The significance of the qualifying declarations under the Cape Town Convention

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Abstract

This article outlines and critically examines the relationship between the qualifying declarations and the economic advantages of the Cape Town Convention on International Interests in Mobile Equipment. It shows that the qualifying declarations operate rather differently from how they are perceived in academic literature and practice. Specifically, the article shows that the critical advantage of the Convention and the qualifying declaration is the potential to reduce enforcement risk relating to different States in a specific transactional setting and not, as some observers might wrongly perceive, from the Cape Town Discount. Thus, if States are not prepared to make the qualifying declarations, this should not deter them from ratifying the Convention and the Protocol. States and society may benefit from adoption of the Convention and its related protocols with partial—or even without—adoption of the qualifying declarations, bearing in mind of course the interdependency of the Convention's remedies.

I. Introduction

Academics and practitioners have often urged that Contracting States will not receive the Cape Town Convention's economic benefits unless they (i) properly implement the Convention into national law and (ii) make the declarations collectively known as the 'qualifying declarations' under the Organisation for Economic Co-operation and Development's (OECD) Aircraft Sector Understanding on Export Credits for Civil Aircraft (ASU). The qualifying declarations, as expressed in the current version of the ASU,[1] are primarily those declarations relating to the exercise of non-judicial remedies,[2] advance

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[1] Organisation for Economic Co-operation and Development's (OECD), 'Arrangement on Officially Supported Export Credits—Annex III Sector Understanding on Export Credits for Civil Aircraft' 26 July 2018 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2018)8> accessed 6 April 2019, 49 et seqq.

[2] Application of extra-judicial remedies pursuant to Article 54(2) of the Convention.

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relief,[3] the availability of the lease remedy,[4] irrevocable de-registration, and expert authorization (IDERA),[5] and remedies on insolvency and insolvency assistance procedures.[6] Among the various economic benefits associated with them, perhaps the most cited example is the Cape Town Discount.[7] Under the ASU, the Cape Town Discount is a reduction of 10 percent of the minimum premium rate granted by governmental export credit agencies to aircraft operators. Thus, it has been understandably argued that the qualifying declarations are a reliable indicator for a successful implementation of the Convention into national law and that they play an important role—if not the most significant role—in guaranteeing the advantages of the Convention.[8] Some of them go even further and

[3] Application of Relief Pending Final Determination under Article 13 of the Convention and its modifications introduced by Article X of the Aircraft Protocol (including the suggested time limits Article X (2) of the Aircraft Protocol).

[4] Application of the remedy that a chargee can grant a lease of the object in that territory pursuant to Article 54(1) of the Convention.

[5] Application of the De-registration and export request authorisation under Article XIII of the Aircraft Protocol.

[6] Application of Alternative A under Article XI of the Aircraft Protocol to all types of insolvency proceeding and that the waiting period for the purposes of Article XI (3) of that Alternative shall be no more than 60 calendar days.

[7] Ludwig Weber, 'Public and private features of the Cape Town Convention' (2015) 4 Cape Town Convention Journal 53, 54; Kristin van Zwieten, 'The insolvency provisions of the Cape Town Convention and Protocols: historical and economic perspectives' (2012) 2 Cape Town Convention Journal 53, 72 ; Roy Goode, 'Private Commercial Law Conventions and Public and Private International Law: The radical approach of the Cape Town Convention 2001 and its Protocols' (2016) 65 International and Comparative Law Quarterly 526–7; Yoshinobu Zasu and Ikumi Sato, 'Providing credibility around the world: effective devices of the Cape Town Convention' (2012) 33 European Journal of Law and Economics 577, 587; Marisa Chan, 'New OECD Sector Understanding on Export Credits for Civil Aircraft' (2007) 1 Law & Financial Markets Review 511, 512; Jeffrey Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit: A Framework as Applied to the Cape Town Convention' (2012) 17 Uniform Law Review 633, 645; Jeffrey Wool, 'Compliance with Transnational Commercial Law Treaties: A Framework as Applied to the Cape Town Convention' (2014) 3 Cape Town Convention Journal 5, 21; Brian F Havel and John Q Mulligan, 'The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic' (2014) 3 Cape Town Convention Journal 81, 91.

[8] Aviation Working Group, 'Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol – Summary of National Implementation' (December 2016) <http://www.awg.aero/assets/docs/CTC-IP-Summary-Chart-(Full%20Version)-(13).pdf> accessed 6 April 2019: 'By effective implementation, AWG means that: (i) a strong, commercially oriented set of declarations were made by a country when ratifying or acceding to the Treaty, and (ii) the Treaty has force of law, and to the extent of any conflict, prevails over other law, in that country. As an objective proxy for whether such declarations were made, we summarise whether a country made the Qualifying Declarations, as set out in the OECD Sector Understanding on Export Credits for Civil Aircraft (2011)'; Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit: A Framework as Applied to the Cape Town Convention', (n 7) 645: 'The rule is prescriptive and binary: the discount is available if, and only if, the qualifying declarations are made. The same underlying reasoning applies to all other forms of EB. *Contracting States seeking EB must make the qualifying declarations*'; Teresa Rodríguez de las Heras Ballell, 'The Accession by Spain to the Cape Town Convention: A First Assessment' (2014) 19 Uniform Law Review 1, 9: 'At the time of ratification of the Protocol, the set of declarations to be made should be carefully selected *in order to exploit to the full the benefits of implementing the Cape Town system*—pondering OECD 'qualifying declarations'—and to prevent internal contradictions between the CTC and its Protocols'. Teresa Rodríguez de las Heras Ballell, 'Key Points for the Effective Implementation of the Cape Town Convention: The Accession of Spain to the Aircraft Protocol' (2016) 21 Uniform Law Review 279, 282: 'First, the careful selection of declarations to be made by a contracting State is critical for two

see the qualifying declarations as a *conditio sine qua non* for the receipt of the Convention's economic benefits.[9]

This article seeks to establish that the role and benefits of the qualifying declarations have been overemphasized. Although significant benefits can be achieved under the qualifying declarations, States and society will benefit from the adoption of the Cape Town Convention and its related protocols despite not making the qualifying declarations.[10] Thus, if States are not prepared to make the qualifying declarations, this should not deter them from ratifying the Convention and the Protocol.

To illustrate this, the article proceeds as follows. Section II provides an analysis of the concept and underlying purposes of declarations. It will thereby serve to establish the foundation for an investigation and assessment of the usefulness of the qualifying declarations as a tool to measure the successful implementation of the Convention into national law. Based on the foregoing, Section III continues with a more specific examination of the economic significance of the qualifying declarations. The essential factors for the creation of the economic benefits under the Convention and its related Protocols for Contracting States will be examined in order to answer the crucial question of whether, and to what extent, the qualifying declarations are really relevant for the generation of economic advantages. This will show that there is a significant gap between the actual and the perceived economic significance of the qualifying declarations in academic, legal, and political discourse. In completing the analysis, Section IV takes stock of the overall impact, potential, and limits of the qualifying declarations. It concludes with the assessment that, although the qualifying declarations are of value and have ordinarily reached sound results, their economic significance is exaggerated and the Contracting States benefit significantly from the Convention itself despite not making the qualifying declarations.

reasons. On the one hand, in terms of economic benefits, *certain declarations (qualifying declarations) qualify a contracting Party for the CTC discount*, in accordance with Annex 1 on the Sector Understanding on Export Credits for Civil Aircraft (ASU).'

[9] Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit: A Framework as Applied to the Cape Town Convention', (n 7) 645.

[10] Neil B Cohen, 'Harmonizing the Law Governing Secured Credit: The Next Frontier' (1998) 33 Texas International Law Journal 173; Spiros Bazinas, 'Modernising And Harmonising Secured Credit Law: The Example of the UNCITRAL Draft Legislative Guide on Secured Transactions, Part 1' (2006) 21 Journal of International Banking and Financial Law 20; Spiros Bazinas, 'Modernising And Harmonising Secured Credit Law: The Example of the UNCITRAL Draft Legislative Guide on Secured Transactions, Part 2' (2006) 21 Journal of International Banking and Financial Law 58; Orkun Akseli, *International Secured Transactions Law* (Routledge), 67 et seqq; Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016); John Armour and others, 'How Do Creditor Rights Matter For Debt Finance? A Review of Empirical Evidence' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar Publishing 2015); Charles W Mooney, 'Choice-of-law rules for Secured Transactions: An Interest-Based and Modern Principles-Based Framework for Assessment' (2017) 22 Uniform Law Review 842; Marek Dubovec and Giuliano G Castellano, 'Bridging the Gap: The Regulatory Dimension of Secured Transactions Law Reforms' (2017) 22 Uniform Law Review 663.

II. Concept of declarations in treaty law

1. Introduction

This section looks at the role played by declarations in the field of international private law. It questions whether a traditional understanding of the concept of declarations as a legal instrument for providing more flexibility for States and achieving a wider ratification of international instruments is sustainable in the context of the Convention and Protocol.[11] This provides the basis for the examination of the legal and economic significance of the qualifying declarations. Before turning to this issue, there is one important point to consider: that of the crucial differentiation between reservations and declarations in international law. The reason is that in the context of the Convention, declarations have to be clearly distinguished from reservations since the Convention expressly authorizes only the declarations listed in its Article 56 and those specified in Article XXXII of its related Protocol. Reservations are not allowed in the context of the Convention and, consequently, have no effect.[12]

2. Difference between reservations and declarations

The 1969 Vienna Convention on the Law of Treaties (https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en) in Article 2(1)(d) defines reservations as 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.' It follows that the decisive element of a reservation is its unilateral nature, meaning that it does not have a binding effect on another Contracting State unless specifically accepted by that Contracting State.[13] This is also why it offers the greatest possible flexibility to a reserving Contracting State with regard

[11] Brian F Havel and Gabriel S Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press 2014), 354 et seq: 'The purported purpose was to be able to attract as many countries as possible'; Mark J Sundahl, 'The "Cape Town Approach": A New Method of Making International Law' (2006) 44 Columbia Journal of Transnational Law 339, footnote 46 stating that: 'flexibility was built into the protocols in order to avoid the catastrophic result that States might refuse to ratify a protocol that promoted commercial efficiency over more debtor-friendly public policies.' Marco Torsello, 'Reservations to international uniform commercial law Conventions' (2000) 5 Uniform Law Review 85, 119 stating with regard to Reservations: 'Reservations, indeed, allow a degree of flexibility that renders the Conventions to which they apply suitable for adoption by a larger number of States'; Jeffrey Wool, 'Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: a Preliminary Proposal for Development of a Policybased Unification Model' (1997) 2 Uniform Law Review 46, 49 proposing a policy-based unification mode that 'leaves important related policy-type decisions with Contracting States to produce the greatest level of support for a convention.'

[12] Article 56 of the Convention states that: 'No *reservations* may be made to this Convention *but declarations* authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions' (emphasis added); see also Goode, (n 7) 532.

[13] Roy Goode rightfully points out that the 1969 Vienna Convention on the Law of Treaties is not entirely consistent with regards to the unilateral nature of reservations. For more details see ibid, 532, n 48.

to the legal effect of an international instrument.[14] In contrast, the contents of declarations are usually specifically defined in the international instrument, such as, for example, in case of the Convention in Articles 39, 40, 50, 52, 53, 54, 55, 57, 58, and 60. This is also true for the date of entry into force or the date of withdrawal of declarations. For example, the Convention specifies in Article 57(2) that subsequent declarations shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Equally, a withdrawal of a declaration takes effect—according to Article 58(1)—on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Having clarified the difference between reservations and declaration, the next section turns to the question: what is the purpose of declarations both in international private law generally and speficially under the Convention?

3. *Purpose of declarations in international law*

The primary rationale behind declarations is simple. They provide States with flexibility in the ratification process in cases where provisions of the international instrument are in fundamental conflict with a national legal system. They can be understood as addressing three principal concerns of States. They are the following: the protection of national interests, preservation of legal traditions, and control over public policy concerns. The assumption behind declarations in international private law is that the framework they create leads to higher ratification numbers of uniform law instruments.[15] The lack of widespread ratification creates severe problems. It undermines the significance of uniform law instruments[16] or, even worse, can mean that they may not enter into force at all since the requisite number of ratifications has not been achieved.[17] As an example of a well-functioning system of declarations, one only need look to at the Convention (and the Protocol) because for decades the unification of personal property securities law has been historically regarded as both undesirable and infeasible, especially owing to the deeply rooted legal traditions and cultures enshrined in domestic legal rules.[18]

4. *Purpose of declarations under the Cape Town Convention*

If one considers the Convention's structure of declarations, four different groups may be identified: opt-in, opt-out, mandatory, and other declarations. By means

[14] Torsello, (n 12) 88 et seqq; Laurence R Helfer, 'Flexibility in International Agreements' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2012).

[15] See footnote 12.

[16] See, for example, the UNIDROIT Convention on International Financial Leasing (1988) and the UNIDROIT Convention on International Factoring (1988).

[17] See, for example, the Convention on Agency in the International Sales of Good (1983) or the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009).

[18] Goode, (n 7) 532: 'The declarations feature was designed to ensure that States otherwise favouring the Convention might feel obliged to refuse to ratify it.'

of opt-in declarations, a Contracting State gives effect to a particular provision. The declarations under Article 39 ('[n]on-consensual rights and interests having priority without registration'), Article 40 ('[r]egistrable non-consensual rights or interests'), and Article 60 ('[a]pplication of Convention priority rules to pre-existing rights or interests') fall in this category. Opt-out declarations provide the possibility of excluding the applicability of a certain provision, as applied by a Protocol, in that Contracting State. The declarations under Article 54 ('[d]eclarations regarding remedies'), Article 55 ('[d]eclarations regarding relief pending final determination'), and Article 50 ('[i]nternal transactions') are of this kind. Mandatory declarations require States to make this kind of declaration because without them the Depository will not accept any State's deposit of a binding instrument of ratification or accession. The declarations under Article 54(2) for the availability of self-help remedies and Article 48(2) for Regional Economic Integration Organizations fall in this category. Finally, the last grouping of declarations is a catch-all category. Under Article 53 ('[d]etermination of courts'), Contracting States may define the relevant court for the purposes of the Convention. Pursuant to Article 52 ('[t]erritorial units'), Contracting States can also declare that the Convention may only extend to certain territorial units of a Contracting State. It is important to note that the Aircraft Protocol provides for further declarations, and this is also true for the other protocols relating to railway rolling stock and space assets.

If one considers the various types of declarations, it is recognizable that primarily opt-out declarations—in particular, Articles 54 and 55 of the Convention—serve the purpose of flexibility in the ratification process. For example, Article 54(2) of the Convention allows Contracting States to decide about the exercise of non-judicial remedies. Thus, States that prefer a debtor-protective approach relating to secured transaction law may choose to have a declaration that disallows private enforcement. Similarly, these States may also declare, under Article 55, not to apply the provisions of Article 13 (relief pending final determination) and 43 (jurisdiction under Article 13). A review of the ratification status of the Cape Town Convention reveals that, on the whole, States with a basis or roots in civil law have fully declared against the availability of self-help remedies, especially because non-judicial remedies are generally viewed with scepticism in these jurisdictions.

Nevertheless, one can question the traditional assumption that the Convention's use of declarations is primarily opening doors for States to maintain their domestic legal culture. It is gradually being recognized that the function of declarations should be understood more widely and thus, should not be limited to their compromising function in the ratification process. Indeed, declarations do have a significant economic impact in the context of the Convention. This is because State parties and private actors are all able to quickly draw conclusions about the financial risk and legal situation based on the declarations made by Contracting States. The transparency arises mainly from two provisions. First, Article 62(1) of the Convention states that the International Institute for the

Unification of Private Law (UNIDROIT) is designated as Depositary of the Convention. Second, UNIDROIT's role as Depositary is further defined by the legal duties set forth in Article 62(2). The most important aspect of these various duties is the depositary's extensive information obligation, requiring the depository to inform all Contracting States of the current status of the Convention and the declarations made by Contracting States to these instruments. UNIDROIT meets this obligation by operating an online presence displaying both this and further information.[19] Thus, the point is that these declarations equally allow states to override national legal peculiarities in a well-defined and limited area of law in order to achieve economic benefits that are typically not afforded by non-harmonized national rules.

III. The qualifying declarations

1. Introduction

The economic function of declarations under the Convention is evidenced by the qualifying declarations. They are frequently cited as a critical factor for the creation of the Convention's economic benefits. Thus, this section seeks to resolve the question: what advantages can directly be attributed to the qualifying declarations that are internationally recognized as determinants of a proper implementation of the Convention into national law? To answer this question, the first subsection explores the internal legal and economic mechanics of the Cape Town Discount to better understand how the qualifying declarations really function. It will be shown that the qualifying declarations operate rather differently from how they are perceived in academic literature and practice, especially with regards to the infrequently granted Cape Town Discount.

2. Cape Town Discount

Under the ASU, the Cape Town Discount is a reduction of 10 percent of the minimum premium rate granted by governmental export credit agencies. The discount may be applicable for buyers and lessors of aircraft if they are located in a State that has been determined through OECD procedures to be eligible.[20]

The participants of the ASU maintain an eligibility list (the Cape Town List) of Contracting States.[21] The criteria agreed upon by participants to the ASU for

[19] UNIDROIT, 'Status of the Cape Town Convention' <http://www.unidroit.org/status-2001capetown> accessed 6 April 2019; UNIDROIT, 'Status of the Aircraft Protocol' <http://www.unidroit.org/status-2001capetown-aircraft> accessed 6 April 2019.

[20] It important to note that the Participants do not constitute an OECD body and that the ASU is not a formal OECD Act as defined under Article 5 of the OECD Convention. From a purely legal perspective, Participants to the ASU are not bound by OECD Procedure although they have voluntarily chosen to follow them.

[21] The Participants are: Australia, Canada, the European Community (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom), Japan, Korea (Republic of), New Zealand, Norway, Switzerland and the USA. See OECD, 'Summary Overview of the Arrangement' (2018) <http://www.oecd.org/trade/xcred/summaryoverviewofthearrangement.htm> accessed 6 April 2019.

States to be added to the Cape Town List, and, therefore, to benefit from the reduced premium rate, are detailed in Section II of Appendix II of the ASU.[22] In particular, a State is expected to meet the following three requirements: (i) to be a Contracting Party to the Cape Town Convention; (ii) to comply with the qualifying declarations; and (iii) to have effectively implemented the Cape Town Convention (including the qualifying declarations) into national law.[23] In this article, we shall refer to these criteria as (i) ratification; (ii) qualifying declarations; and (iii) the compliance requirement. The first lesson that one can draw from this is that there is a direct link between the qualifying declaration and the Cape Town Discount.

But making the qualifying declaration is not a sufficient condition for the Cape Town Discount. As of today, the Cape Town List includes only 29 States—namely Angola, Australia, Brazil, Canada, Ethiopia, Fiji, Indonesia, Ireland, Jordan, Kazakhstan, Kenya, Luxembourg, Malaysia, Malta, Mongolia, Myanmar, New Zealand, Nigeria, Norway, Oman, Panama, Pakistan, Rwanda, Senegal, Singapore, Sweden, Tajikistan, Turkey, and Vietnam.[24] Astonishingly, there are relatively few Contracting States entitled to the discount, if one considers the Convention's high number of ratifications and the fact that the overwhelming majority of Contracting States have made the 'qualifying declarations'.[25] As a result, the the Aviation Working Group has asserted that more Contracting States should be added to this list.[26] This leaves one significant question: what are the reasons for the fairly short Cape Town List? In order to answer that question, the article now turns to an examination of the application procedure of the Cape Town Discount.

3. *Application procedure of the Cape Town List*

The procedure agreed upon by the participants to the ASU for States to be added to the Cape Town List is detailed in Section II of Appendix II of the ASU. As a first step, there must be a formal proposal to the ASU Participants from a government that provides official support for aircraft.

A. Content of Proposal

Article 41 sets out the matters that have to be included in the State's proposal. They are: (i) the date of deposit of the instruments with UNIDROIT; (ii) a copy of

[22] OECD, 'Arrangement on Officially Supported Export Credits – Annex III Sector Understanding on Export Credits for Civil Aircraft', (n 1) 75.

[23] In particular, under the OECD Sector Understanding on Export Credits for Civil Aircraft, a Contracting State is expected to opt for the declarations set out in Article 2 of Annex I, and refrain from the declarations listed in Article 3 of this Annex I. Ibid, (n 1) 80 et seq.

[24] OECD, 'Cape Town Convention (CTC) Contracting Parties Qualifying for a CTC Discount' (30th August 2018) <http://www.oecd.org/tad/xcred/ctc.htm> accessed 6 April 2019.

[25] UNIDROIT, 'Status of the Aircraft Protocol' UNIDROIT, 'Status of the Cape Town Convention', (n 19).

[26] Aviation Working Group, 'Cape Town Convention and Export Credit' (2015) <http://www.awg.aero/projects/capetownconvention/> accessed 6 April 2019, states that: 'AWG believes select other countries should be added to this list and are consulting with relevant parties in that regard'.

the declarations made by the State; (iii) the date on which the Cape Town Convention and the qualifying declarations have entered into force; (iv) an implementation analysis of the Convention and its qualifying declaration to ensure that the Convention's commitments are appropriately transformed into the domestic legal system; and (v) a duly completed Cape Town Convention questionnaire of a law firm located in the jurisdiction of the relevant State.[27] One exception to this rule is an application for reinstatement of a State that has been previously removed from the Cape Town List. These types of proposals, in accordance with Article 44, require the government to include a description of the circumstances that gave rise to the removal of the State as well as a report of the subsequent corrective actions in support of reinstatement.[28]

B. Cape Town discount questionnaire

The Cape Town Convention questionnaire that is attached as Annex II to the ASU is of considerable importance for the proposal. The questionnaire is structured in two parts. The first seeks to address the impartiality and experience of the relevant law firm located in the jurisdiction of the State that is proposed to be added to the Cape Town List. For example, the former criteria are assessed by the question of whether the law firm is involved in a transaction that would benefit from the Cape Town Discount if the proposed State is added to the Cape Town List. The latter is evaluated by requiring the law firm to describe its previous experience with regard to the implementation of international treaties in the State in general. Additionally, the law firm must describe its experience in advising either a government on implementation and enforcement of the Convention or the private sector or enforcement of creditor's rights in the State that is proposed to be added to the Cape Town List.

The second part of the questionnaire concerns questions of substantive law relating to the qualifying declarations, the ratification process, the effect of national and local law, and court and administrative decisions. Clearly, the focus is on the compliance criteria of being added to the Cape Town List, which is the effective implementation of the Convention and compliance with its standards. Admittedly, some of these questions appear to be straightforward—for example, has the State ratified, accepted, approved, or acceded to the Cape Town Convention and Aircraft Protocol? Or has the State made each of the qualifying declarations in accordance with the ASU? However, others seem to be more complex from a legal point of view and costly in terms of time.

Specifically, in the section entitled 'Effect of National and Local Law', the law firm is asked to provide details as to whether—and if so, how—the framework of the Convention would have priority over any conflicting national law, regulation, order, judicial precedent, or regulatory practice. In addition, the law firm is

[27] OECD, 'Arrangement on Officially Supported Export Credits: Annex III Sector Understanding on Export Credits for Civil Aircraft', (n 1) Article 41.

[28] Ibid, Article 44.

requested to list any existing gaps in the implementation of the Convention in the relevant State. But these questions are not the only ones that seek to evaluate the legal system of the State under review in terms of the Convention's effective implementation. Similar questions are also raised in the section entitled 'Court and Administrative Decisions'. Again, the law firm is requested to describe and specify potential issues in the present or past that might result or have resulted in a failure of a judicial, regulatory, or administrative body to give full force and effect to the Convention. If so, the law firm is asked to attach any relevant precedent or decision in this context.

C. Application for addition to the Cape Town List

Upon submission of a comprehensive proposal, the Secretariat circulates it via electronic mail within five working days.[29] At this point the ASU Participants decide whether the requirements of the ASU with respect to the Cape Town Discount provisions have been met. The participants may either agree to, or challenge, a submitted proposal within 20 working days from the date of submission of the proposal.[30] After expiration of this period, and in case no challenge has been made to the proposal and it has not been withdrawn, the proposed update to the Cape Town List is deemed to have been accepted by all participants. As a result, the OECD Secretariat will add the respective State to the Cape Town List and send a message via electronic mail within five working days. The updated Cape Town List will take effect on the date of this message.[31]

D. Challenge of an application for addition to the Cape Town List

Participants may also decide to challenge the proposal brought forward for the addition of a State to the Cape Town List within 20 working days from the date of submission of the proposal. In such a scenario, the challenging participant is required to provide a written explanation of the grounds for challenge that will be circulated to all participants by the OECD Secretariat within the initial period of 20 working days.[32] Subsequently, the participants are asked to reach consensus on the proposal within a further period of 10 working days.[33] If an agreement is reached among the participants, the Cape Town List will be updated in accordance with the procedure just outlined. However, if there is still no agreement, then it is the chairman's responsibility to facilitate a consensus within a further 20 working days.[34]

As a last resort, the chairman is requested under the ASU to make a written recommendation with respect to the proposed update of the Cape Town List,

[29] Ibid, Articles 42 ('Addition') and 44 ('Reinstatement').
[30] Ibid, Article 45.
[31] Ibid, Article 46; Interestingly, the latest update to the List was on 30 August 2018.
[32] Ibid, Articles 45 and 47.
[33] Ibid, Article 47.
[34] Ibid, Article 49.

which participants are asked to accept.[35] The procedure explicitly requires the written recommendation to be based on the majority view emerging from the positions openly expressed by at least the participants that provide official support for aircraft exports. In the absence of such majority, the chairman shall make a recommendation based exclusively on the views expressed by the participants and shall specify in writing the basis for the recommendation, including in the case of ineligibility, the discussed criteria that were not met.[36] Notably, the recommendation must not contain any information relating to participants' views or positions expressed in the procedure.[37]

E. Application for removal from the Cape Town List

Furthermore, participants and non-participants that provide official support for aircraft exports may propose that a State be removed from the Cape Town List.[38] Such a proposal must include not only a comprehensive summary of the grounds—especially the actions or omissions in violations of the State's commitments under the treaty—but also supporting documents if available. Upon submission, the OECD Secretariat will circulate the proposal for removal via electronic mail within five working days.[39] Again, the participants may either agree to or challenge a proposal within a period of 20 working days.[40] The challenge procedure follows the principles just outlined above. If after the expiration of the period the proposal has not been withdrawn, no evidence of corrective actions or events has been presented and no challenge has been made to the proposal, the application for removal is deemed to have been accepted by all participants.[41] The updated Cape Town List will take effect after the OECD Secretariat has updated the Cape Town List and sent a message to this effect via electronic mail within five working days.[42]

4. Limitations of the Cape Town Discount

Given this context, one can draw several explanations for the relatively short Cape Town List that shall now be discussed. First, it is critical to note that an addition to the Cape Town List is not an automated process. After formally applying, States have to sufficiently demonstrate to the participants that they fulfil the aforementioned ratification, qualifying declarations, and compliance requirements.[43] Whereas the former two requirements are easy to determine from a legal perspective, the question of whether the Cape Town Convention, including the

[35] Ibid, Article 49 (c).
[36] Ibid, Article 49 (a).
[37] Ibid, Article 49 (b).
[38] Ibid, Article 43.
[39] Ibid, Article 43.
[40] Ibid, Article 45.
[41] Ibid, Article 46.
[42] Ibid, Article 46.
[43] Ibid, Article 39.

qualifying declarations, has effectively been implemented into national law requires careful legal research and sound judgment as demonstrated by the Cape Town Convention questionnaire. This is a fairly complex, costly, and time-consuming process given the administrative burden of obtaining all the necessary information and legal opinion. Accordingly, it is not surprising that in practice States have generally only been proposed for addition to the list in the context of an impending aircraft export credit transaction in the proposed State.

Second, given this context, one should mention that even though a State has made the qualifying-declarations failure to implement the Convention properly into domestic law can be a reason for a State not to be added to the Cape Town List in the first place as well as for being removed from it subsequently. There is an explicit procedure for the removal of a State from the Cape Town List if they violate their Cape Town Convention commitments.[44] Therefore, there is a chance that States might have been removed from the Cape Town List. But this is only speculation at this point because there is no public data available on the OECD website with regard to the historical evolution of the Cape Town List.

Third, it is of critical importance to note that the participants do not constitute an OECD body and that the ASU is not a formal OECD Act (as defined under Article 5 of the OECD Convention).[45] This raises the question: what is the legal nature of the ASU? The legal nature is crucial to the understanding, interpretation, and application of the Cape Town Discount. It is generally accepted that the ASU is neither a binding international treaty nor customary international law. It is merely a gentleman's agreement.[46] For our purposes, a gentleman's agreement describes an agreement that is entered into by States without an intention to create legal rights or obligations. As a result, there is no way of enforcing its guidelines against its participants, even if a Contracting States fulfils all requirements.

In conclusion, the key lesson one should draw from the analysis of the Cape Town List procedure is that making the qualifying declaration is a necessary, but not a sufficient, condition for being eligible for the Cape Town Discount. The question then becomes what is added by the qualifying declarations to the legal and economic analysis of the Convention's implementation? Is it that the qualifying declarations in question create economic advantages other than the Cape Town Discount?

5. *Risk reduction*

In the author's opinion, the real rationale behind the qualifying declarations seems to be that they fulfil an important function in minimizing credit risk in

[44] Ibid, 81: 'Any Participant or non-Participant which provides official support for aircraft may propose to that a State be removed from the Cape Town List if they are of the view that such State has taken actions that are inconsistent with, or failed to take actions that are required by virtue of, that State's Cape Town Convention commitments.'

[45] Janet Levit, 'The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits' (2004) 45 Harvard International Law Journal 65.

[46] OECD, 'The Arrangement from the Inside' in OECD (ed), *The Export Credit Arrangement: Achievements and Challenges 1978-1998* (OECD 1998); Levit, (46) 77.

a specific transaction setting. In this context, it must be emphasized that, in aircraft finance, the lengthier the process for a creditor to regain possession of an aircraft object, the higher the risk of its exposure.[47] Indeed, as already mentioned, the qualifying declarations are primarily those declarations relating to the exercise of non-judicial remedies, advance relief, availability of the lease remedy, IDERA, remedies on insolvency, and insolvency assistance procedures—and can be understood as addressing one principal concern of creditors: reduction of repossession time for aircraft and, consequently, risk.[48]

Notably, the prompt enforcement and the bankruptcy law enforcement principle are incorporated in the qualifying declarations.[49] This is, first, because Contracting States must not opt out of advance relief and declare a fairly short time frame of 10 days for completion of the proceedings in respect of the advance relief remedies in Article 13(1)(a)–(c) and 30 days for actions specified in Article 13(1)(d)–(e). Further, Contracting States must not opt out of the de-registration and export request authorization that allows a designated creditor to swiftly seek deregistration and export of the aircraft without the registry authority having discretion in this regard. Both of these declarations ensure a prompt realization at market value of the aircraft assets given as security. Further, by requiring Contracting States to apply the entirety of Alternative A under Article XI with a waiting period of no more than 60 calendar days, secured creditors have the ability to swiftly recover the value of the aircraft equipment further in insolvency proceedings. The increased creditor confidence resulting from the qualifying declarations has the effect of lowering credit costs.[50] Transactions in States with underdeveloped secured transactions laws will benefit the most from implementing the qualifying declarations, and transactions in States with highly developed secured transaction laws will benefit the least.[51]

Interestingly, the treatment of certain declarations taken together as qualifying recognizes the interrelationship or interdependency of the various remedies of the

[47] Ludwig Weber and Artur Eberg, 'The Cape Town Convention and Its Implementation in Russia and the Commonwealth of Independent States (CIS)' (2014) 39 Air and Space Law 1, 9; Anthony Saunders and Ingo Walter, 'Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment' (1999) 23 Air & Space Law 339, 354.

[48] Vadim Linetsky, 'Economic Benefits of the Cape Town Treaty' <http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf> accessed 6 April 2019, 2: 'the ratification and effective implementation of the C.T.T. results in significant risk reduction to lenders in secured aircraft financing transactions.' Further, Vadim Linetsky estimates that the total savings directly resulting from the risk reduction due to *reducing the worldwide repossession delay* from ten to two months are on the order of US $161 billion in the period of 2009–30.

[49] For a detailed discussion of the principles in the Convention see: Saunders and Walter, (n 47) 10 et seq.

[50] Roy Goode, 'The preliminary draft Convention on International Interests in Mobile Equipment: the next stage' (1999) 4 Uniform Law Review 265, 266 and 267; Roy Goode, 'From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols' (2012) 17 Uniform Law Review 599, 601; Weber and Eberg, (n 47) 9.

[51] Anthony Saunders, Anand Srinivasan and Ingo Walter, 'Innovation in International Law and Global Finance: Estimating the Financial Impact of the Cape Town Convention' <http://hdl.handle.net/2451/26364> accessed 6 April 2019, 9.

Convention and the Protocol. This only makes sense because the enforcement system provided by the treaty must work at all stages of proceedings if it is to be effective. Take, for example, the right to termination of the agreement. It is, itself, pointless if the creditor is not entitled to obtain possession, control, or custody of the aircraft and/or de-registration of the object afterwards. Likewise, the right to repossession would be of no avail for the creditor if the aircraft object cannot be de-registered in the current jurisdiction and re-registered in another. In the absence of successful de-registration, the aircraft will just sit with the creditor and quickly deteriorate without generating any revenue (this being a consequence of the 1944 Convention on International Civil Aviation).[52] Although the various remedies under the Convention may be technically independent from each other, their isolated assessment poses some difficulties. An effective implementation of the Convention and the qualifying declarations has to consider all of these circumstances.

IV. Conclusion

There are several lessons that can be drawn from the analysis of the qualifying declarations for the purpose of implementing the Convention and the Protocol. The most general observation is that the traditional concept of declaration is outdated in the context of the Convention and the Protocol. Declarations do have an economic effect for Contracting States. The qualifying declarations are a good example of this; they embrace a combined legal and economic approach to declarations, as evidenced by the Cape Town Discount and their risk reduction effect.

However, the qualifying declarations operate rather differently from how they are perceived in academic literature and practice, especially with regard to the infrequently granted Cape Town Discount. What is sometimes lost is the fact that the critical advantage of the Convention and the Protocol (together with the qualifying declaration) is the potential to reduce enforcement risk relating to different States in a specific transactional setting, and not, as some observers might wrongly perceive, from the Cape Town Discount. Thus, if States are not prepared to make the qualifying declarations, this should not deter them from ratifying the Convention and the Protocol. States and society may benefit from adoption of the Convention and its related protocols with partial—or even without—the adoption of the qualifying declarations, bearing in mind of course the interdependency of the Convention's remedies.[53] In this context, further non-measurable economic benefits, for example, may arise from harmonization of domestic secured transactions law or the solution of the *lex situs* problem.[54]

[52] This is because Article 18 of the Chicago Convention states that 'An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.' Consequently, the prohibition on dual registration effectively establishes a link between the right to re-possession and the right to de-registration.

[53] See footnote 11.

[54] Saunders and Walter, (n 47) 23: 'The primary microeconomic impact of the proposed Convention/Aircraft Protocol is the potential benefits that will accrue by virtue of the reduced

Consider, in this regard, the following example. An airline's aircraft, being financed by a leasing company, are registered in State A and State A has adopted the qualifying declarations. At some point in the future, there is a chance that the airline will default, and the leasing company wants to make sure that it can rapidly repossess the aircraft. But this is exactly the problem: the high mobility of aircraft objects makes the jurisdiction of enforcement unpredictable at the time of default. There is a possibility that the location of the aircraft might be in a jurisdiction where the security interest is not protected or adequately recognized, or even worse, not recognized at all. Thus, the more States that become parties to the Convention, the less the location of the aircraft matters. Nevertheless, one has to note that the Convention does cover both cross-border and purely domestic transactions and that there may be circumstances in which the vast majority of the relevant aircraft are used primarily domestically. It should further be mentioned that the *lex situs* problem, to a large extent, has been effectively addressed by the 1948 Geneva Convention on the Recognition of Rights in Aircraft, which gives preference to the *lex registry* for perfecting property rights over aircraft.

It is important to emphasize the benefits of the Convention on a stand-alone basis. This is because the qualifying declarations require Contracting States to integrate concepts in their legal systems based on common law. Take again, for example, the required self-help declaration of Article 54(2). The legal concept of self-help is frequently found in common law jurisdictions and is typically more restricted in their civilian counterparts. It follows that common law jurisdictions may declare for the availability of self-help without any amendments to their legal systems. On the contrary, civil law jurisdictions may face significant hurdles in doing so. Additionally, advanced legal systems with a developed commercial case law, such as France and Germany, may also find it more difficult to make substantial changes proposed by the qualifying declarations since they face a significant risk of disturbing the balance of their highly developed commercial laws. This would not be a problem at all if one appreciates the public law purpose of declarations under the Convention to accommodate the different legal views of civil and common law countries. For example, civil law legal systems might well opt for Article 13 and Article X as civil law parallels to Article 54(2). More problematic, however, is that the financial market stigmatizes Contracting States that are non-compliant with the qualifying declarations. The overemphasis on the Cape Town Discount in practice and scholarship may have created a deterrence effect for civil law jurisdictions considering ratifying the Convention if they cannot comply with the requirements posed by the qualifying declarations. The

cost of financing and the increased availability of credit for the acquisition and use of commercial aircraft from asset based financing. The general order of magnitude of these benefits . . . appears to be significant on a stand-alone basis'; Other often non-measurable economic benefits mentioned in the study are pass-through benefits to passengers and other users of commercial air transport services, lower transactions costs as a result of harmonization that come in the form of delays, professional fees, and resale prices of aircraft under distress conditions and improved efficiency in fleet planning and equipment allocation. See also Saunders, Srinivasan and Walter, (n 51).

point is that the compromising and balancing function of declarations in terms of remedies should not be carelessly sacrificed to the belief that meeting the requirements of the qualifying declaration is the be-all and end-all prerequisite for benefits of the Convention, especially the Cape Town Discount. Indeed, the primary function of declarations should remain, to provide States with the ability to ratify the Convention while maintaining national legal sensitivities in civil and common law systems.