strict adherence to the Article 51 criteria, a broader approach of observing the drafting and rules of the previous protocols was adopted. Throughout the process of development of the MAC Protocol, the starting point of drafting each article was the corresponding article in the previous protocols.

This approach to consistency in drafting and substance began at an early stage. At the Governing Council's 89<sup>th</sup> session in 2010, the French member Daniel Tricot suggested that the Aircraft and Luxembourg Rail Protocols serve as a basis for the MAC Protocol.<sup>20</sup> Interestingly, at that meeting the concept of using the existing protocols as a blueprint for the MAC Protocol was initially challenged on the basis that the contractual parties to financing agreements for MAC equipment were not of equal strength, whereas in the aircraft and rail industries they were.<sup>21</sup>

Notwithstanding the initial debate, the use of the previous protocols as the basis of the MAC Protocol quickly became the established norm. The first draft text prepared by the UNIDROIT Secre-

<sup>17</sup> UNIDROIT, *Governing Council C.D. (93) 4(b) (2014)* paras 10-22 <[www.unidroit.org/english/governments/councildocuments/2014session/cd-93-04b-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2014session/cd-93-04b-e.pdf)> accessed 10 March 2019.

<sup>18</sup> UNIDROIT, *Governing Council C.D. (97) 5 (2018)* para 5 <[www.unidroit.org/english/governments/councildocuments/2018session/cd-97-05-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2018session/cd-97-05-e.pdf)> accessed 10 March 2019.

<sup>19</sup> The Study Group comprised of Michel Deschamps, McCarthy Tétrault (Canada), Charles Mooney, University of Pennsylvania (United States of America), Jean-François Riffard, Université de Clermont-Ferrand (France), Teresa Rodríguez de las Heras Ballell, Universidad Carlos III de Madrid (Spain) and Benjamin von Bodungen, Counsel at Bird & Bird LLP (Germany).

<sup>20</sup> UNIDROIT, *Governing Council C.D. (89) 17 (2010)* para 33 <[www.unidroit.org/english/governments/councildocuments/2010session/cd89-17-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2010session/cd89-17-e.pdf)> accessed 10 March 2019.

<sup>21</sup> *ibid*, intervention from Governing Council member Mr Voulgaris.

tariat ('Secretariat') for consideration by the Governing Council at its 88<sup>th</sup> session in 2009 contained 22 articles based on provisions from the Aircraft Protocol and the Luxembourg Rail Protocol. This first tentative draft, which did not fully explore major issues (such as scope or registration criteria) or contain final provisions, adopted the Aircraft Protocol approach of extending its application to sales of MAC equipment and employed the three insolvency alternatives contained in the Luxembourg Rail Protocol.<sup>22</sup>

The preparation of the MAC Protocol based on a comparative analysis of the three existing protocols was expanded in the Secretariat's report to the 90th session of the Governing Council in 2011. The Secretariat presented a comparative table to the Governing Council containing the wording of the three existing protocols, with a fourth column containing provisions proposed for the MAC Protocol.<sup>23</sup> This comparative analysis confirmed that the Secretariat intended to prepare the MAC Protocol on the basis of the existing instruments, and would only diverge where the approaches to issues in the existing protocols were wholly inappropriate in the MAC Protocol context, or where new issues emerged that were not addressed in the previous protocols.

The establishment of a Study Group rich with expertise in the Cape Town Convention had its desired effect of grounding the preparation of the preliminary draft MAC Protocol in the three existing protocols. Right from the first meeting it was clear that the drafting of the preliminary draft text would be done by first looking to the relevant rule in the preceding protocols, with a strong presumption that where the three existing instruments had a uniform approach to a certain issue, then the preliminary draft MAC Protocol should adopt that approach, unless it was wholly inappropriate.

Where the existing protocols diverged, a strong presumption remained that one of the approaches utilised in the existing protocols should still be preferred to drafting an entirely new rule. An example of this was the Study Group's approach to the insolvency remedies. As discussed in Section III below, the Aircraft and Space Protocols contain two sets of alternative insolvency remedies, Alternative A and Alternative B, whereas the Luxembourg Rail Protocol contains an additional Alternative C.<sup>24</sup> The alternative insolvency remedies under the existing protocols are optional provisions that contracting states may choose to apply instead of their domestic insolvency law. Given the sensitive nature of international attempts to regulate insolvency law, the Study Group prudently determined that the preliminary draft MAC Protocol should follow the approach of the existing protocols, rather than drafting an entirely new approach. There was also agreement that the preliminary draft text should contain Alternative C, as it better reflected the Continental European approach to insolvency.<sup>25</sup> The Study Group queried whether Alternative B was necessary, given the low number of countries that had chosen to opt for it in ratifying the Aircraft Protocol, and because Alternative C had been drafted in part to address the alleged deficiencies in Alternative B. However, the exclusion of Alternative B would have created a new 'third' approach to insolvency remedies, different from the alternatives provided in the Aircraft and Space Protocols and the Luxembourg Rail Protocol respectively. Ultimately, the Study Group decided to include all three insolvency alternatives to retain consistency with the Luxembourg Rail Protocol.<sup>26</sup>

<sup>22</sup> UNIDROIT, *Governing Council C.D. (88)3(c) (2009)* <[www.unidroit.org/english/governments/councildocuments/2009session/cd88-03c-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2009session/cd88-03c-e.pdf)> accessed 11 March 2019.

<sup>23</sup> UNIDROIT, *Governing Council C.D. (90) 4(c) (2011), Annex 2* <[www.unidroit.org/english/governments/councildocuments/2011session/cd90-04c-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2011session/cd90-04c-e.pdf)> accessed 11 March 2019.

<sup>24</sup> Aircraft Protocol, Article XI; Luxembourg Rail Protocol, Article IX; Space Protocol Article XXI.

<sup>25</sup> UNIDROIT, *Study 72K – SG1 – Doc. 5 (2015)* paras 32-36 <[www.unidroit.org/english/documents/2015/study72k/s-72k-sg01-05-e.pdf](http://www.unidroit.org/english/documents/2015/study72k/s-72k-sg01-05-e.pdf)> accessed 12 March 2019.

<sup>26</sup> UNIDROIT, *Study 72K – SG2 – Doc. 6 (2015)* para 46 <[www.unidroit.org/english/documents/2015/study72k/sg02/s-72k-sg02-06-e.pdf](http://www.unidroit.org/english/documents/2015/study72k/sg02/s-72k-sg02-06-e.pdf)> accessed 12 March 2019.

The discussion around the insolvency alternatives illustrates the quite extreme lengths the Study Group went to in order to avoid including provisions in the preliminary draft MAC Protocol that did not directly align with the previous protocols. Even though the Study Group was not strongly convinced that insolvency remedy Alternative B would be utilised by contracting states, the fact that its exclusion would have resulted in the MAC Protocol losing consistency with the previous protocols combined with the optional nature of the insolvency remedies was enough for the Study Group to include Alternative B in the preliminary draft instrument.

The Study Group concluded its preparation of the preliminary draft MAC Protocol after its fourth meeting in March 2016 and determined that the draft instrument was sufficiently developed to be submitted to the Governing Council with a recommendation that a Committee of Governmental Experts<sup>27</sup> ('CGE') be convened to further consider the protocol. In presenting the instrument to the Governing Council, the Secretariat stressed that the articles of the preliminary draft MAC Protocol were overwhelmingly consistent with the articles of the existing protocols. The report to the Governing Council explicitly noted that, where possible, the 33 articles in the Study Group draft mirrored the language and legal substance of the corresponding provisions in the three previous protocols and that most articles were almost identical to previous protocols.<sup>28</sup> The report further explained that where the previous protocols differed from one another in their approach to a particular issue, the Study Group adopted the provisions from the previous protocol that were most suitable for the MAC equipment context.

During the Governing Council's meeting itself, the Secretariat further verbally reiterated the preliminary draft MAC Protocol's consistency with the previous protocols, noting that 27 of the 33 articles closely mirrored the corresponding articles in the previous protocols.<sup>29</sup> In approving the convening of the Committee of Governmental Experts, the Governing Council members explicitly referred to two reasons underpinning their belief that the preliminary draft MAC Protocol was sufficiently developed to progress to the next stage of negotiation: (i) that the protocol had largely remained consistent with the rules in the existing protocols and (ii) that the Study Group had identified appropriate solutions to those issues that required a new approach.<sup>30</sup>

Following the submission of the draft instrument to the Committee of Governmental Experts, in supporting the Governing Council's wishes, UNIDROIT continued to take steps to ensure that consistency with the previous protocols was a major policy consideration for the CGE. Primarily, this was achieved through the preparation of an explanatory report for the preliminary draft MAC Protocol ('Explanatory Report').<sup>31</sup> The 70-page document provided explanatory comments on each article in the preliminary draft text, as prepared by the Study Group and approved by the Governing Council. On an article-by-article basis, the Explanatory Report directly tied each provision of the preliminary draft MAC Protocol to its corresponding articles in the previous protocols, and

<sup>27</sup> Under UNIDROIT's working methodology, intergovernmental negotiation of a draft instrument before it proceeds to a diplomatic conference for adoption is undertaken by a committee of governmental experts. Therefore, Article 51(2) of the Cape Town Convention provides that the Depository (UNIDROIT) shall invite all State Parties to the Cape Town Convention, UNIDROIT member States, member States of the United Nations and relevant intergovernmental organisations to participate in a committee of governmental experts for the negotiation of additional protocols to the Cape Town Convention.

<sup>28</sup> UNIDROIT, *Governing Council C.D. (95) 5 (2016) paras 7-9* <[www.unidroit.org/english/governments/councildocuments/2016session/cd-95-05-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-05-e.pdf)> accessed 12 March 2019.

<sup>29</sup> UNIDROIT, *Governing Council C.D. (95) 15 (2016) para 143* <[www.unidroit.org/english/governments/councildocuments/2016session/cd-95-15-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-15-e.pdf)> accessed 12 March 2019.

<sup>30</sup> *ibid* paras 148-158.

<sup>31</sup> UNIDROIT, *Study 72K - CGE1 - Doc. 3 corr (2017)* <[www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-03corr-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-03corr-e.pdf)> accessed 12 March 2019.

explained the operation of each article in this light. The Explanatory Report states that where articles were based upon those in the previous protocols, material from the official commentaries to the previous protocols was adapted to explain the purpose and function of the relevant provisions.<sup>32</sup> In designing the Explanatory Report in such a way, UNIDROIT ensured that states that were considering the provisions of the preliminary draft MAC Protocol for the first time would be doing so from the perspective of the existing protocols.

The Committee of Governmental Experts met over two sessions in March and October 2017. During negotiations, the participating states themselves further entrenched the position of the existing protocols as a fundamental factor in drafting the preliminary draft MAC Protocol through its election of the CGE's officers.<sup>33</sup> The election of Dominique D'Allaire of the Canadian delegation as chair of the CGE ensured that the CGE would be led at the highest level by an individual with a deep appreciation and understanding of the Cape Town Convention system, as D'Allaire had previously been the chair of the Luxembourg Rail Protocol diplomatic conference in 2007. The appointment of Roy Goode<sup>34</sup> as the reporter for the CGE further guaranteed that the CGE's deliberations would be guided by the world's leading expert in the Cape Town Convention system and its three existing protocols.

Given these factors, it is unsurprising that the CGE upheld the Study Group's approach to maintaining consistency between the MAC Protocol and the previous protocols to the greatest extent possible.<sup>35</sup> Over both sessions, the vast majority of the preliminary draft MAC Protocol's articles were subject to unanimous support and approval, and most articles drafted by the Study Group were adopted verbatim by the CGE. The CGE spent the majority of its time crafting the preliminary draft text's approach to new issues rather than reopening issues that were substantively dealt with in the previous protocols.

On 3 May 2018 at its 97<sup>th</sup> session in Rome, the Governing Council authorised the Secretariat to submit the draft MAC Protocol to a diplomatic conference, which will be held in Pretoria, South Africa in November 2019. Given the longstanding commitment to upholding the 'if it ain't broke, don't fix it' policy throughout the development of the MAC Protocol, it is reasonable to assume that this approach will be continued at the diplomatic conference.

### III. Comparative analysis of the MAC Protocol and the Aircraft Protocol

Considering the importance placed on designing a protocol that was consistent with the Cape Town Convention framework and the existing protocols, it is unsurprising that the draft MAC Protocol is overwhelmingly consistent with the Aircraft Protocol.

While modelled on the Aircraft Protocol, the draft MAC Protocol also has many similarities with the Luxembourg Rail Protocol. In addition to the many almost uniform articles that the draft MAC Protocol has adopted from the three previous protocols, the draft MAC Protocol additionally utilises the Luxembourg Rail Protocol's approach to insolvency remedies, and registration of notices of sale. While the Luxembourg Rail Protocol lends itself to a more straightforward comparison to the draft MAC Protocol, this article uses the Aircraft Protocol as the basis of comparison for a number

<sup>32</sup> *ibid* para 1.

<sup>33</sup> UNIDROIT, *Study 72K - CGE1 - Report (2017)* paras 1-5 <[www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-report-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-report-e.pdf)> accessed 12 March 2019.

<sup>34</sup> Roy Goode is the author of the official commentaries to the Aircraft Protocol, Luxembourg Rail Protocol and the Space Protocol.

<sup>35</sup> UNIDROIT, *Governing Council C.D. (97) 5 (2018)* paras 8, 12-13 <[www.unidroit.org/english/governments/councildocuments/2018session/cd-97-05-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2018session/cd-97-05-e.pdf)> accessed 12 March 2019.



of reasons. First, the Aircraft Protocol is the original protocol and was used as a blueprint for the subsequent protocols, which makes it a natural starting point for a comparative analysis. Second, the Aircraft Protocol has attracted 76 contracting states<sup>36</sup> and has entered into force. As a result, many more governmental experts, academics and practitioners will have a greater familiarity with the Aircraft Protocol than the Luxembourg Rail Protocol. Third, the Aircraft Protocol has an operational registry. Fourth, the clear divergences between the MAC and Aircraft Protocols on certain issues, such as application to sales, allows this article to explain why decisions were made to divert from the successful status quo.

From a macro perspective, the Aircraft Protocol and draft MAC Protocol are structured similarly. The Aircraft Protocol has six chapters, 37 articles and one annex, whereas the draft MAC Protocol has six chapters, 34 articles and three annexes. The six chapters of the draft MAC Protocol directly mirror the Aircraft Protocol's chapters (sphere of application and general provisions, default remedies and priorities, registry provisions, jurisdiction, relationship with other conventions and final provisions). The annexes to the two instruments perform different functions; the annex to the Aircraft Protocol contains the model form for an irrevocable de-registration and export request authorisation ('IDERA'), whereas the draft MAC Protocol's annexes contain the HS Codes which cover equipment which falls within the scope of the protocol.

The text of the preamble of the draft MAC Protocol is based directly on that of the Aircraft Protocol. The draft MAC Protocol substitutes the reference to the 1944 Convention on International Civil Aviation in the Aircraft Protocol with a reference to the role played by the HS System in determining the scope of the draft MAC Protocol. The draft MAC Protocol preamble also contains a direct reference to the Article 51 criteria in its second paragraph, which was added during the first session of the Committee of Governmental Experts to emphasise the draft MAC Protocol's conformity with these principles. The Study Group draft originally contained a reference in the fourth paragraph to the particular benefit the draft MAC Protocol would have in developing countries.<sup>37</sup> However, at the second session of the Committee of Governmental Experts ('CGE2'), a number of delegations from emerging markets and developing countries suggested the preamble should instead refer to global economic benefits only, which led to the removal of the reference to developing countries from the fourth paragraph.<sup>38</sup>

Article I is largely consistent between the Aircraft Protocol and draft MAC Protocol. Both contain an identical rule in Article I(1) that terms in the protocol have the same meanings as those used in the Convention, which ensures the 40 definitions in the Convention are also applicable to the protocol. In paragraph 2, the definitions of 'guarantee contract', 'guarantor', 'insolvency-related event' and 'primary insolvency jurisdiction' are identical in all four protocols. The draft MAC Protocol defines 'agricultural equipment', 'construction equipment' and 'mining equipment' individually to allow for their separate listings in the annexes to the protocol (HS Codes for mining equipment in Annex 1, HS Codes for agricultural equipment in Annex 2 and HS Codes for construction equipment in Annex 3). Article I also contains definitions for new terms not used in the Aircraft Protocol: 'Harmonized System', 'immovable-related equipment', 'dealer' and 'inventory'. These additional definitions reflect three of the key core areas in which the draft MAC Protocol diverges from the Aircraft Protocol, as explored below.

While the descriptive approach of the definitions of 'airframe', 'aircraft engine' and 'helicopter' in

<sup>36</sup> As of March 2019.

<sup>37</sup> UNIDROIT, *Study 72K – CGE1 – Doc. 2 corr. (2017)* 5 <[www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-02corr-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-02corr-e.pdf)> accessed 15 May 2019.

<sup>38</sup> UNIDROIT, *Study 72K – CGE2 – Report (2017)* para 43 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf)> accessed 10 March 2019.

the Aircraft Protocol differ significantly from the draft MAC Protocol's approach to defining 'agricultural equipment', 'construction equipment' and 'mining equipment' by reference to the lists of HS Codes in the annexes, they share a commonality in that both sets of definitions include 'all installed, incorporated or attached accessories and parts and all data, manuals and records relating thereto'. The wording of these expansions of the definitions slightly differ in the two protocols. The Aircraft Protocol also includes 'equipment' and 'modules', whereas the draft MAC Protocol includes the word 'components' (however they are taken to apply to substantively the same material). The draft MAC Protocol contains an additional limitation in that the definitions of 'agricultural equipment', 'construction equipment' and 'mining equipment' only include installed, incorporated or attached accessories to the extent that these additional parts 'do not fall within a separate Harmonized System code listed in that Annex'. This limitation was necessary to prevent two pieces of MAC equipment temporarily physically attached, such as a tractor and harvester, being defined as one indistinguishable piece of equipment. The equipment definitions did not require the Aircraft Protocol limitations in relation to 'military, police and customs' equipment, partially due to the extremely limited likelihood that MAC equipment would have a military function, but predominantly because it was understood that the HS System lists equipment with a military function separately under Chapter 93.

Paragraphs 1 and 2 of Article II of the two protocols are largely consistent, except for one important nuance added to the draft MAC Protocol during CGE2. Article II(1) of the draft MAC Protocol provides that the Convention shall apply in relation to MAC equipment as provided by the terms of the protocol and its annexes, 'irrespective of any intended or actual use of the equipment'. This insertion reflected a policy understanding adopted by the Study Group that the primary mechanism determining the scope of the draft MAC Protocol is the HS Codes listed in the annexes. The effect of Article II(1) is that once uniquely identifiable equipment is covered by a relevant HS Code, it is within the scope of the draft protocol, regardless of its function. Without Article II(1) the application of the draft protocol could become clouded – yet a party should not be able to void an international interest in MAC equipment by using it outside the MAC sectors, for example by using a tractor for transport.

Article II of the draft MAC Protocol contains an additional two paragraphs not included in the Aircraft Protocol. Article II(3) of the draft MAC Protocol contains a mechanism which allows contracting states to limit their implementation of the protocol to one or more of the mining, agricultural or construction sectors. Article II(4) is a further limitation of the instrument's scope, designed to ensure that objects falling within the scope of the Aircraft Protocol, the Luxembourg Rail Protocol or the Space Protocol are outside the scope of the draft MAC Protocol. It achieves this by carving out of the draft MAC Protocol any object which would fall under any of the previous protocols, even if that object falls within the definition of 'mining, agricultural or construction' objects (by virtue of being listed in one of the relevant HS Codes in the annexes to the protocol).<sup>39</sup> The approach of Article II(4) is consistent with Article II(3) of the Space Protocol, which similarly limits its application in relation to aircraft objects unless they are primarily designed for use in space.

The draft MAC Protocol does not contain an article corresponding to Article III of the Aircraft Protocol, as the draft MAC Protocol does not apply to sales. This approach was based upon input from the private sector, which indicated that it did not want the draft MAC Protocol to apply to sales. Instead, the draft MAC Protocol allows for the registration of notices of sale under Article XVIII, as consistent with Article XVII of the Luxembourg Rail Protocol. The registration of a notice of sale in the international registry is for information purposes only and does not have legal effects under the Convention or protocol. The purpose of allowing the registration of notices of sale is to give notice of

<sup>39</sup> UNIDROIT, *Study 72K – CGE2 – Doc. 3 (2017)* para 16 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-03-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-03-e.pdf)> accessed 10 March 2019.

the sale transaction with a view to securing a priority under national law.<sup>40</sup> In deciding to follow the Luxembourg Rail Protocol approach, the Study Group noted that not inserting any article in relation to sales would constitute a further deviation from the previous protocols (which either allowed the registration of notices of sales without any substantive effect, or required such registrations for the purposes of applying the priority rules).<sup>41</sup>

The draft MAC Protocol does not vary the sphere of application by reference to registration in a domestic registry, as the Aircraft Protocol does in Article IV. As consistent with Article 3 of the Convention, the draft MAC Protocol applies where the debtor is located in a contracting state, regardless of where the creditor is located.

Article III of the draft MAC Protocol is substantively identical to Article IV(3) of the Aircraft Protocol. This rule allows parties through written agreement to exclude the protocol's insolvency remedies or vary other provisions of the protocol, except for three unalterable default remedy provisions: (i) a creditor shall not procure the export and physical transfer of an object without prior consent in writing from the holder of a priority registered interest, (ii) remedies must be exercised in a commercially reasonable manner and (iii) reasonable prior notice under Article 8(4) the Convention is satisfied by either 10 working days under the Aircraft Protocol or 14 calendar days under the draft MAC Protocol. Curiously, the Luxembourg Rail Protocol does not extend this prohibition on derogation in the first instance above, preventing a creditor from procuring the export and physical transfer of equipment without written consent of higher-ranking registered creditors.

Article IV of the draft MAC Protocol is consistent with Article VI of the Aircraft Protocol in regulating representative capacities. The drafting of Article IV of the draft MAC Protocol is identical to Article IV of the Luxembourg Rail Protocol, which is slightly more specific in clarifying what is meant by 'effect a registration' by referencing Article 16(3) of the Convention. The differing wording is not understood to give rise to a difference in interpretation of the legal rules (aside from the Aircraft Protocol additionally applying to sales) or powers and responsibilities of representatives under the two instruments.

The draft MAC Protocol has significantly more flexibility than the Aircraft Protocol in what is required in relation to an object for the constitution of an international interest. Article VII of the Aircraft Protocol requires an aircraft object manufacturer's serial number, the name of the manufacturer and its model designation to satisfy the formal criteria for the constitution of an international interest under Article 7 of the Convention. Article V of the draft MAC Protocol instead adopts the approach of the Luxembourg Rail Protocol, which provides that unique identification is unnecessary for the constitution of an international interest. In doing so, the draft MAC Protocol distinguishes the identification requirements for the formation of an agreement from the more stringent requirements for registration imposed by Article XVII. By necessary implication, it also overrides Article 2(2) of the Convention requiring that an object be uniquely identifiable.<sup>42</sup>

In regulating choice of law, Article VI of the draft MAC Protocol and Article VIII of the Aircraft Protocol are almost identical in allowing contracting states to optionally apply the article (the only difference being that Article VIII of the Aircraft Protocol also applies to contracts of sale). The article allows parties to an agreement to decide on the applicable law that governs the contract. This approach is consistent also with the Luxembourg Rail Protocol. Interestingly, the Space Protocol

<sup>40</sup> Roy Goode, *Convention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock: Official Commentary* (2<sup>nd</sup> edn, UNIDROIT 2014) para 5.70.

<sup>41</sup> UNIDROIT, *Study 72K – CGE2 – Doc. 4 (2017)* para 155 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf)> accessed 10 March 2019.

<sup>42</sup> UNIDROIT, *Study 72K – CGE2 – Doc. 3 (2017)* para 23 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-03-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-03-e.pdf)> accessed 10 March 2019.

contains the same basic rule but reverses the onus of the declaration: contracting states automatically apply the choice of law rule in Article VIII of the Space Protocol unless they specifically opt out of it. It is unclear why such a change was adopted in the Space Protocol. Possibly it was to further cement the ideals of party autonomy and freedom of contract.

Article VII of the draft MAC Protocol has been the subject of extensive analysis by both UNIDROIT<sup>43</sup> and international experts.<sup>44</sup> Article VII requires contracting states to mandatorily apply one of three alternative approaches which determine the relationship between an international interest in MAC equipment and a domestic law interest arising from its association with immovable property. This article has no corresponding rule in any of the three existing protocols as aircraft objects, railway rolling stock and space assets generally cannot become subject to immovable property law. The term 'association' is used rather than 'attachment' or 'affixation', as under the law in some jurisdictions, interests in immovable property could extend to mobile equipment that was utilised for the economic exploitation of the immovable property, even where there was no physical connection between the equipment and the immovable property.<sup>45</sup> The experts preparing the draft MAC Protocol had to tread very carefully in dealing with this issue, as states often regard the treatment of their territory as an issue of sovereignty, which makes it particularly challenging to harmonise immovable related interests at an international level. However, the freedom granted to states by Article VIII in choosing one of three different alternative approaches in determining the relationship between immovable property and international interests gained the favour of negotiating states during the Committee of Governmental Experts sessions and provides a well-balanced solution.

Article VIII of the draft MAC Protocol is largely consistent with Article IX of the Aircraft Protocol in allowing contracting states to optionally provide creditors with the additional default remedy of exporting and physically transferring equipment from the territory in which it is situated. Paragraph 1 of both articles provides that this additional remedy is only available where the debtor has agreed to the remedy. Paragraph 2 in both articles provides that the additional remedy cannot be exercised without the prior written consent of higher-ranking creditors.

There are three differences between Article VIII of the draft MAC Protocol and Article IX of the Aircraft Protocol. First, Article IX of the Aircraft Protocol provides the additional remedy of de-registration of the aircraft, a remedy that is particular to the aviation context and is often required to procure the export and physical transfer of an aircraft. Second, paragraph 4 of the two corresponding articles slightly differs in how many days constitute 'reasonable prior notice' under Article 8(4) of the Convention: the Aircraft Protocol requires ten or more working days, whereas the draft MAC Protocol requires the more precise 14 or more calendar days. In most circumstances this would be the same amount of time, however the draft MAC Protocol follows the Luxembourg Rail Protocol in providing additional clarity, as what constitutes a 'working day' may vary in different countries. Finally, the two articles differ in how they require authorities in contracting states to assist creditors in exercising their additional remedies made available under the article. The Aircraft Protocol requires the registry authority to honour a request for de-registration and export where a request has been properly submitted under an IDERA and that higher-ranking creditors have agreed or had their

<sup>43</sup> UNIDROIT, *Study 72K – CGE2 – Doc. 4 (2017)* paras 79-93, Appendix IV <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf)>; UNIDROIT, *Study 72K – CGE2 – Doc. 3 (2017)* paras 32-38 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-03-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-03-e.pdf)>, accessed 10 March 2019.

<sup>44</sup> Benjamin von Bodungen and Charles W Mooney Jr, 'Immovable-Associated Equipment under the Draft MAC Protocol: A Sui Generis Challenge for the Cape Town Convention' (2017) 6 Cape Town Convention Journal 37; Marek Dubovec, 'Accessions and Non-Accessions under the Cape Town Convention: Special Focus on MAC Equipment' (2017) 6 Cape Town Convention Journal 52.

<sup>45</sup> UNIDROIT, *Study 72K – CGE2 – Doc. 4 (2017)* para 80 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf)> accessed 10 March 2019.

interest discharged. Instead, the draft MAC Protocol imposes a general obligation on contracting states to ensure that the relevant administrative authorities expeditiously assist a creditor in exercising remedies under the protocol, based on Article VII(5) of the Luxembourg Rail Protocol.

The precise nature of the obligations placed on the 'administrative authorities' of a contracting state by Article VIII(5) of the draft MAC Protocol (and also by Articles IX(6), Article X Alternative A(8) and Article X Alternative C(9)) was extensively discussed during CGE2.<sup>46</sup> Concerns were raised that the absence of clarity in relation to the obligations imposed on the types of administrative authorities would cause challenges in implementing the protocol, especially for federal states. Several delegations suggested that the provision should allow for contracting states to opt-out of this particular aspect of Article VIII, which is itself an opt-in provision. Other delegations proposed alternative drafting formulations of the rule that provided additional clarity on the types of authorities that might be involved in assisting the export and physical transfer of equipment. Ultimately, no consensus was reached, although additional wording from one of the alternative drafting proposals ('including but not limited to tax and custom authorities and transport infrastructure authorities') was inserted in square brackets in the draft MAC Protocol. This issue will undoubtedly be the subject of further discussion at the MAC Protocol diplomatic conference in 2019.

Article IX of the draft MAC Protocol modifies the Convention's provisions regarding relief pending final determination and is largely consistent with Article X of the Aircraft Protocol. Similar to Article VIII, the draft MAC Protocol does not contain references to the registry authority and mentions 'calendar days' instead of 'working days' in paragraph 2.

As discussed briefly in Section II, the opt-in insolvency remedies in Articles X of the draft MAC Protocol and Article XI of the Aircraft Protocol are legally consistent in providing optional insolvency Alternatives A and B, however the draft MAC Protocol additionally provides Alternative C in conformity with the Luxembourg Rail Protocol. Given the importance and sensitivity of the insolvency remedy provisions, the draft MAC Protocol does not alter any of the substantive rules, although the provisions dealing with administrative authorities in Article X Alternative A(8) and Article X Alternative C(9) are currently in square brackets as explained in the analysis on Article VIII above.

Article XII of the draft MAC Protocol is an entirely new provision which deals with the protocol's treatment of inventory. Article XII was inserted into the draft instrument during CGE2, based upon a proposal from the private sector, which suggested that the draft MAC Protocol should allow contracting states to exclude the application of the protocol to interests in equipment held as inventory by dealers.<sup>47</sup> There is no corresponding provision in the existing protocols for the simple reason that aircraft objects, railway rolling stock and space assets are not commonly held by equipment dealers as inventory. Article XII of the draft MAC Protocol has two underlying policy rationales: (i) the draft MAC Protocol should provide additional protections to buyers and lessees of MAC equipment from dealers and (ii) contracting states should have a choice as to whether the draft MAC Protocol applies to inventory financing. It was originally proposed by the private sector to allow the practice of inventory financing to continue in states where existing arrangements already functioned efficiently.

The current drafting of Article XII has some issues. The CGE2 drafting committee's admirable attempt to deal with two different albeit interrelated policy concerns in the same article has resulted in Article XII being a complex provision that is difficult to read. Paragraphs 1 and 2 set out the mandatory rule designed to provide additional protections to buyers and lessees of MAC equipment

<sup>46</sup> UNIDROIT, *Study 72K - CGE2 - Report (2017)* paras 92-107 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf)> accessed 10 March 2019.

<sup>47</sup> UNIDROIT, *Study 72K - CGE2 - Report (2017)* para 175 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf)> accessed 10 March 2019.

from dealers, whereas paragraphs 3 to 7 provide the opt-out allowing states to remove all inventory financing from the scope of the protocol. The rationale for both providing the mandatory take-free rule in paragraphs 1 and 2 and allowing a contracting state to exercise the opt-out in paragraphs 3 to 7 is that states that choose not to exercise the inventory financing opt-out may nonetheless want to preserve their take-free rules under domestic law. Article XII will probably be subject to drafting changes at the MAC Protocol diplomatic conference, although the final text is likely to retain some mechanism allowing for the exclusion of inventory financing from the scope of the MAC Protocol. Further analysis on Article XII was provided by Bruce Whittaker in his paper at the seventh Cape Town Convention Academic Project Conference.<sup>48</sup>

The draft MAC Protocol does not contain a corresponding provision for Article XIII of the Aircraft Protocol regarding de-registration and export request authorisations. Nor does the draft MAC Protocol contain a corresponding article for Article XIV of the Aircraft Protocol regarding modification of priority provisions, as the draft MAC Protocol does not apply to sales. Similarly, the draft MAC Protocol does not contain a corresponding article for Article XV of the Aircraft Protocol regarding the modification of the Convention's assignment provisions. Article XV of the Aircraft Protocol modifies Article 33 of the Convention by inserting the additional requirement of obtaining a debtor's consent in writing before an assignee may enforce a debtor's duty to make payment or perform other obligations. The Study Group noted that this additional requirement was included in the Aircraft Protocol because it reflected the established practice in the aircraft financing industry, whereas the Luxembourg Rail Protocol did not follow such an approach as it did not reflect existing practice in that industry.<sup>49</sup>

The debtor provisions in Article XIII of the draft MAC Protocol are largely consistent with Article XVI of the Aircraft Protocol in giving debtors the right of quiet possession of equipment where the debtor is not in default. Article XVI of the Aircraft Protocol additionally regulates the rights of buyers, because of that protocol's application to sales.

This concludes the comparative analysis of Chapters I and II of the draft MAC Protocol and the Aircraft Protocol. Chapters IV (Jurisdiction) and V (Relationship with Other Conventions) of the two instruments are generally consistent, although the Aircraft Protocol necessarily has additional articles in Chapter V that govern the treaty's relationship with relevant aviation treaties, such as the Geneva Convention on the International Recognition of Rights in Aircraft<sup>50</sup> and the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft.<sup>51</sup>

The final provisions in Chapter VI of the instruments are also generally consistent. As these provisions are not substantive, they do not warrant an article by article comparative analysis. However, there are three issues in the final provisions that are worth noting. First, the draft MAC Protocol decided to retain the Aircraft Protocol's approach to the making of declarations. Initially, the Study Group decided that the approach to declarations uniformly adopted across the previous three protocols was unnecessarily complicated and the preliminary draft MAC Protocol should use a clearer, simplified system.<sup>52</sup> However, despite agreement that a simplified system would make the proto-

<sup>48</sup> Bruce Whittaker, 'Floating Securities under the Cape Town Convention: Swimming, Sinking or Treading Water?' (2018) 7 Cape Town Convention Journal 39, 60–64 [this issue].

<sup>49</sup> UNIDROIT, *Study 72K – CGE2 – Doc. 4 (2017)* paras 172–173 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf)> accessed 10 March 2019.

<sup>50</sup> Convention on the International Recognition of Rights in Aircraft (adopted 19 June 1948, entered into force 17 September 1953) 4492 UNTS 310.

<sup>51</sup> Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (adopted 29 May 1933, entered into force 12 January 1937) 4479 UNTS 192.

<sup>52</sup> UNIDROIT, *Study 72K – SG2 – Doc. 6 (2015)* para 133 <[www.unidroit.org/english/documents/2015/study72k/sg02/s-72k-sg02-06-e.pdf](http://www.unidroit.org/english/documents/2015/study72k/sg02/s-72k-sg02-06-e.pdf)> accessed 15 May 2019.

col more user-friendly for contracting states, the Study Group ultimately decided to revert to the original declarations structure reflected in the existing three protocols.<sup>53</sup> This is yet another example where consistency with the previous protocols was the overriding policy adopted in preparing the MAC Protocol.

Second, it is interesting to note that Article XXIV of the draft MAC Protocol currently requires five ratifications for the draft MAC Protocol to enter into force,<sup>54</sup> as compared to the eight ratifications that were required by Article XXVII of the Aircraft Protocol for its entry into force. This can be further contrasted with the four ratifications required by Article XXII of the Luxembourg Rail Protocol for entry into force and the 10 ratifications required by Article XXXVIII of the Space Protocol. The higher number of ratifications required for entry into force of the Aircraft Protocol was due to its adoption at the same time as the Cape Town Convention itself and the pragmatic necessity of having sufficient contracting states to ensure the international registry would be economically viable. The ten states requirement for entry into force of the Space Protocol was a result of challenges that arose at the diplomatic conference. Comparatively, the five states currently needed under the draft MAC Protocol would indicate that the instrument is not facing the same political challenges that the Space Protocol did.

Third, it should be noted that Article XXXIII of the draft MAC Protocol providing for how the instrument can be amended will be significantly different from its corresponding article in the Aircraft Protocol. Currently bracketed in the draft MAC Protocol, Article XXXIII requires different amendment mechanisms for the text of the protocol itself, which would be based upon the standard treaty law amendment mechanism in the Aircraft Protocol, and a more streamlined amendment mechanism for changes to the HS Codes in the annexes to the draft MAC Protocol. While relatively straightforward on its face, the drafting of Article XXXIII requires careful balancing of a contracting state's right to control changes to its obligations under the protocol with the need to adapt the protocol to reflect technical changes to the HS System, which occur approximately once every five years. This complex article was the subject of a detailed paper at the sixth Cape Town Convention Academic Project Conference in 2017.<sup>55</sup>

In concluding this comparative analysis, it is also worth noting that the draft MAC Protocol followed the Aircraft Protocol in not including an article that is present in both the Luxembourg Rail Protocol and the Space Protocol. Article XXV of the Luxembourg Rail Protocol and Article XXVII of the Space Protocol provide a public service rule, which in certain circumstances would prevent a creditor from enforcing its default or insolvency remedies against a debtor in relation to an object that is performing a public service. While the two protocols deal with this issue in different ways, Articles XXV and XXVII reflect the same underlying policy in attempting to strike an appropriate balance between the interests of a creditor seeking to exercise remedies against an object subject to an international interest performing a public service, and of a state that is anxious to ensure the continuity of the performance of the particular public service, notwithstanding the debtor's default.<sup>56</sup> These provisions created significant consternation during the negotiation of the two instruments,

<sup>53</sup> UNIDROIT, *Study 72K – SG4 – Doc. 5 (2016)* para 154-156 <[www.unidroit.org/english/documents/2016/study72k/s-72k-sg04-05-e.pdf](http://www.unidroit.org/english/documents/2016/study72k/s-72k-sg04-05-e.pdf)> accessed 21 May 2019.

<sup>54</sup> The draft MAC Protocol also requires the Supervisory Authority to confirm to the Depositary that the International Registry is fully operational for entry into force (Article XXIV(1)(b)).

<sup>55</sup> Teresa Rodríguez de las Heras Ballell and Megumi Hara, 'MAC Protocol and Treaty Design: Examination of the Delimitation of Scope and Mechanism of Amendment' (2017) 6 Cape Town Convention Journal 10.

<sup>56</sup> Martin Stanford, 'The Availability of a New Form of Financing for Commercial Space Activities: The Extension of the Cape Town Convention to Space Assets' (2012) 1 Cape Town Convention Journal 109, 112.

especially in relation to the Luxembourg Rail Protocol.<sup>57</sup> The draft MAC Protocol was able to avoid the issue altogether, on the basis that the MAC sectors do not provide continuous public services.<sup>58</sup> This additional similarity between the draft MAC Protocol and the Aircraft Protocol could be significant in lowering the risk for creditors in issuing credit for mining, agricultural and construction equipment in the future.

#### IV. Conclusion

Sections I and II of this article explored UNIDROIT's determined endeavours over 13 years to ensure that the MAC Protocol stayed within the confines of the Cape Town Convention system, both through adherence to the Article 51 criteria and through the 'if it ain't broke, don't fix it' policy of retaining consistency with the provisions of the earlier protocols. The article-by-article comparison in Section III confirmed that the majority of the substantive rules in the draft MAC Protocol are consistent with the Aircraft Protocol on key issues, such as application based on the location of the debtor, simplified rules for constituting international interests, priority rules, default remedies and optional insolvency remedies. The basic framework of the two instruments is almost identical. The draft MAC Protocol was also consistent with the Aircraft Protocol in avoiding the challenging public service issue.

However, there are some significant necessary divergences in the draft MAC Protocol which reflect the differences between aircraft and MAC equipment and how they are financed. The use of the HS System to determine the application of the draft MAC Protocol to types of equipment, the non-application of the protocol to sales, the mandatory declaration required to determine the relationship between international interests in MAC equipment and interests in immovable property and the treatment of inventory are the major examples of these necessary divergences. Importantly, these necessary divergences appeared to have garnered the support of states during the governmental expert negotiations in 2017.

The current draft protocol appears to provide a strong basis for creating an international legal framework for the financing of MAC equipment. Hopefully, the diplomatic conference can work effectively to resolve the few remaining substantive issues and adopt a final instrument that enjoys broad support across the globe. However, the adoption of a robust instrument with acceptable legal rules will not guarantee that the MAC Protocol will replicate the phenomenal success of the Aircraft Protocol. To do so, the MAC Protocol must also ensure it continues to enjoy strong support from the private sector, and provide concrete economic benefits to incentivise states to ratify. The focus of this paper has necessarily been the legal similarities and differences between the draft MAC Protocol and the Aircraft Protocol. In concluding, it is worth reflecting on these two other areas in which the MAC Protocol has attempted to replicate the development of the Aircraft Protocol: private sector engagement and economic impact.

Throughout the negotiation of the MAC Protocol, the private sector has been an active partner in the project. As consistent with the established practice for the Aircraft Protocol, in 2015 leading private stakeholders formed the Mining, Agricultural and Construction Equipment Working Group ('MAC Working Group'). Representing the manufacturers, financiers, legal advisors and end-users involved in the mining, agricultural and construction industries, the MAC Working Group is responsible for encouraging private sector engagement with the MAC Protocol project as well as communicating private sector views during negotiations. The MAC Working Group has 13 members,

<sup>57</sup> Goode (n 40) paragraph 3.29.

<sup>58</sup> UNIDROIT, *Study 72K - CGE2 - Doc. 4 (2017)* paras 174-179 <[www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf](http://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-04-e.pdf)> accessed 10 March 2019.



which includes the largest global manufacturers of MAC equipment and several trade associations.<sup>59</sup> If the MAC Protocol is to enjoy rapid entry into force, the MAC Working Group will have to perform a similar role to that of the Aviation Working Group in championing the instrument worldwide and actively assisting states in implementation.

In relation to the future instrument's economic impact, the MAC Protocol is only the second treaty in the history of UNIDROIT to have been the subject of an *ex ante* economic assessment (the first being the Aircraft Protocol). A 2018 independent report prepared by Warwick Economics and Associates concludes that the MAC Protocol is predicted to have a positive impact of USD 23 billion on GDP in developing countries and of USD 7 billion in developed countries, for a total impact on GDP equivalent to USD 30 billion a year.<sup>60</sup> It is also estimated that over a ten-year period, the protocol may increase the stock of MAC equipment in developing countries by USD 90 billion. As the scope of the economic assessment was limited to the 63 UNIDROIT member states, the actual global economic impact is likely to be much higher should it enjoy widespread ratification.<sup>61</sup>

Thus, the MAC Protocol project has attempted not only to stay true to the Aircraft Protocol in terms of its legal rules and drafting, but also in relation to its engagement with the private sector and focus on economic benefits. It is hoped that these policies will translate to a similar outcome in terms of contracting states in the coming years.

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<sup>59</sup> MAC Working Group, 'Members of the MAC Working Group' <[www.macwg.org/members](http://www.macwg.org/members)> accessed 10 March 2019.

<sup>60</sup> Warwick Economics and Associates, 'An Economic Assessment of the Fourth Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment' (2018) <[www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf](http://www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf)> accessed 10 March 2019.

<sup>61</sup> A further factor that will affect the economic impact of the MAC Protocol is whether the Organisation for Economic Co-operation and Development (OECD) agrees to allow export credit agencies to lower the cost of credit in relation to the financing of MAC equipment for debtors in countries that have ratified the MAC Protocol, as is the case under the Aircraft Protocol with the Aircraft Sector Understanding. See OECD, 'Aircraft Specific Rules' <[www.oecd.org/trade/topics/export-credits/arrangement-and-sector-understandings/aircraft-specific-rules](http://www.oecd.org/trade/topics/export-credits/arrangement-and-sector-understandings/aircraft-specific-rules)> accessed 15 May 2019.

