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Committee of Governmental Experts
First session
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**DAILY REPORT
FOR
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(prepared by the UNIDROIT Secretariat)

1. The Chair opened the fourth day of the first session of the Committee of Governmental Experts (hereinafter the "Committee") for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (hereinafter the "MAC Protocol") at the Headquarters of the Food and Agriculture Organisation of the United Nations in Rome, on 23 March 2017 at 9:14 a.m.
2. The Chair presented a summary to the Committee of the progress made on the third day of the session.
3. A participant queried the outcome of the proposal made on the third day for the Preamble of the preliminary draft Protocol to explicitly note that the application of the MAC Protocol was restricted to high value, mobile and uniquely identifiable equipment. The Chair responded that the proposal was not adopted by the Committee, however the matter might have received further consideration by the Amendments Working Group during its session on the previous day.

Agenda Item 4: Consideration of the preliminary draft Protocol (continued)

4. The Chair noted that the Committee should not consider all of the Articles under Chapter VI (Final Provisions) of the preliminary draft Protocol, and should instead focus on those which had a direct impact on the substantive provisions of the Protocol.

Article XXV (continued from previous day)

5. The Chair reopened the floor for discussion on Article XXV. He suggested that the issues be divided up into several subjects and that the Committee should first consider the relationship between Article XXV and Article XXXII (6). He explained that Article XXXII paragraph 6 protected the position of the holder of an international interest in MAC equipment where the Harmonised System (HS) code covering the equipment was removed from the Annexes to the Protocol. The Chair suggested that the Committee debate the merits of adding a paragraph 7 to Article XXXII which indicated whether the transitional periods specified in Article XXV (as applied by a Contracting State making a declaration under Article 60 of the Convention) would restart when new HS codes were added to the Annexes.

6. One delegation identified three scenarios under which the transitional provisions in Article 60 of the Convention could apply to the MAC Protocol: (i) the date of entry into force of the MAC Protocol in a Contracting State; (ii) the implications of new HS codes being added to the Annexes where the Protocol was already in force for a Contracting State; and (iii) where a Contracting State chose to subsequently adopt an additional Annex after the Protocol had already entered into force in that State in relation to other Annexes. Several delegations agreed with this formulation of the issues posed by Article XXV.

7. Some delegations suggested that these issues could be addressed by introducing an amendment to Article XXV that amended the definitions found in Article 60 (2)(a) of the Convention. Other delegations voiced their support for the Chair's suggestion to add an additional paragraph to Article XXXII. Delegations disagreed on whether a Contracting State should be bound by the same transitional period in all three circumstances. Some delegations were concerned that allowing for the use of new transitional periods to apply in relation to the addition of new HS codes to the Annexes would add an unnecessary element of complexity to the Protocol.

8. One delegation suggested that a compromise solution could be reached by adding the phrase "renews automatically unless a State determines otherwise" to Article XXV.

9. *The Chair summarised the discussion. He noted that there was consensus that where a new HS code was added to the Annexes to the MAC Protocol, the transitional period referred to in Article XXV would begin again. He further noted that there was consensus that the transitional period related to the addition of additional HS codes to the Annexes should be the same transitional period applied in relation to entry into force of the Protocol. The matter was referred to the Drafting Committee for further consideration.*

10. The Chair then queried whether the effective date of the Protocol should also reflect the fact that some Annexes could be adopted at a time in the future, which would be the effective date of the additional Annexes.

11. One delegation noted its support for such an approach, which was consistent with the previous comments as well as the decision in relation to the transitional period just made by the Committee.

12. *The Chair summarised the discussion by referring the matter to the Drafting Committee, and indicated that the transitional provisions should also reflect the need for a new effective date in specific circumstances.*

Article XXVI

13. The Chair opened the floor for discussion of Article XXVI.

14. One delegation recalled the Committee's conclusion in relation to the approach proposed on the first day of the session whereby declarations under Articles VII and X should not be permitted on an Annex-by-Annex basis.

15. *The Committee agreed with this policy and referred the matter to the Drafting Committee.*

Article XXVII

16. The Chair opened the floor for discussion of Article XXVII.

17. One delegation queried whether Article XXVII allowed Contracting States to make different declarations under the Convention and the Protocol in relation to territorial units. He noted that such an approach could lead to uncertainty in the application of the Convention and Protocol to territorial units within a federal state. The Chair noted the issue, however he responded that the Committee should not address issues of public international law at this time and should instead focus on substantive issues of legal policy.

18. *The Committee adopted Article XXVII as proposed in the preliminary draft Protocol*

Article XXVIII

19. The Chair opened the floor for discussion of Article XXVIII.

20. One delegation noted that Article XXVIII contained an erroneous reference to "Article XXXIX" (a non-existent provision in the preliminary draft Protocol), and should instead refer to Article XXIX. *The matter was referred to the Drafting Committee.*

21. One delegation asked the Reporter to clarify what the practice was in previous protocols in relation to this Article. The Reporter responded that Article XXVIII was a standard provision contained in all three previous Protocols. The Secretary General noted where the corresponding provisions were located in the previous Protocols.

Article XXIX

22. The Chair opened the floor for discussion of Article XXIX.

23. One delegation suggested that by preventing subsequent declarations under Article 60 of the Convention, Article XXIX(1) could preclude the policy position adopted by the Committee in relation to Article XXV. Several other delegations agreed with this interpretation of Article XXIX.

24. *The Committee agreed that Article XXIX should not restrict the amendment of Article XXV and XXXII. The matter was referred to the Drafting Committee.*

Article XXX

25. The Chair opened the floor for discussion of Article XXX.

26. The delegation noted that Article XXX contained a similar restriction in relation to declarations under Article 60 of the Convention to that which had just been considered in relation to Article XXIX. The Chair responded that the same policy concern that related to the restriction of subsequent amendments under Article XXIX did not apply to restrictions of withdrawals under Article XXX.

27. *The Committee adopted Article XXX as proposed in the preliminary draft Protocol.*

Article XXXIII

28. The Chair opened the floor for discussion of Article XXXIII.

29. The Secretary General explained that the role of UNIDROIT as the Depository under the Cape Town Convention was becoming an ever-increasing cost burden for the Institute. He noted that in contrast to the right of the Supervisory Authority to recover costs associated with its role under the Convention, the Depository had no such right to cost recovery. He noted that the role of Depository encompassed the duties of receiving instruments of ratification, assessing ratifications to ensure all

mandatory declarations were made, advising States on requirements related to the deposit of an instrument of ratification and liaising with Embassies. He concluded that the role was occupying approximately one-third of the time of a Senior Officer at the Institute.

30. *The Committee adopted Article XXXIII as proposed in the preliminary draft Protocol.*

Preamble

31. The Chair opened the floor for discussion on the preamble of the MAC Protocol.

32. One delegation noted that the preamble referred to the economic benefits related to the MAC Protocol. He queried whether any further work had been done on the possible economic benefits of the MAC Protocol following the analysis conducted by the Center for the Economic Analysis of Law (CEAL) in 2014.

33. The Secretariat explained that the initial economic analysis conducted by CEAL had reached somewhat uncertain conclusions, as the analysis was conducted before the scope of the MAC Protocol had been determined. The Secretariat noted that further work was being done to conduct a more comprehensive economic analysis based on the scope of the preliminary draft Protocol as delineated by the HS codes contained in the Annexes.

34. One delegation directed the attention of the Committee to the economic issues paper produced by the US Department of Commerce (UNIDROIT 2017 - Study 72K - CGE1 - Doc. 10). He explained that the production of MAC equipment was a growing industry, and that the sale of MAC equipment was forecasted to grow at an annual rate of 5.7% globally. He noted that the MAC Protocol would also create jobs in many different areas including aftersales services, the supply chain, administration and law.

35. One delegation queried whether a reference to the criterion of unique identifiability should be added to the Preamble. The suggestion was supported by other delegations. Another delegation proposed that paragraph 3 should make specific reference to how the HS codes listed in the Annexes to the Protocol determined the Protocol's scope.

36. *The Committee referred the matter to the Drafting Committee, with the suggestion that any changes be placed in square brackets for future consideration.*

Proposal on Articles I and X (Study 72K – CGE – W.P. 5)

37. A delegation submitted proposed amendments to Articles I and X for the consideration of the Committee. The delegation explained that the amendments to Article I related to better describing the equipment that the Protocol applied to. In relation to Article X, it was explained that the proposed provision was designed to protect creditor's rights where MAC equipment subject to an Article X insolvency proceeding had become associated with immovable property. The Committee thanked the delegation for their proposed amendments.

38. One delegation queried whether the phrase "object used in activities related to agricultural production" in the proposed amendments to Article I had the effect of requiring MAC equipment to be considered on an object-by-object basis in determining whether it was used in activities related to agricultural production, or whether the phrase required the consideration of whether a particular type of equipment was used in agricultural production. The delegation that made the proposal explained that the phrase contemplated an object-by-object consideration, but was open to a change in that position.

39. Several delegations emphasised that the scope of the preliminary draft Protocol should be defined solely by reference to the HS codes listed in the Annexes. It was queried whether the proposed change to Article I intended to affect the scope of the Protocol. The proposing delegation responded that the proposed amendment did not intend to displace the use of HS codes to define the scope of the Protocol, it merely intended to give more clarity in describing the equipment that the Protocol applied to in a general sense.

40. Several delegations noted that the proposed amendments to Article X were controversial in balancing the interests of creditors and the interests of owners of immovable property in relation to insolvency proceedings.

41. One delegation noted that while it was clear that the scope of the Protocol was defined with reference to the HS codes contained in the Annexes, it was not clear what criteria the Study Group and the private sector Working Group had established to determine which HS codes should be included in the Annexes to the preliminary draft Protocol. One observer responded that the 36 HS codes contained in the Annexes were the product of 2 years of extensive research, data gathering and consultation with private industry groups. He noted that over 100 HS codes were initially proposed by the private sector, and that the Study Group had significantly narrowed that original list to the 36 HS codes now contained in the Annexes by applying the Article 51 criteria of high value, mobile and uniquely identifiable.

42. One participant noted that the Cape Town Convention was a specialised regime which applied to narrow and specific categories of equipment that satisfied the Article 51 criteria. He explained that the Convention and its Protocols should not undermine the general secured transaction laws of States. He noted that he did not believe that the HS codes listed in the Annexes to the preliminary draft Protocol achieved their purpose of narrowing the scope of the MAC Protocol to high value, mobile and uniquely identifiable equipment. Several delegations responded that they were confident that the use of the HS codes appropriately restricted the scope of the preliminary draft Protocol to high value, mobile and uniquely identifiable equipment.

43. *The Chair concluded that the proposed amendments to Article I intended to increase the transparency of the Protocol by describing the types of MAC equipment it covered, but did not intend to alter the use of the HS codes contained in the Annexes to the Protocol to define the scope of the Protocol. He noted that there was consensus that the HS codes should be the sole criteria for determining the scope of application of the Protocol to MAC equipment. He noted that intersessional work should be done on improving how the Protocol generally described its application to MAC equipment, as an issue of transparency rather than scope. He concluded that the proposed amendments to Article I in their current form were not agreed to by the Committee.*

44. *The Chair concluded that the proposed amendment to Article X raised important issues in relation to the interaction between Articles X and VII of the Protocol, however it was not agreed to by the Committee in its current form.*

Report by the Working Group on Amendment Provisions

45. The Chair asked the delegations which participated in the Working Group on Amendments (hereinafter the “Amendments Working Group”) to present a report on the progress made at its meeting on 22 March.

46. The Chair of the Amendments Working Group explained the progress made by the Working Group to the Committee. She explained that the Working Group set out to identify certain policy concerns and then consequently find solutions to address them.

47. She explained that two policy decisions that framed the discussions of the Working Group: (i) the scope of the MAC Protocol should be determined solely by the HS codes contained in the Annexes to the Protocol and (ii) selection of HS codes for inclusion in the Annexes should be conducted with reference to the Article 51 criteria of high value, mobile and uniquely identifiable.

48. The Chair of the Amendments Working Group then identified three issues in Article XXXII that required consideration: (i) that changes in the Harmonised System made by the World Customs Organisation (WCO) could affect the scope of the MAC Protocol; (ii) that Contracting States were not afforded sufficient control over changes to the HS codes made by the WCO that affected the scope of the Protocol and (iii) that Article XXXII as currently drafted allowed for the expansion of the scope of the MAC Protocol in relation to the addition of new HS codes that covered equipment that may not satisfy the Article 51 criteria of high value, mobile and uniquely identifiable.

49. The Chair of the Amendments Working Group then explained that a new provision had been drafted to replace Article XXXII. She explained that the Working Group decided that paragraphs 1 and 2 of Article XXXII did not require redrafting, although paragraph 2(e) should be removed.

50. She explained that the proposed provision would provide for a new process following a revision of the HS by the WCO as they occurred every five years (or other such times as the circumstances may require) whereby the Depository would present to Contracting States possible amendments to the Annexes which either: (i) reflected changes to the HS codes already contained in the Annexes and also changed the scope of the MAC Protocol, (ii) reflected technical changes to the HS codes already contained in the Annexes that did not change the scope of the Annexes, or (iii) inserted new HS codes covering new types of MAC equipment into the Annexes. Each proposed amendment to the Annexes would require approval by a two-thirds majority of Contracting States to become effective. Additionally, Contracting States could choose to opt-out of individual amendments that passed the two-thirds majority threshold, if they related to: (i) changes to the HS codes already contained in the Annexes that changed the scope of the MAC Protocol or (ii) inserted new HS codes covering new types of MAC equipment into the Annexes. Technical changes to the HS codes already contained in the Annexes could not be opted-out of if they passed the two-thirds majority threshold required to become effective.

51. One delegation praised the efforts of the Amendments Working Group and noted that it had made good progress towards ensuring the amendment procedure for the HS Codes in the Annexes to the MAC Protocol were both nimble and compliant with general principles of treaty law. Another delegation congratulated the Amendments Working Group on ensuring that States had better control over the scope of the MAC protocol.

52. The Chair posed two questions to the Committee in relation to the new Article governing amendments proposed by the Amendments Working Group: (i) whether the Committee was satisfied with the text of the proposal, keeping in mind that it would be further polished by the Drafting Committee; and (ii) should the text replace the current Article XXXII or be kept as an alternative for debate at the second session of the Committee of Governmental Experts.

53. Many delegations expressed their support for the Article proposed by the Amendments Working Group. Several delegations indicated a preference for the new Article to replace the existing Article XXXII in the preliminary draft Protocol.

54. *The Committee approved the text of the Article proposed by the Amendments Working Group, subject to its consideration by the Drafting Committee. The Committee agreed that the Article proposed by the Amendments Working Group replace Article XXXII in the preliminary draft Protocol.*

Interpretative rules applying to Harmonised System codes

55. The Reporter noted that the international agreement that established the HS contained its own system for the interpretation of HS codes and had its own process for determining whether an HS code applied to a certain type of equipment.

56. *The Chair noted that it was implicitly understood that the interpretive rules applying to the HS codes contained in the Annexes to the Protocol were those contained in the international agreement establishing the HS. He requested that the Committee to further consider whether the issue should be expressly provided for in the text of the preliminary draft Protocol.*

Proposal for the creation of an intersessional Working Group on registration criteria

57. The Chair noted that in comments submitted on the preliminary draft Protocol, one delegation had proposed that an intersessional Working Group be created to consider issues related to the criteria for the registration of MAC equipment in the international registry. The proposing delegation explained that the Working Group would communicate via email and teleconference as necessary.

58. The Secretary-General noted that the Secretariat would be willing to provide organisational and administrative support for the intersessional Working Group, should it be established.

59. *The Committee agreed to establish an intersessional Working Group on registration criteria. The Committee requested that the Secretariat provide administrative support to the Working Group. The Chair noted that delegations interested in joining the Working Group should indicate their interest to the Secretariat.*

Potential candidates for the role of Supervisory Authority of the MAC Protocol

60. The Chair opened the floor for discussion regarding international organisations that could be potential candidates to perform the role of Supervisory Authority of the MAC Protocol.

61. One delegation queried whether the World Bank Group could be considered as a possible candidate for Supervisory Authority. He suggested that should the World Bank Group have any interest in the possibility, it could consider the matter further and report back to the Committee at its second session.

62. A participant noted that the organisation had a strong interest in the MAC Protocol project, as it had the potential to significantly improve access to credit in the agricultural, construction and mining sectors in developing countries. He noted that the possibility of the organisation performing the role of Supervisory Authority was not a matter that could be currently commented upon, however it would be discussed further and reported on at the Committee's second session.

63. An observer expressed support for the consideration of the World Bank Group for the role of Supervisory Authority. It was noted that the private sector would be willing to assist the World Bank Group to further explore the possibility.

64. One delegation suggested that further research be undertaken to identify other potential candidates for the role of Supervisory Authority. He noted that the research should focus on existing international bodies involved in the agricultural, construction and mining sectors.

65. *The Committee requested that the Secretariat undertake further research to identify appropriate international organisations that could perform the role of Supervisory Authority for the MAC Protocol. In addition, the Committee invited the World Bank Group to further consider the*

possibility of it performing the role of Supervisory Authority and to report back to the Committee at its second session.

Number of Contracting States required for entry into force of the Protocol

66. The Chair noted that the consideration of this issue had been deferred during the discussion of Articles XXIII and XXXII. The Chair recalled that the Secretary-General had previously explained that due to a variety of factors, the Convention and each of its Protocols required different numbers of Contracting States for entry into force (the Convention itself required three, the Aircraft Protocol required eight, the Luxembourg Rail Protocol required four and the Space Protocol required ten).

67. The Secretary-General noted that this matter was discussed by the Study Group. He noted that five Contracting States for entry into force was initially chosen due to the ability for Contracting States to opt-out of the application of the MAC Protocol in relation to specific Annexes. He explained that if a lower number had been chosen and Contracting States exercised their right to opt-out of specific Annexes, it could have allowed the MAC Protocol to potentially enter into force even though each Annex had only one Contracting State. The Secretariat further explained that the Study Group had decided against allowing different entry into force dates for different Annexes in the preliminary draft Protocol, as such an approach would have created significant complexity.

68. *The Committee agreed to further discuss the number of Contracting States required for entry into force of the MAC Protocol at the Committee's second session. The Committee decided to put the word "fifth" in Articles XXIII and XXXII in square brackets to denote the issue.*

69. The Chair concluded the session at 2:44 p.m.