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The MAC Protocol: some comments and a challenge

Charles W Mooney Jr*

1. Introduction

Professor Henry Gabriel's paper¹ asks the right questions – hard questions – about the MAC Protocol to the Cape Town Convention ('Cape Town' or the 'Convention').² We should be asking these hard questions at this stage of the project. I have no quarrel with the points that he makes. So these comments are essentially an extension and supplement to

Professor Gabriel's paper. In addition, consideration of the MAC Protocol project reveals some recurring hurdles confronting efforts to harmonize commercial law internationally, and especially in the area of secured transactions law. The discussion prompts me to pose a challenge to those involved in the process – in particular to the secretariats of the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL).

2. Comments on Gabriel's 'How far'

Professor Gabriel has provided a thoughtful and thorough evaluation of the MAC Protocol project at the current stage of the process. I will focus on some of the difficulties that the project faces – including those that Professor Gabriel has identified as well as a few others. I should note at the outset that with the exception of the success of Cape Town and the Aircraft Protocol,³ international efforts to harmonize secured transactions law have encountered many obstacles. Any assessment of the prospects for the MAC Protocol must keep this in mind and embrace a healthy skepticism.

On the other hand, the widespread adoption of an international instrument or model law is not the only measure of success. The work of

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¹ See Henry Deeb Gabriel, 'The MAC Protocol: We Aren't There Yet: How Far Do We Have to Go?' (2015) 4 *Cape Town Convention Journal* [this issue].

² International Institute for the Unification of Private Law (UNIDROIT), Third Preliminary Annotated Draft of a Fourth Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment (April 2015) <<http://www.unidroit.org/english/documents/2015/study72k/sg02/s-72k-sg02-07-e.pdf>> ('MAC Protocol') accessed 2 October 2015; UNIDROIT, Convention on International Interests in Mobile Equipment, 16 November 2001, 2307 UNTS 285 <<http://www.unidroit.org/instruments/security-interests/cape-town-convention>> ('Convention') accessed 2 October 2015.

³ UNIDROIT, Protocol to the Convention on Matters Specific to Aircraft Equipment, 16 November 2001 <<http://www.unidroit.org/instruments/security-interests/aircraft-protocol>> ('Aircraft Protocol') accessed 2 October 2015.

UNIDROIT on the Financial Leasing and Factoring conventions,⁴ Cape Town and its Aircraft, Rail, and Space Protocols,⁵ the Model Law on Leasing,⁶ and the Geneva Securities Convention⁷ have done much to unify attitudes, vocabulary, and understanding concerning secured transactions law reform. The same can be said of UNCITRAL's work, including the Receivables convention,⁸ the Legislative Guide,⁹ the Registry Guide,¹⁰ and (currently) the Draft Model Law on Secured Transactions.¹¹ Professor Gabriel also notes the potential value of the MAC Protocol for

domestic law reforms.¹² All of these efforts have influenced the modernization of secured transactions law in various states around the world.

Any assessment of the MAC Protocol project also must consider its potential economic benefits, as Professor Gabriel notes.¹³ This question has been the subject of research and there is reason for optimism.¹⁴ But it remains to be seen whether the manufacturing sectors for MAC equipment will provide sufficient support to make widespread adoption of the MAC Protocol a reality (or, at least, a realistic prospect). I have nothing further to add on this; we shall see what develops. I focus here, instead, on some of the legal and operational challenges that confront the MAC Protocol. To be sure, however, the ultimate success of the MAC Protocol as a viable international instrument will turn on market acceptance based on the potential for actual economic impact, not on resolution of the more technical issues that I raise here.

One challenge arises from the reality that the MAC Protocol is not being drafted on a clean slate. Article 51(1) of the Convention contemplates the possibility of protocols beyond air, space, and rail for 'high-value mobile equipment' that is 'uniquely identifiable'.¹⁵ It is fair to say that financing such equipment is the

⁴ UNIDROIT, Convention On International Factoring, 28 May 1988 <<http://www.unidroit.org/instruments/factoring>> accessed 2 October 2015; UNIDROIT, Convention On International Financial Leasing, 28 May 1988 <<http://www.unidroit.org/instruments/leasing/convention-leasing>> accessed 2 October 2015.

⁵ Aircraft Protocol (n 3); UNIDROIT, Protocol to the Convention on Matters Specific to Space Assets, 9 March 2012 <<http://www.unidroit.org/instruments/security-interests/space-protocol>> accessed 2 October 2015; UNIDROIT, Luxembourg Protocol to the Convention on Matters Specific to Railway Rolling Stock, 23 February 2007 <<http://www.unidroit.org/instruments/security-interests/rail-protocol>> ('Rail Protocol') accessed 2 October 2015.

⁶ UNIDROIT, Model Law on Leasing, 13 November 2008 <<http://www.unidroit.org/instruments/leasing/model-law>> accessed 2 October 2015.

⁷ UNIDROIT, Convention On Substantive Rules For Intermediated Securities, 9 October 2009 <<http://www.unidroit.org/instruments/capital-markets/geneva-convention>> accessed 2 October 2015.

⁸ United Nations Convention on the Assignment of Receivables in International Trade, 12 December 2001 <https://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables> accessed 2 October 2015.

⁹ United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Secured Transactions, UN Sales No E.09.V.12 (2010) <http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf> ('UNCITRAL Legislative Guide') accessed 2 October 2015.

¹⁰ UNCITRAL, *Guide on the Implementation of a Security Rights Registry*, UN Sales No E.14.V.6 (2014) <<http://www.uncitral.org/pdf/english/texts/security/Security-Rights-Registry-Guide-e.pdf>> ('UNCITRAL Registry Guide') accessed 2 October 2015.

¹¹ See UNCITRAL, Draft Model Law on Secured Transactions, Report of Working Group VI (Security Interests) on the Work of its Twenty-Seventh Session (New York, 20-24 April 2015), UN Doc A/CN.9/836 ('UNCITRAL Draft Model Law').

¹² Gabriel (n 2).

¹³ *ibid.*

¹⁴ UNIDROIT, Study 72K – Development Of A Fourth Protocol To The Cape Town Convention On Matters Specific To Agricultural, Construction And Mining Equipment, 'Background' (discussing studies of economic benefits of MAC Protocol by the Center for the Economic Analysis of Law and the National Law Center for Inter-American Free Trade): <<http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol#back>> accessed 2 October 2015.

¹⁵ Convention Art 51(1); Gabriel (n 2) (discussing the Harmonized Commodity Description and Coding System (HS System)).

Cape Town ‘mission statement’. These characteristics of equipment underpin the rationale that sets the scope of Cape Town apart from other approaches to harmonization of secured transactions law.¹⁶

As Professor Gabriel has explained, the current draft of the MAC Protocol provides that its scope is based on whether equipment is included in one of the listed categories in the HS System.¹⁷ Tested by the standards of high value, mobility, and unique identifiability, some of the items listed in the HS System categories included in the MAC Protocol are problematic.¹⁸ Resolution of the appropriate scope of the MAC Protocol implicates issues of policy as well as technical issues. For example, consider equipment of a type in a listed category in the HS system – ‘pile-drivers’.¹⁹ Assume that some pile-drivers are of high value and some are not, but all are under the same HS System code number. Professor Gabriel’s suggestion that one might ask whether a type of equipment is separately financeable has merit – eg, ‘Are pile-drivers separately financeable?’ But even if some are, that does not resolve the issue of whether to include the low-value pile-drivers. Arguably, all pile drivers should be included within the MAC Protocol’s scope unless there is a practical, bright-line means of excluding the low-value items.

Are there substantial risks imposed by including the lower-value items? I would argue that there are not. A creditor²⁰ could choose to

comply with local law (assuming the existence of relevant local secured transactions law) instead of complying with the MAC Protocol (ie, instead of registering its interest in the MAC international registry).²¹ If the creditor’s local law interest were effective in insolvency proceedings, then it would remain so even without registration in the international registry.²² Moreover, the creditor plausibly might consider conflicting priority contests to be rare in the case of such low-value equipment. Where there is no relevant local law, on the other hand, then no one would be extending asset-based financing on that equipment in any event. So no one would be the worse off by including the low-value pile-drivers within the scope of the MAC Protocol. As Professor Gabriel also mentions, the questions of how to deal with general use equipment that *sometimes* may have a MAC use (eg, trucks) and whether to include parts also must be considered.²³ In sum, several issues exist as to defining the proper scope of the MAC Protocol. But at present there is good reason to believe that they can be resolved satisfactorily.

Now consider the means of describing equipment for purposes of registration and searching the international registry. Registration against a debtor identifier, as opposed to an object-based registry, appears to be off the table now. That said, what would be the unique identifier of an object? Article XV(1) of the MAC Protocol provides:

A description of agricultural, construction or mining equipment that contains its manufacturer’s serial number, the name of the manufacturer and its model designation is necessary and sufficient to

seller under a title reservation agreement or a lessor under a leasing agreement’).

²¹ See MAC Protocol, Ch III, Registry Provisions Relating to International Interests in Agricultural, Mining and Construction Equipment.

²² Convention Art 30(2) (‘Nothing in this Article [dealing with effects of insolvency] impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law’).

²³ Gabriel (n 2).

¹⁶ Note that the scope of the Convention and its protocols does not contain a test of internationality. However, a Contracting State may declare that the Convention does not apply to an ‘internal transaction’: Convention Art 50(1). Notwithstanding such a declaration, the Convention’s provisions concerning registration and priorities apply nonetheless: Convention Art 50(2).

¹⁷ MAC Protocol (n 3), Art II(1), Annexes 1 (agricultural equipment), 2 (construction equipment), 3 (mining equipment).

¹⁸ *ibid.*

¹⁹ *ibid* Annex 2, Code 843919 (pile-drivers and pile-extractors).

²⁰ See Convention Art 1(i) (defining ‘creditor’ as ‘a chargee under a security agreement, a conditional

identify the object for the purposes of Article 18 (1) of the Convention.²⁴

This is consistent with the Aircraft Protocol and the regulations of the international registry for aircraft objects.²⁵ Note that this approach does not rely on the HS System. It also does not involve the determination and use of a 'name' of an object as a part of its description, which would be highly problematic. For example, consider the HS System category of 'tamping machines and road rollers'.²⁶ How would one know which is which, inasmuch as road rollers tamp and tamping machines might roll? What if different manufacturers use different names for the same type of item, such as a 'multi-purpose road-making machine' or a 'heavy duty rock and roller'?

MAC equipment is problematic, however, because it appears that some MAC equipment currently lacks a manufacturer's serial number. For this reason, Article XV(2) of the MAC Protocol contemplates an interim period during which the Registrar would supply an identification number for equipment that lacks a manufacturer's serial number.²⁷ As to this interim-period approach, ongoing work on the international registry for the Rail Protocol, which takes a similar registry-generated identifier approach to unique identifiers for rail objects, will be instructive.

²⁴ MAC Protocol, Art XV(1).

²⁵ Aircraft Protocol, Art VII; *Regulations and Procedures for the International Registry*, s 5.3(c) (6th edn, International Civil Aviation Organization 2014) ('Aircraft Protocol Regulations').

²⁶ MAC Protocol, Annex 2, Code 842940 (tamping machines and road rollers, self-propelled).

²⁷ MAC Protocol Art XV(2) provides:

'Notwithstanding paragraph 1, for an initial period finishing at a date defined in the regulations, for the purposes of Article 18(1)(a) of the Convention, where agricultural, construction or mining object does not have a manufacturer's serial number, the regulations shall prescribe a system for the allocation of identification numbers by the Registrar which enable the unique identification of the agricultural, construction or mining object, which shall be affixed to the object.' This approach was borrowed from a similar approach for describing equipment in the Rail Protocol. See Rail Protocol, Art XIV(1).

Were the MAC Protocol eventually to become effective, one hopes that manufacturers would engage in a 'race to the top' to embrace manufacturer's serial numbers so as to render their equipment more readily available for asset-based financing after expiration of the interim period.

One solution to concerns about MAC equipment identifiers for registration and searching purposes would be to establish a registry based on a *debtor* identifier instead of an object-based registry. But some would view that approach as an inappropriate deviation from the Cape Town norm and also as an unfortunate encroachment on the work done at UNCITRAL on its Legislative Guide²⁸ and Registry Guide²⁹ as well as the ongoing work on the Draft Model Law,³⁰ each of which contemplates a debtor identifier-based registry for secured transactions. However, one can imagine that some states would eschew modernizing secured transactions generally under the UNCITRAL approach, which covers all types of movables as well as after-acquired property. Some of such states, nonetheless, might wish to adopt for the benefit of important economic sectors the MAC Protocol (were it in force) or a domestic law following the substance of the MAC Protocol. A generally applicable, debtor identifier-based international secured transactions registry, which I have proposed elsewhere, would facilitate the goals of such states.³¹ Another approach would be for UNIDROIT and UNCITRAL to partner on the MAC Protocol international registry. UNCITRAL and UNIDROIT could work with the existing international registry to develop a debtor identifier-based registry for the MAC Protocol, in lieu of an object-based registry, based on the UNCITRAL Registry Guide.

²⁸ UNCITRAL Legislative Guide (n 9).

²⁹ UNCITRAL Registry Guide (n 10).

³⁰ UNCITRAL Draft Model Law (n 11).

³¹ Charles W Mooney Jr, 'The Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application (2014) 55 *Virginia Journal of International Law* 163.

I should emphasize that the question of overlap of the work of UNIDROIT and UNCITRAL should not be trivialized as a ‘turf’ issue. Both UNCITRAL and UNIDROIT have made tremendous investments of time and funds in their secured transactions projects. It would be unfortunate for one organization to repeat the work of another, especially if in the end different results would emerge. That said, both secretariats should be praised for their cooperation in working toward common goals. I would urge both secretariats to consider even closer cooperation if it should be necessary to explore the feasibility of a debtor identifier-based registry for the MAC protocol.³²

Finally, consider the question of whether qualifying MAC equipment would be ‘mobile’, as contemplated by Convention Article 51(1). Certainly aircraft, rail cars, and some space objects move from place to place. But some of the MAC equipment currently listed in the Annexes to the MAC Protocol may actually be affixed to land or buildings or otherwise be used in the same location for extended periods without movement. In my view, this fact should not disqualify such equipment from inclusion within the scope of the MAC Protocol. If it is good policy – with economic benefits – for the MAC Protocol to cover such equipment, then so be it. A protocol is controlling over any inconsistent provisions of the Convention.³³ Article 51 cannot limit or override the provisions of a duly adopted protocol. Moreover, there is no good reason to circumscribe the potential benefits of the MAC Protocol based on earlier preconceived notions as to the appropriate scope of future protocols.

3. A challenge for the secretariats and beyond: a consortium for modernization of secured transactions law

This part is inspired by my musings about the scope of the secured transactions-related projects, past and present, undertaken by UNIDROIT and UNCITRAL and their respective approaches to law reform. I begin with my premise: At any point in time different states have different needs and, in particular, *different appetites*, for laws governing secured transactions. It follows, as suggested above, that one state may prefer a comprehensive, modern secured transactions law along the lines of the UNCITRAL Draft Model Law and another state may prefer a law similar to the MAC Protocol approach (or the MAC Protocol itself, once finalized). Of course, there are many other possibilities. Were there an omnipotent and omniscient Lord of Law Reform, it would no doubt take account of a state’s needs and appetite in working with its government to fashion a suitable secured transactions law reform program.

Clearly the picture just painted does not reflect the current working methodologies of UNIDROIT and UNCITRAL. While each organization and secretariat has its own distinctive approach, reflecting its governance structure, traditions, and culture, the two organizations also embrace some common patterns of approaching law reform. After following the relevant procedures for finalizing and approving an end product (such as a convention, model law, or legislative guide), each organization then encourages adoption or compliance by states. Nowhere in the process does there seem to be any coordinated assessment and development of a tailored prescription for a given state, taking into account the state’s particular needs and appetite for reform. Should the missions of the two secretariats be confined, essentially, to the development and promotion of products for consumption by states? Or, should the missions be more generally shaped around, or at least adjusted to include, how best to improve the lot of particular states in a

³² As suggested in Part 3, it would be useful for the secretariats to join with others in even greater cooperation and coordination of a path-breaking nature far beyond the context of the MAC Protocol.

³³ Convention Art 6(2).

given area of law reform? It is no doubt apparent that I would favor the broader missions (and mindsets). I suggest that the overarching goal should be widespread reform of secured transactions laws. Individual projects such as the UNCITRAL Draft Model Law and the MAC Protocol should be seen as components of the toolkit for reaching this broader goal, not as ends in themselves.

These thoughts are preliminary, of course, and no doubt would benefit from a broader deliberation and discussion among those experienced with secured transactions law reforms. Unfortunately, the deadline attendant to submission of a manuscript for publication does not permit a broader exposure at this time. Given that, readers should treat the nascent proposal that follows as primarily an invitation to begin a conversation about new methods and norms for secured transactions law reforms.

I propose the development of a consortium to address law reform in the realm of secured transactions. In addition to the obvious need for participation by UNIDROIT and UNCITRAL, the consortium also would benefit from the participation of organizations such as the World Bank Group,³⁴ the International Monetary Fund,³⁵ the Hague Conference on Private International Law,³⁶ regional development banks,³⁷ regional intergovernmental

organizations,³⁸ national agencies devoted to development,³⁹ and nongovernmental organizations with relevant experience and expertise.⁴⁰

I envision the primary goal of such a consortium as supplementing and complementing the work of the various individual organizations involved with law reform efforts by focusing on the individual needs of particular states. This additional dimension could support the coherent, strategic, and effective promotion of specific proprietary products and programs or organizations such as UNIDROIT and UNCITRAL. At least, the consortium could provide a forum for discussions of trans-organizational strategies for secured transactions law reforms and a clearinghouse for pending and planned efforts.

4. Conclusion

It is apparent from Professor Gabriel's careful evaluation of the MAC Protocol project, supported by my comments in Part 2 above, that implementing the MAC Protocol would demand detailed regulations and a comprehensive official commentary. In this respect, the regulations of the international registry for aircraft objects⁴¹ and the Cape Town/Aircraft

secured transactions in movable and immovable property').

³⁸ See, eg, Organization of American States, Department of International Law, Model Inter-American Law on Secured Transactions: Model Registry Regulations (2002) <http://www.oas.org/en/sla/dil/docs/secured_transactions_BOOK_Model_Law.pdf> accessed 2 October 2015.

³⁹ See, eg, United States Agency for International Development, *AGCLIR Lessons from the Field: Getting Credit* (2011) <<http://egateg.usaid.gov/sites/default/files/AgCLIR%20-%20Getting%20Credit.pdf>> accessed 2 October 2015 (discussing *inter alia* importance of a legal framework for security interests in connection with agribusiness credit).

⁴⁰ See, eg, Center for the Economic Analysis of Law, Draft Laws <<http://www.ceal.org/draftlaw.asp>> accessed 2 October 2015 (links to draft laws on secured transactions); National Law Center for Inter-American Free Trade <<http://www.natlaw.com/project-areas>> accessed 2 October 2015 (describing, *inter alia*, the Center's work on access to credit and secured transactions law).

⁴¹ Aircraft Protocol Regulations (n 25).

³⁴ See International Finance Corporation, World Bank Group, *Secured Transactions Systems and Collateral Registries* (2010) <<http://www.ifc.org/wps/wcm/connect/c5be2a0049586021a20ab719583b6d16/SecuredTransactionsSystems.pdf?MOD=AJPERES>> accessed 2 October 2015.

³⁵ See *Financial Sector Assessment: A Handbook* (International Monetary Fund 2005) 231.

³⁶ See Hague Conference on Private International Law, Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, 5 July 2006 <<http://www.hcch.net/upload/conventions/txt36en.pdf>> accessed 2 October 2015.

³⁷ See, eg, Inter-American Development Bank, *TC9507255: Strengthening System of Properties Right* <<http://www.iadb.org/en/projects/project-description-title,1303.html?id=TC9507255>> accessed 2 October 2015 (describing a project for 'improv[ing] the legal framework and administrative procedures for

Protocol Official Commentary⁴² have set a high bar.

I agree with Professor Gabriel that the MAC Protocol has a ways to go. With the benefit of the HS System it would appear that the scope issues are manageable. A remaining technical hurdle, however, is the development of a registry-generated unique identifier during an interim period for MAC equipment that lacks a manufacturer's serial number. Progress on the same issue in structuring the international registry for rail objects may provide solutions.

Another critical remaining question, of course, is the extent and nature of industry support for the MAC Protocol project.

Finally, I propose in Part 3 the beginning of a conversation about the development of a consortium of interested and experienced organizations for addressing, in a coordinated and cooperative way, law reform in the area of secured transactions. Whether or not this specific idea has legs remains to be seen. But perhaps the conversation itself could lead to improved communications, consultations, and coordinated efforts.

⁴² R. Goode, *The Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, UNIDROIT 2013) ('*Official Commentary*'). Much of the *Official Commentary* would apply to the MAC Protocol. Such a commentary for the MAC Protocol would only be required to supplement the *Official Commentary* in respect of matters peculiar to that protocol.