



EN

**MAC Protocol
Study Group
1st meeting
Rome, 15-17 December 2014**

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Report

(Prepared by the UNIDROIT Secretariat)

1. At its 93rd session (Rome, 7-10 May 2014) the Governing Council of UNIDROIT agreed to convene a Study Group entrusted with preparing a draft of a potential Fourth Protocol to the Cape Town Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment (the 'MAC Protocol'). The Governing Council decided that the Study Group would be composed of various international experts in secured transactions law and be chaired by Mr Hans Georg Bollweg, member of the UNIDROIT Governing Council.

2. This document provides a report of the Study Group's first meeting, which took place between 15-17 December at the seat of UNIDROIT in Rome.

I. Opening

3. The meeting was opened by Mr José Angelo Estrella Faria, Secretary-General of UNIDROIT. It was decided that the Secretary-General should chair the first meeting, as Mr Bollweg was unable to attend. Mr Faria welcomed the participants of the Study Group and thanked them for their involvement in the project (for a full list of participants, please see Annex I). Mr Faria then invited the Study Group to consider and adopt the Agenda for the first meeting (see Annex II), which was duly adopted.

II. History and development of the Protocol

4. Mr William Brydie-Watson (Legal Officer at the UNIDROIT Secretariat) discussed the history of the MAC Protocol project, noting the background work done by the Secretariat since 2006. In particular, Mr Brydie-Watson noted the national questionnaire circulated to member and non-member states (2007-2009), consultations with private industry (2010-2012) and the economic analysis' and issues dialogues (2013-2014) that had all been conducted prior to the first Study Group meeting.

III. Preliminary consultations

5. Mr Marek Dubovec (Senior Research Attorney from the National Law Center for Inter-American Free Trade) presented some initial findings from recent consultations with private sector stakeholders. Mr Dubovec noted that consultations had been conducted with manufacturers and dealers, lenders including leasing and financing associations and end users of MAC equipment. The geographical range of the initial consultations covered stakeholders located in North America, South America, Europe, Africa and the Middle East. Mr Dubovec's initial findings included information on the governing legal frameworks that currently regulate the sale and financing of

MAC equipment, the sources of credit and financing mechanisms currently utilised and information relating to the mobility and retail value of different pieces of MAC equipment.

IV. Legal Issues

The Harmonised System

6. Mr Brydie-Watson introduced the Harmonised Commodity Description and Coding System (HS), the international product nomenclature developed by the World Customs Organisation (WCO) that divides up the world's tradable goods into 5,000 commodity groups each identified by a six digit code. He noted that it is applied by 206 countries worldwide to set customs tariffs as negotiated in the World Trade Organisation Consolidated Tariff Schedules and is updated every 5 – 6 years. He further noted that the Issues Dialogues in Washington had concluded that the six digit HS could be a useful mechanism for delineating the scope of the MAC Protocol. It was suggested that categories of MAC equipment as identified by a six digit HS code could form a list of MAC equipment to which the Protocol would apply. The Study Group discussed whether a list of such equipment could effectively define the scope of the Protocol. The Secretariat provided the Study Group with a list of HS codes compiled by private industry in the United States which could be covered by a MAC Protocol.

7. Professor Riffard noted that the HS underpins the Combined Nomenclature of the European Union used to determine common customs tariffs. Professor De Las Heras noted that the use of the HS to delineate the scope of the Protocol is only possible if it makes it sufficiently clear for stakeholders to quickly and efficiently determine whether a certain piece of MAC equipment is covered by the Protocol.

8. The Study Group agreed that there was merit in using the HS to delineate the scope of the MAC Protocol. However, members of the Study Group posed additional questions regarding the HS, which required answering before the viability of using the HS to define the scope of the MAC Protocol could be fully assessed.

- The Study Group queried exactly how the HS was updated every 5 – 6 years and whether the reclassification was substantive or merely administrative.
- The Study Group queried what range of equipment fell within each HS code and whether it was possible to identify HS codes which contained exclusively MAC equipment which met the Article 51 criteria (mobile, high value and uniquely identifiable).
- The Study Group queried whether there are official definitions and accompanying descriptions for each of the HS codes.
- The Study Group queried what percentage of the equipment under each of the HS codes suggested by private industry in the US was MAC equipment.
- The Study Group queried whether there were any other alternative systems that could be utilised to delineate the scope of the Protocol.

9. The Study Group requested that the Secretariat conduct further research on the HS and report back to the Study Group before its second session.

Scope of the Protocol

10. Mr Brydie-Watson introduced the topic, noting that the natural starting point when considering the scope of the MAC Protocol should be Article 51(1) of the Cape Town Convention, which provides that the Convention can be extended to categories of high value, mobile and uniquely identifiable equipment.

11. Mr Deschamps queried whether mobility meant equipment that is capable of being moved, or equipment that is demonstrated to move in the course of its sale or operation. Professor Mooney noted that a definition of mobility based on whether a type of equipment was capable of moving may be too broad, as it would include anything tangible that is not immovable. Professor

De Las Heras noted that it might be easier to describe immobility in relation to fixtures rather than define mobility itself.

12. Professor von Bodungen noted that the definition of mobility also arose during the negotiation of the Luxembourg Rail Protocol and that a solution could not be identified. The Chair noted that it might not be necessary to define mobility in the Protocol as equipment that demonstrably moves across national borders. The Deputy Secretary-General of UNIDROIT, Professor Veneziano queried whether there was actually a need to define mobility at all in the MAC Protocol, noting that the description of railway rolling stock in the Luxembourg Rail Protocol does not include any element of cross border movement. Professor Mooney agreed, querying whether it was necessary to include a definition of mobility in the text of the Protocol.

13. The Study Group concluded that the example of the Luxembourg Rail Protocol should be followed and that there was no need to explicitly define mobility in the MAC Protocol.

14. Mr Brydie-Watson noted that during the second Issues Dialogue in Washington in January 2014 the US Department of Commerce had made a presentation on the HS which explained that trade data can be utilised to determine the minimum, maximum and median purchase price of pieces of equipment in each commodity group under the HS. These purchase prices could then be utilised to determine whether equipment under a certain HS code was of sufficiently high value to warrant inclusion under the scope of the Protocol.

15. Professor Mooney queried whether the trade data was produced using only US trade statistics. Mr Brydie-Watson responded that it was US specific data, however it had been found to be consistent with global data. Mr Dubovec noted that every country would have this kind of data, and it should be possible to obtain further data sets from other countries.

16. The Study Group concluded that it could be possible to determine the high value criteria of the Protocol on a case by case basis by reference to the unit prices of equipment under the HS, however further research on the HS was required.

17. Professor Mooney noted that in addition to the high value criterion, the MAC equipment as identified under the HS would also need to be uniquely identifiable. Professor Mooney noted that it was likely that there would be several types of MAC equipment falling under the relevant HS codes that would not have unique serial numbers affixed to them. Mr Dubovec stated that the practice of affixation of serial numbers to equipment would vary between different manufacturers and different companies and further data is required to determine whether the MAC equipment identified under the initial HS code list provided by US private industry have unique serial numbers affixed to them.

18. The Study Group concluded that for MAC equipment to be considered for inclusion under the scope of the Protocol, it would have to be uniquely identifiable by serial number or other means.

Severability

19. Mr Brydie-Watson introduced the topic, noting that it had been suggested during consultations that it may be worth splitting the MAC Protocol into three separate protocols governing each of the three classes of equipment. The Study Group concluded that the Protocol should be maintained as a single Protocol, while allowing states to opt out of any of the three classes (agricultural, construction and mining) of equipment.

Multiple purpose equipment

20. The Chair introduced the topic, clarifying that the Protocol should not cover equipment that is general in nature but has an application in the agriculture, construction or mining fields. The Chair noted that a further issue arises where a piece of equipment is frequently used in more than one of the MAC areas (for example, a drill used in both mining and construction). This becomes a problem in determining whether to list the category of equipment in one or both of the applicable class lists.

21. Professor Riffard suggested focussing on the design rather than use of the equipment when determining the purpose of different types of equipment. Professor Riffard also suggested that this issue should not be over emphasized, as it would not arise often.

22. Mr Deschamps suggested that the Study Group could consider removing the ability to opt out, which would resolve the problem of multiple purpose MAC equipment that could be listed under more than one class (agriculture, construction or mining). The Chair noted that it was likely that member states would appreciate the possibility of opting out and it would likely increase ratifications of the Protocol.

23. Professor Mooney suggested that where a category of equipment is used in more than one of the MAC areas, it should be included in both lists. Under this approach, if a state opted out of one class of equipment such as mining, a drill listed under both the mining and construction lists would still be covered by the Protocol in that state. The Chair agreed, noting that the final use of the equipment in that state would be irrelevant in determining whether it was covered by the Protocol.

24. The Study Group concluded that, in principle, the Protocol should not cover equipment that is general in nature and decided to give further consideration to this issue at the next Study Group Meeting. The Study Group further concluded that where a category of MAC equipment has the possibility to be listed under more than one of the classes (agriculture, construction and mining), then it should be listed under each class independently.

Interaction between MAC and Rail Protocols

25. Professor von Bodungen noted that there could be an overlap between the MAC Protocol and the Luxembourg Rail Protocol, due to the broad definition of railway rolling stock contained in the Luxembourg Rail Protocol. Professor Mooney noted that if the MAC Protocol limits its scope by identifying specific types of equipment through the HS system, then it would have a stricter approach to scope than the description-based approach of the Luxembourg Rail Protocol. He further suggested that if the MAC Protocol adopted this stricter approach to scope, it should prevail over the Luxembourg Rail Protocol in the event of a conflict between the scopes of the two Protocols. Professor Mooney suggested that the overlap between the two Protocols could be dealt with either through limiting the scope of the MAC Protocol or by inserting a priority rule into Article XIX of the MAC Protocol. The Study Group decided to defer its decision on how to resolve conflicts between the scopes of the MAC and Rail Protocols until the second meeting, and requested that the Secretariat gather information on the likelihood of MAC equipment falling under the definition of railway rolling stock under the Luxembourg Rail Protocol.

Accessions

26. Professor von Bodungen noted that in negotiating the Luxembourg Rail Protocol a decision had been made not to allow the registration of discrete interests in railway engines. Professor von Bodungen noted that while there were circumstances where railway engines were removed and put into other trains, this practice was not widespread enough to warrant including a separate provision allowing for the registration of an interest in railway engines in the Luxembourg Rail Protocol. Professor von Bodungen distinguished this from the longstanding practice in the aviation industry of separate financing for aircraft engines.

27. The Study Group concluded that unless there was widespread commercial practice of separate financing of accessions to MAC equipment, then accessions would not be separately registerable under the MAC Protocol.

Merged collateral

28. The Study Group concluded that merged collateral was not an issue unique to the financing of MAC equipment and there was no need to diverge from the approach of the previous Protocols on this issue.

Inventory

29. The Study Group discussed whether the MAC Protocol should contain additional provisions dealing with the financing of equipment being held on inventory. Mr Deschamps suggested that the Protocol should not create a distinction between inventory and equipment. Professor Riffard suggested that there would be no need for the Protocol to deal with inventory unless it intends to explicitly provide for protection for buyers in due course.

30. The Chair noted that for an interest in equipment to be registerable under the Protocol the equipment itself must be uniquely identifiable. As such, unfinished inventory was unlikely to be uniquely identifiable and thus interests thereto could not be registered under the MAC Protocol. The piece of equipment would become registerable once it became uniquely identifiable by serial number or other means.

31. The Study Group concluded that there was no need for the MAC Protocol to contain additional provisions covering inventory.

Insolvency

32. The Study Group discussed which insolvency provisions from the previous Protocols should be included in the MAC Protocol. Mr Deschamps suggested that the lack of utilisation of Alternative B under the Aircraft Protocol did not necessarily mean that it should be excluded from the MAC Protocol. Professor Mooney agreed, noting that the Protocol should not only include Alternative A, as Alternative A is a very creditor friendly option and other options should be available to states.

33. Professor von Bodungen promoted Alternative C as a compromise solution that took into account the Continental European approach to insolvency and encouraged the Study Group to consider including Alternative C in the MAC Protocol.

34. Professor Veneziano queried whether the MAC Protocol could contain an additional provision that covers reorganisation proceedings. The Chair noted that the MAC Protocol should only diverge from the precedents in previous Protocols where there was a very strong rationale to do so.

35. The Chair queried whether there may be special insolvency regimes applicable in the agricultural industry, noting that in some civil law jurisdictions natural persons engaged in agriculture are not covered by insolvency law and are instead subject to the normal laws of the civil code. Mr Deschamps noted that in Canada the agricultural insolvency law reflected the spirit of Alternative B. Mr Dubovec noted that in the United States, there are special provisions in Chapter 12 of the US Bankruptcy Code dealing with 'family farmers', but they typically deal with farmers who would not be using high value equipment.

36. The Study Group concluded that Alternatives A, B and C should be kept in the draft MAC Protocol (as consistent with the Luxembourg Rail Protocol), pending further discussion of this issue at the second meeting. The Study Group requested that the Secretariat conduct further research on special insolvency regimes for farmers or other enterprises likely to own MAC equipment and report back to the Study Group before the next meeting.

Fixtures

37. Mr Brydie-Watson introduced the topic, noting that this issue will arise where MAC equipment requires physical affixation to real property and thus could be treated as a fixture under domestic law. Professor Riffard noted that there are two sub-issues that need to be considered: (i) the definition of physical fixation under the Protocol, and (ii) how to determine priority in such situations as between an international interest in mobile equipment and a national interest in immovable property. Professor von Bodungen noted that under German law, simply placing a moveable asset onto land (rather than affixing it to the land) may subject the asset to an interest in the land.

38. Professor Mooney stated that all the MAC Protocol could viably achieve would be to create a general rule on fixtures which would apply when a piece of MAC equipment over which an international interest has been registered has become so associated with an immovable object that it cannot function independently. Professor Riffard noted an interrelated consideration would be whether the object could be moved without damage to the land/immovable property.

39. Mr Bazinas noted that under the UNCTIRAL Legislative Guide on Secured Transactions, the national security law governing immovable objects has priority over interests in mobile objects and that no loss of individual identity of the mobile object need occur for this priority of the national interest to come into effect. Mr Bazinas further noted that a party can remove an affixed mobile object; however the party may have an obligation to compensate the mortgagee under the domestic immovable property register for any damage incurred in removing the affixed object.

40. Professor Veneziano noted that more information was required in relation to (i) how many types of equipment in the HS list suggested by the private sector actually require some degree of affixation and (ii) how priority between interests in mobile affixable property and domestic interests in immovable property is currently resolved under domestic legal regimes. Professor Riffard drew a distinction between the term 'fixtures', which implies permanent or long-term affixation, and 'attachment', which is the term used in the UNCITRAL Legislative Guide and applies to equipment that can be temporarily attached to immovable property. Professor Riffard queried whether MAC equipment that is designed to be permanently affixed to immovable property should be excluded from the Protocol.

41. Professor Mooney suggested that a simple mechanism could be included in the Protocol that defers to domestic law governing security interests over immovable property, and that this could be drafted alongside a model domestic law that properly facilitates priority between an international interest in affixed/attached mobile equipment and a domestic interest in immovable property. The Study Group noted that this potential approach had merit, but cautioned against making a final decision on this matter before additional research had been conducted.

42. Professor von Bodungen suggested that this issue could be further examined by considering the history and drafting of Article 29(2) of the Convention, which deals with installations.

43. The Study Group concluded that further research is required to determine the best mechanism for dealing with fixtures under the MAC Protocol, noting that 'soft law' solutions may be open to ratifying states which complement potential Protocol text.

Public service exception

44. Mr Brydie-Watson introduced the topic, noting the different approaches to the public service exception in Article XXV of the Luxembourg Rail Protocol and Article XXVII of the Space Protocol. The Study Group agreed to adopt a cautious approach to this issue, given the difficulty involved in its negotiation in the previous Protocols. Professor von Bodungen noted that the defined terms in Article I of the Aircraft Protocol also contain a type of public service exception by excluding the Protocol's application to objects used in military, customs or police services.

45. The Chair highlighted the important distinction between objects that actually provide a public service covered under the Rail and Space Protocols, and objects that are used in performing functions that are of significant public interest. For example, construction equipment may be used in the building of important infrastructure projects that are central to the public interests of a country; however the construction equipment itself is not providing a continuous public service. The Chair noted that he was not aware of any national examples where the agricultural, construction or mining industries would be considered to be public services.

46. Professor Riffard queried whether a public service exception would be necessary in the MAC Protocol context. Professor Veneziano noted that the most common types of MAC industry-related projects of national importance would have a degree of public financing and as such would be unlikely to be financed by private financing agreements covered by the Cape Town

Convention. Professor De Las Heras noted that in Spain these types of projects would often be financed by public-private partnership arrangements. Mr Bazinas noted that this was also the case in Greece, noting that the building of the Athens metro was done by a public-private partnership.

47. The Study Group agreed that it was not necessary to include a public service exception article in the draft MAC Protocol, on the basis that MAC industries do not provide continuous public services. The Study Group agreed that this issue should be sufficiently covered by a note in the text of the revised annotated Protocol.

Application to sales

48. The Study Group discussed whether the MAC Protocol should extend to sales, in conformity with the approaches in the Aircraft and Space Protocols. Professor Mooney noted the Aircraft Protocol was extended to sales because of the existing practice in the industry of registering sales on the title registry. Mr Boger noted that registration of sales was also important in the aircraft industry because of the very high value of aircraft and that payment was often made to a seller before the sale.

49. Professor von Bodungen explained the approach taken in Article XVII of the Luxembourg Rail Protocol in relation to notices of sale. Article XVII of the Luxembourg Rail Protocol allows for the registration in the International Registry of notices of sale covering railway rolling stock. However, such registration of a notice of sale is for information purposes only and does not have any legal effect under the Convention or Protocol. Professor von Bodungen noted that the benefits of this approach were that it allowed for more accessible information on the sales of equipment to be provided, and it generated additional fees for the International Registry. Professor Mooney agreed, noting that there appeared to be very few downsides to the Luxembourg Rail Protocol approach.

50. Mr Deschamps noted that while the registration of notices of sale under the Luxembourg Rail Protocol did not have any legal effect under the Convention or Protocol, it would likely have an effect under domestic law in jurisdictions where knowledge of a prior interest in an asset can affect the priority rules relating to that asset. Mr Deschamps noted that this approach is still adopted in several common law countries. Professor De Las Heras stated that knowledge of a prior interest may affect priority rules under the Spanish civil law. Professor Riffard noted that the French legal system has a new rule where knowledge of a prior interest is irrelevant.

51. Professor Veneziano queried whether the Luxembourg Rail Protocol approach was appropriate for adoption in the MAC Protocol. Mr Deschamps supported Professor Veneziano's view, noting that the purpose of the Protocol was to implement the Convention for a certain type of equipment, not assist domestic law rules. Professor Mooney noted that the policy logic behind the International Registry system set out in the Cape Town Convention was that knowledge of an earlier interest was an irrelevant consideration in determining priority. As such, allowing the registration of a notice of sale that could affect domestic priority rules based on knowledge encouraged a countervailing legal policy. However, Professor Mooney also stressed that this policy logic issue was minor and should not prevent the adoption of the Luxembourg Rail Protocol approach.

52. The Chair noted that not adopting either the Luxembourg Rail Protocol approach or the Aircraft/Space Protocol approaches on this issue would constitute a new, third approach. To diverge from all precedents was a significant decision that could only be warranted by a very strong policy and legal rationale for doing so.

53. The Study Group decided that the approach in Article XVII of the Luxembourg Rail Protocol should be adopted in the MAC Protocol and requested that the Secretariat conduct further research on how such notices of sale affect domestic law priority rules.

De-registration and export request authorisation

54. The Study Group discussed whether it was necessary to include an Article in the MAC Protocol on 'de-registration and export request authorisation', as consistent with Article XIII of

the Aircraft Protocol. Professor von Bodungen noted that the two separate de-registration and export powers are two of the most powerful instruments in the Aircraft Protocol. Professor von Bodungen further noted that a similar export power exists in Articles VII(5) and IX(8) of the Luxembourg Rail Protocol which provide that subject to any applicable safety laws are regulations, a Contracting State shall ensure that the relevant administrative authorities shall expeditiously cooperate with and assist a creditor in procuring the export and physical transfer of equipment from the territory in which it is situated where the debtor has defaulted on their obligations or have become insolvent.

55. The Chair noted that there seemed to be no need for an explicit de-registration provision for the MAC Protocol, as countries did not have title registries for MAC equipment in the same way they do for aircraft. The Chair further noted that there was no clear 'relevant administrative authority' for MAC equipment from which a party might require assistance. Professor Veneziano cited page 405 of the Luxembourg Rail Protocol commentary which stated that the reference to 'relevant administrative authority' did not intend to effect or refer to export/customs rules. The Study Group agreed that this approach was correct.

56. The Study Group considered that while a single relevant administrative authority could not be identified, assistance from authorities other than export/customs authorities might be required in moving certain types of equipment within a territory. The Study Group concluded that the approach in Article VII of the Luxembourg Rail Protocol should be retained for the MAC Protocol, however more detail on the meaning of 'relevant administrative authority' should be provided in the Official Commentary to the MAC Protocol.

Modification of assignment provisions

57. The Study Group discussed whether it was necessary for the MAC Protocol to modify the assignment provisions in the Cape Town Convention, as consistent with Article XV of the Aircraft Protocol and Article XXIV of the Space Protocol. Mr Deschamps noted that Article XV of the Aircraft Protocol modified Article 33 of the Cape Town Convention, by adding the additional requirement of obtaining a debtor's consent in writing before an assignee may enforce the debtor's duty to make payment or give other performance. Professor Mooney noted that this additional requirement was included in the Protocol because it reflected the established practice in aircraft financing and that the airline industry did not want to have it removed. Professor von Bodungen noted that the Luxembourg Rail Protocol did not follow this approach as such a practice was not followed in the rail industry.

58. The Study Group concluded that the precedent in the Luxembourg Rail Protocol was to be followed and there was no need for the MAC Protocol to modify the original assignment provisions in the Cape Town Convention.

7. Practical and drafting issues

59. The Study Group discussed a first draft of the MAC Protocol prepared by the Secretariat.

Article I – Defined terms

60. The Study Group discussed how agricultural, construction and mining equipment should be defined in the Protocol. In particular, the Study Group considered whether the definitions of agricultural, construction and mining equipment should include specific high value criterions. The Study Group agreed that the classes of equipment could be defined by reference to a list of HS codes, however more information on the operation of the HS was required before this definition could be fully agreed upon.

Article II – Application of the Convention

61. The Study Group agreed to adopt paragraphs 1 and 2, as consistent with the previous three Protocols, and to delete paragraph 3.

Article III – Derogation from the application of Protocol

62. The Study Group agreed with the drafting of the provision.

Article IV – Representative capacities

63. The Study Group agreed with the drafting of the provision.

Article V – Identification of agricultural, mining or construction equipment

64. The Study Group agreed to follow Option B in the draft Protocol, modelled on Article V of the Luxembourg Rail Protocol.

Article VI – Application of the Protocol to certain categories of equipment

65. As consistent with the Study Group's decision to allow parties to opt out of certain classes of equipment (agricultural, construction and mining), the Study Group decided to adopt paragraph 2 of the draft Protocol and eliminate paragraphs 1 and 3. The Study Group noted that Article VI could possibly be moved to Article II or Article XXVIII.

66. The Chair noted that a subsequent declaration to opt out of a class of equipment from a state after the Protocol had already entered into force in relation to that class of equipment in that state would be in effect a denunciation of that class of equipment.

Article VII – Choice of Law

67. The Study Group agreed with the drafting of the provision.

Article VIII – Modification of default remedies provisions

68. The Study Group discussed whether the MAC Protocol should modify the default remedies provisions of the Convention, as consistent with the Luxembourg Rail Protocol. Professor Riffard noted that the language 'commercially reasonable manner' may be problematic in the agricultural context, as the agricultural sector in some countries will be considered as a civil rather than commercial sector. The Chair noted that this terminology had been used in previous Protocols and advised against altering the language. Professor Mooney agreed, advising not to deviate from the approach in the Luxembourg Rail Protocol. The Study Group agreed to adopt Option B, as consistent with the drafting of the Luxembourg Rail Protocol.

Article IX – Modification of provisions regarding relief pending final determination

69. The Study Group agreed to the drafting of the provision. The Study Group suggested that Article VIII (6) of the Rail Protocol should be added as paragraph 6 of the Article.

Article X – Remedies on insolvency

70. The Study Group agreed to provisionally include Options A, B and C, as consistent with the Luxembourg Rail Protocol. Professor von Bodungen noted that the drafting error in relation to Article B in the Official Commentary of the Luxembourg Rail Protocol should be rectified in the future Official Commentary of the MAC Protocol.

Article XI – Insolvency Assistance

71. The Study Group agreed with the drafting of the provision, noting an error in the cross-reference in paragraph 2 which should refer to Article X rather than Article XIII.

Article XII – Debtor Provisions

72. The Study Group agreed with the drafting of the provision, noting that the reference to the buyer in paragraph 1(a) should be removed to make it consistent with the policy of the non application of the MAC Protocol to sales.

Article XIII – The Supervisory Authority and the Registrar.

73. The Study Group agreed with the drafting of the provision. The Study Group noted the difficulty in identifying a Supervisory Authority for the MAC Protocol due to the diverse nature of the classes of equipment (agriculture, construction and mining). The Study Group discussed the possibility of either the World Customs Organisation or the International Finance Corporation being the Supervisory Authority. The Study Group requested that the Secretariat do further research to provide a full list of possible candidates for Supervisory Authority.

Article XIV – First regulations

74. The Study Group agreed with the drafting of the provision.

Article XV – Identification of agricultural, construction and mining equipment for registration purposes

75. The Study Group discussed whether to adopt the differing approaches in the Rail and Space Protocols. Professor von Bodungen noted that a lesser standard can apply to the identification of equipment between the parties (Article V), but the identification standard must be higher for registration purposes. The Chair noted that the HS would not resolve this identification issue.

76. The Study Group decided to adopt Option 1 as modelled on the Luxembourg Rail Protocol. The Study Group suggested that paragraphs 1(c) and 2-5 could be removed, as they are specific to railway rolling stock.

Article XVI – Designated entry points

77. The Study Group discussed whether designated entry points were required for the MAC Protocol. Professor De Las Heras noted that Spain has a personal property registry and it may be easier for Spain to ratify the Protocol if designated entry points are allowed. The Study Group agreed with the drafting of the provision.

Article XVII – Additional modifications to Registry provisions

78. The Study Group discussed whether the issue of the liability of the Registrar should be delegated to the regulations, as provided for in Option 2 paragraph 5 (modelled on the Space Protocol). Mr Deschamps noted that there was a disagreement on the implementation of the insurance provisions in the Aircraft Protocol and it took time to resolve the issue. Professor von Bodungen noted that the Luxembourg Rail Protocol set the liability of the Registrar at 5 million Special Drawing Rights in any calendar year, which is significantly lower than the liability of the Registrar in the Aircraft Protocol. Professor von Bodungen suggested that the liability should be set in the Protocol itself, as it is an important issue.

79. The Chair suggested that the latest version of the Aircraft Protocol Regulations be considered in approaching this issue. The Study Group decided to defer its decision in relation to Article XVII until the next meeting and requested that the Secretariat do further work on this issue in advance of the next Study Group meeting,

Article XVIII – Waivers of sovereign immunity

80. The Chair noted that this Article was more relevant in the Aircraft and Rail Protocols because many airlines and railways are state owned. The Chair queried whether it was necessary to include this provision in the MAC Protocol. The Study Group decided to tentatively retain the provision and defer the decision to the Committee of Governmental Experts.

Article XIX – Relationship with other International Instruments

81. The Study Group discussed whether it would be appropriate to address the overlap between the Rail and MAC Protocols in this Article. Mr Deschamps recommended that this issue be

dealt with in the Article pertaining to scope rather than in this Article which governs conflict priority rules. Professor De Las Heras expressed a preference for dealing with the issue in the conflict priority Article.

82. The Study Group decided to retain the drafting in paragraph 1 of the Article, and decided to defer its decision in relation to the overlap with the Luxembourg Rail Protocol until the next meeting.

Article XX – Signature, ratification, acceptance, approval or accession

83. The Study Group agreed with the drafting of the provision.

Article XXI – Regional Economic Integration Organisations

84. The Study Group agreed with the drafting of the provision.

Article XXII – Entry into Force

85. The Study Group discussed entry into force of the Protocol, noting the different approaches adopted by the Aircraft Protocol and the Rail and Space Protocols. The Study Group discussed a new alternative under which the Protocol would only come into force for a class of equipment (agricultural, construction and mining) once four parties had ratified the Protocol for that class of equipment (by not opting out of it). Professor von Bodungen noted that entry into force should also be contingent on the operation of the Registry, as consistent with the approaches in the Rail and Space Protocols.

86. The Study Group concluded that the MAC Protocol should enter into force for each specific class of equipment (agricultural, construction and mining) once that class had received four ratifications, and the Registry was operational. The Study Group decided that drafting from both Options B and C should be adopted to achieve this policy.

Article XXIII – Territorial units

87. The Study Group decided to adopt Option 1, as modelled on the Luxembourg Rail Protocol. The Study Group noted paragraph 5(c) which deals with 'administrative authorities' may need to be omitted in the future, depending on whether such administrative authorities exist in the MAC industries.

Article XXIV – Declarations relating to certain provisions

88. The Chair noted that the approach to declarations in the Cape Town Convention and its Protocols is unnecessarily complicated and that this Article may be superfluous. The Study Group recommended that the approach to declarations in the MAC Protocol be simplified.

Article XXV – Declarations modifying the Convention or certain provisions thereof

89. The Study Group recommended that the approach to declarations in the MAC Protocol be simplified.

Article XXVI – Reservations and declarations

90. The Study Group recommended that the approach to declarations in the MAC Protocol be simplified.

Article XXVII – Subsequent declarations

91. The Study Group decided to adopt Option 1, which is modelled on the Aircraft and Rail Protocols. The Study Group decided to tentatively retain Option 2 and defer the decision to the Committee of Governmental Experts.

Article XXVIII – Withdrawal of declarations

92. The Study Group decided to adopt Option 1, as consistent with the approach in Article XXVII.

Article XXIX - Denunciations

93. The Study Group agreed with the drafting of the provision. The Study Group decided that an additional paragraph should be added to this Article to reflect that a subsequent decision to opt out of a class of equipment under Article VI after ratification will have the effect of a denunciation.

Article XXX – Review conferences, amendments and related matters

94. The Study Group agreed with the drafting of the provision.

Article XXXI – Depository and its functions

95. The Study Group agreed with the drafting of the provision.

Additional Article on notices of sale

96. The Study Group decided to add an additional Article to the draft Protocol modelled on Article XVII of the Luxembourg Rail Protocol.

97. The Study Group requested that the Secretariat update the draft Protocol, taking into account the Study Group's decisions, and to redistribute an updated draft prior to the next Study Group meeting.

8. Next meeting

98. The Study Group discussed possible dates and locations for the next Study Group meeting. The Study Group decided that the Secretariat should confer with the Chair Mr Bollweg in confirming arrangements for the next meeting.

ANNEX I - LIST OF PARTICIPANTS

MEMBERS OF THE STUDY GROUP

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ANNEX II - AGENDA

- I. Opening of meeting and introductory remarks
- II. Adoption of the agenda and organisation of the meeting (see “Annotations” below)
- III. Development of the MAC Protocol
- IV. Study Group methodology and consultation strategy
- V. Results of preliminary consultations by Dr Dubovec
- VI. Legal analysis
 - (i) Scope of the MAC Protocol
 - a. High value criterion
 - b. Mobile criterion
 - c. Unique identifiability criterion
 - d. Multi-purpose equipment
 - e. Severability
 - f. Multiple purpose equipment
 - (ii) Accessions
 - (iii) Merged Collateral
 - (iv) Inventory
 - (v) Insolvency
 - (vi) Interaction with domestic secured transaction regimes
 - (vii) Additional issues
- VI. Practical issues
 - Identification of MAC equipment in a registration
 - Access to the international registry
- VII. Organisation of the second meeting of the Study Group
- VIII. Closing of meeting