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The MAC Protocol: we aren't there yet – how far do we have to go?

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This article examines the proposed MAC protocol to the Cape Town Convention. This proposed fourth protocol covers mining, agricultural and construction equipment. The proposal for this protocol was originally made in 2006, but a study committee was not appointed until 2014. This article considers the scope of the proposed protocol, its likely economic impact and the major practical hurdles that will be necessary for it to be a viable protocol. With regard to scope, the initial drafts have focused on the Harmonized Commodity Description and Coding System, an internationally recognized categorization of equipment that is used in international trade and customs. The article examines whether this system is adequate to meet the mobility and internationality aspects that are essential to the framework of the Cape Town Convention. This article also notes that, among other issues to be resolved, until the scope of the equipment that will be covered by the proposed protocol is finalized, a serious estimation of the economic impact of the MAC protocol is premature.

1. The Cape Town Convention

The Cape Town Convention, with its Protocols, is designed to provide for secure and readily enforceable rights in aircraft objects, railway rolling stock and space assets which by their nature have no fixed location, and in the case of space assets are not on earth at all. The problem the Convention seeks to solve is the widely differing approaches legal systems have for security and title reservation rights that creates uncertainty among financiers, and therefore both restricts the availability as well as raises the costs of financing of these assets. It has been assumed, and it has been the case, that the greatest beneficiaries of the Convention would be developing countries that might otherwise not receive financing for assets provided for by the Convention.

The purpose and structure of the Convention can be easily summarized. It provides for the creation of an international security interest that is recognized in all contracting states. It provides the creditor with a range of basic default remedies and, if there is default, a means to obtain quick interim relief pending a final determination of the claim on the merits. It establishes an electronic international register for the registration of the international interests that gives notice of the existence of these interests to third parties and it enables the creditor to preserve its priority against subsequently registered and unregistered interests as well as provides protection to the creditor in case of debtor insolvency. With the Convention, creditors should have greater confidence in the decision to grant credit, the credit rating of equipment receivables should be enhanced, and there should be reduced borrowing costs for the debtors.

Throughout the early part of the drafting process, there was much discussion about whether there should be a two-tiered structure

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of a general convention with individual protocols or whether there should be a series of free-standing conventions.¹ By the time the decision to have a two-tiered structure solidified, the first three potential protocols were agreed upon: aircraft, rolling stock and space assets.²

¹ See eg, Roy Goode, 'Transcending the Boundaries of Air and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment' (1998) *Unif L Rev* 52.

² These first three protocols are memorialized in the Cape Town Convention itself:

Cape Town Convention Article 2 — The international interest

...

3. The categories referred to in the preceding paragraphs are:

- (a) airframes, aircraft engines and helicopters;
- (b) railway rolling stock; and
- (c) space assets.

The Convention, however, has always assumed the possibility of additional protocols:

Article 51 — Future Protocols

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

2. The Depositary shall communicate the text of any preliminary draft Protocol relating to a category of objects prepared by such a working group to all States Parties to this Convention, all member States of the Depositary, member States of the United Nations which are not members of the Depositary and the relevant intergovernmental organizations, and shall invite such States and organizations to participate in intergovernmental negotiations for the completion of a draft Protocol on the basis of such a preliminary draft Protocol.

3. The Depositary shall also communicate the text of any preliminary draft Protocol prepared by such a working group to such relevant non-governmental organizations as the Depositary considers appropriate. Such non-governmental organizations shall be invited promptly to submit comments on the text of the preliminary draft Protocol to the Depositary and to participate as observers in the preparation of a draft Protocol.

4. When the competent bodies of the Depositary adjudge such a draft Protocol ripe for adoption, the

For purposes of future protocols,³ such as the proposed mining, agriculture and construction ('MAC') protocol (the 'MAC Protocol' or 'Protocol'), this decision has a significant impact on future protocols as they need to conform to the structure and policy of the Cape Town Convention itself.

2. The proposed MAC Protocol

At the request of several governments, the UNIDROIT Governing Council added the MAC Protocol to its work program in 2006. Input from member and non-member states led to the initial draft of a protocol in 2008. Although nominally on the work program, there was no real work on the project until 2013. Two meetings organized by the United States Department of State and hosted by the International Law Institute in Washington DC in November 2013 and January 2014, were attended by experts and stakeholders for the purpose of providing an overview of the structure and functioning of the Cape Town Convention system and to examine its adaptability to agricultural, mining and construction equipment. The objective of the first meeting was to identify the economic, legal and procedural issues necessary to determine the feasibility of the MAC Protocol. The second meeting continued the examination of the economic impact of a fourth protocol, the analysis of methods for determining its scope, and had considered whether the current Protocols to the Cape Town Convention provided viable models to follow for a MAC Protocol.

Depositary shall convene a diplomatic conference for its adoption.

5. Once such a Protocol has been adopted, subject to paragraph 6, this Convention shall apply to the category of objects covered thereby.

6. Article 45 bis of this Convention applies to such a Protocol only if specifically provided for in that Protocol.

³ The possibility of a protocol for ships has been discussed from the beginning of the Cape Town project, and this possible protocol is even now part of the UNIDROIT work program, albeit as a low priority.

Based on a report from these two meetings, the Governing Council at its annual meeting in 2014, instructed the Secretariat to set up a Study Group to work on the proposed MAC protocol. The Study Group has met twice; in December 2014 and April 2015, and a third meeting is planned for October 2015. This will be the final meeting of the study group before the draft protocol is presented to the UNIDROIT Governing Council in May 2016. At that meeting it is likely that the Governing Council will be asked to approve the draft and to move forward with a meeting of governmental experts.

3. Scope

(a) *Defining the Equipment*

As with the prior protocols, the MAC protocol presupposes assets that are high value, mobile and uniquely identifiable.⁴ As for value and unique identifiability, thus far the focus has been on the Harmonized Commodity Description and Coding System (the ‘HS System’ and ‘HS Codes’).⁵ One-hundred and

⁴ The Preamble to the Cape Town Convention highlights some of the characteristics of the assets it covers: ‘Aware of the need to acquire and use mobile equipment of high value or particular economic significance ...’ High value and economic significance are important features that a category of assets should possess under a future protocol such as the proposed MAC protocol. ‘High-value’ is relative to the particular types of assets, and none of the other Protocols have included a minimum monetary threshold indicating the market price of an asset for it to fall within the scope of the Cape Town Convention.

⁵ The Harmonized Commodity Description and Coding System (‘HS System’) is used by more than 200 countries for the main purposes of establishing customs tariffs and compiling trade statistics. The HS System covers about 98% of all international trade. Countries also use it to monitor controlled goods and quotas, calculate and collect internal excise and sales taxes, compile transport statistics etc. The earliest uniform and international statistical nomenclature, a predecessor to the HS System, was adopted at the Brussels Second International Conference on Commercial Statistics, in 1913. For a full discussion of the HS System, see UNIDROIT Study 72K-SG2-Doc 2 (March 2015) <[http://www.unidroit.org/english/](http://www.unidroit.org/english/documents/2015/study72k/sg03/s-72k-sg03-02-e.pdf)

three⁶ items have been designated as appropriate for the MAC Protocol thus far.⁷ This is a preliminary list compiled by industry groups, and it will be refined in the future,⁸ and therefore it is too early to determine the exact number of items that might be included in the final list. In the future the UNIDROIT Secretariat hopes to be able to quantify both the value of the global trade for each item as well as the approximate value of each unit. These will be useful numbers to assess the potential economic impact of the protocol, but even with these figures it is not clear that there will be data to show how much of this trade would be financed through the Protocol.

At this point in the drafting process the items on the list from the HS System are those items that have been suggested by industry. Whether all of the items on the list should be included as having high value and whether they are uniquely identifiable is not certain. Much work and refinement is necessary to ensure that all of the items meet these requirements. Most likely the burden will be on industry to justify the inclusion of the individual items. The question of whether to set a minimum value for the equipment, and what it would be, remains open.

The HS Codes are revised every five or six years, and how this would affect the use of the HS Codes to define the scope of the Protocol is yet to be determined. Moreover, it is anticipated that the HS Codes will only serve the purpose of establishing the scope of the MAC Protocol. It is not anticipated that they

[documents/2015/study72k/sg03/s-72k-sg03-02-e.pdf](http://www.unidroit.org/english/documents/2015/study72k/sg03/s-72k-sg03-02-e.pdf)>. It is presently used by the World Customs Organization, and covers over 5000 items identified by a six-digit code. UNIDROIT Study 72K-SG1-Doc 5 para 6 (January 2015).

⁶ 56 cover machinery; 22 cover engines; 25 cover parts. Whether the protocol should cover parts should probably be determined on the basis of whether they are independently financeable.

⁷ UNIDROIT Study 72K-SG2-Doc 3 (March 2015).

⁸ These numbers are based on two rounds of industry consultations. UNIDROIT Study 72K-SG2-Doc 6 para 14 (April 2015).

will be used for registration or search purposes under the international registry.

Exactly how identification will be determined for the registry is yet to be established and will have to be worked out in the regulations. This may prove to be a substantial hurdle given the number of different assets that will be covered by the Protocol and the differing ways in which these assets are given a specific identification number. At this time, there has not been a minimal value suggested, but one must assume that the list of assets in the annexes should not include every low-value piece of farm equipment. When the specific assets that will come within the scope of the Protocol are determined they will be listed in three separate annexes to the Protocol.

(b) Single or multiple protocols – severability

In the early consultations it was suggested that the different categories of equipment – agricultural, construction, and mining – may have significantly different aspects that would justify creating separate protocols for each. Thus far, the Study Group has worked on the assumption that there will be a single protocol with the option of opting out of any of the three classes of equipment.⁹ What may be the more difficult question for harmonization is the question of which assets within the three classes countries would opt out of as being national, and not international, interests.

(c) Multi-purpose equipment

Trying to determine the types of equipment that fit into each of the three categories of the MAC Protocol is anything other than a simple exercise in categorization. Focusing in on the three specific categories, the Study Group has decided to exclude equipment that has a general use, as opposed to a specific use for agriculture, mining or construction.¹⁰ Thus, trucks would be excluded as a truck has general use beyond its use among the three categories.

⁹ UNIDROIT Study 72K-SG1-Doc 5, para 14 (January 2015).

¹⁰ *ibid*, paras 20–24 (January 2015).

Where, of course, the line between equipment of a general use and equipment that is designed for or used for the specific application of agriculture, mining or construction is unclear, and the Study Group has not suggested any standards for divining this distinction. This should prove to be a problem in the future.

To show the implicit understanding of the Study Group that this is an unsolved problem, the Study Group has also determined that if a piece of equipment comes within more than one of the categories (agricultural, construction and mining) it should be listed under both or all categories.¹¹ This, of course, suggests that equipment may have multiple uses, and from there it is a quick step toward a ‘general use’.

4. Internationality and mobility

The Convention provides for international interests¹² that are primarily distinguished

¹¹ *ibid*.

¹² Article 1(o) provides that an ‘international interest’ means an interest held by a creditor to which Article 2 applies’. Article 2 defines an international interest:

1. This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.
2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:
 - (a) granted by the chargor under a security agreement;
 - (b) vested in a person who is the conditional seller under a title reservation agreement; or
 - (c) vested in a person who is the lessor under a leasing agreement.An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).
3. The categories referred to in the preceding paragraphs are:
 - (a) airframes, aircraft engines and helicopters;
 - (b) railway rolling stock; and
 - (c) space assets.
4. The applicable law determines whether an interest to which paragraph 2 applies falls within sub-paragraph (a), (b) or (c) of that paragraph.
5. An international interest in an object extends to proceeds of that object.

from national interests. The purpose of this distinction is to allow a freestanding security right that is enforceable in the ratifying jurisdictions without having to seek recourse to the domestic law of the jurisdiction where the asset happens to be at the time of default.

While this provides an excellent remedial structure to create and enforce security rights in mobile assets in multiple countries, the question of whether there is an ‘internationality’ requirement for what constitutes mobility has not been raised in the recent drafts of the proposed protocol. Whether the internationality of mobility is in the protocol or not, it has been stated that it is ‘inherent in the nature of the equipment’.¹³ This may be so, but like the other protocols that do not define mobility, there has been an assumption that it need not be defined in the MAC Protocol.¹⁴ Thus, although the assumption underlying the Convention is that the assets covered by the Protocol are assets that might normally travel among different countries during their normal use, it is clear that ‘[t]he Convention thus leaves open the possibility of taking and registering an international interest in equipment which never leaves its State of origin’.¹⁵

Therefore, as to the question of ‘internationality’ for purposes of the proposed MAC Protocol, the question is whether the Protocol, to come within the scope of the Convention should only apply to assets that by their nature are likely to be used in multiple jurisdictions; a requirement that might be argued is implicit in the Cape Town Convention and its existing protocols by implication, or whether the only requirement of internationality is the express requirement that the security interest be an international interest as opposed to a national one.¹⁶

¹³ Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment*, *Official Commentary* (3rd edn, UNIDROIT 2013) 48.

¹⁴ UNIDROIT Study 72K-SG1-Doc 5, paras 1–13.

¹⁵ *ibid.*

¹⁶ Although ‘mobile’ is also an undefined term, there has been no suggestion in the deliberations, drafts and

If the more narrow scope of the proposed Protocol were adopted, the number of assets covered by the Protocol would be greatly diminished. There has not been any discussion regarding, nor do the proposed drafts suggest, the narrow scope of the proposed Protocol.¹⁷

It probably does not make sense to limit the scope of the Protocol to assets that normally move across borders when the evidence suggests this is rarely the case with agricultural, mining and construction equipment.¹⁸ Moreover, the expectation of international mobility is probably quite low in the protocols as a whole. Despite the inherently mobile nature of the equipment covered by the Cape Town Convention, it has been estimated that about 50% of the aircraft covered by the Aircraft Protocol do not engage in any cross-border movement, and the ratio of railway assets covered by the Railway Assets Protocol is even lower.¹⁹

other materials on the proposed MAC Protocol that it would apply to anything other than what would easily be deemed mobile as opposed to fixed goods. That this could be an issue in yet another potential future protocol is yet to be seen, but it should be noted that a preliminary study was done by UNIDROIT in 2013 about the possibility of a protocol on off-shore wind power generation and similar equipment. UNIDROIT 2013 CD (92)5(d). If this, or a similar protocol is to be developed in the future, the question of mobility as an absolute requirement will have to be revisited. It is of course, important to note that the Convention, by its title, assumes mobile equipment.

¹⁷ Article 50 empowers a Contracting State to make a declaration excluding internal transactions from the Convention. However, this Article is of very limited application. A transaction is an internal transaction only if the centre of the main interests of all parties is situated and the object is located in the same Contracting State, that State has a national register for registration of interests arising under the transaction and the interest in question (which the Convention terms a ‘national interest’) has been registered there.

¹⁸ One early commentator suggested that the question of internationality might be met when equipment is manufactured in one jurisdiction and used in another, but this seems to miss the point.

¹⁹ National Law Center for Inter-American Free Trade, ‘Secured Financing for Mobile Equipment: The Proposed Protocol on Mining, Agricultural and Construction Equipment’ (5 March 2014) 43

5. Economic impact of the proposed MAC Protocol

It is simply too early at this stage of the process to assess accurately the potential economic impact of the proposed MAC Protocol. The potential economic impact cannot begin to be analyzed without at least some rough estimate of the types of equipment that would come within the scope of the Protocol.

The discussion thus far has focused on the 'Harmonized Commodity Description and Coding System' as a basis for determining what equipment should be covered by the Protocol.²⁰ The focus on the HS System is primarily a means to meet the requirements of high value equipment and unique identification. At this time, the number of assets that fall under the HS System, much less the value of these assets in various countries, is unknown. At this time we do not have an accurate list of the items on the HS System list that would be covered by the Protocol. Even with that, one would need to know the amount of this trade that would be likely to use the Protocol as a basis for finance instead of relying on existing domestic law.

Without more information, there is simply no basis for determining the potential economic impact of the MAC Protocol. Having said that, it is unlikely that the increased security and enforcement rights that the Protocol will provide to creditors would not result in increased financing and therefore availability of MAC assets. Having noted that, it must be assumed that certain economic benefits would flow from the MAC Protocol. The deficiencies in some national laws of secured finance have hindered lending in some jurisdictions.²¹ The

<<http://www.unidroit.org/english/governments/councildocuments/2014session/nlcift-e.pdf>>.

²⁰ The use of the HS System is considered in detail in document UNIDROIT Study 72K-SG2-DOC 2 (March 2015) <<http://www.unidroit.org/english/documents/2015/study72k/sg03/s-72ksg03-02-e.pdf>>.

²¹ This appears to be the situation in Central Asia for example. See eg, Lawrence Clarke, 'Agricultural Mechanization in Countries in Transition in Eastern Europe and Central Asia' in Josef Kienzle, John Ashburner and Brian Sims (eds), *Mechanization For Rural*

Protocol might either supplant existing domestic law, and thereby give creditors a more efficient, timely and more readily available remedy and thereby encourage finance, or the Protocol might encourage the development of new domestic secured finance law that would bring about similar results.

It would also be most short-sighted to view the economic benefits solely as benefits to be derived from the immediate parties to the transactions: the manufacturers, the financiers and the buyers and lessors. Particularly in the area of agricultural equipment finance, the availability of more favourable financing or even of financing at all, of equipment, will have a substantial positive effect on the development of agriculture in many countries. This translates quickly into more domestic food production and greater national exports. Broader developments in food security, and infrastructure and job growth, are likely benefits as well.

6. Efficacy of the Protocol

The proposed Protocol is still in the early stages, and whether it is a viable addition to Cape Town Convention is yet to be decided. There are still some broad unanswered questions that will have to be resolved.

(a) The Registry

First, there is the question of the registry. Thus far the Study Group has focused on the issues of the supervisory authority, the designated entry points and the identification of the equipment.²² These are essential aspects of the Protocol, but there looms the larger question of whether the registry itself would be viable. Who will run it? Will it be cost effective?²³ It

Development, A Review of Patterns and Progress from Around the World (FAO 2013) 165 <<http://www.fao.org/docrep/018/i3259e/i3259e.pdf>> accessed 7 September 2015.

²² See eg, UNIDROIT Study 72K-SG2-Doc 5 (March 2015).

²³ At present, since there is only one registry – the registry for the Aircraft Protocol – that is functioning, we do not have any experience with an international

would be anticipated that there would be a significantly greater number of potential assets registered under this Protocol than the prior three. Also, as mentioned previously, there must be a clear and certain method for identifying the assets in the registry.

One commentator has suggested that, unlike the other protocols, the MAC Protocol might be ‘debtor listed’ and not ‘asset listed’.²⁴ This suggestion has not gained any traction. It is worth noting that some jurisdictions, such as Australia, already provide for asset-based registration of automobiles and some other assets; assets that are somewhat similar in use and proliferation, and this system has worked well.

The viability of the registry will also depend on the extent that countries exclude from the class of ‘international interests’ assets that would otherwise come within the scope of the Protocol.²⁵

(b) *Enforcement*

Creating international interests in MAC equipment and a remedial scheme to enforce these interests may provide a sound theoretical structure of security rights, but creditors will in many situations still have to rely on local enforcement mechanisms for their security interests, and the problems attendant here will be the same with or without the Protocol. Simply put, it is just more likely that a creditor can keep track of a jet plane than it will be able to keep track of a tractor that is being used in agriculture in a developing country. Creditors know this risk, and the actual ability to enforce creditor rights may not be significantly greater with the Protocol than without it. This is a ultimately a question of industry buy in and support. The question is whether the additional rights significantly advance the interests of

registry other than with aircraft. The aircraft registry, however, has been most successful in achieving its goals of notice, reliability and affordability.

²⁴ National Law Center for Inter-American Free Trade, ‘Secured Financing for Mobile Equipment’ 76.

²⁵ These are issues beyond the scope of the study group and will be resolved in the regulations and procedures that will accompany the registry.

creditors when the additional rights may not transfer into realistically stronger enforcement rights. Industry support for this Protocol is essential to its success.

(c) *Government support*

Governments must believe there is a need for this Protocol. The earlier protocols have been justified by the appreciation of governments that a single unified security device for a small number of assets that are truly internationally mobile benefits from the Convention. Because the scope of the MAC Protocol is likely to cover a significant number of assets that will spend their working life in a single jurisdiction, there is the question of whether existing domestic laws will be perceived as adequate from potentially ratifying parties. This issue has been raised at the UNDRUIT Governing Council in the past, and it may be an issue in spring 2016 when the Governing Council revisits the MAC Protocol.

(d) *Industry support*

It is worth noting that presently most large manufacturers of MAC equipment are already selling, leasing and financing the equipment around the world. What needs to be shown is that the benefits of this Protocol will increase the amount of and reduce the cost of equipment finance. At this time, we do not have sufficient data on the economic effects the Protocol would have, but based on extensive industry consultations, there does appear to be substantial industry support for the MAC Protocol.²⁶

(e) *Fixtures*

One must assume that MAC equipment will often require physical affixation to real property and therefore will often be a fixture under

²⁶ See eg, National Law Center for Inter-American Free Trade, ‘Secured Financing for Mobile Equipment’. Much of the expressed support has come from developed nations, particularly the United States, see *ibid*; however, this should be viewed positively as it suggests the major manufacturing countries perceive a benefit in their abilities to sell or lease equipment in other nations through the protocol.

domestic law. Because of the widely varying domestic laws that govern fixtures and their relationship to movable property this matter poses one of the most complex problems in the proposed MAC Protocol. At this still rather early time in the drafting process:

The Study Group decided to provisionally insert a provision into the draft MAC Protocol which allows MAC equipment listed in Annexes 1, 2 or 3 which becomes attached/fixed to immovable property, but retains its individual identity to retain its priority over domestic secured interests. The Study Group requested that the Secretariat conduct further research on how priority between interests in mobile affixable property and domestic interests in immovable property is currently resolved under domestic legal regimes, and report back at the next Study Group meeting.²⁷

This, in other words, is a problem that does not have an easy and clear resolution and the question has been deferred.

7. The MAC Protocol and the other protocols

(a) *Insolvency*

Different versions of the remedies available on the insolvency of the debtor have been something of a growth industry with the Cape Town Convention. The Aircraft Protocol offers two alternatives and the Rail Protocol offers an additional one, thereby providing three. To provide potential ratifying states the most options to encourage adoption of the Protocol, the Study Group has suggested the MAC Protocol replicate the three options of the Rail Protocol.²⁸

(b) *Public service exemption*

Article XXV of the Rail Protocol and Article XXVII of the Space Protocol provide an exemption to the operation of certain aspects of the Cape Town Convention and the

relevant protocols for certain public services. While the approach in the two protocols is different,²⁹ the underlying policy is the same between the two: that the state has an interest in ensuring that a creditor that exercises its rights under the Convention and relevant protocol does not effect a termination of services of public importance.

²⁹ Article XXV of the Rail Protocol provides that a Contracting State may, at any time, enter a declaration that it will continue to apply its domestic law in force at the time of the declaration that precludes, suspends or governs the exercise by the creditor of any remedies under the Convention/Protocol in relation to public service railway rolling stock. Article XXV applies to both passenger vehicles and freight vehicles that must be habitually providing a service of public importance (ie, a passenger vehicle habitually carrying a substantial number of passengers on a main line would ordinarily be considered to provide a service of public importance). If the public service is exercised by the Contracting State, it has duties to preserve and maintain the asset and pay to the creditor compensation under either the national law or the market lease rental within 10 calendar days of taking possession of the asset (and thereafter on the first day of each successive month). There is no time limit on the period the Contracting State can prevent the creditor from exercising a remedy in relation to public service stock. Under Article XXVII of the Space Protocol, a debtor who enters into a contract providing the use of a space asset to provide public services can agree with other parties to the contract for the provision of the public service and the Contracting State to register a public service notice under the Protocol. Technically, it does not require the creditor's consent, as the creditor is not a party to the contract for the provision of public services. However, the creditor can impose contractual restraints on the debtor's consent to registration of a public service notice at the time of the creation of the international interest, and therefore in practice is likely to be a part of the negotiations. Subject to certain exceptions, a creditor may not exercise any Convention/Protocol remedies in the event of a debtor default on an asset that is subject of a public service notice. The period that a creditor cannot exercise its remedial rights is limited to 3–6 months. During the suspension period, the creditor, debtor and public service provider are required to cooperate in good faith with a view to find a commercially reasonable solution permitting the continuation of the public service. The approach in Article XXVII appears to be more complex than the approach in the Rail Protocol.

²⁷ UNIDROIT Study 72K-SG2-Doc 6, para 72 (April 2015).

²⁸ UNIDROIT Study 72K-SG2-Doc 7, fn 24 (April 2015).

The types of public services relating to rail transport (carriage of persons and goods) and space assets (national security, transport safety, communications) are obvious. Conversely, the agriculture, construction and mining sectors do not provide public services. Rather, they operate in fields of significant public interest. It is this distinction that led the Study Group to determine that it was not necessary to include a public service exception article in the draft MAC Protocol.³⁰

8. Conclusion

The Study Group has presumably one more meeting before its work will be presented to the Governing Council in May 2016 to determine the viability of the proposed Protocol. It is clear from the secretariat reports, the reports of the first two meetings and the third revised draft that the Study Group will have produced an excellent draft MAC Protocol. The success of the project, however, will be subject to some political questions that go beyond the technical competency of the draft protocol.

First there is the question of government support. Some members of the Governing Council have suggested that the question of secured financing of mining, agricultural and construction equipment is an issue of domestic law that does not have the same international aspects that are present in the three existing protocols. For these members of the Governing Council, if there is presently a problem the solution is to encourage reform of existing domestic laws. It has been suggested that this is precisely the work that is being done at UNICTRAL on security rights, and therefore the MAC Protocol is both duplicative of this work and unnecessary.

That, to a significant extent, the impetus behind the MAC Protocol is a perceived deficiency in domestic laws is fairly clear from the supporting materials provided to the Study Group:

³⁰ UNIDROIT Study 72-K-SG2-Doc 4, para 64 (March 2015).

The estimates of economic benefits also depend on the scope of the MAC Protocol and the deficiencies in domestic secured transactions laws. Countries that have efficient secured transactions laws already provide adequate protections to creditors, but that is not the case in a significant majority of developing countries. The MAC Protocol would benefit primarily these countries in providing an alternative to their outdated legal regime for the financing of equipment. It could even entice these countries to overhaul their general secured transactions systems having realized the economic benefits derived from the ratification of the MAC Protocol.³¹

Thus, for the Protocol to succeed, it must garner support from governments that will appreciate that one purpose of ratification is an acknowledgement of a failure of their own legal system. This may be worth the economic benefits the Protocol would bring. It might also be perceived as a reason to update the domestic law instead of ratifying the Protocol.

There is also the issue of industry support. Although industry has shown a great interest in the project thus far, the unanswered question is whether industry will put its resources behind the adoption of the Protocol. The great success of the Aircraft Protocol was dependent upon a discreet number of affected industry players that were willing to put significant resources behind its ratification. It is yet to be seen whether the proposed MAC Protocol will have this type of support. It is precisely this type of strong industry support that will be necessary to implement a functioning registry system for the Protocol. It is also strong industry support that will be necessary to define the exact scope of assets that the Protocol will cover.

After the next meeting of the Study Group in October, the next step is a request for approval of the draft protocol by the UNIDROIT Governing Council with a mandate to move forward to a meeting of governmental experts.

This may be an excellent additional protocol to the Cape Town Convention. We just aren't there yet.

³¹ National Law Center for Inter-American Free Trade, 'Secured Financing for Mobile Equipment' 34.