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

Opening of the session

1. The Chair opened the second day of the second 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 3 October 2017 at 9:09 a.m.
2. The Chair recalled the presentations and discussions from the first day of the session and summarised his conclusions.
3. The Chair opened the floor for nominations for the role of Vice Chair for the Africa region. One delegation nominated Mr Hazem Fawzy from the delegation of Egypt. Another delegation supported the nomination. *The Committee confirmed Mr Hazem Fawzy as Vice Chair for the Africa region.*
4. The Chair opened the floor for nominations for the role of Vice Chair for the Asia region. One delegation nominated Mr Liu Keyi from the delegation of the People's Republic of China. *The Committee confirmed Mr Liu Keyi as Vice Chair for the Asia region.*
5. A number of delegations expressed their condolences to the delegation of the United States for the incident that had occurred in their country on the previous day.

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

Article I (continued)

6. The Chair reconvened the discussion on Article I of the preliminary draft MAC Protocol (hereafter the "Protocol"). He began with the proposal made during the previous day to add a definition for "equipment" which would replace "Agriculture, Construction or Mining Equipment" in the Protocol in order to simplify the text. He explained that in various instances the Protocol used both the terms "agricultural, construction or mining equipment" and "agricultural, construction and mining equipment".

7. Different views were expressed by delegations as to whether the new definition of “equipment” would be an appropriate and useful mechanism for streamlining the text of the Protocol.

8. *The Committee referred the matter to the Drafting Committee, with instructions to consider (i) whether a definition of “equipment” should be added to streamline the text, and (ii) whether the terms “agricultural, construction or mining equipment” and “agricultural, construction and mining equipment” were used consistently and appropriately throughout the Protocol.*

9. *The Committee adopted the definitions of “Agricultural Equipment”, “Construction Equipment”, and “Mining Equipment” as proposed in Article I(2)(a),(b) and (h) of the Protocol.*

10. The Chair reintroduced the proposal from the previous day to add a definition for “judicial interpretation” into Article I of the Protocol.

11. One delegation noted that while it would be beneficial for Contracting States to have a more precise definition of “judicial interpretation”, he suggested the matter be dealt with in the Official Commentary. Another delegation proposed that Article XXXII(2)(b) should refer to “interpretation” rather than “judicial interpretation”, as the interpretation of the text more generally was at issue and not only in relation to judicial interpretation.

12. *The Committee agreed that the issue of defining both “judicial interpretation” and “interpretation” should be dealt with in the Official Commentary to the Protocol.*

13. The Chair reintroduced the proposal from the previous day to specify the types of persons being referred to in Article I(2)(c) and (d), which related to the definitions of “guarantee contract” and “guarantor” respectively. One delegation reminded the Committee that the proposal advocated for the inclusion of the terms “natural and legal” when using the term “person” in the respective paragraphs.

14. One delegation noted that while they understood the policy behind the proposal, the corresponding definitions in the previous Protocols to the Cape Town Convention did not address the issue, and suggested that the MAC Protocol should adopt the same approach. Other delegations agreed with this proposition.

15. One delegation restated that the addition of the phrase “natural and legal” before the word “person” would exclude unincorporated associations which often conducted businesses in the MAC sector. Other delegations added that the proposal would also exclude several other legal relationships commonly used in their jurisdictions.

16. The Reporter stated that the Official Commentaries to the previous Protocols explained that the word “person” should be interpreted to apply to all types of entities.

17. *The Chair concluded that there was consensus that no change should be made to the Protocol, and that the issue should be addressed in the Official Commentary. The Committee adopted the definitions of “guarantee contract” and “guarantor” as proposed in Article I(2)(c) and (d) the Draft Protocol.*

18. *The Committee adopted the definition of “Harmonised System” as proposed in Article I(2)(e) the Protocol.*

19. *The Chair noted that the definition of “immovable-associated equipment” as proposed in Article I(2)(f) the Protocol should be revisited during the discussion of Article VII.*

20. *The Committee adopted the definition of "Insolvency-Related Event" as proposed in Article I(2)(g) the Protocol.*

21. *The Committee adopted the definition of "Primary Insolvency Jurisdiction" as proposed in Article I(2)(i) the Protocol.*

Article II

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

23. A representative from the MAC Working Group proposed an additional rule on the application of the MAC Protocol to items held for sale by dealers. The MAC Working Group proposed that an opt-out provision be added to the Protocol, which allowed States to exclude inventories held for sale by dealers from the application of the Protocol. In cases where States exercised the opt-out, dealers would be able to register their inventories under national law rather than in the international registry. It was explained that this would allow for the practice of inventory financing to continue in States where existing arrangements already functioned efficiently.

24. The Reporter noted that the issue of inventory was not addressed in the previous Protocols, as the nature of the assets covered by the previous Protocols were not typically kept as inventory for sale by dealers.

25. Several delegations queried whether the proposal would apply only to charges, or also to conditional sales agreements, title retention agreements and floating mortgages. It was also queried whether the proposal should apply not only to sales, but also to leasing agreements.

26. An observer noted the importance of inventory financing and agreed that the matter should be directly addressed in the Protocol. He noted that several jurisdictions did not allow for inventory financing due to its lack of specificity in defining collateral. He further noted that the proposal should also take into account the treatment of receivables that resulted from the sale of inventory and the treatment of warehouse receipts. The Reporter clarified that the Cape Town Convention only applied to receivables in extremely limited circumstances, and that the inventory proposal did not relate to the treatment of warehouse receipts.

27. One delegation asked for further clarification of the difference between the terms "Contracting State" and "States party". The Reporter clarified that a "Contracting State" was a State which had consented to be bound by the treaty, whether or not the treaty had entered into force; and a "State party" was a State which had consented to be bound by the treaty and for which the treaty was in force.

28. The Committee resumed after a consultation break. One delegation took to the floor to explain their understanding of the MAC Working Group's proposal on inventory. He explained that the opt-out provision proposed would only apply to equipment held in inventory for sale. The exclusion would only apply to dealers of MAC equipment and would operate such that inventories would be registered under national law, whereas subsequent sales of that inventory could be subject to international interests under the MAC Protocol. He explained that the normal priority rules on the Convention would still apply, which meant that a later in time international interest in MAC equipment would take priority over an earlier inventory interest. He further explained that the opt-out was beneficial in scenarios involving two dealers, as it would prevent a subsequent dealer registering their interest in the international registry to obtain a priority interest over an earlier inventory interest that had not been registered. The delegation also noted that under the opt-out, the types of security interests that could be used by dealers in relation to inventory would depend on the applicable national law. He concluded that the proposed approach would allow existing inventory financing

practices to continue, whilst ensuring that end-users would still be able to use the MAC Protocol to obtain finance.

29. The Chair enquired whether this opt-out mechanism would be exercised by States rather than individual dealers, and whether a definition for “dealer” would have to be included in the Protocol. The delegation responded that the mechanism applied only to States and that further consideration should be given to the inclusion of definitions for “dealer” and “inventory”.

30. One delegation queried how the proposal would affect the rights of a purchaser of MAC equipment that had been held as inventory, and whether the buyer’s position would be affected by Article 29(3) of the Cape Town Convention. A delegation responded that Article 29(3) allowed a purchaser to acquire an interest in an object free from an unregistered interest, even if it had actual knowledge of the unregistered interest. It was noted that under the opt-out, a subsequent purchaser would be able to acquire an interest in MAC equipment free of any prior inventory interest protected under domestic law. It was further noted that the subsequent purchaser would still acquire the interest, even if it had actual knowledge of the existing inventory interest and the domestic law would not normally allow the purchaser to take free in such circumstances. A number of delegations queried whether this was the correct policy approach.

31. Several delegations expressed concern with respect to the rights of creditors who offered finance to dealers for inventory on the basis of conditional sale agreements. It was noted that under the opt-out, the registration of an international interest by a subsequent purchaser would have priority over the prior creditor’s interest in the inventory under the domestic law.

32. A number of delegations noted that an opt-out procedure should only be employed as a last resort when trying to solve a problem in an international instrument. Other delegations noted that the inventory issue would be an appropriate subject for an opt-out clause, as it would allow the continuation of existing efficient inventory financing practices in some jurisdictions, and improve inventory financing practices in others.

33. Several delegations expressed support for the proposal but indicated that it would need to be considered in further detail once a draft text had been prepared.

34. The Secretary General a.i. queried whether the connecting factor to determine the applicability of the inventory provision should be considered under Article 4 or Article 60 of the Cape Town Convention. Some delegations favoured Article 4 determined the connecting factor, whereas other delegations suggested that Article 60 should determine the connecting factor. *The Chair referred the matter to the Drafting Committee for further consideration, as it was felt that the variation between the two options were not substantive in nature.*

35. One delegation queried whether the Protocol applied to unfinished MAC equipment and allowed for the registration of assets in bulk. The Chair noted that the applicability of the Protocol was determined by the HS codes in the Annexes to the Protocol, and that Article V of the Protocol required objects to be individually identifiable. Another delegation noted that unfinished equipment would be within the scope of the Protocol if it was covered by an HS code in the Annexes and could be individually identified.

36. *The Chair summarised that there was consensus on the need for an article addressing inventory financing. The Chair also noted that there was general support for an opt-out mechanism that would allow States to declare whether to apply the Protocol to inventory. The Committee requested that the Drafting Committee prepare an opt-out article on inventory, and to suggest where such a clause should be located in the Protocol. The Committee further requested that the Drafting Committee consider whether the article should also apply to title reservation agreements and leasing*

agreements. The Drafting Committee was further requested to clarify in the provision that it applied to a person selling equipment in the ordinary course of business.

37. One delegation proposed that an additional sentence be added to Article II(3) that reflected the substance of paragraph 64 of the Legal Analysis (UNIDROIT - Study 72K - CGE2 - Doc. 4), Paragraph 64. It was suggested that the following text be added as a separate sentence at the end of Article II(3): "in the event a Contracting State opts out of a particular annex where a type of equipment is included in that annex and another annex, the type of equipment would continue to be covered by the MAC Protocol in that Contracting State regardless of its final use".

38. It was noted that the intention of the proposed additional text was to provide an explicit reference to an underlying policy that was already implicitly understood to apply under the Protocol.

39. Several delegations noted that the additional text reflected their understanding of an implicit rule in the Protocol, and expressed support for its express inclusion in Article II(3).

40. *The Chair noted that the proposal for the addition of text to Article II(3) had been accepted and referred the matter to the Drafting Committee.*

Article III

41. *The Committee adopted Article III as proposed in the Protocol.*

Article IV

42. *The Committee adopted Article IV as proposed in the Protocol.*

Article V

43. Two delegations proposed minor drafting changes to Article V. One delegation referred to their proposal in Study 72K – CGE2 – Doc. 14 that the word "the" in the second line of Article V(1) (appearing after the words "description of") should be deleted as not all of the equipment would necessarily be dealt with at the same time. Another delegation suggested that the phrase "agricultural, construction and mining equipment" in Article V(2) should be replaced with "agricultural, construction or mining equipment".

44. *The Committee adopted Article V in substance and referred both proposals to the Drafting Committee.*

Annexes

45. The Secretariat explained the methodology used by the Study Group to determine whether an HS code was suitable for inclusion in the Annexes to the Protocol. It was explained that the MAC Working Group had provided the initial list of codes for consideration, and the necessary data to examine the code. The Study Group then applied the following criteria to determine whether an HS code should be added to the Annexes: (i) whether the equipment under the HS code was used almost exclusively in the MAC sectors, (ii) whether the majority of the equipment under the HS code was of sufficiently high value and was separately financeable in practice, (iii) whether the equipment under the HS code possessed individual serial numbers and (iv) whether the HS code applied to assets that were already covered under other Protocols to the Cape Town Convention.

46. Several delegations noted that private industry in their jurisdictions had suggested additional codes to be considered for inclusion in the Annexes to the Protocol. One delegation noted that the additional codes suggested by their domestic industry were outlined in Study 72K – CGE2 – Doc. 15. Another delegation suggested that HS code 843020 be added to Annex I, HS codes 847410 and

847420 be added to Annex II and HS codes 842831, 843039 and 847989 be added to Annex III. Other delegations noted that they did not have the technical knowledge regarding the equipment covered by the newly suggested HS codes to determine whether it was appropriate to include them in the Annexes to the Protocol.

47. *The Chair concluded that all States that wished to add new codes to the Annexes should provide their proposed additional codes to the Secretariat. The Secretariat would then review the codes in close consultation with the MAC Working Group, to determine whether they should be included. On completing the review process, the Secretariat would then form a recommendation for consideration by negotiating States as to whether specific additional codes should be added to the Annexes to the Protocol.*

48. One delegation queried whether the application of the Protocol could be extended to HS codes that covered low value equipment in circumstances where (i) the equipment had a significant economic value in its productive use or (ii) where the cumulative value of a number of different types of equipment used together was high. It was noted that while such an approach had merit, the burden of individual registration in the international registry of many low value types of equipment used together might place a large practical burden on parties to a secured transaction.

49. A number of delegations requested clarifications to the meanings of the headings used in the HS and the level of precision achieved by utilising the HS. The Chair noted that these matters were addressed in Study 72K – CGE2 – Doc. 4 and Study 72K – CGE2 – Doc. 5. The Secretariat noted that it was available to assist States in improving their understanding of the operation of the HS, and how it was used to define the scope of the Protocol.

50. A number of delegations queried whether parts were covered by the Protocol, and whether HS codes specifically applying to parts should be included in the Annexes. An observer responded that parts incorporated into complete types of equipment were covered by the definitions of “agricultural equipment”, “construction equipment” and “mining equipment” in Article I(2) of the Protocol.

51. One delegation noted that certain HS codes in the Annexes were not listed in numerical order. The Secretariat confirmed that the HS codes listed in the Annexes were intended to be in numerical order. *The matter was referred to the Drafting Committee.*

52. The Reporter queried whether the Protocol should explicitly provide that the rules of interpretation of the WCO System were applicable to the HS codes in the Annexes to the Protocol. An observer confirmed the Reporter’s understanding of the issue, and suggested that the existing definition of the HS in Article I(2) might sufficiently address the issue.

53. *The Committee approved the Annexes to the Protocol, subject to the changes referred to the Drafting Committee.*

Article VI

54. One delegation queried whether there was an inconsistency in Paragraph 2 of the French text of Article VI. *The Chair referred the matter to the Drafting Committee.*

55. *The Committee adopted Article VI in substance.*

Article VII

56. The Chair noted that Article VII had been the subject of significant debate during the Committee's first session. He invited all delegations who had made written submissions with proposed changes to Article VII to present them to the Committee.

57. One delegation presented their proposal as outlined in Study 72K – CGE2 - Doc. 10. He noted that the proposal had the following key goals: (i) to limit the rule described in Alternative A to instances where there would not be irreparable physical damage to the immovable associated property, (ii) to ensure that domestic law that deemed equipment to no longer be considered a movable asset would not affect an international interest in immovable associated equipment and (iii) to explicitly state that international interests in MAC equipment could still be created after it became associated with an immovable asset. Another delegation noted their support for the changes suggested, subject to amendments provided in Study 72K – CGE2 - Doc. 14. In particular, it was noted that the test of irreparable physical damage should apply both to damage to the immovable property and the equipment.

58. Several delegations expressed their support for the policy rationale behind the proposal in Study 72K – CGE2 - Doc. 10. However, a number of delegations raised concerns regarding the interpretation of "irreparable damage". Some delegations proposed that the term should be understood to refer to circumstances under which the removal of the equipment would cause damage to the equipment and/or the immovable to the extent that the equipment's removal would be "economically unfeasible". Another delegation proposed the use of the term "constructive loss", which the Reporter noted was a term commonly used in the satellite insurance industry. One delegation proposed that "irreparable damage" be replaced with an obligation on the party removing the equipment to compensate all damages incurred as part of the act of repossession of immovable associated equipment. Yet another delegation proposed the use of "without deterioration" instead of "irreparable loss". Another delegation proposed the term "reasonableness" be added to the text.

59. *The Chair concluded that there was consensus that the effect of Alternative A needed to be limited. However, he surmised that the Committee had not agreed on how the limitation would operate or be formulated. He postponed further discussion on the issue until the following day.*

60. A delegation presented their proposal to add the words "in accordance with the law of the State where the immovable property is situated" after the words "individual legal identity" to Paragraph 4 of Alternative B.

61. *The Committee accepted the proposal relating to Alternative B Paragraph 4 and instructed the Drafting Committee to refine its wording.*

62. The Chair concluded the session at 16:49 PM.