



EN

MAC Protocol
Committee of Governmental experts
Second session
Rome, 2 – 6 October 2017

UNIDROIT 2017
Study 72K – CGE2 – Doc. 17
Original: English
September 2017

Comments on the MAC Protocol Draft

(Submitted by the Government of the People's Republic of China)

The People's Republic of China highly appreciates the opportunity to comment on the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment. The government of People's Republic of China would like to give its thanks to all those involved in the preparation of the MAC protocol and its supporting documents, particularly the Study Group, the Working Group, the Unidroit Secretariat. We support the decision to develop this new Protocol. By facilitating access to credit for the purchase and lease of MAC equipment, this new Protocol could provide a significant boost for the development in the areas of food production, infrastructure construction, and economic growth, particularly for those in the developing countries, which are eager to get financed the investment in these areas.

1. We suggest that in paragraph 4 of Alternative B in Article VII the words "in accordance with the law of that State where the immovable property is situated" be inserted after "individual legal identity" as below:

Alternative B

Where agricultural, construction or mining equipment subject to an international interest is immovable-associated equipment and to the extent that it has not lost its individual legal identity in accordance with the law of that State where the immovable property is situated, an interest in the immovable property that extends to that equipment has priority over the registered international interest in the equipment only if the following conditions are fulfilled: [unchanged]

The reason is that in the Alternative B, Article VII (3)(4) provide different rules, to determine whether the immovable-associated equipment has lost the "individual legal identity" or not under applicable law. According to paragraph 3, "laws of the State where the immovable property is situated" applies to determine whether the "individual legal identity" of the equipment has lost, therefore, it is necessary to apply the same principles to choose applicable law for the purpose of consistency.

2. We suggest that an additional article to be added at the end of Chapter II (Default Remedies and Priorities):

Article [] – Compensation for confiscation, condemnation or requisition of the registered equipment

If the agricultural, construction or mining equipment subject to a registered international interest is confiscated, condemned or requisitioned as described in Article 1(w) of the Convention by a Contracting State, such Contracting State shall provide the creditor with reasonable compensation. For the purposes of Article 2(5) and 29(6) of the Convention, any international interest or any priority to an interest in the equipment extends to such compensation.

The rationale for this newly added article is that the government of a Contracting State may execute its right to expropriate or make a requisition for private properties. Under such circumstances, the creditor could neither exercise his legal rights on the equipment according to the agreement nor obtain remedies under the Convention and this Protocol. Since property expropriation will certainly deprive or restrict property ownership of the equipment being expropriated, the government should bear reasonable compensation responsibilities in order to protect the creditor as well as to avoid the adverse effects on the transaction environment of the equipment.

3. Article 16 provides the identification of MAC equipment for the registration purpose, which requires the description of MAC equipment shall contain its manufacturer's serial number and the name of the manufacturer. However, article 5 also provides the description of the future equipment for the constitution of international interest on them. In practice, it is usually very hard to get the manufacturer's serial number of the future MAC equipment. In this case, even the international interested could be constituted on the future MAC equipment, it could not be registered in the international registry. So we suggest UNIDROIT to clarify the rules for the registration of the future MAC equipment.

4. Article 17(3) provides the standard to determine the amount of registration fees, namely the fees shall be determined to recover the reasonable costs of establishing, operating and regulating the International Registry[, and] the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 17(2) of the Convention [and the reasonable costs of the Depositary associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 62 of the Convention].

We propose to further clarify the standard to charge the registration fees, namely charge by item or by the value of the collateral. We propose a fundamental principle to charge as low as possible, just to the extent to cover the cost for the constitution and operation of the registry and depository, so as to lower the cost of registration and facilitate the international financing activities based on MAC equipment. For this purpose, we propose (1) to charge by item not by the value of the collateral; and (2) to charge half or even less for any subsequent change of the record of the international interest, compared with the fees for the first time, based on the fact that the registry is operated electronically with a great lower cost, compared with the traditional paper-based recording system.

5. According to Article XXXII 2(b) of this Protocol, the Review Conferences are entitled to consider "the judicial interpretation given to, and the application made of the terms of this Protocol and the regulations....." It has not yet mentioned that how the "judicial interpretation" should be understood, who the subject of the interpretation is, and whether it refers to interpretations of judicial organs in the Contracting States, of a designated international organization, or to general understanding in practice. Therefore, it is suggested that the term "judicial interpretation" be defined or clarified in Article I or in the official comments.

6. Paragraph 3 of Article XXXII of the draft Protocol sets out the amendment procedure for the Protocol, while paragraph 4 and 5 provide the amendment procedure for the Annexes. We support that it's necessary to provide a distinction between the two amendment procedures, and we suggest that further simplification be made to the modification procedure of the Annexes on this basis.

It is suggested that paragraph 5 of Article XXXII be modified as follows:

5. After each revision of the Harmonised System, or such other times as the circumstances may require, the Depositary, after consultation with the Supervisory Authority, shall ~~convene a meeting of Contracting States to consider any amendments to~~ renew/amend the Annexes that reflect changes to the Harmonised System that have affected the Harmonized System codes listed in the Annexes without changing the scope of the Annexes. Each such renewal/amendment shall be notified to the Contracting States. ~~approved by at least a two-thirds majority of States participating in the meeting. After approval of an amendment by Contracting States~~ The renewal/amendment will become effective upon the expiration of [ninety] days after such approval notice, unless [XX%] or more of the Contracting States have notified the Depositary that they do not accept to be bound. The Depositary shall immediately notify all Contracting States of the renewal/amendment and the date at which the amendment becomes effective.

We believe that the rule "Each such amendment shall be approved by at least a two-thirds majority of States participating in the meeting" would be too strict for the amendment to the HS Codes without changing the scope of the Annexes. Considering that the Annexes may be frequently modified, the amendment procedure in paragraph 5 might be too formal and burdensome for most of the Contracting States, and is not efficient enough to adapt to need of the dynamic international financing activities. Therefore, we propose the "adverse voting system" applied for the amendment to the HS Codes without changing the scope of the Annexes, which is more flexible and feasible.

7. It is suggested that the order of code 847982 and code 847910 should be transposed in Annex 2, and code 843041 in Annex 3 be listed between 843039 and 843049, in order that all the HS Codes be listed in numerical order.

We understand that in the discussion about inclusion of HS Codes in the Annexes, the Working Group may have added or deleted different HS Codes and adjusted the order of those codes many times. We suggest that all the HS Codes in the Annexes be arranged in numerical order, ensuring consistency in code ordering.

8. We propose that the original should be in English, Arabic, Chinese, French, Russian and Spanish languages as in the Aircraft Protocol.