



**EN**

**MAC Protocol  
Study Group  
3<sup>rd</sup> meeting  
Rome, 19-21 October 2015**

UNIDROIT 2015  
Study 72K – SG3 – Doc. 5  
Original: English  
December 2015

## **Report**

(Prepared by the UNIDROIT Secretariat)

### **I. Opening**

1. The 3<sup>rd</sup> session of the MAC Protocol Study Group was opened by *Professor Anna Veneziano*, Deputy Secretary-General of UNIDROIT at the seat of UNIDROIT in Rome.
2. *Mr William Brydie-Watson*, Legal Officer at UNIDROIT, provided a general overview of activities since the 2<sup>nd</sup> session held in April 2015, and the current status quo of the MAC Protocol Project. He highlighted that an updated draft of the Protocol was presented to the Governing Council in May 2015 and a consultation paper circulated to the UNIDROIT Correspondents which asked for input on certain legal queries relating to insolvency in the agricultural sector and the treatment of security interests in 'fixtures'. Additionally, he noted the MAC Protocol session held at Cape Town Academic Conference on 10 September 2015 in London chaired by Professor Gabriel and commented on by Professor Charles Mooney and the consultations with the World Customs Organization (WCO) and International Finance Corporation (IFC).
3. Mr Brydie-Watson also noted the significant amendments applied to the structure of the Preliminary List of HS Codes, the draft Protocol as well as the issues paper. Three distinct reports on agricultural insolvency, restrictions on enforcement of security interests against agricultural equipment as well as registration and titling of MAC equipment were submitted to the Secretariat by Mr Marek Dubovec, Senior Research Attorney at the National Law Centre for Inter-American Free Trade.
4. *Mr Phil Durham*, Partner at Holland and Knight LLP and executive board member of the MAC Protocol Working Group, gave an overview of what had been done in regards to data collection and consultation with private stakeholders and noted that additional HS Codes had been added to the list of preliminary codes, partially as a result of consultation with the German industrial sector as conducted by Mr Ole Böger, the District Court Judge from Federal Ministry of Justice and Consumer Protection.

## I. Legal Analysis

### *The scope and use of Harmonised System*

5. *Mr Brydie-Watson* introduced the topic, and noted that the World Customs Organization (WCO) had agreed to assist UNIDROIT on the MAC Protocol project. *Mr Brydie-Watson* highlighted that the WCO identified two other international instruments that have their scope defined by the Harmonised System (HS), the Agreement on Trade in Civil Aircraft and the Energy Charter Treaty (ECT).

6. *Mr Ed de Jong*, Senior Technical Officer from the WCO, delivered a detailed presentation on how the HS mechanism operates and how the system could be used by the prospective MAC Protocol in identifying the types of equipment which would eventually be covered by the Protocol. He noted that the current 2012 edition of the HS Code was in force and would be valid up to the end of 2016, where necessary amendments would take place, if required, given that the WCO had a review cycle of every five to six years. He suggested that the Study Group should take into account the 2017 edition as the basis for its deliberations on the scope.

7. *Mr de Jong* explained that the HS mechanism was utilised in the Agreement on Trade in Civil Aircraft. The covered goods were free from customs duties, and identified both through a description clause but also with additional references to HS codes. Similarly, the Energy Charter Treaty provided for energy products to be free from duties, yet the scope was quite broad and also included a reference to the HS codes.

8. He noted that trade statistics on the global trade of goods under the HS system were monitored and kept by the United Nations Statistics Division. Contracting parties to the HS system were required to publish their statistics and there were currently 153 contracting parties. The HS system was also used by other international organisations to monitor goods which were potentially tradable.

9. Every contracting party was a member of the HS Committee which held meetings twice a year. The HS Committee discussed classifications in order to reach uniform solutions. Where needed due to changes in trade volume, problems in classification or emerging new technologies, the nomenclature was subject to an amendment. If a product is of low volume in global trade, on the basis of the figures received from COMTRADE of the UN which reports on the HS and its six-digit system, which indicate that the trade volume of a particular product is lower than the defined economic threshold, then it could be subject to deletion. He noted that quite a few amendments had taken place in 2012 and 2017, such as amendments for the agricultural sector, whereby suggestions were also submitted by the Food and Agriculture Organization of the UN (FAO).

10. *Mr de Jong* concluded his speech by noting the existence of an alternative classification system, namely the GS1 mechanism, as utilised by NATO, where the manufacturers are clearly identified and where they retain discretionary power to come up with their own code. However, *Mr de Jong* noted that it was not a uniform system and was not likely to be a suitable alternative system for the MAC Protocol project.

11. *Professor Charles Mooney*, University of Pennsylvania, referred to the Agreement on Trade in Civil Aircraft and noted that the actual use of items falling in the scope of that Agreement was an important feature of its operation, and asked whether the ECT also looked at the 'actual use'. He also noted that the MAC Protocol starting position was that if a certain object was covered by the Protocol, then it was covered, regardless of its actual use. *Mr de Jong* replied that the actual use was not taken into account for the ECT. *Mr Michel Deschamps*, Partner at McCarthy Tetrault, noted that because actual end use was not a determinant in deciding whether an international interest was effective in a piece of equipment under the MAC Protocol, the mere inclusion of equipment in an

Annex, would render an international interest in it as registerable in the international registry. Therefore, in cases where a country opted out of a certain Annex, but such equipment remained included under other annexes, it would still be possible to create and register a valid international interest in that equipment as long as the HS code included under other annexes covered that specific code.

12. *Mr Alejandro de la Campa*, Global Product Leader from the International Finance Corporation, World Bank Group, queried how the HS system dealt with the deletion of a code covering a certain product due to a lack of sales, yet the product was still traded among countries on the secondary sales market (i.e. agricultural equipment). *Mr de Jong* replied that if there was a specific subheading on a certain commodity and global trade on such commodity falls below the threshold, the subheading could be deleted yet the commodity would still be covered by a residual six-digit code subheading. They would be traded but not subject to its previous separate nomenclature.

13. *Mr Dubovec* referred to the commonly used 'other' subheading and inquired whether there were any specific criteria for an asset to fall under such a category. *Mr de Jong* replied by mentioning that subheadings could be divided by industry, or for function, or alternatively the 'other' subheading referred to objects that were not elsewhere covered.

14. *Professor Benjamin von Bodungen*, of Counsel at Bird & Bird LLP, addressed the issue of classifying new types of equipment under an existing HS code, by referring to the 5-year review system and the rules of interpretation. He asked who would apply the rules of interpretation to classify the new equipment under one or other HS code, and whether there was a mechanism for conflict resolution. *Mr de Jong* replied by mentioning that normally the rules of interpretation were effective in accommodating any new entry and preventing disputes, and the fourth rule of '...goods that are most akin' applications were quite rare (namely it had been applied for filter cigarettes). He noted that industrial goods could always be classified.

15. *Mr Böger* queried whether it was possible to not apply a wholesale HS code and drop some of the elements, noting that many of the HS codes contained 'including parts' references. He asked whether it would be possible to make a variation to the definition and modify a HS code to apply to equipment 'without parts,' and include such more narrowly defined codes under the draft MAC Protocol. *Mr de Jong* pointed out that the MAC Protocol was free to modify its application of the HS system and would be free to expressly exclude its application to parts.

16. *Mr de la Campa* inquired whether there is a way to identify individual items within the HS code with more specific numbering. *Mr de Jong* replied that the HS was a global six digit system and that the EU provided more detailed codes up to eight digits within its nomenclature system, whereas the US system, for certain HS codes, included 10-digit nomenclatures. Depending on the national systems, 8 and 10-digit nomenclatures could differ.

17. *Professor Jean-Francois Riffard*, Universite de Clermont-Ferrand, noted that the core question of the MAC Protocol was whether it could effectively cover the types of MAC equipment appropriate for inclusion under its scope, without indirectly covering additional unwanted types of equipment. *Mr de Jong* noted that the classification of parts was often difficult, as parts could be parts of different objects. He noted that there were often separate 6 digit HS codes that covered parts for specific types of machines and that the HS system included specific rules concerning parts.

18. *Professor Mooney* referred to the GS1 and manufacturer identification system and noted that since the MAC Protocol would require 'unique identifiability' for the objects to be subject to registration in the international registry, such codes identifying the manufacturer could be relevant.

19. *Professor Riffard* mentioned that engines were not considered parts under the HS system to the extent that they had their own 6 digit codes. He asked whether an engine was covered exclusively under its own 6 digit code or whether it could also be covered under the 6 digit codes of the equipment itself. *Mr de Jong* mentioned that both cases were possible. He further elaborated that a diesel engine could come under the heading of machines if it was already installed in the relevant completed machine. If certain engines were to be covered by the MAC Protocol, references could be made to the headings concerning those engines. *Mr de Jong* further explained that parts to specific machines were classified under their own specific HS code, which related to the HS code covering the specific machine, whereas parts which were utilised for general use were classified under their own different headings.

20. *Mr de la Campa* queried whether the HS system was radically altered during its review process every five to six years. *Mr Brydie-Watson* referred to paragraph 13 of issues paper, and noted that amendments were generally not radical changes to the system, and that 72% of all HS codes had never been changed by any amendment. In relation to the HS codes covered by the preliminary list, among the amendments which took place in three review cycles of 2002, 2007 and 2012, only six changes were made, and they were structural changes rather than substantive ones.

21. *Mr Dubovec* queried whether the general trade volume of engines was higher than the completed machines which engines form part of. *Mr de Jong* highlighted that for precise statistical data the COMTRADE database should be referred to.

22. *Mr Deschamps* drew attention to the fact that even when certain items were being separately financed, it did not mean that they should come within the scope of an international instrument. He noted that engines were separate objects under the Aircraft Protocol, but it remained to be seen whether they should be considered separate objects under the MAC Protocol as well.

23. *Mr Brydie-Watson* referred to the amendment procedures in the Agreement on Civil Aircraft whereby a council of state's party had to approve modifications to the agreement as it related to changes in the HS system. *Mr de Jong* clarified that the signatories to the agreement at the time had adopted a protocol of amendment of the product coverage annex. Similarly, the ECT held a Conference of Parties in December 2014, where they also adopted their amendments to the annexes with reference to the HS Codes. *Mr de Jong* noted that because these two international instruments did not exclusively define their scope through reference to the HS system, amendments relating to the HS system did not change the scope of the agreement.

24. *Mr Brydie-Watson* highlighted the fact that a change to the HS Code would result in a direct change to the scope of the MAC Protocol and noted that a protocol amending the agreement (as in the case of Civil Aircraft Agreement) appeared to be a formal treaty action which would require the usual formal treaty process involving all States. The starting point of the previous Study Group meeting was a rule which would allow the supervisory authority to release annotations to the annex which identifies the HS codes noting where they had been changed due to HS Code reclassifications in the interest of avoiding formal treaty action.

25. *Professor Mooney* posed a hypothetical case where a tractor was included in the list in an annex to the MAC Protocol, however subsequently it's trade volume decreases resulting in the machine being included in a HS code covering 'other' equipment, which was unlikely to be covered by the MAC Protocol. Under this hypothetical, the MAC Protocol would trace such an item to the new category and future interests in that type of MAC equipment would no longer be covered under the Protocol.

26. *Mr Brydie-Watson* referred to the preliminary approach adopted by the Study Group on page 31 of Doc. 3 (Fourth Preliminary Draft), Annex I, Para 2 and 3 concerning the question of modifications and amendments to the HS Code and its effect on the MAC Protocol. He highlighted that when required, a Supervisory Authority could adopt an addendum to realign any equipment

type either with correct numbering and title (which would not substantially alter the scope of the Protocol), or alternatively to include additional harmonised system codes (new codes that require the expansion of the scope) with substantive similarity to types of equipment already included, which in case of latter would require formal treaty action.

27. *The Deputy Secretary-General* noted that one possible avenue of dealing with amendments was to allow the supervisory authority to decide on assessments, insofar as they related only to structural changes to the HS system. *Professor Mooney* suggested that an alternative approach for the addition of new HS codes could be that the supervisory authority would suggest changes, and a threshold of States would be needed to veto the additional item which would render their inclusion impossible.

28. *Mr Dubovec* noted that if the supervisory authority was charged with the responsibility of suggesting possible amendments to the lists of HS codes in the annexes, that in the event that new financing practices developed for lower value equipment, the amendment process could be utilised by the supervisory authority to consider expanding the scope of the protocol based on the changes in industry practice.

29. *Mr Deschamps* noted his concern regarding the deletion of old codes from the MAC Protocol where they no longer existed under an updated HS system and existing registrations had already been made against the old number. *Mr Brydie-Watson* mentioned that registration on the international registry would not require the HS codes to be listed.

30. *Mr Dubovec* agreed with *Mr Deschamps* and raised the possibility of keeping the HS codes in the MAC Protocol instead of deletion so that previous registrations were not negatively affected. *Professor Riffard* agreed with *Mr Dubovec* and maintained that any deletion should have absolutely no impact either on the validity of the security interest or on registration. *Professor De la Heras* also agreed with the non-deletion approach.

31. *Mr Böger* suggested that in order to protect existing rights in the case of a subsequent deletion of a HS Code it would be useful to incorporate a rule similar to Article 57 paragraph 3 of the Cape Town Convention (on the effect of subsequent declarations): Such a rule would clarify that in case subsequent deletion of an HS Code, any previously established existing rights associated with equipment covered by that HS Code under the MAC Protocol will remain in effect.

32. The question of whether deleted numerical HS codes were ever reassigned was raised by *Mr John Wilson*, Senior Operations Officer from the International Finance Corporation, World Bank Group. *Mr de Jong* replied that the same numerical codes were not utilised for at least for 5 consecutive years. *Mr Wilson* took the view that an amended code should be kept in the MAC Protocol even if not perpetually, at least, for a certain period of time so that equipment which had been financed under an HS code which subsequently ceased to exist under the HS system could continue to be financed in cases of resales under the MAC Protocol.

33. *The Study Group* agreed that the HS system continued to be the best mechanism for delineating the scope of the MAC Protocol. *The Study Group* agreed that HS codes included in the annexes to the Protocol should not be removed, even where they were deleted from subsequent updates of the HS system. *The Study Group* requested that the Secretariat conduct further research on the GS1 mechanism and work with COMTRADE to extract global trade data in relation to the HS codes on the preliminary list. *The Study Group* requested the Secretariat conduct additional research into different amendment processes.

#### *The scope and Preliminary List of HS Codes for inclusion under the MAC*

34. *Mr Brydie-Watson* introduced the topic, and noted the changes made to the preliminary list since the second Study Group meeting. He noted that the list had further been expanded by an

extra 7 codes from the German industry through ministry consultations facilitated by Mr Böger and was now 110 codes in total. He emphasised that the current list was merely a preliminary list from private industry and it would definitely be further limited.

35. He suggested that the Study Group may wish to consider categorising the preliminary list into (i) codes which appeared strong candidates for inclusion under the scope of the Protocol, (ii) codes which may be appropriate for inclusion and (iii) codes which did not appear appropriate for inclusion. In doing the categorisation, the value and utilisation of the equipment under an HS code should be the primary factors for consideration; high-value objects exclusively used in the MAC industries should be deemed as appropriate for inclusion, whereas low value objects and parts, objects that were not uniquely identifiable and objects commonly used outside the MAC industries should not be included. Mr Brydie-Watson noted that further detailed input and financial data was needed in order to fully evaluate the current list, however there was likely some value in going through the list and considering which codes were likely to be included on face value.

36. *Professor Riffard* agreed that categorisation of the preliminary list would be a useful exercise.

37. *Mr Böger* addressed the large table in the List and queried the meaning of the 'multiple use' criteria. *Mr Brydie-Watson* replied that it referred to types of equipment that were commonly used outside the MAC industries and thus were likely not be included in the final MAC Protocol.

38. *Mr Durham* agreed with the approach proposed by Mr Brydie-Watson and emphasised the fact that the MAC Protocol should cover less equipment as opposed to trying to be over-inclusive. He also noted that categorising the list may also assist in private stakeholder consultation. He further noted that the Working Group had provided further input on which codes they were currently producing equipment under, and which codes were priorities for coverage. The Working Group also suggested additional three HS codes for coverage, bringing the total number of codes in the preliminary list to 113.

39. *Mr de Jong* reiterated that the Study Group should consider using the 2017 HS codes as the basis for the MAC Protocol as the scope of that edition would be broadened.

40. The Study Group considered the preliminary list in assigning categorisations. The Study Group agreed that broad codes covering 'other' types of equipment, codes covering low value equipment, codes covering parts and codes covering equipment commonly used outside the MAC industries should not be included in the 'desirable' tier one category of HS codes.

41. *The Study Group agreed that the preliminary list should be categorised into three tiers of desirable, possible and undesirable equipment. The Study Group requested that the Secretariat conduct this classification and report back to the Study Group in advance of the fourth meeting with the new classifications. The Study Group agreed that the preliminary list should be based upon the 2017 addition of the HS system.*

#### *Use of Article 51(1) Criteria – High Value*

42. *The Deputy Secretary-General* introduced the topic, and noted that one of the key measures in relation to high-value was whether there was established industry practice of separate financing of a type of MAC equipment. Professor Mooney referred to certain relatively efficient jurisdictions with advanced secured transactions regimes, and held the view that it is hard to believe that in those jurisdictions such equipment is not separately financed under secured transactions laws.

43. *Mr Brydie-Watson* pointed out that the rationale behind utilising the Harmonised System was that it was deemed unworkable to affix a certain monetary value threshold as a limit

for inclusion of types of equipment under the scope of the MAC Protocol. Similarly, it was also deemed unworkable to list every possible type of high value equipment in the annex. As an indicative criterion for the range of equipment, Mr Brydie-Watson noted that cost-related data was expected from the US Department of Commerce to assist in identifying maximum, minimum and median per unit costs of equipment.

44. He referred to paragraph 73 of the Issues Paper where he took the view that a possible limitation in order to exclude low value goods could be the unique identifiability requirement. Many of the low value parts covered by the listed HS codes might not be individually serialised by their manufacturer which would thus render them ineligible for registration in the International Registry.

45. *The Deputy Secretary-General* pointed out that an additional determinant for the registration of interest on low value equipment would be the cost of registration. This would require further studies and a comparison could be made with the Aircraft Protocol scenario.

46. *Professor Teresa Rodríguez de las Heras Ballell*, Universidad Carlos III de Madrid, concurred that the unique identifiability criterion might indeed be a useful limitation for excluding low value equipment. She noted that in the cases of low value equipment which could potentially be uniquely identifiable, the industry input on the question of separate financing of goods would be important.

47. *Mr Deschamps* drew attention to the fact that the likely course was that of a 'no criteria' solution whereby the only factor would be the mere inclusion of equipment on the list, which would avoid legal uncertainty.

48. *Mr Dubovec* distinguished between the criterion of high value for the purposes of an asset to be subject to the Convention, and for the purposes of an asset to be registrable. He noted that even though there may possibly be types of assets that were not identified by serial numbers, they could still be subject to the Protocol in order to allow lenders to benefit for instance from modern enforcement rules. As many countries currently did not have efficient enforcement regimes, it would still be beneficial to include certain assets which were not identifiable uniquely for the purpose of registration yet still within the scope of the MAC Protocol.

49. *Mr Deschamps* inquired whether two classes of assets, registrable and non-registrable, were envisaged by such an approach and whether the priority regime will only apply to the assets that were registrable. *Mr Dubovec* agreed with such an analysis and noted that priority rules of the MAC Protocol would apply only to the former class. *Mr Deschamps* reflected on the last comment and stipulated that since the existing priority rules would apply but no international registration would be possible, then the security interest under the international registry would not come into play and domestic rules would be upheld.

50. *Professor Riffard* highlighted that the high value criterion should be utilised in the process of selection of the codes to be included in the annexes and drafting of the Protocol but should not be the subject of a particular article in the Protocol. *Professor Mooney* agreed with that stance and maintained that the values worded in Article 51(1) of the Convention, merely serve as guidelines to be applied in determining the scope of the Protocol.

51. *Mr de Jong* answered to an inquiry as to whether trade statistics and database from national authorities were published by the Contracting Parties under the Harmonised System, and he maintained that there was no obligation, however the WCO recommended that State parties report such data to the UNSD (UN Statistics Division) whereby all the relevant data would be publicly available via the COMTRADE platform.

52. *The Study Group reaffirmed that only HS codes covering types of high value MAC equipment should be included in the annexes to the MAC Protocol, and this was to be determined*

by references to unit prices, financing industry practice and whether the items were uniquely identifiable by manufacturer serial numbers.

#### *Use of Article 51(1) Criteria – Mobile*

53. *Mr Brydie-Watson* introduced the topic, and noted that one issue that required further discussion was the question of whether certain equipment which was stationary in its operation should be included in the Protocol. The starting point from the previous Study Group meetings on this matter was based on both the experience of the Rail Protocol and the operation of the Aircraft Protocol whereby there would be no need to explicitly define international mobility. It had been concluded that by using the HS system, the MAC Protocol would be covering objects that were inherently exported and therefore it would cover equipment of a cross-border nature. The data from the International Registry under the Aircraft Protocol was that over 50% of registrations under the Protocol were for assets that were not internationally mobile in their operation. As a result, the coverage of the Aircraft Protocol over aircraft that travelled only domestically had obviously not harmed its success. How mobile goods were in their actual use appeared to be of little relevance in relation to the scope and success of the Convention. He also drew the Study Group's attention to the types of equipment which were still internationally mobile in trade and were capable of being packed and moved, yet stationary in terms of their functionality, i.e. fruit presses. He questioned whether such equipment should be excluded from the scope of the Protocol even if it would meet the other criteria.

54. *Mr Böger* suggested that the mobility criteria could well be understood as being part of export trade. As such, the post export use should not be relevant and the scope should not be limited too much. As long as the equipment had not become a fixture where it would lose its separability from the immovable property, everything should be potentially eligible to be included in the scope.

55. *Mr Deschamps*, on the other hand, maintained that the fact that certain equipment was traded internationally did not make them mobile by definition. He used the example of Italian and French wine as well as Swiss watches whereby they were all exported internationally yet definitely not covered by the expression 'mobile goods'.

56. *The Deputy Secretary-General* wondered whether the MAC Protocol was necessarily bound by the notions of mobility used in different jurisdictions. If so, in such a restrictive approach, most items of the List would fall outside the scope of the Protocol. Mr Dubovec affirmed that there were already certain assets in the List which were stationary in their operation, such as cranes.

57. *Mr de la Campa* inquired whether the Convention required the three elements of Article 51(1) to be strictly and simultaneously included or not necessarily, whereby mobility could be set aside.

58. *Mr Spyridon Bazinas*, Senior Legal Officer, the United Nations Commission for International Trade Law (UNCITRAL), cautioned against an interpretation of mobility which would run counter to national laws or against the meaning of this term in the parent Convention itself. Additionally, Mr Bazinas noted that the purpose of the Cape Town Convention and its Protocols was to unify rather than fragment the law and the original concept of Cape Town Convention should be respected. He concluded that the three elements of Article 51(1) should be considered together and could not be taken in isolation from one another.

59. *Mr Brydie-Watson* suggested that the mobility criteria could be taken into account in the HS Code constitution as a factor in deciding which HS codes would be placed in the annex.

60. *Professor de las Heras* proposed alternatively that the mobility criterion could be satisfied where an object was the subject of an international transaction whereby conflict of laws



issues could potentially arise. In this scenario, comparison could be made with internal transactions where mobility was an irrelevant notion. Therefore mobility could be taken as not being a requirement for an asset but the concept of mobility would rather be applied in the sense that different jurisdictions could be involved in such a transaction. In order to avoid the conflict of laws, the MAC Protocol could then be taken as a uniform law.

61. *Mr Wilson* pointed out that different types of mobility had been discussed during the issues dialogues in Washington in 2013 and 2014. One type was mobility prior to the financing of the equipment in question which was related to the export transaction. In some circumstances financing took place prior to the exportation and sometimes after the importation had been concluded. The second type was internal mobility and movement within national borders, where things were more complicated. He noted the example of Southwest Airlines in the USA, which was a completely domestic carrier service (until September 2015) and yet they were one of the largest customers of Boeing and utilised one of the biggest multi-billion dollar security packages based on the Cape Town Convention. The third type was the international mobility in operation. He noted that the solution seemed to be that mobility could not be separated and both national and international mobility should be taken into account.

62. *Professor Riffard* questioned Professor de las Heras's proposal and maintained that mobility in terms of the Convention necessarily implied an international dimension. It would be very difficult only to focus on the criterion of internationality if it implied that actual international use of the collateral was necessary, as it would inevitably cause legal uncertainty. Therefore it should be considered whether for a reasonable person certain collateral could be used in more than one jurisdiction.

63. *Mr Bazinas* agreed to the previous comment in the sense that actual use should not be a criterion.

64. *Mr Deschamps* said that if the Protocol attempted to define mobility, it would open the door for further criticism. The Protocol should apply to the equipment in the annex leaving aside the term 'mobile'.

65. *Professor von Bodungen* pointed out that an additional sentence based upon Article 29(2) of the Rail Protocol could be added, which could allow contracting states to opt out of the Protocol in relation to purely stationary items of equipment. *The Deputy Secretary-General* objected to that approach and took the view that it would cause additional issues and would require the term 'stationary' to be defined.

66. *Mr Bazinas* took the view that definitions of the terms 'mobile' and 'stationary' should both be avoided and instead it could be mentioned that the Protocol covered items contained in its annexes.

67. *Professor Riffard* emphasised that given the criterion of high value was not to be defined and only utilised in the process of selecting the HS codes, the same approach should be taken for the mobility criterion. *Mr Brydie-Watson* agreed, and noted that actual mobility was a problematic concept and theoretical mobility could alternatively be taken into account, albeit as a low threshold.

68. *Mr Wilson* concluded that focusing on definitions of high value or mobility during the selection phase of the HS codes for inclusion in the annexes would suffice, and the official commentary could provide additional detail on how these criteria were taken into account during the selection process. He argued that an additional list of excluded items would defeat the purpose of not defining mobility in the first place.

69. *Professor Riffard* pointed out that once the codes had been selected, the MAC Protocol would have to be able to explain to the opponents of the project how the three elements had been respected in the selection phase and during the assessments.

70. *The Study Group* agreed that no specific definition of mobility was required in the MAC Protocol, and equipment that was not mobile in its operation should not be strictly excluded. *The Study Group* further concluded that mobility would be taken into account in the selection of the HS codes for inclusion in the annexes to the Protocol.

#### *Use of Article 51(1) Criteria – Uniquely Identifiable*

71. *Mr Brydie-Watson* highlighted consideration of the diverse approaches taken by the Aircraft Protocol and the Luxembourg Rail Protocol in relation to this criterion at the second Study Group meeting. He noted that the Aircraft Protocol required a manufacturer serial number, whereas the Rail Protocol allowed for the creation and affixation of a serial number to a railway stock object without a manufacturer serial number. A compromise approach had been reached at the second meeting whereby a manufacturer serial number would be required for registration, but in the event that an object did not have a manufacturer serial number, for a limited period set out by the Protocol, the Registrar would be able to create and issue a number for the purposes of unique identification. This approach had been adopted in order to give the industry time to make sure that in the future manufacturer serial numbers were provided for all equipment within the scope of the Protocol.

72. *Mr Durham* noted that the preliminary consultations with the private sector at the first Working Group meeting had indicated that it was likely that all completed types of machinery contemplated under the scope of the Protocol already had serial numbers. He also noted that the finance community preferred the Aircraft Protocol approach as a basis.

73. *The Deputy Secretary-General* queried whether it was necessary for the Protocol to provide the flexible approach allowing for the issuing of unique serial numbers by the registrar, if the private sector was already providing manufacturer serial numbers.

74. *Professor Mooney* took the view that in the absence of a demonstrated need for Registry-generated serial numbers, the manufacturer serial number approach would suffice for the registration of objects in the international registry under the MAC Protocol. However, he also noted that it might be worth keeping the current drafting option in the Protocol until it was completely sure that all equipment under the MAC Protocol had unique manufacturer serial numbers.

75. *Professor von Bodungen* posed the question of whether it would be possible for two manufacturers to apply the same number for different objects and whether numbers could actually be recycled. *Mr Durham* replied that there was no evidence of identical serial numbers for different types of machinery, however it was not an issue the Working Group had considered explicitly. If this indeed became an issue, he noted that one possible way to address it would be having the Registry require the model designation of the objects in question for registration. *Mr Durham* indicated that he would seek further input from the private sector on this issue.

76. *Mr de la Campa* suggested that the best solution would be to adopt the manufacturer serial number approach from the Aircraft Protocol and to set aside the Registry generated numbering system.

77. *Mr Bazinas* took the view that it was not possible to avoid the Protocol applying to inventory through the 'serial number only' approach as it was not sufficient. He noted that there was inventory-like equipment which had manufacturer serial numbers yet the numbers were issued in bulk rather and were not always unique and individual numbers. As such, *Mr Bazinas* emphasized

the importance of restricting the application of the Protocol to high value equipment to prevent its application to inventory.

78. *Mr Böger* favoured the 'serial number only' approach. He noted that it appeared that some assets might have numerous serial numbers for each of its parts, for example tower cranes, and it was important that the object would need a unique serial number covering the entire object.

79. *Professor Riffard* mentioned that both the mobility and the high value criteria should be used for the selection phase, choice of category and limitation of the scope of the MAC Protocol. However, he noted that the unique identifiability criterion had a different purpose. It was essential that every object within the scope of the Protocol had a serial number for registration purposes.

80. *The Study Group concluded that the serial number only approach should be adopted in the draft Protocol, however the approach from the second Study Group meeting should be retained as an alternative if further consultation with the Working Group identified a need for it. The Study Group requested the Working Group to confirm that all objects under the current anticipated scope of the MAC Protocol did indeed have unique manufacturer serial numbers as applying to the whole completed piece of machinery.*

### *Fixtures*

81. *The Deputy Secretary-General* introduced the topic, noting that at the second Study Group meeting the Secretariat had been tasked with doing a comparative study on the treatment of fixtures under domestic law in different countries, and that the research conducted by the Secretariat was available in the Issues Paper. She further noted that the Study Group needed to decide both the policy position that had to be reached in relation to the treatment of fixtures, as well as how this policy could be achieved in the actual drafting of the Protocol. *The Deputy Secretary-General* asked Mr Brydie-Watson to present the findings of the comparative study to the Study Group.

82. *Mr Brydie-Watson* noted the complications in addressing the fixtures issue, highlighting the tension between the policy of an international interest having priority over domestic law interests, and the principle of non-interference with domestic law governing immovable property. Mr Brydie-Watson noted that information had been gathered for the comparative analysis both through a consultation paper sent to the Unidroit correspondents, of which 11 useful responses had been received by the start of the meeting and also through in-house research done by the Secretariat.

83. Mr Brydie-Watson noted that there was a definitional issue in relation to the term 'fixture', as its legal meaning varied significantly between jurisdictions. Mr Brydie-Watson noted that for the purposes of discussion and in the Issues Paper, the use of the term 'fixture' had been taken to have the equivalent meaning of 'component part', 'essential part', 'integral part' as well as 'fixed accessories', whereas the term 'accessory' had been considered to be the equivalent of the common law term 'chattel'. He also noted that the paper tries not to use the word 'accession' in relation to the connection of a movable object to immovable property, as the word accession had its own particular meaning in the Cape Town Convention context. Mr Brydie-Watson noted that in drafting possible Articles regulating the treatment of fixtures for inclusion in the Protocol, the Secretariat would attempt to avoid using these terms altogether.

84. Mr Brydie-Watson presented the Secretariat's research of treatment of fixtures under domestic law, noting examples in Argentina, Colombia, Egypt, the United Kingdom, France, Germany, Greece, Hungary, Italy, Mexico, Quebec, Spain, Syria, Turkey, the United States and Uruguay.

85. *Professor Hara*, Professor of Law at Gakushuin University, presented the approach under Japanese law, noting in particular that under the Japanese Civil Code, in affixing movable equipment to an immovable property, the independent property rights (including security interests) in the equipment would cease to have any legal effect. She further noted that in order to safeguard the legal rights of creditors, the Code set forth two possible compensatory measures against the owner of the immovable property, on the grounds of unjust enrichment.

86. The *Deputy Secretary-General* noted the divergent approaches to both the definition of affixable equipment and the differing tests in determining whether secured interests in movable equipment continued to exist or were extinguished on its connection to immovable property.

87. *Professor Mooney* noted that a functional approach should be adopted that incorporated local law in relation to when goods become so associated with immovables that to some extent the good becomes subject to the law that applies to immovable (under US Law, this occurred when it became so far affixed that you could transfer an interest in it when an interest in the immovable was transferred). Professor Mooney suggested a 'menu approach' that gave States different options, one being a complete deferral to domestic law, but that would also create other options that would be desirable to other states. Professor Mooney doubted that the legal policy regarding the treatment of fixtures could be comprehensively harmonised in a binding Protocol which did not give States any discretion in choosing its operation.

88. *Mr Bazinas* noted that UNCITRAL decided not to directly address the fixtures issue under the draft UNCITRAL Model Law on Secured Transactions, because of the difficulties of attempting to unifying the law in the treatment of security interests in immovable property at an international level. Mr Bazinas noted that the Secured Transaction Legislative Guide does consider the effect of tangible assets being affixed to immovable property. Mr Bazinas noted that under the Legislative Guide approach, a party could remove an affixed mobile object; however, the party might do so only if it had priority as against competing rights in the immovable property and would owe an obligation to compensate the mortgagee under the domestic immovable property law for any damage caused in removing the affixed object, other than any diminution in its value attributable solely to the absence of the fixture.

89. The *Deputy Secretary-General* noted that in the MAC Protocol context, it was necessary to directly deal with the issue, and welcomed any comments from the Study Group as to how this could be achieved.

90. *Mr Deschamps* noted that in relation to terminology the term 'fixture' should be avoided in the Protocol, and the word used should describe the situation without using legal terms that might have differing connotations and highlighted that the word 'attachment' raised similar issues. He noted that it needed to be decided whether (1) the Protocol should clearly define what a 'fixture' was, which could be problematic as it would likely be inconsistent with definitions in many countries, such as France where some assets could be classified as 'fixtures by destination'. (2) Secondly, he noted that it needed to be decided whether it should be possible to create a security interest in a fixture after it had become affixed to immovable property.

91. *Professor de las Heras* argued that it would be desirable to adopt a uniform rule describing the situation and the legal effects of the connection of the movable and immovable property, which would have priority over national domestic legislation, and that it was particularly important to do that given the high likelihood of some degree of connection between many of the types of equipment in the preliminary list and immovable property. She also noted that any such rule should take into account Article 60, which preserves pre-existing interests.

92. *Professor Riffard* urged caution in trying to define the concept through a comparative approach given the lack of uniformity in approaches as exemplified through the comparative

analysis. He argued for a functional approach which directly addressed the problem and provided a legal solution, rather than starting from a conceptual basis.

93. *Mr Durham* noted that the view from the Financing and Leasing stakeholders involved in the Working Group was that the creation of a uniform rule on fixtures was not of urgent concern, as existing practices dealing with the issue under national law were sufficient in most jurisdictions, mainly through private contractual agreements with the landowners.

94. *Mr de la Campa* noted the IFC experience in emerging market countries was that many countries did not have a specific rule on affixable equipment, and that in secured transaction reform projects the IFC generally tried to include a rule on fixtures. In relation to the MAC Protocol, Mr de la Campa noted the most straightforward rule would be to have a priority rule for an interest in the movable equipment to have priority over interests in the immovable property, but also noted that such an approach would prevent ratification for certain countries. He queried whether a compromise position could be reached under which the Protocol would allow countries to adopt such a priority rule (which would assist in law reform activities in emerging markets) and for other countries to elect to retain their existing domestic legal arrangements.

95. *Mr Böger* noted that from the German perspective, a functional rule which allowed for declarations by Contracting States to choose from different options, either retaining domestic arrangements or adopting a uniform priority rule, would be desirable as the German financing industry had noted that it did not want the Protocol to affect current domestic practices in Germany.

96. *Professor Mooney* agreed with the benefits of allowing for declarations and flexibility in the Protocol, and urged caution in not adopting an approach that could make ratification of the Protocol less likely in some States. Professor Mooney further noted that even if a deferral to national law was adopted, the drafting of such a rule would remain complex, because the rule would have to state to what situation it applied. He queried whether the Secretariat could provide some different policy and drafting options which could be alternatives for States to consider, and defer to the next Study Group meeting to make a final decision on the issue.

97. *Mr Deschamps* agreed that it would be useful for the draft Protocol to provide different options on the issue for States to consider. He noted that it was more likely for mining equipment to be involved in affixation issues, and he had personal experiences in private practice under which domestic law applying to fixtures had posed a problem in the financing and creation of security interests in mobile mining equipment that became connected to immovable property.

98. *Mr Wilson* noted the diagnostic work that the IFC did, often through the utilisation of analytical questionnaires dealing with fixtures (across all fields, not just in relation to MAC equipment). Using the example of an air conditioner attached to a hotel over which there was an underlying mortgage, and that there was not a single case where the mortgage over the hotel did not take priority over the air conditioner. As such, Mr Wilson noted a general legal axiom in most civil law emerging market countries where an accessory would follow the rule of the principle, and therefore most real estate mortgages would have priority over the movable. He noted that a useful starting point could be a draft rule that would not make a reference to immovable property but make a differentiation between jurisdictions that allowed for interests in fixture to continue to exist.

99. *Mr Bazinas* noted that the purpose of the MAC Protocol was not to provide an international commercial code, and agreed that a functional approach addressing the existing legal problem would be preferable to a conceptual approach. Mr Bazinas encouraged looking at actual transactions as examples to guide the functional approach.

100. *Mr Dubovec* noted that there was a clear existing problem that he had witnessed in Africa, where lenders were hesitant to provide financing for movable affixable assets because their security interests in the equipment would be subject to customary land law, the effects of which

were uncertain or undesirable. Mr Dubovec also noted that a current review of the Australian Federal Personal Property Securities Act based on its operation over its first five years had found that it was deficient in not providing a rule on fixtures, and recommended that the law should be amended to provide an express rule on fixtures. He also noted his support for a mechanism in the Protocol that provided options in addressing fixtures.

101. *Professor de las Heras* noted that in formulating a uniform rule, different options should be provided, covering both pre-attachment and post-attachment scenarios.

102. *Mr Wilson* noted that the IFC could provide some priority rules for fixtures that the organisation had provided in assisting emerging markets reform their secured transactions law. Mr Wilson noted that most priority rules relating to fixtures implemented by the IFC were based on the rule in the US Uniform Commercial Code.

103. *Mr Brydie-Watson* welcomed individual submissions from the Study Group members in relation to the drafting options which implement the different policy options available.

104. *Mr Durham* noted that he would engage the Working Group in relation to which types of equipment might be affixed in its operation in the priority list of HS codes.

105. *The Study Group decided that the Protocol should include a substantive provision addressing fixtures, and that the draft Article should allow contracting states to make a declaration in relation to the operation of the rule. The Study Group requested the Secretariat to prepare a paper setting out possible policy and drafting options as a priority, and that the issue should be discussed further during a conference call in advance of the final Study Group meeting.*

### *Accessions*

106. *Mr Brydie-Watson* introduced the topic, and noted that the term 'accession' had its own specific meaning in the Cape Town Convention and had no relevance to 'accessories' in terms of terminology. Mr Brydie-Watson mentioned that the Convention referred to accessions in Article 29 which described accessions as items connected to a registerable object which were not registerable as an object themselves. As addressed in paragraphs 181 and 182 of the issues paper, Mr Brydie-Watson highlighted that both the first and second Study Group had meetings touched upon the issue, whereby in the former it had been preliminary concluded that unless there was a widespread commercial practice of separate financing of accessions to the MAC equipment, then accessions would not be separately registrable under the MAC Protocol. In the second meeting, it had been decided that the private industry would have to make a strong argument that accessions were of sufficiently high value and were in practice separately financed in order to be included in the MAC Protocol. He further noted that during the Working Group meeting in September, it had become clear that most manufacturers did serialise accessions and parts, which would make them registerable under the Convention. Therefore, if there was no excluding rule in the Protocol, such accessions could be deemed registerable, which would be unworkable pragmatically, as the time and financial costs of registration for low value accessions would create significant transactional burden.

107. As a secondary issue, Mr Brydie-Watson referred to the differentiation made in the second Study Group meeting between implements and accessions when it had been concluded that implements, (for example, shovels for bulldozers), were not capable of separate financing as they were connected only on a temporary basis. He was doubtful whether such a distinction should be made and included.

108. *The Deputy Secretary-General* noted that an additional issue related to accessions was whether the Protocol should allow an interest other than a Convention interest to be created on an

item when that item had already been installed on an object with reference to Article 29.7 of the Convention.

109. *Professor de las Heras* noted that consideration must primarily be given to whether this kind of accession was subject to separate financing.

110. *Professor von Bodungen* agreed and mentioned that the private sector should be subjected to more queries and that object definition should be further looked at.

111. *Mr Durham* pointed out that there were 4 categories of HS codes that dealt specifically with accessories that the private sector and manufacturers had indicated as high priority and certain codes that specifically dealt with engines. Most of the engines, from financiers' point of view, were not separately financed and then repossessed if there was a default. He also noted that whether the engines were easily removable once they were attached should also be a definitive factor in considering them for inclusion.

112. *Mr Brydie-Watson* noted that despite the fact that the manufacturers had indicated support for the Protocol to apply to engines, given it appeared that they were not separately financed, and tended to spend their entire life in one single machine, it did not appear appropriate for them to be separately registerable under the Protocol. He further noted that if the machines were sold and the engine was already installed, then it would be covered as part of the interest in the entire piece of equipment.

113. *Mr Bazinas* referred to paragraphs 182 and 183 of the issues paper, and agreed that the Protocol should not extend to accessions as separate objects unless they were of demonstrated high value and subject to separate financing.

114. *Mr Böger* raised the question as to whether there would be a need for a specific rule to be included to govern accessions including serial numbers.

115. *Professor Mooney* pointed out that there was no need to diverge from the approach of the Aircraft Protocol and its structure. *The Deputy Secretary-General* referred to the complexities faced by the Space Protocol in dealing with accessions and mentioned that the key issue remained whether certain parts were capable of being separately financed.

116. *Mr Brydie-Watson* replied to the point raised by Mr Böger and took the view that in cases where certain accessions would be capable of being separately financed, the approach of the Aircraft Protocol would be applicable in cases where an interest could be registered in the airframe and an interest could be registered in the engine. Similarly if there was an interest in a tractor and a separate one in a part of it, it would be desirable that they were separately registered, as consistent with the Aircraft Protocol approach.

117. *Professor von Bodungen* agreed and emphasised that whether the accession was capable of being a registerable object was of prime importance in that respect.

118. *Professor Riffard* contemplated that certain parts would be discovered that were subject to separate asset-based financing, where interests could be separately registered. He favoured the Aircraft Protocol approach.

119. *The Study Group reaffirmed that unless there was a strong evidence of separate financing for accessions and parts, they should be excluded from the Protocol.*

*Special Insolvency Regimes affecting farmers and agricultural enterprises*

120. *Mr Dubovec* presented the study of the National Law Centre for Inter-American Free Trade in collaboration with the UNIDROIT Secretariat on this matter. He referred to paragraph 210 of the issues paper for a summary of approaches of various national special insolvency regimes. The research had revealed that there were indeed certain specialised insolvency regimes that could apply to farmers. Domestic laws generally tended to give farmers certain rights as opposed to other insolvent debtors. Additionally, certain agricultural machinery might be exempt from repossession, certain assets could be protected as part of the protection of the farmers' ownership in the land itself, and certain actions taken by creditors would be suspended, and under some regimes farmers would also have access to special funds to restructure their business, etc. *Mr Dubovec* emphasized that most legal mechanisms protecting farmers and agricultural enterprises primarily targeted individual and family farmers which would exclude economically high value equipment as small scale farmers wouldn't generally be in a position to possess such equipment.

121. It was recalled that this issue had initially arisen at the first Study Group meeting in relation to the three insolvency alternatives, as to whether there was a need to provide for a fourth alternative or to simply modify the existing alternatives to account for some of these restrictions whereby a State may decide to continue to apply even after the ratification of the MAC Protocol. *Mr Dubovec* took the view that there wouldn't be any need for additional alternatives as the transactions covered by the special domestic insolvency regimes would simply be outside the scope of the Protocol in the first place.

122. *Professor de las Heras* agreed with the conclusion and queried what was happening in countries with emerging markets and their agricultural sector, in particular African countries. *Mr Dubovec* replied that very few African countries had modern insolvency regimes, however they were in the process of reforming and developing their existing laws. *Mr de la Campa* agreed and mentioned that very few African countries had laws on reorganisation and most existing laws were relevant for corporate insolvency only.

123. *Professor von Bodungen* proposed that an additional article along the lines of Article 25 (the public service railway exemption) of the Luxembourg Rail Protocol could be drafted in this respect. It would operate to the effect that where there was a conflict between the existing national law and insolvency remedies under the Protocol, then the State could declare that they uphold their current legislation.

124. *Mr Brydie-Watson* mentioned that if such a carve out approach was adopted, it should be drafted in consistency with Article 40 (registerable non-consensual rights or interests) of the Cape Town Convention, which would require States to specifically provide information about how their declaration would affect rights under the Convention and Protocol. He noted that while the drafting of Article 25 of the Rail Protocol might be a useful model, it would be important to distinguish that issue from the public service provision in the Rail Protocol, as the inclusion of such an article could cause significant controversy. He noted that it had been concluded at the first Study Group meeting that the public service provision in the Rail Protocol served a completely different purpose as compared to the nature of the MAC Protocol, which essentially addressed private enterprises.

125. *Professor Mooney* took the view that the current options under the Protocol should be left as they were and any exclusive exceptions for the agricultural sector should not be included in the Protocol. He explained that the strong version of the insolvency provisions mimicked in many ways section 1110 of the U.S. Bankruptcy Code which was limited to transportation equipment. The theory behind section 1110 was that the protected firms had an extraordinarily high portion of their assets tied up in very expensive equipment when compared to most kinds of business firms. For that reason they needed special protection in favour of their lessors and lenders in order to be able to get financing. Such a strong version of protection for the agricultural sector seemed to be unnecessary. Therefore, it would be better to let contracting states to choose from the three-option



alternatives of A, B and C, which would also include the option of doing nothing (and thus having national law apply).

126. *The Study Group decided that it was unnecessary to add a new article to the draft Protocol in relation to special insolvency regimes for agricultural enterprises.*

#### *Restrictions on the enforcement of security interests in farming equipment*

127. *Mr Dubovec* introduced the topic, and noted that were laws which imposed certain limitations on enforcement rights. Typically those laws were found in pieces of legislation separate from the secured transactions regimes, such as in Australia, Canada and the USA. Some secured transactions laws, such as in Kenya and Nigeria, explicitly included such limitations. However in the context of latter two countries, it was noted that their secured transaction regimes were subject to current IFC secured transaction reform projects, and it was anticipated that such laws in Kenya and Nigeria would no longer be applicable.

128. *Mr Dubovec* further elaborated that certain States and Provinces in Australia, Canada and the USA had adopted laws which required mediation of farmer debts which would essentially delay the enforcement of secured creditors' rights. The farmer had the right to initiate mediation in order to attempt to settle a debt whereby the enforcement process was suspended, typically for a period of thirty days. If the mediation was then unsuccessful, the enforcement rights could then be enforced under the relevant law.

129. *Mr Dubovec* continued with other jurisdictions and mentioned Mexico had a unique approach. Typically, exemption laws would protect assets only against judgement creditors. Yet in Mexico, there was a peculiar situation, namely estate exemption, which allows a family farmer to exempt certain farming machinery even against secured creditors. For that exemption to take effect, however, public registration was a pre-requisite. Therefore, a creditor essentially knew beforehand that a certain asset might not be subject to enforcement.

130. *Mr Brydie-Watson* referred to the 11 submissions received from a number of UNIDROIT Correspondents. Most jurisdictions did not have any specific protection for farmers and agricultural equipment, except for Hungary, Japan and Turkey. Hungary noted that there was a closed list of farmer definitions whereby based on eligibility criteria, an individual would be exempt from enforcement measures of potential secured creditors. Excluding agri-businesses and large scale agricultural enterprises, the Turkish legislation provided for special legal protection for farmers, provided that such equipment was deemed essential for the sustenance of the debtor farmer and his family. The Japanese approach, on the other hand, provided for exemption from seizure for 'indispensable equipment' for the agricultural sector subject to certain conditions. Further, subject to certain conditions, farmers' equipment was only protected against mere actual seizure, whereas transfer of such equipment was not prohibited. As a result, security by way of assignment was legally effective and enforceable against agricultural equipment.

131. *Professor de las Heras* stipulated that the scope of application of the MAC Protocol was based on the nature of the object rather than 'actual use'. She noted that some of the restrictions contained in national legislation were based on the actual use of the equipment which could create legal uncertainty and additional complications.

132. *The Deputy Secretary-General* referred to Article 14 of the Convention (procedural requirements) which provided that any remedy under the Convention was to be exercised in conformity with the procedure prescribed by the law of the place where the remedy was to be exercised. She queried whether there were certain limitations to enforcement that apply to situations which have been envisaged to be classified as procedural requirements under domestic laws, and whether the restrictive interpretation of Article 14 would not include such laws.

133. *Professor von Bodungen* pointed out that Article 14 should be narrowly construed which justified the drafting of Article XXV of the Rail Protocol. *Mr Deschamps* noted that none of the special rules applied in case of farmers and agricultural equipment in Canada were of a procedural nature.

134. *Professor Mooney* suggested further discussion on the two options referring to Paragraphs 245 and 246 of the issues paper. The former option would be not to address the issue in the Protocol and simply require Contracting States that have such domestic protections to reform their domestic laws to exempt agricultural equipment registerable under the MAC Protocol from the application of the enforcement restrictions. The latter option would be to provisionally include an article in the draft Protocol allowing Contracting States to limit the application of the Protocol, or possibly just the default and insolvency remedies, in relation to family farming enterprises, where such enterprises were protected by existing domestic legislation which would possibly be in the form of an 'opt-in' declaration.

135. *Professor De la Heras* questioned whether countries such as Canada, where there were special protective rules for farmers and agricultural equipment, would be reluctant in adopting the MAC Protocol if no specific rule would eventually be included in the draft.

136. *Mr Wilson* referred to the importance and relevance of financial lease and the retention of title in the context of enforcement. The operative part of a financial lease with regards to enforcement was the retention of title. Therefore, the financier was the actual owner. The utility of the Protocol should be taken into account and a much speedier enforcement system should be developed. *Mr de la Campa* agreed with the issue raised by Mr Wilson. He further reiterated that in the case of small scale individual farmers as well as family farmers which governments were aiming to protect, it would be highly unlikely that any type of high-value machinery would be involved.

137. *Mr Brydie-Watson* asked Mr de la Campa whether the emerging markets' jurisdictions with which the IFC had been working had any carve-outs for special insolvency schemes. *Mr de la Campa* highlighted that while certain objections had been raised by the social sector, no opposition from the agricultural sector had been encountered thus far.

138. *The Study Group concluded that there was no need for the inclusion of a specific article in draft Protocol in relation to restrictions on enforcement of agricultural equipment.*

### *Insolvency Alternatives*

139. *Mr Brydie-Watson* introduced the topic and mentioned that in both the first and the second Study Group meetings it had been tentatively agreed that Alternatives A, B and C should be kept in the draft Protocol. The Alternatives A and B had been in all the Protocols and hence a very strong policy rationale would be required to allow for their removal and Alternative C appeared to be a very reasonable addition to the Rail Protocol.

140. *Mr Brydie-Watson* further referred to Professor von Bodungen's proposal on the possible inclusion of a similar article as Article 25 of the Rail Protocol. He noted that while the Study Group had decided not to include a fourth alternative, the Study Group could consider a provision allowing States to apply different insolvency alternatives to the annexes to the Protocol, which would thus make it possible for them to exempt agricultural machinery from insolvency Alternative A, while still applying Alternative A to construction and mining equipment.

141. *Professor Mooney* favoured allowing States to choose freely from the three Alternatives for the different annexes to the Protocol.

142. *Mr Böger* also favoured this flexible approach. However he wondered whether that could be problematic in cases where certain HS codes were in more than one list, taking into account that

the criteria to be followed in the MAC Protocol was based on an object's nature rather than on its actual use.

143. *Mr Deschamps* argued that if an item was listed in more than one annex, only one Alternative should be applied instead of allowing flexibility for all Alternatives.

144. *Mr Brydie-Watson* explained the rationale behind multiple listing of certain HS codes in different annexes to the MAC Protocol. The rationale behind listing a type of equipment in more than one annex was to allow Contracting States to opt out of the application of the entire Protocol to one or more of the categories of equipment (agricultural, construction or mining). He further emphasised that the vast majority of equipment was in two, rather than three categories. He noted that multiple listing and applying different insolvency alternatives to different annexes was still possible, if the Protocol also required States to declare which insolvency alternative would apply to equipment listed in more than one annex.

145. *The Study Group* decided that the draft Protocol should allow Contracting States to apply different insolvency alternatives to the lists of HS codes provided in Annexes 1, 2 and 3 to the Protocol.

### *Application to sales*

146. *The Deputy Secretary-General* introduced the topic and highlighted that the main issue was whether the MAC Protocol should be extended to sales, in conformity with the approaches in the Aircraft and Space Protocols as had been discussed in the first Study Group meeting. The rationale behind the Aircraft approach was the existing practice in the industry of registering sales on the title registry, because of the high value of aircraft, which required payment to a seller before the sale.

147. *Mr Brydie-Watson* explained that there was a broad consensus at the previous meetings that the MAC Protocol should not apply to sales as the Aircraft Protocol did, since the established practice in the aircraft financing industry was missing in this context. Yet there was a tendency to adopt an approach similar to the Rail Protocol, whereby notices of sale could be registered under an International Registry, but such notices would have no legal effect under the Convention or the Protocol. It was noted that the reason for inclusion of sales in the Rail Protocol was the benefits of more accessible information on the sales of equipment to be provided internationally and also the additional registrations generated fees for the International Registry, making it more cost effective. Whether it was appropriate for the MAC Protocol to allow for a registration which had no legal effect unto itself but might have effect under domestic law had been discussed in both previous meetings. The effect of such notices of sale in domestic law would be in relation to jurisdictions that allowed a notice of a claim to have an effect on subsequent interests. Under the Cape Town Convention, on the other hand, knowledge of prior interest had no effect due to it being a first-in-time registration system.

148. *Mr Brydie-Watson* further explained that the approach in the Rail Protocol was not just about accessible information and the generation of fees. The Official Commentary expressly contemplated that the Protocol would have an effect under domestic law. He further referred to paragraph 258 of the issues paper. The Secretariat had conducted comparative research in different jurisdictions and it had been found that most European civil law jurisdictions assigned priority to a registration that was first in time. Therefore, notice of a prior unregistered interest in a property or a notice of sale would not have any effect. He further referred to the reformed law in Australia whereby the effect of prior notice had been significantly diminished under the Personal Property Securities Act as opposed to the historical constructive notice of a prior interest. Rather than a legal issue, *Mr Brydie-Watson* pointed out that it was a policy issue and suggested that it could eventually be left to the Governing Council and intergovernmental stages to decide upon the correct approach. He further referred to paragraph 269 of the issues paper which based the prospective MAC Protocol

approach on the Rail Protocol approach, whereby it might be necessary to generate additional fees. It was also anticipated that the Rail Protocol would enter into force in the near future and certainly prior to the adoption of the MAC Protocol. As a result, evidence could flow from the Rail Protocol scenario in order to demonstrate whether companies were actually making registrations of notices of sales and also whether the mechanism had any practical benefits.

149. *Mr Deschamps* proposed that the best way to proceed was to leave the matter to the intergovernmental stage. However, he suggested that further examples should be found under national law by means of additional research by Secretariat, of whether there would be a benefit for the purchaser to register in the international registry. Mr Deschamps described two scenarios, whereby the competing interest could either be another sale or it could be a security interest. In case of former, a buyer who would take the trouble of registering under the International Registry would also do so under national registry and therefore there would be no potential competition which could arise in the event of another buyer. In latter case, the previous owner sold the asset to the buyer who registered in the International Registry. Under which circumstances would a security interest granted by the previous owner rank ahead of the sale under national law? In what circumstances would the purchaser gain some benefit by registering in the International Registry? He noted that in most States, if the owner had sold the asset to the purchaser, the owner would have no right to grant to a second purchaser. He emphasised that the research of the Secretariat should focus on these scenarios.

150. *Professor von Bodungen* emphasised that under German law there would definitely be a benefit of registering the notice of sale as this would prevent the creation of security interests or the undoing of the transfer of title in the asset. Secondly, he noted that if neither the Rail nor Aircraft approach were adopted, it would lead to the creation of a third option that diverged from the existing Protocols. As such, he favoured the adoption of the Luxembourg Rail Protocol approach.

151. *Professor Mooney* contemplated that one benefit to the purchaser would be to register the notice before the sale was consummated. If the owner then tried to re-sell, the second buyer would take title subject to the earlier right. He noted the policy concerns regarding allowing a registration of a notice of sale under the Protocol which would have no legal effect and would simply affect rights under national laws. He suggested that the situation might not be beneficial for the protection of certain rights but would rather be beneficial from a litigation point of view. He suggested wording in square brackets and adding a note to the Committee of Government Experts in order to clarify the situation.

152. *Mr Böger* added that if there was a consensus to keep such a provision in, either in square brackets or not, it would be useful for the Secretariat to study the area of double sales where notices would play significant role.

153. *Mr Wilson* pointed out that the multiplicity of registrations and the multiplicity of purposes behind registrations should be taken into account. National registration systems were already complicated, in particular in the case of vehicles. There were registrations for ownership, registrations for lien and registrations for circulation in certain respects and in many national systems each of these registrations occurred in different places. In addition to this complexity, the MAC Protocol would add a new international registration. He noted that ideally such an improvement should take place at the national level, and it was highly unlikely that international registration would solve such inefficiencies at the local level.

154. *Mr Brydie-Watson* noted rather than a 'harm minimisation' approach which had been agreed upon in previous meetings, the tendency seemed to lean more towards an approach that required a demonstrably 'beneficial' effect under national law of registration of a notice of sale on the international registry.

155. *Mr Wilson* responded that the definition of a beneficial effect of registration at an international level should be addressed. Turkey could be taken as an example, where ownership

registration in cases of financial leases had been adopted. As a result, Turkey now had an ownership-based search criterion which provided no notice to third parties. With equipment which did not have ownership of title, as in the case of vehicles, the presumption was that possession equalled title. If the purpose was to create a registry which would transfer title from one seller to the other, the question would be whether the transfer was valid and whether ownership should also be registered.

156. *Professor Mooney* reflected on the previous comment and mentioned that in cases of purchase of equipment, search in an International Registry was normally conducted in order to avoid encountering a situation where such equipment would be subject to a security interest. In cases where a notice of sale was discovered, which would be indicative of the fact that the equipment had already been sold or could be subject to a contract of sale, it would act as a deterrent for the prospective purchaser in the first place. On the other hand, if the rule was that the purchaser would take title free if he did not have actual knowledge, then he would be better off by not finding out about the buyer who under that regime could have noticed and who would rather be in a worse situation. But if that buyer didn't take possession then that buyer knew that he would be running the risk. Professor Mooney further concluded that the assessment of social utility of a rule would be difficult.

157. *The Deputy Secretary-General* asked whether from a technical point of view it would be preferable to leave the matter to the stage of the intergovernmental experts to decide, by placing the provision as it was currently drafted in brackets and include a comment in the footnote with further explanations.

158. *Mr Bazinas* noted that the possibility of adding a rule on the notice of sale highlighted the need to avoid covering inventory and low-value equipment that were generally described in bulk.

159. *Professor Riffard* supported the approach of including the draft provision as an option. If the purpose of the registration of sale was not only to provide information to third parties, but also to protect the rights of parties, then the registration of sale should be mandatory. He noted that such conclusion would be significant from a legal policy perspective.

160. *Mr Deschamps* took the view that both the potential advantages and disadvantages should be examined. He referred to Article 29 (2) of the Cape Town Convention, and mentioned that the secured creditor who registered in the International Registry would have knowledge that there had been a registered sale beforehand. Yet the secured creditor, who had acquired its security interest from the previous owner, would be entitled to disregard the sale that was registered prior to the registration of the security interest, notwithstanding that they had full knowledge of existence of that sale.

161. *Professor de las Heras* suggested that an additional rule could also be added to the Protocol which would deal with the interaction between a registration of a notice of sale and Article 29(3) of the Convention. *The Deputy Secretary-General* inquired whether such an approach would require a specific provision to that effect in the Protocol. *Mr Böger* took the view that such a provision would not be desirable as it would inevitably raise doubts concerning the interpretation of the Rail Protocol, where such a rule did not exist.

162. *The Study Group* decided to retain the current approach, albeit as a tentative option, and defer the decision for further consideration by the Committee of Governmental Experts. *The Study Group* requested the Secretariat to conduct further research on the effect of notices of sale under domestic law regimes, using practical examples to illustrate.

*Interaction between Article 29(3)(b) and the MAC Protocol*

163. *Mr Brydie-Watson* explained that Article 29 (3)(b) dealt with the position of a buyer and referred to paragraph 271 of the issues paper. He mentioned that the matter had been discussed at the second Study Group meeting and queried whether, as a matter of policy, given that the registrations of sales with legal effect under the Protocol were not allowed, would it be allowed for the effect of Article 29(3)(b) to let secondary buyers to take title free of interest even when they would not qualify for such priority under domestic law. He noted that this was the substantive effect of the Article in question.

164. *Mr Deschamps* reiterated that registration of a notice of sale under the International Registry did not have any legal effect under the Convention. He referred back to paragraph 274 of the issues paper, an extract from the Official Commentary to the Rail Protocol, and elaborated that it applied to a buyer who acquired its right free from a security interest.

165. *Mr Böger* noted that the rule in Article 29(3) dealt with the regulation of rights of the buyer only to the extent that it dealt with the consequences concerning security interests. As a result, Article 29(3) did not regulate the consequences concerning a sale. The case of a double sale which would include a sale and a notice of sale would, therefore, fall outside the scope of Article 29(3).

166. *Mr Brydie-Watson* agreed with the previous comment. He noted that an unregistered interest under domestic law which might affect a buyer's subsequent interest, given that there was actual knowledge of such an unregistered interest, might also affect the title as a buyer under domestic law. Under the application of Article 29(3)(b), however, such domestic law would completely be changed and even removed.

167. *Mr Deschamps* noted that Article 24 of the Aircraft Protocol modified Article 29(3). Article 29(3) was a stand-alone provision and its framework would only contemplate the registration of security interests, leases and etc. As a result, interaction with a registered sale would come into play only if the Protocol provided for the registration of sales.

168. *Professor Mooney* maintained that the definition of an unregistered interest covered consensual interests of any kind. He raised the scenario where Buyer 1 bought and had an unregistered interest, whether or not it was registrable, and then Buyer 2 subsequently also bought, whether Article 29(3)(b) would then provide that Buyer 2 acquired its interest free from Buyer 1's unregistered interest, even where Buyer 2 had actual knowledge? He then explained that the principles of property law outside the Convention should apply with the result that the original owner would have nothing left to transfer.

169. *Professor Riffard* disagreed with Professor Mooney and took the view that interest in Article 29 did not cover sales, and therefore the adoption of a broad interpretation of the provision would be wrong. In the case of competing buyers, however, the issue would not be solved by the application of the priority rule. Neither would it be a question of third party effectiveness. It would rather be a question of validity, whereby the second sale would be void and invalid as the seller had no right to transfer. This would fall outside the scope of Article 29.

170. *Mr Durham* referred to the Aircraft Protocol and said that the contract of sale itself required a power to dispose, and that a power to dispose was sui generis in the double sale scenario.

171. *Professor de las Heras* thought that even if the wording of Article 29(3) was not entirely clear, an unregistered interest would not cover transfer of ownership, unless it was decided in the Protocol that legal effect was given to a registered notice of sale.

172. *Professor Mooney* emphasised once again that ownership was a consensual interest and it took title free of a prior unregistered interest. It should be clarified that knowledge did not matter for the purposes of the Convention.

173. *Mr Deschamps* maintained that any legal text had to be read and construed taking into account the particular context. Article 29 (3)(b) should not be read without taking into account the other Protocols and without taking into account that sales could be registered. The Article should not be read as meaning that the buyer of an object, assuming that the buyer had no registered interest in the International Registry, acquired its interest in it free from a non-registered interest, even if it had actual knowledge of such interest. Otherwise, the non-registered buyer would acquire its interest free from any other unregistered previous sale. This would mean that the last buyer would always prevail under the Convention, irrespective of domestic law, even though the Convention did not intend to deal with competing buyers. He cautioned that a contextual interpretation rather than a literal interpretation was required.

174. *The Study Group* decided that there was no need to insert an Article into the draft Protocol dealing with Article 29(3), however the Official Commentary should expressly provide that Article 29(3) would not apply to situations involving competing buyers.

#### *Interaction between MAC and Luxembourg Rail Protocols*

175. *Mr Brydie-Watson* highlighted that at the first Study Group meeting a possible overlap between the two Protocols had been anticipated, due to the broad descriptive definition of railway rolling stock contained in the Rail Protocol. The issue had been further discussed at the second meeting, where it had been tentatively recommended to carve out the scope of the MAC Protocol from the Rail Protocol where the latter was already in force in a relevant Contracting State. He noted that this approach was problematic if the MAC Protocol were to come into force prior to the Rail Protocol, a situation under which the existing drafting would not apply. In this scenario, registrations under the MAC Protocol would be permissible, and registrations for the same piece of equipment would also be possible under the Rail Protocol if it were to later come into force. He emphasised that such a scenario would create significant legal uncertainty and raise the undesirable prospect of competing registrations in different Cape Town Convention international registries, which could have substantial consequences, if, for instance, different insolvency regimes had been applied to the different Protocols by a Contracting State. He suggested that a possible policy solution for that issue would be the inclusion of an express rule in the MAC Protocol that provided that an object an interest in which was registerable under the Rail Protocol 'cannot be registered' under the MAC Protocol. *Mr Böger* questioned whether the phrase 'it cannot be registered' would mean that 'the registration would not have an effect'. *Mr Brydie-Watson* replied that the phrase would mean that the registration would be deemed invalid and thus without legal effect.

176. *Professor De la Heras* agreed that the potential overlapping issue could be avoided by mere exclusion of railway rolling stock and limiting the scope of the MAC Protocol on that very specific matter.

177. *Professor Mooney* took the view that it would be desirable for the MAC Protocol to completely defer the issue to the Rail Protocol as the scope of latter provided more certainty. In scenarios where there was a clash between the two Protocols, an express carve-out approach seemed to be more suitable for practical purposes.

178. *Mr Deschamps* queried whether there could be a potential clash between the MAC and Aircraft Protocols. He referred to the case of helicopters for construction purposes in Canada where many of them might be covered under the MAC Protocol.

179. *The Study Group decided that the MAC Protocol should contain an Article that explicitly provided that any object that was registerable under the Aircraft, Space and Rail Protocols could not be registered under the MAC Protocol.*

#### *Registration and Titling of MAC equipment*

180. *Mr Dubovec presented a short summary on the topic and mentioned that the research focused on the question of whether it was required to include a provision that would provide for de-registration of certain MAC equipment as a remedy. He noted that the registration of MAC equipment in national registries was possible in several jurisdictions. He also noted that in the USA, mainly in Arizona and Texas, the registering authorities were given the power to issue serial numbers. Typically the laws that govern the registration of ownership had different scopes of application whereby such scope would depend on the definition of the asset in question. He explained that the definition of 'motor vehicle' was important for this purpose. Other than motor vehicles, some States also included a category of 'specialised vehicles' in their laws. He concluded that registration and titling overall existed in several States for MAC equipment, however only in limited circumstances.*

181. *Mr Brydie-Watson queried whether there was a need for a de-registration export authority power in the limited instances where registration under national motor registry was possible.*

182. *Mr Dubovec replied that some States' secured transactions laws did have a specific provision for a 'transfer statement' through which the secured creditor would be empowered to submit a statement to the department of motor vehicles, transferring ownership of the vehicle to the transferee or the buyer who bought it at a foreclosure sale. Therefore he foresaw some need for the MAC Protocol to address those situations, under certain circumstances for these States, but not in the form of a full-blown Immediate Deregistration and Export Request Authorisation (IDERA) provision as set forth in Article XIII of the Aircraft Protocol.*

183. *Professor Mooney mentioned that unlike the Aircraft Protocol, there was no element of nationality in the context of the MAC Protocol. Unlike in the case of the Aircraft Protocol, the safety regulations for the export of MAC equipment were less relevant. He proposed the inclusion of a straightforward and simple obligation for Contracting States to cooperate with creditors when they realised their enforcement rights in the form of a cooperation provision, instead of trying to come up with a precise obligation.*

184. *Mr de la Campa raised the issue of transitional provisions about which Mr Dubovec referred to Article 60 of the Cape Town Convention where the effectiveness of any pre-existing right would be upheld.*

185. *Mr de la Campa requested further clarification on the issue of double registration. Mr Dubovec commented that it was possible to have two interests in the same asset, one under the MAC Protocol, which was an international interest, and the other under national law. According to the priority rules of the Convention, an international interest would have priority even if it was later in time.*

186. *Mr Brydie-Watson referred to page 64 of the issues paper and noted that it dealt with de-registration and export request authorisation, which had been discussed in previous meetings with regard to whether it was necessary to include a provision in the MAC Protocol. He noted that the power remedy was located in the Aircraft Protocol at Article XIII, as an opt-in provision.*

187. *Professor von Bodungen referred to Article VII (5) of the Luxembourg Rail Protocol, namely the cooperation obligation, and took the view that it would well serve for the purposes of this context. Professor de las Heras concurred, and noted that there is no need for the inclusion of*



a specific remedy on de-registration under the MAC Protocol. She explained that providing assistance to the creditor through a provision based on Article VII(5) of the Rail Protocol would suffice.

188. *The Study Group affirmed that the MAC Protocol should continue to include Article VII(5) of the draft Protocol (modification of default remedy provisions) as based upon Article VII(5) of the Luxembourg Rail Protocol, and there was no need for a provision modelled on the de-registration and export request authorisation provision in Article XIII of the Aircraft Protocol.*

#### *Multiple purpose equipment*

189. *Mr Brydie-Watson explained that the term 'multiple purpose equipment' was used in a broader sense to describe equipment which could have other uses outside the MAC industries, for example transport equipment. At the second Study Group meeting it was concluded that where a type of MAC equipment had the possibility to be listed under more than one of the Annexes, it should then be listed under each Annex independently. A cautious approach was favoured in listing any type of equipment whereby equipment should be either employed or used for one of the three fields covered by the MAC Protocol.*

190. *The Study Group reaffirmed that equipment with broad usage outside the MAC industries should be excluded from the scope of the Protocol.*

#### *Supervisory Authority*

191. *Mr Brydie-Watson noted that a consensus had been reached in the first Study Group meeting that preference should be given to choosing an existing organisation to act as Supervisory Authority under the MAC Protocol, given the difficulties faced by the Rail Protocol in the establishment of a new international entity to act as Supervisory Authority.*

192. *The Study Group raised the possibility of either the World Customs Organisation (WCO) or the International Finance Corporation (IFC) as possible entities that could act as Supervisory Authority. Mr de la Campa commented that the IFC or the World Bank had not consulted or considered such possibility internally within their current mandate. They requested that the Secretariat provide more information on the operation of the Supervisory Authority so the IFC could conduct internal consultations.*

193. *The Study Group requested that the Secretariat consult the IFC to determine the viability of the IFC acting as Supervisory Authority for the MAC Protocol.*

#### *Resolved Legal Issues*

194. *The Deputy Secretary-General introduced the topic, and highlighted the legal issues that had been resolved at the previous sessions of the Study Group. She invited comments from the Study Group.*

195. *Mr Bazinas referred to the sections that covered 'Inventory' and 'Interaction with domestic secured transactions regimes'. He addressed the first sentence of paragraph 333 and noted that inventory, even if individually serialised, was identified in bulk. It was normally not subject to a specialised registration system, and rather subject to a general registration system. He argued that the general criteria of high value, unique identifiability, as opposed to identifiability in bulk, as well as cross-border mobility should all be preserved in the assessment. With regards to paragraph 336, Mr Bazinas mentioned that an important aspect of the treatment of that issue was dealt with in the UNCITRAL Legislative Guide on Secured Transactions as well as in the Draft Model Law of UNCITRAL. Mr Bazinas stated that it was not appropriate for a specialised system such as the Cape*

Town Convention to cover equipment kept as inventory. He emphasized that duplication of efforts, possible overlaps and conflicts as well as fragmentation of the legal systems concerning the laws of secured transactions should be avoided.

196. *Mr Deschamps* noted that it was not feasible to have a regime which would apply to a specific type of asset in circumstances where the asset is considered as equipment, whereas it would not apply to the same asset when it was considered as inventory. He further reiterated that 'actual use' was not the point of the focus in the context of the MAC Protocol. If construction equipment was held for lease to contractors, it could be considered as inventory, yet if the same equipment was purchased by a builder then it would become 'equipment' rather than inventory. This would create difficulties. *Mr Bazinas* agreed and further explained that if the three criteria of the Convention were duly preserved, then the use of the device in question would bear no legal significance.

197. *Mr Wilson* referred back to paragraph 336 of the issues paper and stipulated that the scope of the paragraph had to consider financial leases given that they were considered as a part of national secured transactions regimes. In cases where the financial lessor would retain title to a property, the national interest would take priority over the MAC Protocol.

198. With regards to the issue of inventory, *Mr Wilson* further added that inventories were generically described. As items of equipment come into inventory they had to be specifically identified by their make, model and serial number. As they were sold they were required to be de-registered for every single sale, possibly prior to the sale actually taking place. The third party would then be able to take title free and clear of that interest. If they were not described generically, however, there would have to be registration, de-registration as well as re-registration procedures every time new equipment was brought in and out of inventory. *Mr Wilson* expressed his hesitation in regards to how this system would practically function.

### III. Review of the fourth draft Protocol

The Study Group discussed the second draft of the MAC Protocol prepared by the Secretariat.

#### *Preamble*

199. *Mr Brydie-Watson* noted that the approach in the previous Protocols, including the current draft of the MAC Protocol, as well as the Convention itself, had been that the preambles were kept relatively brief. The only exception to this was the Space Protocol, which due to the involvement of the United Nations Commission on the Peaceful Use of Space, contained a longer preamble.

200. *Mr Deschamps* referred to the paragraph beginning with 'recognising' in the preamble, and he noted that the inclusion of the phrase *developing countries* would generally be viewed as condescending. *Professor Mooney* suggested the term *emerging markets* as an alternative. He took the view that it would better serve for the purposes of the MAC Protocol context. *Mr Bazinas* took the view that *emerging markets* was a narrower approach compared to *developing countries*. He suggested that the phrase *countries with developing economies* could be used instead. He argued that all countries were developing in a sense and the global UN programmes generally did not utilise the term *developing countries*, as the term implied a situation whereby developed countries would work on a project for developing countries.

201. *Mr Böger* pointed out to the phrase *as it relates to* in the paragraph beginning with 'considering' in the preamble and highlighted that the Convention itself did not relate to such equipment, namely mining, agricultural and construction. The literal translation of the phrase into German would inevitably modify the intended meaning.

202. *Mr Brydie-Watson* mentioned that the phrase was consistent with the previous Protocols. The *Deputy Secretary-General* noted that Article 51 of the Convention indirectly allowed for the inclusion of other equipment even if they were not expressly mentioned in the Convention itself, however it was possible for the Secretariat to develop alternative language if necessary. The phrase 'as applicable to' was instead proposed.

203. The Study Group decided that the terminology should further be evaluated and studied by the Secretariat taking into account the language in the most recent UN instruments. The Study Group decided to include the phrase 'as applicable to' rather than 'as it relates to' in the second paragraph of the preamble.

#### *Article I – Defined Terms*

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

#### *Article II – Application of the Convention as regards to agricultural, mining and construction equipment*

205. The Study Group agreed with the drafting of the provision, and noted a slight drafting change to the title in which 'agricultural, mining and construction' equipment was not listed in alphabetical order.

#### *Article III – Derogation*

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

#### *Article IV – Representative capacities*

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

#### *Article V – Identification of agricultural, mining or construction equipment*

208. *Mr Brydie-Watson* elaborated on Article V and noted it was relevant for contract purposes rather than registration purposes. He mentioned that a more flexible approach based on the Rail Protocol had been adopted. He referred to paragraph 2 of Article V and the term *future*. He queried whether there was a consensus among the Study Group members for keeping the term as it was.

209. *Professor de las Heras* explained that the term *future equipment* would inevitably mean equipment that was not existent. It would then refer to the cases in which an interest was going to be created in the future given that the chargor did not have a power to dispose of the equipment. She further elaborated that the problem was about the capacity to create an interest in the present or in the future. *Professor Mooney* took the view that it would be problematic to deviate from the language of the Rail Protocol. He mentioned that the term had a common understanding and only an explanation could be added to the Official Commentary for further clarification. *Professor Riffard* noted that current drafting was appropriate.

210. *Mr Wilson* referred to the phrase the *power to dispose* in Paragraph 2 of Article V. He explained that it would occur at two different times. He explained that in many domestic systems the term would refer to a time when collateral was repossessed in an enforcement procedure. He contemplated that it was not the intention of the term in the Protocol to apply to that context. He took the view that further clarification might be required. *Mr Deschamps* replied that deviation from

the language of the Convention and its protocols was not recommended. The term the *power to dispose* covered a situation where the grantor was not the owner, yet they still had the legal ability to grant a security interest. Mr Deschamps thought the issue had been sufficiently explained in the Official Commentary.

#### *Article VI – Choice of law*

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

#### *Article VII – Modification of default remedies provisions*

212. Article VII on 'modification of default remedies provisions' was referred to and the term *assignments* in the title was raised by *Mr Dubovec*. He queried whether the term should be kept or omitted, given the fact that the associated chapter did not refer to assignments at all. *Professor Mooney* explained that as the term is in the title rather than the text, its modification should not have substantive legal effect. The Study Group concluded that the term 'assignments' should be omitted.

213. *The Deputy Secretary-General* highlighted that the specific remedy of de-registration would not be included in Article VII as discussed earlier in the meeting. Paragraph 5 of Article VII, namely the provision on cooperation, would suffice for these purposes. The Commentary to this Article, however, should clarify the situation on the remedy of de-registration.

214. *Mr Bazinas* referred to paragraph 2 of Article VII and contemplated whether the prior consent requirement would be required for scenarios whereby junior and senior creditors were involved. He further reflected upon a case where the junior creditor would proceed with the enforcement, sell the asset and pay the senior secured creditor. He queried whether it would then mean that the junior secured creditor did not necessarily require the consent of the senior secured creditor whereas the senior creditor would always be entitled to take over enforcement?

215. *Professor Mooney* noted that such a level of detail had not generally been dealt with in relation to the junior and senior creditor scenario. *Professor von Bodungen* intervened that the consent requirement was only relevant with respect to the export remedy and not for other remedies under the Convention. He noted that there was a notification requirement. If the junior creditor went ahead and exercised his rights under the Convention, the prior ranking security interest would simply remain on the asset.

#### *Article VIII – Modification of provisions regarding interim relief pending final determination*

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

#### *Article IX – Remedies on insolvency*

217. *Mr Brydie-Watson* noted that as consistent with the Study Group's decision earlier in the meeting, that an additional paragraph would need to be inserted which would allow the Contracting States to potentially apply different insolvency regimes to different annexes to the Protocol. The paragraph would also need to deal with HS codes listed separately in two separate annexes.

218. The Study Group discussed whether an additional rule in relation to family farmers should be inserted into the draft Protocol. *Mr Deschamps* highlighted that it was decided by the Study Group not to make any exceptions for family farmers. He noted that the matter should be left open for further consideration. Part of the answer, he thought, would be found in the types of

equipment and whether such equipment would be often used by an individual farmer who would own a family farm.

219. *The Deputy Secretary-General* clarified that the final decision was to start from an assumption where there would be no special rule, and noted that drafting such a provision would be quite complicated as subjective aspects of what constituted a 'family farmer' would have to be taken into account.

220. *Mr Dubovec* affirmed that it would be generally difficult to define the term 'family farmer'. It was previously noted by the Secretary General that there were family farmers in Brazil that own very high value equipment.

221. *Professor Mooney* suggested giving Contracting States a right for a more general declaration that certain kinds of grantors could be carved-out. The Contracting States would therefore have the right to decide on the classes through a declaration.

222. *Professor de las Heras* expressed her concerns for leaving such rights to States, with regards to potential risks of corruption. She explained the cases whereby a big enterprise could set up an arrangement and certain types of equipment could be owned under the name of particular category of individuals who were legally exempt from enforcement procedures. *Professor Mooney* clarified that in his previous comment, he was specifically addressing the insolvency alternatives.

223. *The Deputy Secretary-General* took the view that this was a matter which could preferably be left to the intergovernmental stage, as it was more of a policy rather than technical legal issue.

#### *Article X – Insolvency Assistance*

224. *The Study Group* agreed with the drafting of the provision.

#### *Article XI – Debtor provisions*

225. *The Study Group* agreed with the drafting of the provision.

#### *Article XII – The Supervisory Authority and the Registrar*

226. *The Study Group* agreed with the drafting of the provision.

#### *Article XIII – First regulations*

227. *The Study Group* agreed with the drafting of the provision.

#### *Article XIV – Designated entry points*

228. *The Study Group* agreed with the drafting of the provision.

*Article XV – Identification of Agricultural, Mining and Construction Equipment for registration purposes*

229. *Mr Brydie-Watson* referred to paragraph 2 of Article XV and mentioned that a dual system had been created whereby in the absence of manufacturer's serial number, identification numbers were allocated by the Registrar which would enable the unique identification of the equipment. He proposed that paragraphs 1 and 2 of the Article be considered as a 2-option scenario. Option 1 as preferred by the Study Group and the preferred choice would be flagged in the footnote. Option 2, on the other hand, would only act as a back-up option if it were discovered that there were certain equipment with no serial numbers.

230. *Mr Böger* queried about the precise purpose of inclusion of the term *model designation* as worded in paragraph 1 of Article XV.

231. *Professor de las Heras* suggested that the industry should be consulted. She further mentioned that model designation could be useful to be included as part of registration only as a search criterion.

232. *Professor Mooney* commented that model designation would be useful to clarify what the equipment was in the first place by nature. The mere serial number might not necessarily clarify the nature of the equipment.

233. *Professor Riffard* noted that the inclusion of model designation was definitely practical for identification of equipment for registration purposes and should be retained.

234. *Mr Böger* inquired about the languages in which the model designation would preferably be conducted, as they might be different, for example, in English and German.

235. *Mr Durham* suggested that there could be a Registry solution whereby a uniform way of model designation could be introduced, as was the case for the Aircraft Protocol. This would, however, ultimately rely on manufacturers.

236. The Study Group decided to create two options under Article XV, with the Aircraft Protocol model of only allowing registration of interest in those objects with a manufacturer's serial number as the primary option. The Study Group further decided that model designation would remain as part of the criteria for registration, subject to further consultation with private industry.

*Article XVI – Additional modifications to Registry provisions*

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

*Article XVII – Notices of sale*

238. *Mr Brydie-Watson* noted that further research was required, however the Study Group had earlier ultimately decided to defer this issue to the intergovernmental negotiations stage of the process.

239. *Professor Mooney* suggested that in the absence of a definitive commentary, the issue of Article 29(3) should preferably be set aside.

240. *Mr Böger* favoured that the provision on notices of sale to be drafted in line with the Rail Protocol and paragraph 2 to be omitted.

241. The Study Group decided to omit paragraph 2 from Article XVII(2).

*Article XVIII – Waivers of sovereign immunity*

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

*Article XIX – Relationship with the UNIDROIT Convention on International Financial Leasing*

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

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

244. The Study Group agreed with the drafting of the provision, and noted that a comma should be added after the word 'acceptance' in the title.

*Article XXI – Regional Economic Integration Organizations*

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

*Article XXII – Entry into force*

246. *Mr Brydie-Watson* noted that for the purposes of Article XXII on 'entry into force', the MAC Protocol would follow the Rail Protocol approach, and the earlier idea of allowing different annexes to enter into force at different times had been abandoned.

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

*Article XXIII – Territorial units*

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

*Article XXIV – Declarations*

249. The Study Group agreed that the new approach to declarations should be the status quo in the draft, requested that the Secretariat remove the second option, and find a better way to represent the different options rather than having the older Articles struck out with a line through their heading.

*Article XXV – Denunciations*

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

*Article XXVI – Review conferences, amendments and related matters*

251. *Mr Brydie-Watson* mentioned a possible three-tier approach could be created for this Article, and noted the distinction between (i) amendments to the Protocol itself, which should remain consistent with the formal amendment procedures in the previous Protocols, (ii) amendments to the lists in the annexes which simply realign codes and did not expand the scope of the Protocol and (iii) amendments to the list in the annexes that were deliberate expansions to the Protocol to accommodate for emerging MAC technologies.

252. Mr Brydie-Watson also noted the suggestion with regards to *the Montreal Convention for the Unification of Certain Rules for International Carriage by Air* approach which under Article 24 utilised a review system which occurred every 5 years. He stipulated that such an approach could also be considered for the purposes of this article.

253. *The Deputy Secretary-General* noted that all the procedural points on amendments would preferably be placed in the final provisions of the Protocol as they relate to all the annexes.

254. As direct changes to the annexes would imply changes to the Protocol itself which would require a formal treaty action, *Mr Brydie-Watson* took the view that the differences in these two procedures should be clearly defined and differentiated.

255. *Professor von Bodungen* suggested that a separate provision be formulated and follow the current Article XXVI which would clearly differentiate between the two procedural scenarios.

256. The Study Group agreed that Article XXVI would be subject to modifications and should be re-drafted, with different provisions relating to the amendment processes.

#### *Article XXVII – Depository and its functions*

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

#### *Article ??? – Fixtures*

258. The Study Group agreed that the Article dealing with affixable equipment would need to be completely modified and redrafted.

#### *Annexes to the Protocol*

259. *Mr Brydie-Watson* introduced the Annexes provisions and noted that paragraphs 2 and 3 would be modified in line with the changes made to the amendments and procedures.

260. As consistent with its earlier decision, the Study Group decided to include a provision in the annexes which provided that interests in any object registerable under the Aircraft, Rail or Space Protocols could not be registered under the MAC Protocol. Any registration contravening this rule would have no legal force and no liability for the Registrar would arise.

### **IV. Other items**

261. The Study Group requested that the Secretariat convene a conference call in late December 2015 to further discuss the fixtures issue.

### **V. Next meeting**

262. The Study Group discussed possible dates and locations for the next Study Group meeting. The Study Group tentatively identified 7-9 March 2016 as possible dates for the fourth Study Group meeting. The Study Group decided that the Secretariat should confer with the Chair Mr Bollweg in confirming arrangements for the next meeting.

263. *The Deputy Secretary-General* thanked all attendees for their participation and closed the meeting.



**ANNEX I - LIST OF PARTICIPANTS****MEMBERS OF THE STUDY GROUP**

Mr Hans-Georg BOLLWEG (*chair*) (*excused*)  
Head of Division, Federal Ministry of Justice and Consumer Protection  
Berlin, Germany  
[Bollweg-Ha@bmjv.bund.de](mailto:Bollweg-Ha@bmjv.bund.de)

Mr Michel DESCHAMPS  
Partner, McCarthy Tetrault  
Montreal, Canada  
[mdeschamps@mccarthy.ca](mailto:mdeschamps@mccarthy.ca)

Professor Charles MOONEY  
Charles A. Heimbald Jr. Professor of Law  
University of Pennsylvania, United States of America  
[cmooney@law.upenn.edu](mailto:cmooney@law.upenn.edu)

Professor Jean-François RIFFARD  
Professor, Université de Clermont-Ferrand  
Clermont-Ferrand, France  
[j-francois.RIFFARD@u-clermont1.fr](mailto:j-francois.RIFFARD@u-clermont1.fr)

Professor Teresa RODRÍGUEZ DE LAS HERAS BALLELL  
Associate Professor in Commercial Law  
Universidad Carlos III de Madrid, Spain  
[teresa.rodriquezdelasheras@uc3m.es](mailto:teresa.rodriquezdelasheras@uc3m.es)

Professor Benjamin VON BODUNGEN  
Of Counsel at Bird & Bird LLP  
Frankfurt, Germany  
[benjamin.von.bodungen@twobirds.com](mailto:benjamin.von.bodungen@twobirds.com)

**MAC PROTOCOL WORKING GROUP**

Mr Phillip DURHAM  
Partner, Holland and Knight LLP  
New York, United States of America  
[phillip.durham@hklaw.com](mailto:phillip.durham@hklaw.com)

**OBSERVERS**

Mr Alejandro ALVAREZ DE LA CAMPA  
Global Product Leader, Secured Transactions and Collateral Registries,  
International Finance Corporation, World Bank Group  
Johannesburg, South Africa  
[aalvarez1@ifc.org](mailto:aalvarez1@ifc.org)

Mr Spyridon BAZINAS  
Senior Legal Officer, United Nations Commission on International Trade Law Secretariat  
Vienna, Austria  
[Spiros.Bazinas@uncitral.org](mailto:Spiros.Bazinas@uncitral.org)

Mr Ole BÖGER  
District Court Judge, Federal Ministry of Justice and Consumer Protection  
Berlin, Germany  
[boeger-ol@bmjv.bund.de](mailto:boeger-ol@bmjv.bund.de)

Mr Ed DE JONG  
Senior Technical Officer (Nomenclature), World Customs Organization  
Brussels, Belgium  
[ed.dejong@wcoomd.org](mailto:ed.dejong@wcoomd.org)

Mr Marek DUBOVEC  
Senior Research Attorney, National Law Center for Inter-American Free Trade  
Tucson, United States of America  
[mdubovec@natlaw.com](mailto:mdubovec@natlaw.com)

Ms Megumi HARA  
Professor of Law  
Gakushuin University, Japan  
[megumi.hara@gakushuin.ac.jp](mailto:megumi.hara@gakushuin.ac.jp)

Mr Benjamin JOHNSON  
JD Candidate  
University of Pennsylvania, United States of America  
[bendjoh@gmail.com](mailto:bendjoh@gmail.com)

Mr John WILSON  
Senior Operations Officer, Finance and Markets  
International Finance Corporation, World Bank Group  
Panama City, Panama  
[jwilson4@ifc.org](mailto:jwilson4@ifc.org)

## **UNIDROIT**

### **UNIDROIT SECRETARIAT**

Professor Anna VENEZIANO (temporary chair)  
Deputy Secretary-General  
[a.veneziano@unidroit.org](mailto:a.veneziano@unidroit.org)

Mr William BRYDIE-WATSON  
Legal Officer  
[w.brydie-watson@unidroit.org](mailto:w.brydie-watson@unidroit.org)

### **UNIDROIT INTERNS AND RESEARCHERS**

Ms Golnaz JAFARI  
Intern, Iran  
[jafarigolnaz@gmail.com](mailto:jafarigolnaz@gmail.com)

Mr Tarek KADOUR ALEINIEH  
Intern, Syria  
[primostello@gmail.com](mailto:primostello@gmail.com)

Mr Hítalo SILVA  
Intern, Brasil  
[hitalorick@gmail.com](mailto:hitalorick@gmail.com)

**ANNEX II - AGENDA**

1. Opening of meeting and introductory remarks
2. Adoption of the agenda and organisation of the meeting (see “Annotations” below)
3. Overview of activities since the second study Group meeting
4. Overview of recent stakeholder consultation
5. Legal Analysis
  - A. Scope - Use of the Harmonized System
  - B. Scope – Preliminary List of HS Codes for inclusion under the MAC Protocol
  - C. Use of Article 51(1) Criteria – High Value
  - D. Use of Article 51(1) Criteria – Mobile
  - E. Use of Article 51(1) Criteria – Uniquely Identifiable
  - F. Fixtures
  - G. Accessions
  - H. Special Insolvency Regimes affecting farmers and agricultural enterprises
  - I. Restrictions on the enforcement of security interests in farming equipment
  - J. Insolvency Alternatives
  - K. Application to sales
  - L. Interaction between Article 29(3)(b) and the MAC Protocol
  - M. Interaction between MAC and Rail Protocols
  - N. Registration and Titling of MAC equipment
  - O. Multiple purpose equipment
  - P. Supervisory Authority
6. Review of the fourth draft Protocol
7. Organisation of the fourth meeting of the Study Group
8. Closing of meeting