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Facilitating access to credit and economic growth in Czechia, Hungary, Poland and Slovakia through international treaty law – The Mining, Agricultural and Construction Protocol to the Cape Town Convention

ABSTRACT

Adopted in 2019, the Mining, Agricultural and Construction Protocol (MAC Protocol) to the Convention on International Interests in Mobile Equipment (Cape Town Convention) is the world's most recent international commercial law treaty in the field of secured transactions and asset-based finance. The MAC Protocol provides a comprehensive international legal framework for the creation, registration, and protection of security interests in mining, agricultural and construction equipment. It is predicted to increase international global economic production by \$30 billion annually, with the largest economic benefits for developing countries and emerging markets that ratify and implement the treaty. The Protocol would provide significant legal and economic benefits to Czechia, Hungary, Poland and Slovakia (the Visegrad Group), by facilitating regional investment, trade and cross-border business cooperation. If implemented, the MAC Protocol would improve access to credit for companies in the Visegrad countries in the face of increasingly difficult international economic headwinds.

This article provides an overview of the legal operation of the Cape Town Convention and the MAC Protocol. It then examines how the MAC Protocol will improve the legal frameworks in facilitating asset-based finance in the Visegrad Group. Finally, the article evaluates the economic benefits of the MAC Protocol for the Visegrad Group, should it be ratified by Czechia, Hungary, Poland and Slovakia.

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KEYWORDS: International Secured Transactions Law, Cape Town Convention, MAC Protocol, Czechia, Hungary, Poland, Slovakia, Visegrad Group

I. INTRODUCTION

On 22 November 2019, the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (MAC Protocol)¹ was adopted at a Diplomatic Conference in Pretoria, South Africa.² The MAC Protocol is the fourth Protocol to the Convention on International Interests in Mobile Equipment (the Cape Town Convention),³ following the adoption of the Aircraft Protocol (2001),⁴ the Luxembourg Rail Protocol (2007)⁵ and the Space Protocol (2012).⁶ The Cape Town Convention treaty system represents

¹ Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Mining, Agricultural and Construction equipment, adopted in Pretoria in a diplomatic Conference in 2019; English text at <https://www.unidroit.org/instruments/security-interests/mac-protocol/> (MAC Protocol) (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Mining, Agricultural and Construction Equipment, Official Commentary* (UNIDROIT, 2021).

² UNIDROIT, MAC Protocol – Diplomatic Conference, ‘Summary Report for 22 November 2019’ DCME-MAC – Doc. 43 (2019) para 3.

³ Convention on International Interests on Mobile Equipment, jointly adopted at a diplomatic Conference in Cape Town in 2001 by UNIDROIT and the International Civil Aviation Organization (ICAO); English text at <http://www.unidroit.org/instruments/security-interests/cape-town-convention> (Last accessed: 29.12.23.); for a comprehensive overview of the Convention system see R. Goode, *From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols*, (2012) *Uniform Law Review*, 599.

⁴ Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Aircraft Equipment, jointly adopted in a diplomatic Conference in Cape Town in 2001 by UNIDROIT and ICAO; English text at <http://www.unidroit.org/instruments/security-interests/aircraft-protocol> (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects, Official Commentary*, (5th ed., UNIDROIT, 2022).

⁵ Luxembourg Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Railway Rolling Stock, jointly adopted in a diplomatic Conference in Luxembourg in 2007 by UNIDROIT and the Intergovernmental Organisation for International Carriage by Rail (OTIF); English text at <http://www.unidroit.org/instruments/security-interests/rail-protocol> (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock, Official Commentary*, (2nd ed., UNIDROIT, 2014).

⁶ Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Space Assets, adopted in Berlin in a diplomatic Conference in 2012; English text at <http://www.unidroit.org/instruments/security-interests/space-protocol> (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Space Objects, Official Commentary*, (UNIDROIT, 2013).

one of the most successful international commercial law instruments in history, having been ratified by 85 States.⁷

The Cape Town Convention system utilises a two-tier framework, under which the Convention itself provides the core rules and each Protocol adapts the Convention rules to suit the category of equipment to which it applies. Article 6 of the Convention provides that the Convention is to be read and interpreted together with each Protocol separately as a single instrument, but, to the extent of any inconsistency between the two, the Protocol prevails.

While at first glance it might seem strange that the Protocol overrules the Convention, this clever mechanism allows each Protocol to adapt the core Convention rules appropriately, to suit the specific needs of the sector to which it applies. For example, the Aircraft Protocol provides specialised rules allowing for expedited authorisation from civil aviation authorities for the de-registration and export of aircraft that have been repossessed under the Cape Town Convention.⁸ The Luxembourg Rail Protocol provides a specialised system for the identification of railway rolling stock for registration purposes.⁹ The Space Protocol allows for parties to use command codes to allow creditors to establish control over assets in Space.¹⁰ The MAC Protocol provides a specialised rule for the treatment of mining, agricultural and construction equipment that is being financed as inventory by a dealer.¹¹

A second innovative feature of the Cape Town Convention and its Protocols is its system of declarations. In order to ensure that the international legal framework for secured transactions established by the treaty system operates smoothly, efficiently and transparently, the Convention and its Protocols do not allow Contracting States to make reservations.¹² However, the Convention and Protocols do allow Contracting States to make specific declarations under a limited number of articles, which provide Contracting States with various policy choices in relation to important aspects of the treaty. Where allowed, these declarations allow for Contracting States either to apply, set aside or modify specific articles.

One important policy choice available for Contracting States under each Protocol is in relation to whether a holder of an international interests receives additional protections in the event of the grantor's insolvency, or whether the Contracting State's domestic insolvency regime will apply instead.¹³ Other examples of

⁷ As of 2 August 2023.

⁸ Cape Town Convention, Article XIII.

⁹ Luxembourg Rail Protocol, Article XIV.

¹⁰ Space Protocol, Article XIX.

¹¹ MAC Protocol, Article XII.

¹² Cape Town Convention Article 56, Aircraft Protocol Article XXXII, Luxembourg Rail Protocol Article XXVIII, Space Protocol Article XLIII and MAC Protocol Article XXX.

¹³ While each individual Protocol provides slightly different insolvency remedies, all of the Protocols provide Contracting States with the opportunity to make a declaration that enhances the position

important policy choices that Contracting States can make through declarations include whether Contracting States can delay enforcement actions in relation to assets performing a public service under the Luxembourg Rail Protocol and the Space Protocol,¹⁴ and the relationship between international interests in equipment and immovable property under the MAC Protocol.¹⁵

The declarations system contained in the Cape Town Convention and its Protocols is ingenious for two reasons. First, it provides a structured compromise solution on difficult policy issues for Contracting States, without allowing States simply to disapply any part of the Convention they don't like through reservations. Second, and perhaps more importantly, it allows Contracting States to make declarations that enhance the legal and economic benefits of the Convention. Under the Aircraft Protocol, the economic benefits related to specific declarations have been expressly recognised by the OECD Aircraft Sector Understanding (ASU). The ASU allows export credit agencies to grant a reduction of up to 10% off the minimum premium rate on export credit (known as the "Cape Town Discount") if the aircraft operator is (i) based in a Contracting State that has ratified the Convention and Protocol, and (ii) has made certain declarations that enhance the legal protections afforded to a holder of an international interest (known as "qualifying declarations").¹⁶ The ASU and Cape Town Discount have brought significant economic benefits to many of the 82 States that have ratified both the Convention and Aircraft Protocol.

II. A SIMPLIFIED OVERVIEW OF THE CAPE TOWN CONVENTION

The Cape Town Convention and its Protocols provide a widely adopted, harmonised and efficient international legal framework for financing certain categories of mobile, high value equipment. The Convention provides a comprehensive system for the creation, protection and enforcement of international interests in equipment, which through the Aircraft Protocol has come to be regarded as international best practice.

of the holder of an international interest in the event of the grantor's insolvency, instead of applying domestic insolvency law. See Aircraft Protocol Article XI, Luxembourg Rail Protocol Article IX, Space Protocol Article XXI and MAC Protocol Article X.

¹⁴ See Luxembourg Rail Protocol Article XXV (public service railway rolling stock), Space Protocol Article XXVII (limitations on remedies in respect of public service).

¹⁵ MAC Protocol Article VII (association with immovable property).

¹⁶ *Sector Understanding on Export Credits for Civil Aircraft* (the ASU), Appendix I, Annex 1, page 80–81, [https://one.oecd.org/document/TAD/PG\(2023\)7/en/pdf](https://one.oecd.org/document/TAD/PG(2023)7/en/pdf) (Last accessed: 29.12.23.).

1. Scope of the Convention and the creation of international interests

There are three requirements for the Cape Town Convention to apply to a transaction. First, the transaction must create an “international interest”. Second, the “international interest” must relate to an object of equipment within the scope of one of the Protocols to the Cape Town Convention. Third, the grantor party must be located in a State that has become party to both the Convention and the relevant Protocol. Each of these elements will now be briefly explored.

In relation to the first requirement, Article 2 of the Convention provides that an “international interest” is an interest in equipment that is (i) granted by the chargor under a security agreement, (ii) vested in a person who is the conditional seller under a title reservation agreement, or (iii) vested in a person who is the lessor under a leasing agreement. Article 6 of the Convention provides very few formal requirements for the constitution of an international interest: the agreement must simply (i) be in writing; (ii) relate to an object over which the chargor, conditional seller or lessor has the power to dispose; (iii) enable the object to be identified; and (iv) for security agreements, enable the secured obligations to be determined. The notion of an “international interest” under the Convention is *sui generis* and autonomous from any national interest that may be created over the same object under the applicable domestic law.

This streamlined approach to the creation of international interests reflects a functional approach to secured transactions law, whereby the three types of agreements that can create an international interest (security agreement, title reservation agreement and lease) are generally subject to the same basic framework throughout the Convention.¹⁷ The functional approach to secured transactions law, as reflected in both the Cape Town Convention and the UNCITRAL Model Law on Secured Transactions,¹⁸ has become the international best-practice standard and is the basis of the majority of secured transactions reforms being undertaken by States around the world.

In relation to the second requirement, the international interest must relate to an object within the scope of one of the Protocols. This is generally a fairly straightforward matter, as each Protocol provides definitions of the equipment to which they apply. For example, Article II of the Aircraft Protocol provides that the Convention applies to “aircraft objects”, and Article I(c) of the Aircraft Protocol then

¹⁷ See M. Deschamps, The perfection and priority rules of the Cape Town Convention and the Aircraft Protocol. A comparative law analysis, (2013) *Cape Town Convention Journal*, 51, at 53, <https://ctcap.org/wp-content/uploads/2020/03/The-perfection-and-priority-rules-of-the-Cape-Town-Convention-and-the-Aircraft-Protocol-A-comparative-law-analysis.pdf> (Last accessed: 29.12.23). DOI: <https://doi.org/10.5235/204976113808391189>

¹⁸ *UNCITRAL Model Law on Secured Transactions* (2016), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_st_e_ebook.pdf (Last accessed: 29.12.23).

defines “aircraft objects” as “airframes, aircraft engines and helicopters”, with each subcategory also having a more specific definition. The Luxembourg Rail Protocol and the Space Protocol respectively contain similar specific definitions of “railway rolling stock” in Article 1(e) and “space asset” in Article 1(k). The MAC Protocol provides for a different approach to defining mining, agricultural and construction equipment, as will be described in more detail below.

The third and final requirement for the Convention to apply to an international interest in equipment within the scope of a Protocol is for the grantor to be situated in a Contracting State, as provided in Article 3. Under Article 4, a grantor is situated in a Contracting State if it is incorporated or formed under the law of that State, or where it has a registered office or statutory seat, or if the State is its centre of administration or place of business. Importantly, if the grantor is located in a Contracting State, the Convention will apply, regardless of the location of the creditor. As such, the Convention can apply to both domestic transactions, where both the grantor and creditor are in the same Contracting State, and international transactions where the creditor is located in another State (regardless of whether that State is a Contracting State or not).

2. Protection of international interests through registration

Each Protocol to the Cape Town Convention provides for the establishment of an individual electronic international registry for the registration of international interests. The Aircraft Protocol established the Aircraft Registry, which has been functioning since 2006 and has over 1.5 million registrations relating to interests in aircraft objects.¹⁹ Similar registries are being established for railway rolling stock under the Rail Protocol, space assets under the Space Protocol and mining, agricultural and construction equipment under the MAC Protocol.

Once a party has correctly registered their international interest in the international registry, they enjoy protection against competing claimants, including later registered international interests and unregistered international interests. This strong priority protection given to registered international interests operates regardless of whether the parties have knowledge of other international interests. Furthermore, registered international interests generally prevail over interests created over the same asset under national law, whether they are registerable or not.²⁰

¹⁹ Aviareto, *International Registry of Mobile Assets*, <https://www.internationalregistry.aero/ir-web/> (Last accessed: 29.12.23.).

²⁰ As an exception, Articles 39 and 40 of the Convention do allow Contracting States to declare whether a limited number of non-consensual interests prevail over registered international interests.

The utilisation of a modern, electronic registry to protect international interests is an essential element of the Cape Town Convention system, as it provides transparency, predictability and certainty for parties. A creditor can be confident that if they are the first to register an international interest in the international registry in relation to a security agreement over equipment, then they will have priority over other creditors in the event of the grantor's default or insolvency. This legal certainty lowers credit risk and often allows the creditor to extend credit at a lower cost, which is the main driver of the economic benefits for States that ratify the Convention and its Protocols.

3. Enforcement of international interests

In addition to the simple creation rules and clear protection rules for international interests, the Cape Town Convention also provides strong and effective enforcement rules, largely based on the contractual agreement between the parties. Article 8 of the Convention provides that if a party defaults on its repayment obligations, the holder of an international interest may take possession or control of the asset, sell it or lease it, and collect or receive any income or profits arising from the management or use of the asset. The Aircraft, Rail and MAC Protocols also provide creditors with the additional remedy of invoking assistance from relevant administrative authorities for the export and physical transfer of equipment over borders.²¹

Contracting States may also make declarations under the Convention and Protocols that further strengthen the enforcement rights of a holder of an international interest, by allowing them to (i) apply to court for interim relief in order to preserve the object and its value,²² (ii) exercise self-help in enforcing its remedies under the Convention without applying to a court,²³ and (iii) provide the creditor with priority protection in the event of the grantor's insolvency.²⁴ The majority of Contracting States under the Cape Town Convention and Aircraft have made these additional declarations that provide further protection to the holders of international interests, which in turn further enhances the legal and economic benefits of the Cape Town Convention and its Protocols.²⁵

²¹ Aircraft Protocol Article IX, Luxembourg Rail Protocol Article VII and MAC Protocol Article VIII.

²² Cape Town Convention, Article 13 (relief pending final determination).

²³ Cape Town Convention, Article 54(2) (declarations regarding remedies).

²⁴ Aircraft Protocol, Article XI Alternative A (remedies on insolvency).

²⁵ For further analysis on how the Aircraft Protocol facilitates finance in the aviation sector, see A. Veneziano and W. Brydie-Watson, A modern international approach to equipment financing in Africa: The Cape Town Convention and its Protocols, in *Secured Transactions Reform in Africa*, (Bloomsbury Publishing, 2019) 378–394.

III. EXPANSION OF THE CAPE TOWN CONVENTION THROUGH THE MAC PROTOCOL

The MAC Protocol was adopted in November 2019 at a Diplomatic Conference, after almost 15 years of work.²⁶ It represents an ambitious expansion of the Cape Town Convention system, with the express intention of improving legal frameworks and facilitating economic growth in emerging economies and developing countries that tend to derive a higher percentage of their gross domestic product (GDP) from the mining, agriculture and construction sectors. It was decided to extend the Cape Town Convention to three new sectors in one instrument in order to maximise economic benefits for Contracting States, although the MAC Protocol does allow Contracting States to disapply the Convention to specific sectors by making a declaration under Article II(2).

The MAC Protocol retains the essential features of the Cape Town Convention in providing simple requirements for the creation of international interests, clear rules for protecting international interests through registration and strong enforcement rules for holders of international interests in the event of the grantor's default or insolvency. The MAC Protocol applies where the grantor is located in a Contracting State. Chapter I retains the Convention's functional approach for the creation of international interests in MAC equipment through security agreements, title reservation agreements or leasing agreements. The basic formal requirements for the constitution of an international interest are the same as those in Article 7 of the Convention. Chapter III of the MAC Protocol provides for the creation of a separate international registry for international interests and other registerable interests in MAC equipment. Registration of an international interest continues to provide third-party effectiveness and priority over unregistered interests, subsequently registered interests and interests registered in domestic registries. Chapter II of the MAC Protocol retains the essential default remedies provided by the Convention and existing Protocols, and allows for Contracting States to make declarations that strengthen the position of the holder of an international interest. Crucially, Article X of the MAC Protocol allows Contracting States to provide the creditor with the right to take

²⁶ For analytical examinations of the history and development of the MAC Protocol, see H. Gabriel, *The MAC Protocol: We Aren't There Yet – How Far Do We Have to Go?* (2015) (4) *CTCJ*, 67. DOI: <https://doi.org/10.1080/2049761X.2015.1104842>; C. W. Mooney Jr, *The MAC Protocol, Some Comments and a Challenge*, (2015) (4) *CTCJ*, 76. DOI: <https://doi.org/10.1080/2049761X.2015.1104843>; C. W. Mooney Jr, M. Dubovec and W. 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. DOI: <https://doi.org/10.1093/ulr/unw023>; W. Brydie-Watson, *If It Ain't Broke, Don't Fix It! The Development of the Draft MAC Protocol*, (2018) (7) *CTCJ*, 3. DOI: <https://doi.org/10.4337/ctcj.2018.01.01> See also, UNIDROIT, *The MAC Protocol: History*, www.unidroit.org/instruments/security-interests/mac-protocol/history/ (Last accessed: 29.12.23.).

possession of MAC equipment within a “waiting period” to be declared by the Contracting State (under the Aircraft Protocol, the majority of Contracting States have declared a 60 day waiting period), unless the insolvency administrator or debtor has cured all defaults and agreed to perform all future obligations under the security agreement.

Overall, the overwhelming majority of the MAC Protocol’s provisions closely mirror the corresponding articles in the previous Protocols. A 2016 analysis found that over 80% of the articles in the draft MAC Protocol closely mirrored the corresponding articles in the previous Protocols.²⁷ This outcome was no accident; it was the result of an intentional approach in the preparation of the MAC Protocol to adhere to the rules in the Cape Town Convention and existing Protocols to the greatest extent possible.²⁸ This drafting approach was logical, given the outstanding success that the Cape Town Convention and Aircraft Protocol had already achieved in 2014, when the Study Group started its work on the preliminary draft MAC Protocol.

1. Adapting the Convention for the financing of MAC equipment

Necessarily, the MAC Protocol does contain additional rules that adapt the Convention to apply to the financing of equipment used in the mining, agriculture and construction sectors. In particular, the MAC Protocol had to make three major adaptations in relation to (i) identifying MAC equipment within the scope of the MAC Protocol, (ii) the relationship between international interests in MAC equipment and domestic immovable property law interests, and (iii) the treatment of inventory. Articles II, VII and XII of the MAC Protocol provided innovative solutions to each of these challenges. It is beyond the scope of this article to provide a detailed review of these provisions in the MAC Protocol, and this analysis is available elsewhere.²⁹ However, it is worth briefly evaluating how the MAC Protocol identifies the types of mining, agricultural and construction equipment to which it applies.

The Cape Town Convention provides a legal framework for international interests in high value, mobile and uniquely identifiable equipment.³⁰ As discussed

²⁷ Brydie-Watson, *The Development of the Draft MAC Protocol*, 9; UNIDROIT Governing Council, Report, (2016) 95 (15) C.D., para 143, www.unidroit.org/english/governments/councildocuments/2016session/cd-95-15-e.pdf (Last accessed: 29.12.23.).

²⁸ Brydie-Watson, *The Development of the Draft MAC Protocol*, 7.

²⁹ For a more comprehensive analysis of how the MAC Protocol makes adaptations to the Cape Town Convention system, see W. Brydie-Watson, *The MAC Protocol – a new era for the Cape Town Convention*, in *The Elgar Companion to the International Institute for the Unification of Private Law (UNIDROIT)*, (forthcoming, 2023).

³⁰ Article 51 of the Convention allows the Depositary (UNIDROIT) to create Working Groups to assess the feasibility of extending the application of the Convention through additional Protocols to categories of high-value, mobile and uniquely identifiable equipment.

above, the Aircraft, Rail and Space Protocols describe the categories of asset (airframe, aircraft engine, helicopter, railway rolling stock, or space asset) to which they apply, on the presupposition that these categories of assets are inherently high value, mobile and uniquely identifiable. However, the MAC Protocol's application to a broader and more diverse universe of equipment used in three separate sectors created challenges that required new innovations to the treaty text. In particular, it was not possible to provide simple descriptive rules to identify MAC equipment that was inherently high value, mobile and uniquely identifiable.

Rather than the descriptive approach adopted in the three earlier Protocols, the MAC Protocol uses the Harmonized Commodity Description and Coding System (HS) to identify the types of MAC equipment within its scope. The HS is a multipurpose international nomenclature, which provides a uniform system for the classification of commodities and merchandise in international trade. The HS is applied globally and covers 98% of all international trade. States use it to monitor controlled goods, calculate and collect duties and indirect taxes and compile trade and transport statistics. The HS was created by the 1983 International Convention on the Harmonized Commodity Description and Coding System,³¹ and came into effect in 1988.³² The HS comprises more than 5,000 groups of commodities; each identified by a six-digit code, arranged in legal and logical structure. The six-digit code system is supported by a set of rules to achieve uniform classification. By way of example, HS code 870195 is a six-digit HS code that covers tractors with an engine power exceeding 130kW.

Article II(1) of the MAC Protocol provides that the Convention applies to mining equipment, agricultural equipment and construction equipment as provided by the terms of the MAC Protocol and its Annexes. Article I(2)(a)(b) and (o) provides that "mining equipment", "agricultural equipment" and "construction equipment" are objects that fall within a HS code listed in the Annexes to the Protocol.³³ Annex 1 lists the HS codes for mining equipment, Annex 2 lists those for agricultural equipment and Annex 3 lists those HS or construction equipment.³⁴ In total, fifty-six

³¹ International Convention on the Harmonized Commodity Description and Coding System (adopted 14 June 1983, entered into force 1 January 1988) 1503 UNTS 3.

³² The HS is maintained by the WCO, an independent intergovernmental organisation based in Brussels, Belgium. See World Customs Organization, *What is the Harmonized System (HS)?*, www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (Last accessed: 29.12.23).

³³ "Equipment" also includes all installed, incorporated or attached accessories, components and parts that do not fall within separate HS codes listed in the Annexes, as generally consistent with the Aircraft Protocol, Art I(2)(b) and the Luxembourg Rail Protocol, Art I(2)(e).

³⁴ HS codes were selected for inclusion in the MAC Protocol Annexes on the basis of five criteria: (i) the codes cover equipment predominantly used in the MAC sectors; (ii) the codes cover equipment primarily used on-site rather than off site; (iii) the codes cover equipment that is predominantly of high value when new; (iv) the codes cover equipment that is individually serialised; and (v) the codes should cover complete equipment rather than parts. By selecting codes on this basis, the drafters

individual HS codes are listed in the MAC Protocol Annexes. Certain codes that apply to only one sector are only listed in one Annex.³⁵ Conversely, codes that apply to more than one of the mining, agriculture and construction sectors are listed in more than one annex.³⁶

Utilisation of the HS is an innovative and effective approach to determining the scope of the MAC Protocol in relation to equipment. As the HS is also the basis of global trade statistics recorded in the United Nation's Comtrade database, it has the additional benefit of providing States with useful data in relation to the amount of MAC equipment within the scope of the Protocol that is annually imported and exported. For example, the total value of the MAC equipment covered by the Protocol exported globally in 2021 was 148 billion USD.³⁷

Utilisation of the HS also allows the MAC Protocol to adapt its scope to accommodate future technological changes. Article XXXVI of the MAC Protocol allows for Contracting States to propose new HS codes to include within its scope, which allows the scope of the MAC Protocol to be expanded in the future to apply to new types of mining, agricultural and construction equipment that have not yet been invented. Similarly, Article XXXV provides a system for adjusting the HS codes in the MAC Protocol Annexes to accommodate revisions of the HS, which occur approximately every five years.³⁸

2. Economic benefits of the MAC Protocol

Should the MAC Protocol become widely ratified to the same extent as the Aircraft Protocol, the estimated global economic benefits are significant. In 2018, UNIDROIT commissioned an independent economic assessment of the MAC Protocol, which was

of the MAC Protocol were effectively able to limit the MAC Protocol to the types of high value, commercially used equipment within the ambit of the 2001 Cape Town Convention. See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Mining, Agricultural and Construction Equipment, Official Commentary*, para 3.15.

³⁵ For example, HS code 843410, which covers milking machines, is only listed in Annex 2, as milking machines are only used in the agriculture sector, and not in the mining and construction sectors.

³⁶ For example, HS code 870195 which covers tractors with an engine power exceeding 130kW (as noted above) is listed in all three annexes, as such tractors are used in all three sectors, mining, agriculture and construction.

³⁷ Comtrade, *UN Trade Statistics Database*, (2023), <https://comtrade.un.org/data> (Last accessed: 29.12.23.), data extracted on 18 July 2023.

³⁸ The HS codes listed in the MAC Protocol annexes are consistent with the current HS revision, which came into force on 1 January 2022. See MAC Preparatory Commission, *2022 revision of the Harmonised System*, (2022), MACPC/5/Doc. 4, <https://www.unidroit.org/wp-content/uploads/2022/11/MACPC5-Doc.-4-2022-Revision-of-the-Harmonized-System.pdf> (Last accessed: 29.12.23.).

conducted by Warwick Economics and Associates.³⁹ The economists assessed how the implementation of the MAC Protocol will directly affect the credit market, the product market and subsequently create broader macroeconomic affects (as described in more detail in section 5 below).⁴⁰ The assessment found that, by strengthening the legal rights of the holders of international interests in MAC equipment, the MAC Protocol will reduce lending risks, reduce the cost of secured finance and increase the availability of secured finance. These direct effects in the credit market will increase the number of secured loans for purchases of MAC equipment, increase the demand for MAC equipment, increase sales of MAC equipment and increase the amount of MAC equipment stock being used around the world. Finally, the indirect effects of the MAC Protocol flowing from the direct impacts in the credit market and product market will increase productivity in the MAC sectors, lower the production cost of MAC equipment, increase trade and investment opportunities, create new business and employment opportunities, upskill workforces and create spillover effects in other sectors through supply chains.⁴¹

Ultimately, the independent economic assessment found that the global macroeconomic benefits resulting from the broad implementation of the MAC Protocol will be substantial. Warwick Economics found that, over a ten-year period, the MAC Protocol may increase the stock value of MAC equipment in developing countries by 90 billion USD and may have a positive impact of 23 billion USD in GDP in developing countries and 7 billion USD in developed countries, for a total increase in annual global GDP of 30 billion USD.⁴² It is interesting to note that, of the predicted 30 billion USD increase in global annual GDP, 76% will flow to developing countries, while only 24% would flow to developed countries.

Three key conclusions can be drawn from the MAC Protocol economic assessment. First, by strengthening the legal rights of holders of international interests and thereby allowing creditors to increase the availability of finance for the acquisition of MAC equipment, the MAC Protocol will generate direct economic benefits for States that implement the treaty. Second, these economic benefits are significant for all States, but particularly for those where the mining, agriculture and construction sectors are larger contributors to GDP. Third, if widely implemented, the MAC Protocol has the potential to be the most economically significant Protocol of the Cape Town Convention, and possibly one of the most economically significant international commercial law treaties in history.

³⁹ Warwick Economics and Associates, *An Economic Assessment of the Fourth Protocols to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment*, (2018) 1, www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf (Last accessed: 29.12.23.) (MAC Protocol Economic Assessment).

⁴⁰ MAC Protocol Economic Assessment, 9.

⁴¹ MAC Protocol Economic Assessment, 9 (Figure 1).

⁴² MAC Protocol Economic Assessment, 1.

IV. LEGAL BENEFITS OF IMPLEMENTING THE MAC PROTOCOL FOR CZECHIA, HUNGARY, POLAND AND SLOVAKIA (THE VISEGRAD GROUP)

Czechia, Hungary, Poland and Slovakia are all UNIDROIT Member States.⁴³ However, none of these four central European countries have ratified the Cape Town Convention, nor its Aircraft Protocol. This is somewhat surprising, given that the Cape Town Convention has been ratified by 85 States around the world, including several other States in central Europe, such as Bulgaria, Latvia, Moldova, Romania and Ukraine. Similarly, while Czechia, Hungary, Poland and Slovakia⁴⁴ all participated in the negotiation of the MAC Protocol, none of these countries have signed nor ratified the MAC Protocol.

Given the significant legal and economic benefits that ratification of the Cape Town Convention and the MAC Protocol will have for implementing States (as described in sections 2 and 3 above), it would seem prudent for Czechia, Hungary, Poland and Slovakia to consider ratifying these treaties as a priority. To build support for this initiative, one possibility would be to make the ratification of the Cape Town Convention and MAC Protocol an economic cooperation initiative for the Visegrad Group.

1. An overview of the Visegrad Group

In 1991 the President of Czechia, the Prime Minister of Hungary, the President of Poland and the Prime Minister of Slovakia met in Visegrad, Hungary to form the “Visegrad Group”. The high-level political meeting represented a historical link to a similar meeting between three Kings in 1335, the unifying factor being a desire to intensify mutual cooperation between this grouping of Central European States.⁴⁵

⁴³ Czechia became a UNIDROIT Member State in 1993, Hungary in 1940, Poland in 1979 and Slovakia in 1993. See UNIDROIT, *Membership*, <https://www.unidroit.org/about-unidroit/> (Last accessed: 29.12.23.).

⁴⁴ Czechia, Hungary, Poland and Slovakia all participated in at least one session of the MAC Protocol Committee of Governmental Experts negotiations in Rome in 2017. See UNIDROIT, *MAC Protocol Committee of Governmental Experts Reports* (2017), Study 72K – CGE1 – Report, Study 72K – CGE2 – Report, <https://www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-report-e.pdf> (Last accessed: 29.12.23.), <https://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf> (Last accessed: 29.12.23.). Additionally, Poland participated in the MAC Protocol Diplomatic Conference in Pretoria in 2019. See UNIDROIT, *MAC Protocol Diplomatic Conference Final Act* (2019), <https://www.unidroit.org/wp-content/uploads/2022/10/FINAL-ACT-22-November-2019-complet.pdf> (Last accessed: 29.12.23.).

⁴⁵ Visegrad Group, *History of the Visegrad Group*, <https://www.visegradgroup.eu/about/history> (Last accessed: 29.12.23.).

The Visegrad Group is a non-institutional regional arrangement formed between four States to facilitate political, economic and cultural cooperation. The founding 1991 Visegrad Declaration set out five basic objectives: (i) state independence, democracy and freedom; (ii) elimination of all aspects of the totalitarian system; (iii) construction of parliamentary democracy, the rule of law and respect for human rights; (iv) creation of a modern free market economy; and (v) integration into the European political and economic system.⁴⁶ In 2021, the four Prime Ministers of the Visegrad Group reaffirmed their commitment to the forum and to pursue close collaboration in areas of common interest, with a particular focus on: (i) society, economy and innovation; (ii) environment; energy and transport; (iii) internal and external security; and international cooperation and solidarity.⁴⁷

The structure of the Visegrad Group is informal and is not institutionalised. It achieves its collaborative goals through joint projects coordinated between respective ministries in the four countries. Cooperation occurs at various levels, from junior officers to ministers and heads of state. Presidency of the Visegrad Group rotates annually between each of the four member countries. The only formal organisation within the Visegrad Group is the International Visegrad Fund, which was established in 2000 to support the civic dimension of the Visegrad cooperation, and has financed over 6000 projects related to cultural and scientific exchange, research, education, exchange of students and tourism.⁴⁸ The Visegrad Group also partners with other countries to launch joint projects as part of the V4+ initiative, which in recent years has included Romania and Bulgaria.

As a regional bloc, the Visegrad Group has significant weight. All Visegrad countries are members of the European Union (EU), the Northern Atlantic Treaty Organisation (NATO) and the Organisation for Economic Co-operation and Development (OECD). Their combined population is over 65 million, which represents 14% of the total EU population and translates to 108 members in the European Parliament. Economically, the Visegrad Group would be the 5th largest economy in Europe and the 12th largest in the world. Historically, GDP growth in the Visegrad Group has exceeded EU averages, which would indicate that its collective economic strength is only growing.⁴⁹

⁴⁶ Visegrad Group, *Visegrad Declaration of Cooperation 1991*, <https://www.visegradgroup.eu/documents/visegrad-declarations/visegrad-declaration-110412> (Last accessed: 29.12.23.).

⁴⁷ Visegrad Group, *Declaration of the Prime Ministers of the Czech Republic, Hungary, the Republic of Poland and the Slovak Republic on the Occasion of the 30th Anniversary of the Visegrad Group*, (17 February 2021), <https://www.visegradgroup.eu/calendar/2021/declaration-of-the-prime> (Last accessed: 29.12.23.).

⁴⁸ Visegrad Group, *Aims and structure*, <https://www.visegradgroup.eu/about/aims-and-structure> (Last accessed: 29.12.23.).

⁴⁹ Hungarian Presidency to V4, *V4 Facts and Figures*, <https://v4.mfa.gov.hu/page/v4-facts-infographics-tbc> (Last accessed: 29.12.23.).

As an informal cooperative intergovernmental regional arrangement, the Visegrad Group is highly dependent on continual political support from each participating Government. In recent years, divergences between Visegrad countries on major political issues has inevitably put a strain on their cooperative efforts.⁵⁰ However, while political divisions currently exist, there does not appear to be any intention of dissolving the cooperative regional arrangement. Importantly, recent survey data suggests that the population in Visegrad Group countries is highly supportive of continued cooperation within the Visegrad Group.⁵¹ Given that it has already survived for 30 years through an incredible period of cultural, economic and societal change for central Europe, it is suggested that it will remain a relevant entity into the future.

The Visegrad Group provides a useful lens through which to analyse the legal and economic benefits that the MAC Protocol could provide in central Europe. As just discussed, the MAC Protocol directly supports specific policy and economic initiatives undertaken by the Visegrad Group, and will drive economic growth within the regional grouping. On this basis, it is suggested that the Visegrad Group would benefit from including the implementation of the Cape Town Convention and MAC Protocol as part of their regional economic cooperation goals.

However, the benefits of implementing the MAC Protocol for each Visegrad country are not directly tied to it becoming a policy objective of the Visegrad Group (although this would undoubtedly help in prioritising ratification efforts in central Europe). As an international treaty, implementation of the MAC Protocol is a sovereign act undertaken by each individual State. If ratified by Czechia, Hungary, Poland and Slovakia, it will individually improve the domestic legal frameworks of each Visegrad country. If all four Visegrad countries implement the MAC Protocol, it will create a uniform legal framework for the financing of MAC equipment to facilitate cross-border financing and trade within the regional grouping, as well as with the rest of the world. As such, the legal and economic benefits of implementing the MAC Protocol can be seen as simultaneously national (for each Visegrad Group country individually), regional (for the Visegrad Group as a whole), and international (for the global economy).

⁵⁰ Politico Europe, *The not-so-fantastic 4: Central Europe's divided Visegrad alliance* (2022), <https://www.politico.eu/article/central-europe-divided-visegrad-v4-alliance/> (Last accessed: 29.12.23.).

⁵¹ A 2021 survey of citizens in the Visegrad Group countries found a strong majority of the population indicated that the "Visegrad Group was still important and had a mission to fulfil". 82% of Hungarian respondents, 78% of Slovakian respondents, 71% of Czech respondents and 59% of Polish responded answered positively, which represented an increase in support for the Visegrad Group in all countries as compared to a similar survey undertaken in 2015. See Bratislava Institute for Public Affairs, *Visegrad Four as Viewed by the Public* (2021), page 18 graph 3, <https://www.visegradgroup.eu/documents/other-articles/key-findings25-years-of-160601> (Last accessed: 29.12.23.).

2. Secured transactions, legal frameworks and access to credit in the Visegrad Group

As set out in section 2 of this article, the MAC Protocol will create a uniform legal regime for the creation, protection and enforcement of international interests in MAC equipment in each State that ratifies the treaty. This international legal regime is not dependent on the domestic secured transactions regime in force in the Contracting State. If all four States ratified the MAC Protocol, each would improve access to finance for their domestic mining, agricultural and construction companies, and create new investments and export opportunities for their finance and manufacturing industries, regardless of the efficacy of their existing domestic law regimes.

While the CTC and MAC Protocol operates largely independently from domestic secured transactions law regimes in Contracting States, the extent of the legal and economic benefits created by the Cape Town Convention in the Visegrad Group will depend on how much more effective its legal rules are in creating, protecting and enforcing secured rights than those existing domestic law frameworks. For States that already have a modern and strong domestic legal regime for the creation, protection and enforcement of legal rights in movable equipment, which reflects the standards of the MAC Protocol, its introduction will result in a more modest improvement in the legal framework (to the extent it will create certainty in relation to international transactions and internationally mobile assets). Hence, a brief examination of the current domestic legal regimes in Czechia, Hungary, Poland and Slovakia needs to be undertaken to determine how large the legal (and thus economic) benefits could be.

Each of the Visegrad countries has undertaken some degree of secured transactions legal reforms in recent years. This next section will provide a brief survey of the recent reforms, describing their main features. The success of the reforms will then be assessed, using international measures such as the EBRD Core Principles for a Secured Transactions Law,⁵² and the more recent World Bank Ease of Doing Business (EODB) Getting Credit Strength of Legal Rights Index.⁵³ The latter framework measures the legal rights of borrowers and lenders with respect to secured transactions through one set of indicators and the reporting of credit information through another. In particular, the Strength of Legal Rights Index measures whether certain features that facilitate lending exist within the applicable collateral and bankruptcy laws.⁵⁴

⁵² European Bank for Reconstruction and Development, *Core Principles for a Secured Transactions Law* (1997), <https://www.ebrd.com/what-we-do/legal-reform/access-to-finance/transactions.html> (Last accessed: 29.12.23.).

⁵³ World Bank, *Ease of Doing Business Rankings, Getting Credit* (2020), <https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/what-measured> (Last accessed: 29.12.23.).

⁵⁴ The data used by the World Bank to assess a country's Getting Credit score was obtained using a questionnaire administered to financial lawyers and verified through analysis of laws and regulations as well as public sources of information on collateral and bankruptcy laws. Questionnaire responses

While the World Bank suspended the Ease of Doing Business Index in late 2021 after 18 years of operation,⁵⁵ the index retains value as a limited tool for assessing the basic features of each country's legal framework for secured transactions. Furthermore, as of August 2023, it has not been replaced or superseded by any other internationally accepted framework, so for the moment, it's the best comprehensive index that exists.

In Czechia, a significant legal reform was passed in 2015, which provided for the creation, registration and enforcement of secured interests in tangible movable assets by way of pledge, security transfer of title, retention right or reservation of title.⁵⁶ Registration of an interest in an asset can be made in the Registry of Pledges. The reform also strengthened creditors rights by providing for out of court enforcement of registered interests.⁵⁷ These reforms resulted in a tangible improvement in the rights of creditors, making it possible to recover 80% of the value of an asset held as collateral within six months of a debtor's non-payment. Nevertheless, Czechia scores only 7 out of 12 on the World EODB Getting Credit Strength of Legal Rights Index, because (i) it does not have a unified legal framework for secured transactions, (ii) security rights cannot be extended to future assets and they do not automatically extend to proceeds, (iii) Czechia does not have a modern, online notice-based collateral register for functionally equivalent secured interests, and (iv) the law does not protect secured creditors' rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation procedures.⁵⁸ In relation to insolvency, Czechia has a recovery rate of 67.5 cents on the dollar and insolvency procedures take 2.1 years on

were verified through several rounds of follow-up communication with respondents, as well as by contacting third parties and consulting public sources. The questionnaire data was confirmed through teleconference calls or on-site visits in each economy. See World Bank, *Ease of Doing Business Rankings, Getting Credit* (2020), <https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/what-measured> (Last accessed: 29.12.23.).

⁵⁵ See World Bank, *World Bank Group to Discontinue Doing Business Report* (16 September 2021), <https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report> (Last accessed: 29.12.23.); G. McCormack, Why Doing Business with the World Bank may be Bad for You, (2018) 19 *European Business Organization Law Review*, 649–676, <https://link.springer.com/article/10.1007/s40804-018-0116-4#Sec4> (Last accessed: 29.12.23.) DOI: <https://doi.org/10.1007/s40804-018-0116-4>; M. Sharma, The “Ease of Doing Business” List Deserved to Die, *Bloomberg* (19 September 2021), <https://www.bloomberg.com/opinion/articles/2021-09-19/world-bank-s-ease-of-doing-business-list-deserved-to-die#xj4y7vzkg> (Last accessed: 29.12.23.).

⁵⁶ M. Krejčí, P. Koblovský and D. Sobek, Lending and taking security in the Czech Republic: overview, (2015) *Thomson Reuters*, [https://uk.practicallaw.thomsonreuters.com/9-617-6908?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/9-617-6908?transitionType=Default&contextData=(sc.Default)&firstPage=true) (Last accessed: 29.12.23.).

⁵⁷ World Bank, *Doing Business, Getting Credit, Subnational Studies* (2019), <https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/reforms> (Last accessed: 29.12.23.).

⁵⁸ World Bank Group, *Doing Business 2020 Czech Republic Economy Profile* (2020), page 34, <https://archive.doingbusiness.org/content/dam/doingBusiness/country/c/czech-republic/CZE.pdf> (Last accessed: 29.12.23.).

average to resolve.⁵⁹ Despite the legislative reforms and the World Bank assessing Czechia as having a strong insolvency framework, in 2019 asset recovery for secured creditors was just above 20% for bankruptcies and 60% for reorganisations.⁶⁰

Similarly to Czechia, Hungary adopted a new legal regime on secured transactions in 2015, which implemented a functional approach to secured transactions, extended security interests to the products and proceeds of the original asset, and established a unified and notice-based collateral registry.⁶¹ Under Hungarian law, a pledge may be established over assets, bank accounts, any type of receivables, shares (quotas) or intellectual property rights. In order to be valid and enforceable, the relevant security needs to be registered in Hungary's collateral registry, which allows the registration of bank account pledges, receivables pledges, movable assets pledges, share pledges and security assignments of receivables.⁶² The 2015 reform also allowed for out of court enforcement in relation to registered security rights.⁶³ While the priority of security interests under domestic law is determined by the order of registration (consistent with the MAC Protocol's approach to priority between competing registered international interests), if the debtor becomes insolvent then all creditors enjoy the same security (regardless of whether they are the junior or senior creditor) and the proceeds from insolvency are settled proportionally.⁶⁴ Hungary scores an impressive 9 out of 12 on the EODB Getting Credit Strength of Legal Rights Index, with the World Bank only marking Hungary down on the basis that (i) Hungary's legal framework does not allow businesses to grant a non-possessory security right without requiring a specific description of collateral, (ii) it does not have a modern collateral registry that allows for online registrations, amendments, cancellations and searches, and (iii) Hungarian law does not protect secured creditors' rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation

⁵⁹ World Bank Group, *Doing Business 2020 Czech Republic Economy Profile* (2020), page 59, <https://archive.doingbusiness.org/content/dam/doingBusiness/country/c/czech-republic/CZE.pdf> (Last accessed: 29.12.23.).

⁶⁰ PRK Partners, *Chambers Global Practice Guide: Banking and Finance – Czech Republic* (2019), page 12, <https://www.prkpartners.com/files/013-czech-republic.pdf> (Last accessed: 29.12.23.).

⁶¹ World Bank, *Doing Business, Getting Credit, Subnational Studies* (2019), <https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/reforms> (Last accessed: 29.12.23.).

⁶² Chambers and Partners, *Project Finance in Hungary 2022*, <https://practiceguides.chambers.com/practice-guides/comparison/709/9734/15629-15630-15631-15632-15633-15634-15635-15636-15637> (Last accessed: 29.12.23.).

⁶³ Hungary, *Secured Transactions Law Reform Project*, <https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/europe/hungary/> (Last accessed: 29.12.23.).

⁶⁴ Chambers and Partners, *Project Finance in Hungary 2022*, <https://practiceguides.chambers.com/practice-guides/comparison/709/9734/15629-15630-15631-15632-15633-15634-15635-15636-15637> (Last accessed: 29.12.23.).

proceedings.⁶⁵ However, insolvency recovery rates remain relatively low in Hungary, with 2020 data indicating that creditors only recover 44.2 cents on the dollar and that most insolvency proceedings take two years to resolve.⁶⁶

Poland was a relatively early adopter in establishing a register for pledges in 1996.⁶⁷ A distinct electronic registry was subsequently set up for the registration of security interests in movables, including specified assets and a pool of floating assets.⁶⁸ Creditors that register pledges can recover their debts through both court enforcement and out of court enforcement if the pledge agreement so provides;⁶⁹ however, self-help repossession of collateral remains prohibited.⁷⁰ Despite these reforms, Poland only scores 7 out of 12 on the EODB Getting Credit Strength of Legal Rights Index, because (i) Poland does not have a unified legal framework for secured transactions, (ii) it does not have a modern, online notice-based collateral registry for functionally equivalent secured interests, (iii) secured creditors are subordinated to other claims upon debtor default and (iv) the law does not protect secured creditors' rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation proceedings.⁷¹ Insolvency recovery rates are somewhat higher in Poland, at 60.9 cents on the dollar, although insolvency proceedings take an average of three years to resolve.⁷²

Slovakia too has a strong history of secured transactions law reform. In 2003, it passed a secured transactions law reform based on the EBRD Model Law on Secured Transactions, which at the time *The Economist* called “the world’s best rules on

⁶⁵ World Bank Group, *Doing Business 2020 Hungary Economy Profile* (2020), page 35, <https://archive.doingbusiness.org/content/dam/doingBusiness/country/h/hungary/HUN.pdf> (Last accessed: 29.12.23.).

⁶⁶ World Bank, *Ease of Doing Business Resolving Insolvency. Hungary* (2020), <https://archive.doingbusiness.org/en/data/exploretopics/resolving-insolvency> (Last accessed: 29.12.23.).

⁶⁷ European Bank for Reconstruction and Development, *Poland Law on Registered Pledges and the Pledge Registry*, (English translation provided by Commercial Law Centre Foundation) (1996), <https://www.ebrd.com/downloads/legal/core/polandls.pdf> (Last accessed: 29.12.23.).

⁶⁸ Secured Transactions Law Reform Project, *Poland*, <https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/europe/poland/> (Last accessed: 29.12.23.).

⁶⁹ Restructuring and insolvency in Poland: overview, (2012) 4, [https://uk.practicallaw.thomsonreuters.com/4-380-8479?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-380-8479?transitionType=Default&contextData=(sc.Default)&firstPage=true) (Last accessed: 29.12.23.).

⁷⁰ Art. 777 of the Polish Code of Civil Procedure allows the debtor to issue a notarised statement that they voluntarily submit themselves to enforcement in favour of a designated creditor directly from the notarial deed. This allows the creditor, in the event of default, to commence the enforcement procedure without the need for lengthy court proceedings. M. Wojtasik and M. Iwaniak, *Typical Security for Corporate Financing in Poland, The Legal 500* (2021), <https://www.legal500.com/developments/thought-leadership/typical-security-for-corporate-financing-in-poland/> (Last accessed: 29.12.23.).

⁷¹ World Bank Group, *Doing Business 2020 Poland Economy Profile* (2020), page 33, <https://archive.doingbusiness.org/content/dam/doingBusiness/country/p/poland/POL.pdf> (Last accessed: 29.12.23.).

⁷² World Bank Group, *Doing Business 2020 Poland Economy Profile* (2020), page 58, <https://archive.doingbusiness.org/content/dam/doingBusiness/country/p/poland/POL.pdf> (Last accessed: 29.12.23.).

collateral”.⁷³ The Slovakian law satisfied all ten of the EBRD secured transaction principles, including public registration of the secured asset, clear priority of title and low cost of enforcement. Furthermore, the new law was relatively effective; hundreds of thousands of interests have been filed in the register and, following the reform, it was possible to recover at least 80% of the market value of the asset taken as security in six months or less.⁷⁴ Identically to Czechia, Slovakia only scores a 7 out of 12 on the EODB Getting Credit Strength of Legal Rights Index. The World Bank marked Slovakia down on the basis that (i) Slovakia does not have a unified legal framework for secured transactions, (ii) security rights cannot be extended to future assets and does not automatically extend to proceeds, (iii) Slovakia does not have a modern, online notice-based collateral registry for functionally equivalent secured interests, and (iv) the law does not protect secured creditors’ rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation proceedings.⁷⁵ Insolvency recovery rates also remain relatively low at 46.1 cents on the dollar and most insolvency proceedings take a lengthy four years to resolve.⁷⁶

3. The legal benefits of the MAC Protocol for the Visegrad Group

Compared to an OCED high-income economy average of 6.1 out of 12 on the Getting Credit Strength of Legal Rights Index, in 2020 Czechia scored 7, Hungary scored 9, Poland scored 7 and Slovakia scored 7 respectively. As noted above, while these scores should be viewed with some caution, they provide a useful basic measurement regarding the comparative strength of the secured transactions legal frameworks in the Visegrad Group.

On the basis of the work of the World Bank, the EBRD and assessments undertaken by academics and expert practitioners, it is clear that the Visegrad Group countries have significantly improved their laws over the past quarter of a century in order to improve access to credit. They have all now have reformed and operational legal frameworks that are generally aligned with the core tenets of the Cape Town Convention and MAC Protocol; simple priority rules based on registration in an

⁷³ The Economist, *Slovak Solution*, (23.01.2023), <https://www.economist.com/finance-and-economics/2003/01/23/slovak-solution> (Last accessed: 29.12.23.).

⁷⁴ C. Calomiris, M. Larrain, J. Liberti and J. Sturgess, How collateral laws shape lending and sectoral activity, (2015) *Journal of Financial Economics*, 11–12, <https://hermes-ir.lib.hit-u.ac.jp/hermes/ir/re/27317/wp020.pdf> (Last accessed: 29.12.23.), DOI: <https://doi.org/10.3386/w21911>; EBRD, *Enforcing secured transactions in central and eastern Europe: an empirical study*, (2008), <https://www.ebrd.com/downloads/legal/secured/enf.pdf> (Last accessed: 29.12.23.).

⁷⁵ World Bank Group, *Doing Business 2020 Slovak Republic Economy Profile* (2020), page 31, <https://archive.doingbusiness.org/content/dam/doingBusiness/country/s/slovakia/SVK.pdf> (Last accessed: 29.12.23.).

⁷⁶ *Ibid.* 56.

electronic registry and strong enforcement rules that are effective if the debtor defaults or even becomes insolvent. As such, the difference between the legal rules in the MAC Protocol and the domestic law secured transactions rules in the Visegrad Group is smaller than in many developing countries and emerging markets that have not undertaken modern reforms.

However, there are still several areas where the MAC Protocol would strengthen the legal frameworks in the Visegrad Group countries if implemented, which will translate to significant economic benefits. In particular, the MAC Protocol would represent an improvement to the domestic legal regime in relation to secured interests in MAC equipment by (i) providing a simple and functional approach to the creation of interests, (ii) strengthening enforcement rights on debtor default, (iii) strengthening enforcement rights in insolvency and (iv) creating a uniform cross-border framework. Each of these benefits will be briefly explained.

First, the MAC Protocol provides a simple, clear and functional approach for the creation of international interests in relation to security agreements, retention of title agreements and leases. While all four Visegrad Group countries have online registers for pledges and certain other types of secured transactions, only Hungary has been assessed by the World Bank as having a modern, online notice-based collateral registry for functionally equivalent secured interests. Through its functional approach, the MAC Protocol will provide better protection for creditors for a broader range of legal interests in MAC equipment (including leases), thereby decreasing the cost of credit.

Second, the MAC Protocol will clarify and strengthen the enforcement rights of creditors upon the default of the debtor. The Cape Town Convention and MAC Protocol explicitly provide that, upon debtor default, a creditor may take possession of the MAC equipment, sell the equipment, lease it and (should the Contracting State so declare) export it from the country. Furthermore, the MAC Protocol allows Contracting States to further strengthen the position of the creditor by permitting creditors to apply for interim relief pending final determination of a claim, and to enforce their rights out of court. While many of these default remedies are available under the domestic law regimes in the Visegrad Group, the MAC Protocol improves the position of the creditor significantly by clearly allowing for interim relief and out of court enforcement, two remedies which have some limitations in the Visegrad Group.

Third, insolvency proceedings take an average of 2.8 years to resolve across the Visegrad Group countries (2.1 years in Czechia, 2 years in Hungary, 3 years in Poland and 4 years in Slovakia), which is well above the 1.7 year OECD high income economy average. If each Visegrad Group country makes a declaration under Article X of the MAC Protocol, allowing the creditor to take possession of MAC equipment within a “waiting period” upon the debtor’s insolvency, the MAC Protocol would significantly increase the legal strength and economic value of international interests. Moreover, if

the four countries were to follow the 70% of Aircraft Protocol Contracting States in declaring a waiting period of between 30 – 60 calendar days under Article X, the MAC Protocol could allow creditors to receive financial relief or repossess assets 94% more quickly than it would take to resolve the insolvency procedure under their domestic insolvency law. Again, by strengthening legal protection for the creditor, the MAC Protocol will reduce the cost of credit and create economic benefits for Visegrad Group countries.

Fourth and perhaps most importantly, the MAC Protocol will apply a best practice legal framework for financing mining, agricultural and construction equipment across all Visegrad Group countries. If all of them ratify the MAC Protocol, a bank in Poland could finance the purchase of a fleet of new tractors for a large farm in Slovakia, with confidence that its legal interests would be enforceable. A construction company could move a crane from Hungary to Czechia to undertake a new project without concern that the cross-border movement of the asset might affect the lease agreement over the crane. A consortium of financiers could offer cheaper credit in relation to a retention of title agreement for high value drilling equipment to establish a new mining operation in Poland. Of course, these cross-border legal benefits would not just be limited to the Visegrad Group if its member countries ratify the MAC Protocol. They would also connect the Visegrad Group to the broader international framework for MAC equipment, allowing the better access for local mining, agricultural and construction companies to cheaper foreign finance, and create new export opportunities for Visegrad manufacturing companies.

In concluding this section, it should also be noted that while the MAC Protocol would operate independently to domestic secured transaction law frameworks in Visegrad Group countries, there is the possibility of connecting them. Article XVI of the MAC Protocol allows Contracting States to designate a domestic entry point into the future International Registry for International Interests in MAC equipment. This would allow the Visegrad Group countries to connect their domestic collateral registries to the MAC Protocol, in order to allow creditors to register both domestic and international secured interests in MAC equipment. Linking the MAC Protocol with an effective domestic collateral registry is mutually beneficial for both registries, as it allows parties in the Contracting State to continue using the domestic framework with which they are familiar in order to register international interests (including in their native language), while also ensuring that the domestic registry does not suffer a decline in registrations once the MAC Protocol enters into force in that country.

V. ECONOMIC BENEFITS OF IMPLEMENTING THE MAC PROTOCOL FOR THE VISEGRAD GROUP

By providing legal benefits in relation to the financing of mining, agricultural and construction enterprises in the Visegrad Group, the MAC Protocol will have significant economic benefits. The independent economic assessment of the MAC Protocol described its impact through a theory of changes with multiple orders of benefits.⁷⁷ Improving the legal framework for the financing of MAC equipment would first impact the credit market, second the product markets, third MAC equipment suppliers and supply chains, and finally the wider economy.

1. First Order Effects: Credit Market

By improving the legal protections provided to creditors who hold international interests in MAC equipment, the first order benefits of the MAC Protocol directly impact on the credit markets in Contracting States. Through the creation of an international security interest in the MAC equipment, recognised in all Contracting States, creditors can obtain priority against subsequently registered and unregistered interests and protect their interest in the event of insolvency.⁷⁸ Accordingly, creditors can grant credit more confidently, increasingly the overall availability and decreasing the cost of credit.⁷⁹ Thus, the first order effects of the MAC Protocol on the credit market include a reduction in lending risk; reduction in cost and increase in availability of secured finance; increased demand from MAC sectors for new secured loans and refinance of existing unsecured loans; and potential for new entrants and instruments to enter the market.⁸⁰ For mining, agriculture and construction companies in the Visegrad Group, this will mean that more financiers would be willing to provide credit and invest in Visegrad companies, as well as offer lower cost credit, on the basis that their legal risk exposure will be reduced.

The Visegrad Group is an increasingly attractive destination for industrial investment as a region with rapidly developing infrastructure, stable legal systems, and a well-educated and highly qualified workforce.⁸¹ Accordingly, the region is primed to capitalise on the increase in investment that flows from the ratification and

⁷⁷ MAC Protocol Economic Assessment, 9.

⁷⁸ Gabriel, *The MAC Protocol: We Aren't There Yet – How Far Do We Have to Go?* 67, DOI: <https://doi.org/10.1080/2049761X.2015.1104842>

⁷⁹ L. Gullifer, *A comparison of the position of buyers under the Cape Town Convention, the three existing protocols and the draft MAC Protocol*, (2017) (6) *Cape Town Convention Journal*, 1, DOI: <https://doi.org/10.2139/ssrn.3146798>.

⁸⁰ MAC Protocol Economic Assessment, 43.

⁸¹ Polish presidency of the Visegrad Group July 2020 – June 2021: Presidency Programme, 19.

implementation of the MAC Protocol. The MAC Protocol will simplify and harmonise the legal lending framework, thereby removing the competitive disadvantage experienced by foreign lenders unfamiliar with local legal frameworks, with reduced transactional costs.⁸² To some extent, the MAC Protocol may also increase access to finance for small and in particular medium enterprises (SMEs), which are vital within the Visegrad Group as the main source of job opportunities and innovation.⁸³ The Visegrad Group has demonstrated its desire to encourage investment in Visegrad Group SMEs at its investment forum.⁸⁴ At present, 70% of SMEs worldwide do not have access to finance at all and a further 15% are under-financed.⁸⁵ By expanding access to finance, the MAC Protocol encourages creditors to extend credit into this underserved market. There is presently significant unmet demand for finance; if this demand can be met then there is scope for both immediate and broader market growth.⁸⁶ This is particularly critical within the context of the current and predicted shortage of workers, as technological progress and innovation will become increasingly vital to maintaining progress and competitive success.⁸⁷ This first order effect would also support the Visegrad Group policy objective of increasing access to finance through innovation in order to make the Visegrad Group region a destination for investment.⁸⁸

2. Second Order Effects: Product Markets

The second order, or flow-on, benefits of the MAC Protocol include an increase in secured loans for purchases of MAC equipment, an increase in demand for MAC equipment and an accompanying increase in supply; and an increase in sales and the profitability of MAC equipment.⁸⁹

The MAC Protocol's most fundamental benefit is increasing the ability for companies to acquire MAC equipment through the provision of more accessible and favourable credit. In 2021, the Visegrad Group imported \$6.1 billion USD worth of

⁸² P. Durham and M. Dubovec, More Good News from Cape Town: How the New MAC Protocol Will Benefit the Mining, Agriculture and Construction Industries, (2017) 35 (1) *Journal of Equipment Lease Financing*, 4.

⁸³ Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 25–26, <https://www.mzv.sk/documents/10182/276214/Program+predsedn%C3%ADctva+Slovenskej+republiky+vo+Vy%C5%A1ehradскеj+skupine+EN/ba84a58e-6b6a-4ad4-bdd0-3043d687c95b> (Last accessed: 29.12.23.).

⁸⁴ *Ibid.*

⁸⁵ World Bank, (2018b), *Improving Access to Finance for SMEs: Opportunities through Credit Reporting, Secured Lending and Insolvency Practices*, May 2018 (4), see MAC Protocol Economic Assessment, 62.

⁸⁶ MAC Protocol Economic Assessment, 62.

⁸⁷ Programme for the Czech Presidency of the Visegrad Group 2019/2020: V4 Reasonable Europe, 3, https://www.mzv.cz/file/3572188/programme_CZ_V4_PRES_2019_2020.pdf (Last accessed: 29.12.23.).

⁸⁸ *Ibid.* 4.

⁸⁹ MAC Protocol Economic Assessment, 43.

MAC equipment within the scope of the MAC Protocol.⁹⁰ These figures demonstrate the existing importance of MAC equipment to companies in the region. By lowering the cost of credit for over \$6 billion USD worth of equipment, the MAC Protocol will improve the financial viability, operational efficiency and profitability of thousands of enterprises across the Visegrad Group. The MAC Protocol would also be expected to increase imports of MAC equipment significantly into the Visegrad Group, over and above the \$6 billion USD worth of equipment that is already imported annually.

The MAC Protocol's second order effects on product markets are not limited to increased imports. It would also provide new export opportunities for local equipment manufacturers in the Visegrad Group, as well as improve the secondary market, allowing companies to resell second hand equipment. In 2021, the Visegrad Group also exported \$3.7 billion USD worth of MAC equipment within the scope of the MAC Protocol.⁹¹ Interestingly, cross-border trade between the Visegrad Group countries in MAC equipment is also significant, accounting for \$447 million USD in 2021. This represents 27% of Slovakia's total annual global MAC equipment exports and 16% of Czechia's total annual global MAC equipment exports. Accordingly, increasing imports and exports of MAC equipment will facilitate both regional and global trade for the Visegrad Group, contributing to greater shared prosperity.

3. Third Order Effects: MAC Sectors, equipment suppliers and supply chains

The third order, or indirect, benefits of the MAC Protocol affect the MAC sectors, MAC equipment suppliers and the entirety of the MAC supply chains. Within the MAC sectors, the benefits include changes in the size and quality of equipment stock and productivity gains from the deployment of more technologically advanced equipment stock. For MAC equipment suppliers, benefits encompass building economies of scale from the expansion of exports and productivity gains. Finally, the entirety of the supply chain will benefit from new business and employment opportunities, upskilling workforces, increased sales and profitability, increases in trade and investment opportunities, and the flow on of benefits to customers and end users, as well as the "spillover" of technology and skills to other sectors via supply chains.⁹²

⁹⁰ Specifically, Czechia imported \$1.4 billion USD, Hungary imported \$980 million USD, Poland imported \$3.3 billion USD and Slovakia \$440 million USD respectively. Data extracted from the United Nations, *Comtrade database* (2021 data), <https://comtradeplus.un.org/> (Last accessed: 29.12.23.).

⁹¹ Poland and the Czech Republic exported approximately \$1.6 billion USD worth of MAC equipment, Hungary \$280 million USD, and Slovakia \$230 million USD, respectively.

⁹² MAC Protocol Economic Assessment, 43.

The Visegrad Group region is a preeminent agricultural power within Europe. It has stated that it seeks to continue their successful cooperation and competitiveness in the face of challenges stemming from Brexit, EU Common Agricultural Policy reform, climate change and the economic fallout from the COVID-19 pandemic.⁹³ The MAC Protocol would directly support current Visegrad Group programmes that improve the economic conditions and productivity of farmers,⁹⁴ which has become particularly pertinent in light of the growing need to ensure food security in Europe.

The Visegrad Group has also indicated that it seeks to pursue infrastructure development,⁹⁵ with a focus on improving North-South connectivity by means of a high-speed railway network between their capitals.⁹⁶ By facilitating access to finance for construction equipment, the MAC Protocol would make it cheaper for companies to undertake large cross-border infrastructure projects, such as the construction of the envisaged high-speed railway line between their capitals.

4. Fourth Order Effects: Wider Economy

The fourth order effect of the MAC Protocol includes: an overall expansion in the productive potential of the Visegrad Group economies; an increase in total output and GDP; and an increase in the pace of human and economic development.⁹⁷ As noted earlier, the macro, wider economy effects of the MAC Protocol are globally significant, when considering the independent assessment that the treaty could increase global GDP by \$30 billion USD per year. As a grouping of four high-income countries, the Visegrad Group would share in the \$7 billion USD GDP benefits that are predicted to flow to developed countries. However, given that the Visegrad Group is a region that both imports and exports large amounts of equipment within the scope of the MAC Protocol, the benefits flowing to the Visegrad Group countries would be higher than those benefits flowing to countries that predominantly only export MAC equipment.

Following the COVID-19 pandemic, the Visegrad Group has reiterated the need to spearhead the region's economic recovery and crisis-resilience, whilst simultaneously recognising the need to focus on economic innovation and digitalisation.⁹⁸ The adoption of the MAC Protocol presents a critical opportunity for the region to continue to accelerate its growth and strength through its compounding economic growth via modernisation. Prompt adoption of the MAC Protocol would

⁹³ Programme of the Presidency, Hungary 2021–2022, 20.

⁹⁴ Programme for the Czech Presidency of the Visegrad Group 2019/2020: V4 Reasonable Europe.

⁹⁵ Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 10.

⁹⁶ Hungarian Presidency to V4, *V4 Facts and Figures*, <https://v4.mfa.gov.hu/page/v4-facts-infographics-tbc> (Last accessed: 29.12.23).

⁹⁷ MAC Protocol Economic Assessment, 43.

⁹⁸ Programme of the Presidency, Hungary 2021–2022, 11.

allow the Visegrad Group to continue to benefit from its relatively strong economic position during the COVID-19 crisis.⁹⁹

Finally, from a broader global perspective, the MAC Protocol presents benefits outside of the region of the Visegrad Group. The Visegrad Group has supported the development of third countries, particularly in Africa and the Middle East.¹⁰⁰ Adoption of the MAC Protocol is predicted to benefit developing countries enormously, by increasing GDP by \$23 billion USD and the stock of MAC equipment by \$90 billion USD. Accordingly, the MAC Protocol aids in the achievement of several United Nations Sustainable Development Goals, including: Target 9.3 “increase the access of small-scale industrial and other enterprises, particularly in developing countries, to financial services including affordable credit and their integration into value chains and markets”; Target 17.3 “mobilize additional financial resources for developing countries from multiple sources” and; Target 17.5 “adopt and implement investment promotion regimes for least developed countries”.¹⁰¹ In this way, the ratification of the MAC Protocol would not only be in the narrow economic interests of just the Visegrad Group. Ratification of the MAC Protocol by the Visegrad Group would also broadly support development, improve living conditions and increase economic prosperity globally.

VI. CONCLUSION – THE FUTURE OF THE MAC PROTOCOL

In concluding this article, it appears prudent to assess the future success of the MAC Protocol and how the Visegrad Group could fit into this future. To enter into force, the MAC Protocol requires a functioning international registry for MAC equipment, a Supervisory Authority for the international registry, and five Contracting States. The 2019 Diplomatic Conference tasked a group of 16 States (the “MAC Preparatory Commission”) to achieve these requirements, in order for the MAC Protocol to enter into force at the soonest possible time.

With the global COVID pandemic just around the corner, November 2019 was an inauspicious time for UNIDROIT to conclude an international treaty almost 15 years in the making. Despite the challenges posed by the pandemic, the MAC Preparatory Commission has made significant headway in relation to achieving the three requirements for entry into force. Following an intensive international procurement process, in January 2023, the MAC Preparatory Commission selected a preferred entity to build and operate the international registry for MAC equipment. The MAC Preparatory Commission is currently undertaking contract negotiations

⁹⁹ Review of major events under the 2021/2022 Hungarian presidency of the Visegrad Group, 3.

¹⁰⁰ Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 15.

¹⁰¹ United Nations Department of Economic and Social Affairs, the Sustainable Development Goals, <https://sdgs.un.org/goals> (Last accessed: 29.12.23).

with the preferred entity, with an expectation that the registry will be operational by the end of 2025.

Similarly, having undertaken a comprehensive assessment of existing entities that could perform the Supervisory Authority function, in 2021 the MAC Preparatory Commission invited UNIDROIT to consider undertaking the role of Supervisory Authority. In May 2023 the UNIDROIT Governing Council recommended that UNIDROIT undertake the role, and the matter will be formally considered at the UNIDROIT General Assembly in December 2023. As such, it appears certain that two of the three requirements for entry into force will be achieved in the near future.

In relation to the third requirement, of five Contracting States, progress has been slower. Ratification efforts across the world were significantly hampered by the understandably higher governmental priority of protecting citizens from the global pandemic. As of August 2023, the MAC Protocol has been signed by five States (the Republic of Congo, the Republic of Gambia, the Federal Republic of Nigeria, the Republic of Paraguay and the United States of America), as well as the European Union,¹⁰² although the MAC Protocol has no ratifications. As the world started to emerge from the COVID19 pandemic in late 2022, countries began to demonstrate an increased interest in MAC Protocol ratification. This increased interest has generated renewed hope that the MAC Protocol may have the five requisite Contracting States at the point at which the Registry becomes operational.

The ratification and implementation of the MAC Protocol by the four Visegrad Group countries would ensure the soonest possible entry into force of the MAC Protocol. Once ratified and in force, the MAC Protocol would produce substantial legal and economic benefits in Czechia, Hungary, Poland and Slovakia, as outlined in this article. The Visegrad Group has repeatedly emphasised their support for economic convergence and the removal of trade barriers to promote economic recovery, stability and growth.¹⁰³ The MAC Protocol would assist them in pursuing economic convergence; improving access to finance; increasing MAC equipment exports; growing its agriculture and infrastructure sectors to respond to current international economic challenges; and, finally, contributing to overall national and global economic growth. The Visegrad Group has also expressed interest in the ability of digitally smart solutions to facilitate such convergence,¹⁰⁴ and the MAC Protocol and Cape Town Convention exemplify these ideals.

¹⁰² The European Union has competency for several areas of law under the MAC Protocol, which requires the EU to sign and ratify the MAC Protocol before any EU Member States can do so. As such, the EU signature of the MAC Protocol does not automatically sign the MAC Protocol on behalf of the 27 EU Member States, but it does allow each EU Member State to individually sign the MAC Protocol.

¹⁰³ Programme of the Presidency, Hungary 2021–2022, 11; Programme for the Czech Presidency of the Visegrad Group 2019/2020: V4 Reasonable Europe, 9.

¹⁰⁴ Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 5.

Given the outstanding success of the Cape Town Convention and its Aircraft Protocol, coupled with the significant economic benefits that the MAC Protocol promises around the globe, it would appear that entry into force for the treaty is a question of when, rather than if. What is less certain is whether Czechia, Hungary, Poland and Slovakia will be among the first countries to benefit from the MAC Protocol through prompt ratification, or will lag behind other countries. Given the legal and economic benefits on offer, it is suggested that it would be of significant benefit for the Visegrad Group to be early adopters of the MAC Protocol, and to prioritise ratification as an urgent policy initiative.

