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**MAC Protocol  
Committee of Governmental Experts  
Second session  
Rome, 2 – 6 October 2017**

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**DAILY REPORT  
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*(prepared by the UNIDROIT Secretariat)*

**Opening of the session**

1. The Chair opened the third 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 4 October 2017 at 9:26 a.m.
2. The Chair summarised his conclusions on the discussions so far on the preliminary draft MAC Protocol.

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

Article VII (Continued)

3. The Chair reconvened the discussion on the proposal made on the previous day to amend Alternative A of Article VII of the Protocol.
4. Various views were discussed on whether “irreparable physical damage” was an appropriate standard for the limitation of the application of Alternative A. One delegation suggested that damage, no matter how severe, could always be repaired. Another delegation suggested that damage could be irreparable but not severe, such as a scratch on a marble column. Several other drafting alternatives were suggested, including “irreparable harm” and “deterioration”. One delegation proposed the definition “irreparable physical damage is damage that renders the equipment definitively out of order”. Another delegation suggested the test should be “substantial damage” or “damage which would impair the normal use of the immovable property”. One delegation suggested that the concept of “reasonableness” be used. The terms “anti-economic” and “burdensome” were also proposed.
5. One delegation noted that Article XVII(3) of the Space Protocol dealt with the physical removal of a space asset which was attached to another space asset in the following way: “a creditor may not enforce an international interest in a space asset that is physically linked with another space asset so as to impair or interfere with the operation of the other space asset.”

6. A number of delegations suggested that the standard should be whether the removal of the equipment would cause damage to either the equipment or the immovable property to the extent that it would render its removal economically unfeasible. It was suggested that this standard could be reflected by the phrase “unreasonable physical damage”.

7. Other delegations suggested that the Protocol should provide a compensation mechanism for owners of the immovable for any physical damage caused by the removal of the MAC equipment. A number of delegations voiced their opposition to this proposal, noting that a system of compensation for damage caused by removal was beyond the scope of the Protocol.

8. One delegation noted that the consideration of irreparable physical damage under Alternative A would be a similar test to the consideration of loss of individual legal identity under Alternative B. A number of delegations distinguished the tests by stating that the irreparable physical damage test under Alternative A would be a question of fact, whereas the loss of individual legal identity test under Alternative B would be a question of law.

9. *The Chair summarised the discussion, and stated that there was consensus that the application of Alternative A should be limited to circumstances where the physical removal of the equipment would have a detrimental effect on the immovable. The Chair requested that the Drafting Committee change the proposed irreparable damage test to one based on an objective element, such as unreasonable damage, or reasonable conduct in a commercial context. The Committee agreed that it should be a factual test rather than a legal test. The matter was referred to the Drafting Committee for further consideration.*

10. The Chair recalled the Committee’s decision on the previous day to refer a proposal for additional text to Paragraph 4 of Alternative B to the Drafting Committee.

11. The Reporter recommended adding the words “any laws of the State where the immovable property is situated” to Alternative C to replace the phrase “any domestic laws”. He suggested that such an addition would add clarity to the meaning of the text.

12. *The Committee accepted the change to Alternative C proposed by the Reporter and referred the matter to the Drafting Committee.*

#### Article VIII

13. One delegation made reference to their comments on Article VIII(5) in Study 72K – CGE2 - Doc. 10. They noted that the obligations imposed on administrative authorities within States by Article VIII(5) were unclear. They suggested that in the absence of clarity in relation to the obligations imposed and the types of administrative authorities that would be affected by Article VIII(5), that the paragraph should be deleted.

14. The Reporter noted that the assistance of administrative authorities in the physical transfer and export of equipment was important in the Aircraft Protocol context. He explained that administrative authorities performed a crucial role in the execution of Irrevocable Deregistration and Export Request Authorisations (IDERA) under the Aircraft Protocol. He concluded that there might not be the same urgent need to impose a similar obligation on States in the MAC Protocol context.

15. The Secretariat explained that further research had been undertaken intersessionally on the meaning of “administrative authorities”, which was contained at paragraphs 138 – 147 of the Legal Analysis in Study 72K – CGE2 – Doc. 4.

16. Several delegations noted that Article VIII(5) imposed a particularly high burden in Federal States. It was also noted that exportation would be a more commonly exercised remedy in the aircraft sector than in the MAC sectors. One delegation suggested that Article VIII(5) was unnecessary because administrative authorities would provide assistance to creditors in the normal course of performing their governmental functions.

17. One delegation noted the distinction between State authorities and administrative authorities and suggested that the Committee consider using the term “State authorities” instead. Another delegation proposed using the term “public authorities”. Other delegations responded that retaining the term “administrative authorities” was desirable insofar as it made it clear that judicial authorities fell outside the scope of the Article.

18. A number of delegations opposed the deletion, on the basis that the assistance of administrative authorities in the physical transfer and export of equipment was required in both the Aircraft and Luxembourg Rail Protocols. It was suggested that the removal of the paragraph would have the implication that administrative authorities of the Contracting States were not required to assist creditors under the MAC Protocol to the same extent they were required to assist creditors under the earlier Protocols.

19. The Chair noted that no consensus had been reached on the matter, and suggested that Article VIII(5) should be put in square brackets, to allow States to consider it further and to submit written comments for future consideration.

20. *The Committee decided to place Article VIII(5) in square brackets. The matter was referred to the Drafting Committee.*

21. One delegation noted that the Protocol made reference to the assistance of administrative authorities in procuring the physical transfer and export of equipment in other circumstances in Article IX(6), Article X Alternative A(8) and Article X Alternative C(9). The delegation suggested, consistent with the Committee’s decision to insert square brackets around Article VIII(5), that other Articles that referred to administrative authorities should also be placed in square brackets.

22. *The Committee decided to place Article IX(6), Article X Alternative A(8) and Alternative C(9) in square brackets. The matter was referred to the Drafting Committee.*

#### Article IX

23. One delegation queried whether the reference to Article VIII(1) in the first line of Article IX(6) was correct. It was clarified that the reference was correct, on the basis that the reference to Article 13 of the Cape Town Convention in line 3 of Article IX(a) had erroneously referenced a different provision in previous Protocols, however the MAC Protocol had not reproduced that error.

24. One delegation further explained that Article IX(6) contemplated a two stage process. First, a creditor had to be granted a remedy as interim relief under Article 13 of the Cape Town Convention. Second, where such relief had been granted and the administrative authorities in a Contracting State had been notified, Article IX(6)(a) required administrative authorities in the Contracting State to assist with the physical transfer and export of the equipment within 7 calendar days.

25. *The Chair concluded that after discussion the Committee was of the view that there is no need to amend the reference to Article VIII(1) in the first line of Article IX (6).*

#### Article X

26. *Consistent with the approach in Article XIII(5), the Committee reaffirmed its decision to place Alternative A(8) and Alternative C(9) in square brackets. The Committee adopted the rest of Article X.*

#### Article XI

27. One delegation queried whether the term “Contracting State” needed to be repeated twice in the first two lines of Article XI(2). *The Chair referred the matter to the Drafting Committee.*

#### Article XII

28. *The Committee adopted Article XII as proposed in the Protocol.*

29. The Chair opened the floor for general questions in relation to Chapter 2 of the Protocol.

30. One delegation queried whether the Protocol contained a mechanism for addressing non-compliance by a Contracting State in fulfilling its obligations under the Protocol. The Reporter clarified that no such mechanism existed in the Protocol or in the previous Protocols to the Cape Town Convention. He concluded that the absence of such a mechanism in the Aircraft Protocol had not been detrimental to the overall effectiveness of the Cape Town Convention system.

#### Article XIII

31. Some delegations queried whether it would be beneficial for the Protocol to allow for different supervisory authorities and different international registries for the registration of agricultural, construction and mining equipment separately. It was suggested that such an approach would make it be easier to identify a supervisory authority for each of the three registries. It was further suggested that the Protocol should not expressly require three separate supervisory authorities and international registries, but that the text could contemplate more than one.

32. A number of delegations opposed the proposal on the basis that having multiple supervisory authorities and international registries would have the consequence that interests in equipment that could be used in each of the agricultural, construction and mining sectors would need to be registered in all three international registries. The MAC Working Group noted that this would be a significant burden on parties both in making registrations and searching for existing registrations. An observer noted that there were substantive costs associated with the operation of the Aircraft Protocol’s International Registry, and that maintaining three separate international registries under the MAC Protocol would likely multiply the operational costs by three, which might render the international registries financially unviable.

33. *The Chair noted that there was no support for the proposal to allow for multiple Supervisory Authorities and multiple International Registries under Article XIII.*

34. One delegation queried how the international registry would be established and financed.

35. The Reporter noted that Article 17(2) of the Cape Town Convention provided how the international registry would be established and financed. He explained that the operation of Article 17(2) of the Convention was in part modified by Article XVII of the MAC Protocol. He further explained that the costs of establishing and operating the international registry would be financed through the international registry’s registration and search fees. An observer shared its experience in relation to the operation and maintenance of the International Registry established under the

Aircraft Protocol and stressed that the Supervisory Authority approved the annual budgets of the International Registry to ensure that it operated on a cost recovery basis.

36. *The Committee adopted Article XIII as proposed in the Protocol.*

#### Article XIV

37. One delegation proposed adding the phrase “in accordance with Article XXIII” to the end of the text in Article XIV. *The Chair referred the matter to the Drafting Committee.*

38. Another delegation proposed that instead of being a standalone provision, Article XIV should be an additional subparagraph of Article XIII. *The Chair referred the matter to the Drafting Committee.*

#### Article XV

39. While noting its importance in previous Protocols to the Cape Town Convention, one delegation questioned whether the inclusion of Article XV in the MAC Protocol was necessary.

40. An observer explained some of the practical consequences of having a designated entry points Article in the Aircraft Protocol. He noted that in certain instances, domestic entry points charged substantial registration fees, and did not always act promptly or enter data correctly when making registrations in the International Registry. He explained that States might prefer to have a designated entry point as it would allow them to keep track of transactions within their jurisdictions, although the same outcome could be achieved through coordination directly between the State and the International Registry.

41. *The Chair noted that discussion of Article XV would be resumed on the following day.*

42. Comments received by the Secretariat from Colombia were presented to the Committee for consideration. It was further noted that Colombia excused itself for not being in a position to be represented at the session.

43. The Chair concluded the session at 15:44 pm.