



EN

**MAC Protocol
Study Group
4th meeting
Rome, 7 – 9 March 2016**

UNIDROIT 2016
Study 72K – SG4 – Doc.5
Original: English
April 2016

Report

(Prepared by the UNIDROIT Secretariat)

I. Opening of the meeting and introductory remarks

1. The fourth session of the MAC Protocol Study Group was opened by *Mr Jose Angelo Estrella Faria*, Secretary-General of UNIDROIT at the seat of UNIDROIT in Rome.

2. The Secretary-General noted the significant progress made since the 3rd Study Group meeting in October 2015. He noted that if the Study Group was satisfied that the MAC Protocol was sufficiently developed, it was invited to recommend to the Governing Council that it approve the convening of a Committee of Governmental Experts to further examine the Protocol. He suggested that should this occur, it was likely that the phase of intergovernmental negotiations would not begin until 2017. He noted that the reasoning for this was twofold: first, such a timeline would allow additional promotional activities to be carried out among industries that would have an interest in the Protocol, especially those from parts of the world that were not yet involved in the project. Second, he doubted whether member states would have budgeted the funding of delegations for intergovernmental negotiations in 2016.

II. Adoption of the agenda

3. The agenda of the meeting (Annex II) was adopted without amendment.

III. Overview of activities since the third Study Group meeting

4. *Mr William Brydie-Watson*, Legal Officer at UNIDROIT, provided a general overview of activities since the third session. He noted that most activity related to the further refinement of the three key documents associated with the project; (i) the annotated draft Protocol (UNIDROIT 2016 – Study 72K – SG4 – Doc. 3), (ii) the Preliminary List of Harmonized System (HS) codes for inclusion in the Annex to the Protocol (Preliminary List) (UNIDROIT 2016 – Study 72K – SG4 – Doc. 4) and (iii) the accompanying Issues Paper (UNIDROIT 2016 – Study 72K – SG4 – Doc. 2). He also noted that *Mr*

Marek Dubovec, Senior Research Attorney at the National Law Center for Inter-American Free Trade, submitted a study on the GS1 system and the effect of notices of sale on the domestic laws to the Secretariat which had been incorporated into the legal analysis.

5. *Mr Brydie-Watson* mentioned the two out-of-session teleconferences held in December 2015 and February 2016 to further examine how the draft Protocol should regulate MAC equipment association with immovable property. He noted that the draft Protocol and issues paper reflected the conclusions reached by the Study Group during the teleconferences.

IV. Overview of recent stakeholder consultation

6. *Mr Brydie-Watson* summarised the stakeholder consultations conducted by the Secretariat since the third session in October 2015. He highlighted that the United Nations COMTRADE database had been contacted through the World Customs Organisation (WCO), which enabled access to international data on net exports and imports of the types of equipment covered by the Harmonized System (HS) codes listed in the Annexes. He noted that this information was contained in the Preliminary List, which had been provided to the Study Group in advance of the meeting. *Mr Dubovec* intervened by saying that additionally the individual and specific values and pricing lists of equipment had been obtained and were also reflected in the Preliminary List.

7. *Mr Brydie-Watson* noted that the Secretariat had been communicating with the International Finance Corporation (IFC) through *Mr John Wilson*, Senior Operations Officer, in relation to the possibility of the IFC acting as the potential Supervisory Authority for the Protocol, and that the Secretariat had produced a paper for consideration by the IFC to assist with the process.

8. *Mr Phil Durham*, Partner at Holland and Knight LLP and executive board member of the MAC Protocol Working Group explained that stronger private sector engagement had occurred since the third Study Group meeting. He noted that over recent months both the manufactures and the financiers had contributed significantly to data collection related to the preparation of the Preliminary List of HS Codes. The manufacturers had provided input concerning the equipment, in particular whether items were serialised or were affixed to immovable property, and whether items were sold as a completed unit or in parts. The financiers were asked for data in particular with regards to whether the items of equipment covered by the Preliminary List was subject to individual financing arrangements. He concluded that the data collected by the Working Group was very positive, in that it affirmed that vast majority of the equipment covered was high value, uniquely identifiable and capable of being individually financed.

9. *Mr Brydie-Watson* also noted that there was a consultation meeting organised by Japanese manufacturers on 17 February 2016 which was facilitated by both *Professor Magumi Hara*, Professor of Law at Gakushuin University, and *Professor Kozuka*. *Professor Hara* briefly explained that the meeting was attended by major Japanese corporations and functioned as an introduction on the progress of the MAC Protocol project. She noted that the meeting provided an opportunity to request that the Japanese manufacturers provide further input on the types of equipment they were producing.

10. She noted that some corporations were somewhat hesitant about the practicality of the MAC Protocol project. In particular, they considered the issues surrounding accessions and fixtures as being quite abstract in practical sense. She further noted that one corporation doubted whether the use of manufacturer's serial numbers for identification purposes was actually plausible, as manufacturer's serial numbers were not generally utilised for any other purpose than the manufacturing purposes, and as such had not been utilised previously for trade purposes. *Professor Jean-Francois Riffard*, Université de Clermont-Ferrand and member of the Study Group, queried whether the corporations opposing the manufacturer's serial number approach had any alternative

solutions. *Professor Hara* responded that there were no alternative solutions proposed at the meeting.

11. Finally, *Professor Hara* pointed out that some corporations wanted to have forestry machinery also covered by the MAC Protocol. *Professor Hara* queried whether it was plausible to have additional clarification in this regard. She further explained that in Japan the term forestry fell outside the definition of 'agriculture'. *Mr Dubovec* intervened by clarifying that there were already a number of codes in the 'suitable' Tier 1 of the Preliminary List of HS codes covering forestry machinery and that they were considered as agricultural equipment. *The Secretary General* proposed that additional wording could be added to the definitions in Article I paragraph 2, that provided that agricultural equipment included 'any agricultural, fishery and forestry equipment listed'.

V. Legal Analysis

A. Scope – Use of the Harmonised System

12. *Mr Brydie-Watson* introduced the topic and explained that the Secretariat had done additional research on two other international instruments that utilised the Harmonised System to define aspects of their scope. The Secretariat conducted an additional study on both the Agreement on Trade in Civil Aircraft and the Energy Charter Treaty (ECT), in order to ascertain whether the approaches used in these instruments could be adopted by the MAC Protocol. He noted that the approach of the Civil Aircraft Agreement did not appear to be particularly useful for the MAC Protocol, primarily because it used a description-based scoping article in addition to the use of the HS codes. Given the diversity in the range of agricultural, construction and mining equipment covered by the MAC Protocol, a description-based approach would not be practical for the MAC Protocol. He further noted that the approach of the ECT to the scope of application was one which explicitly referred to four annexes which all refer to the HS codes, coupled with the requirement that the objects be used in economic activities in the energy sector. The other restricting mechanism in the ETC was the listing of certain HS codes in Annex NI, which explicitly excluded the application of the Protocol to objects covered by the listed HS codes. He concluded that the Annex NI was a mechanism that had only been utilised sparingly.

13. He further explained that the potentially useful mechanism utilised by both instruments was the 'ex' designation placed before HS codes to indicate that not all items that fell under a certain HS code were within the scope of the instrument. He noted that if it was decided to exclude certain items from the MAC Protocol, such as parts that were covered under an HS code listed in the annex, then the 'ex' designation could be used to continue to apply the MAC Protocol to the completed equipment listed under an HS code, albeit excluding parts.

14. *Mr Dubovec* explained the study prepared on the GS1 system, a system of unique ID numbers for manufacturers largely in retail, healthcare and logistics. He indicated that the mechanism included the generation of ID keys as unique identifiers for products. He noted that the GS1 system had only a remote relevance to the MAC Protocol scenario and could not be used as a substitution for the use of HS codes.

15. *The Study Group noted the additional research conducted by the Secretariat on the use of the Harmonised System to define the scope of other international instruments, and the additional research on the GS1 system.*

B. Scope - Preliminary List of HS Codes for inclusion under the MAC Protocol

16. *Mr Brydie-Watson* introduced the changes to the structure of the Preliminary List of HS codes since the third Study Group meeting, and highlighted the structure of the preliminary list as being categorised in three tiers of suitable (Tier 1), possible (Tier 2) and unsuitable (Tier 3) lists of HS codes. He noted that only Tier 1 codes were to be included in the annexes to the Protocol. Primary factors for such categorisation were the value and the utilisation of the equipment, whereby low value objects and parts, objects that were not individually financeable, objects that were not uniquely identifiable and objects commonly used outside the MAC industries were placed in either Tier 2 or Tier 3. He noted that 30 codes currently were classified as Tier 1.

17. *Mr Durham* mentioned that the Working Group had provided an additional 4 previously unlisted HS codes which they requested be added to Tier 1 (HS codes 843031, 843049, 843340 and 843351). He also noted that the Working Group had also requested several codes be elevated from Tier 2 to Tier 1, and drew particular attention to HS code 870190, which covered a very high volume of international trade in tractors and was very important the industry to be elevated from Tier 2 to Tier 1.

18. *Mr Brydie-Watson* went through the codes in detail in order to receive feedback from the Study Group members. HS code 842959, with a broad range in financial value, was considered to be included in Tier 1. *Professor Benjamin von Bodungen*, Counsel at Bird & Bird LLP and member of the Study Group, took the view that value should not be an essential criterion and referred back to rolling stock for railway equipment and mentioned that price variation was not of significance.

19. *The Secretary-General* suggested a separation of codes into their different Annexes (Annex 1 for agricultural equipment, Annex 2 for construction equipment and Annex 3 for mining equipment) for the purposes of better presentation at the upcoming Governing Council meeting.

20. *Mr Boger* queried whether the security rights for vehicle mortgages could be considered relevant for this HS code. *Mr Dubovec* intervened that some of these tractors could potentially fall under the definition of a vehicle or specialised construction machinery and therefore could be subject to certificate of title under which mortgages could be registered locally, although not all jurisdictions would have those kinds of laws.

21. *Professor Hara* presented additional input received from major Japanese manufacturers of MAC equipment, including additional codes for consideration for inclusion in the Preliminary List. *Mr Dubovec* noted that of the 8 HS codes suggested by the Japanese manufacturers all of them were already on the list; 6 were already in Tier 1 and 2 were already listed in Tier 2. From the Japanese descriptions, the two Tier 2 codes (843149 and 843141) appeared to cover attachments/implements. The Study Group asked the Working Group to communicate to the Japanese manufacturers that they would need to provide strong evidence of individual financing and high individual unit prices for the two Tier 2 codes to be upgraded to Tier 1.

22. *The Study Group* noted the updates to the Preliminary List of HS Codes. Based upon the additional data provided by the Working Group, the Study Group agreed to add HS codes 843031, 843049, 843340, 843351 to Tier 1, upgrade HS codes 847982, 870190 and 843680 from Tier 2 to Tier 1 and downgrade HS codes 842620 (Tower Cranes) from Tier 1 to Tier 3, bringing the total number of HS codes on the Tier 1 of the Preliminary List to 36 codes. The Study Group tasked the Secretariat with updating the table for presentation to the Governing Council, and asked the Working Group to provide further data on whether the equipment under each code on the Tier 1 list was used in the agriculture, construction or mining, or across more than one industry.

C. Use of Article 51(1) Criteria – High Value

23. *Mr Brydie-Watson* noted that the Study Group had agreed at previous meetings that the high value criterion should be taken into consideration in determining which lists of HS codes should be included in the Annexes to the MAC Protocol. He noted that the Preliminary List of HS codes now contained data of individual unit prices of the MAC equipment they covered, and that while the individual unit prices in Tier 1 ranged from \$10,000 - \$7,000,000, most codes had a minimum individual unit value of at least \$100,000. He concluded that this input demonstrated that the Protocol had effectively been tailored to cover high value MAC equipment.

24. *Mr Bazinas*, Senior Legal Officer at the United Nations Commission for International Trade Law (UNCITRAL), noted that as consistent with his interventions at previous meetings, that it was important that the MAC Protocol respected the criteria of Article 51(1) of the Cape Town Convention (high value, mobile and uniquely identifiable) to ensure that the Protocol did not duplicate the work of UNCITRAL in the field of secured transactions. He emphasized that low value equipment that was not mobile or uniquely identifiable should not fall under the Protocol. *The Secretary General* noted that these issues had been carefully considered throughout the Study Group process and that the current draft Protocol and Preliminary List adhered to the Article 51(1) criteria.

D. Use of Article 51(1) Criteria – Uniquely Identifiable

25. *Mr Brydie-Watson* reflected on previous considerations by the Study Group during the second meeting, in which the Study Group attempted to find a middle road between the Rail Protocol and the Aircraft Protocol approaches to 'uniquely identifiable', which would have allowed for the creation and the issuing of serial numbers for a certain time period in case it was discovered that certain MAC equipment did not have manufacturer's serial numbers. He noted that as reflected in the updated Preliminary List, it appeared that in the vast majority of cases this was not an issue. Two HS codes were exceptions on the Tier 1 list, namely 842620 (tower cranes) and 842919 (bulldozers and angledozers). Code 842620 was downgraded to Tier 3, whereas HS code 842919 was retained in Tier 1.

26. *Professor Mooney*, University of Pennsylvania and member of the Study Group, suggested that a code should not be excluded for the mere reason that it covered some equipment that did not have manufacturer-issued serial numbers, as the equipment might be serialised later.

27. *The Study Group decided that paragraph 2 (in square brackets) from Article XVI should be removed, as it appeared that the vast majority of equipment under the Tier 1 HS codes had unique individual manufacturer-issued serial numbers.*

E. Association with Immovable Property

28. *Mr Brydie-Watson* introduced the topic, and noted that this issue was the subject of two out of session teleconferences in December 2015 and February 2016. He referred to the legal paper, and noted that the Study Group had previously decided that association with immovable property should be dealt with a mandatory declaration in the MAC Protocol, that the draft article should provide different options for consideration by the Intergovernmental Committee of Experts and that the article should not use the terms 'fixture' or 'accessory'. *Mr Brydie-Watson* thanked the members of the Study Group who had provided additional input for the legal analysis in relation to the immovable property issue.

29. *Mr Boger* noted that Alternative D had been simplified to the extent that he hoped it would be more palatable for the Study Group, by reforming both the declarations structure and not referencing the terms 'fixture' and 'accessory'.

30. *Mr Dubovec* noted that the first Cape Town Convention draft referenced 'oil rigs that were not intended to be permanently immobilized' and that the discussion paper in relation to a possible Protocol on wind energy equipment also mentioned the effect of affixing wind turbines to the ocean bed, and made the point that this was not a completely new issue that UNIDROIT was considering.

31. *The Secretary-General* made two opening comments. First, he queried the rationale behind the inclusion of paragraph 2 in Article VII, which provided that the Protocol was to be applied subject to the declaration made by the Contracting State in relation to immovable-associated equipment in that State. He noted that the extensive discussion on the application of the right of requirement in the negotiation of the *Convention on the International Sale of Goods* (the CISG) was settled law. He noted his concern that keeping paragraph 2 would convey the message that this legal issue was still unclear, which was not the case, and that it would be a matter better dealt with in the Official Commentary rather than as an operative provision. Secondly, he noted that the drafting of the four alternatives were different, in that Alternatives A and C were drafted as substantive law provisions and Alternatives B and D were drafted as conflict provisions. He noted that it could be preferable for all alternatives to be drafted as substantive provisions.

32. *Professor Mooney* agreed with the *Secretary-General* in relation to his first point, and noted that every court in the world would generally refer to the State where the immovable property was located to determine the governing law, and as such paragraph 2 was not necessary. On the second point, he agreed with the principle but queried how the redrafting could be achieved.

33. *Mr Bazinas* noted that UNCITRAL faced a similar issue in relation to the finality of rights after the enforcement of a security interest where enforcement took place in a court or out of court. He noted that in relation to judicial enforcement, the judicial enforcement rule deferred to the domestic law of the enacting State, but was not drafted as a private international law rule. He noted such an approach could be adopted by the MAC Protocol.

34. *Mr Deschamps*, Partner at McCarthy Tetrault and member of the Study Group, queried whether paragraph 3 was useful, and noted that paragraph 3 gave the impression that in its absence, a declaration under Article VII by a Contracting State would have an impact in a non-Contracting State, which in his view was incorrect. He noted that a non-Contracting State would only need to apply the law of a Contracting State to the extent that the non-Contracting State's domestic conflict of law rules required it to do so.

35. *The Secretary-General* concurred with *Mr Deschamps'* view, and noted that paragraph 3 should be redrafted to reflect that movable equipment becomes associated with immovable property, rather than immovable property becoming associated with equipment.

36. *Mr Boger* noted that the intention behind paragraph 2 was to confirm the underlying assumption, and that if its inclusion created the opposite presumption then it should be removed. He noted paragraph 1 could be redrafted in a way which made paragraph 2 redundant. In relation to paragraph 3, he also noted that it was clear that a declaration under this Article should not bind a non-Contracting State, however in the absence of such a paragraph, Article 29 would apply which would bind the courts of Contracting States to apply the Protocol rule, as the defining rule under the Convention was the location of the debtor.

37. *Professor Mooney* surmised that the Study Group wanted to protect the non-Contracting State's immovable property law, it was just a matter of how to achieve that objective.

38. *Mr Bazinas* queried what would occur when equipment under the Protocol was associated with immovable property in a Contracting State and was subsequently moved and associated with immovable property in a non-Contracting State. *Professor Mooney* responded that if a secured creditor was relying on the applicable law of a Contracting State, and the law of the Contracting State became inapplicable because the law of a non-Contracting State then applied, then this was a reasonable outcome and it was not for the Protocol to try to affect this situation.

39. *The Secretary-General* noted that the issue was ultimately a matter of enforcement, and that a court in a Contracting State should not issue an enforcement order that would be unenforceable in a non-Contracting State because the court of the Contracting State had not applied the law of the place where the immovable was located.

40. *Mr Deschamps* noted that in an insolvency proceeding the insolvency court could rule on the respective rights of a secured creditor and insolvency administrator in respect to property that might be located outside the jurisdiction of the insolvency court. He concluded that perhaps paragraph 3 should be retained in some form to provide that Article 29 should not permit a court to apply the law of a Contracting State to equipment associated with immovable property in a non-Contracting State. He concluded that this provision should not be considered as part of a declaration but as a qualification to the priority rules. *Mr Boger* concurred that paragraph 3 could indeed be retained, although not as part of a declaration.

41. *Professor Mooney* noted that due to the fact the Protocol was attempting to regulate interests in immovable property, which was the first time an international instrument had ever attempted to do so, that even if paragraphs 2 and 3 were ultimately removed, it might be prudent to include footnotes on the issue explaining to future readers of the draft Protocol the reasoning behind the draft provisions.

42. *The Secretary-General* noted that if paragraph 3 was to be retained, it should be rephrased as a positive rule.

43. *Professor Von Bodungen* noted that the phrasing behind paragraph 3 was originally based upon the wording of Article 29(7) of the Convention, and agreed that the wording could be improved further.

44. *Professor Teresa Rodríguez de las Heras Ballell*, Professor at Universidad Carlos III de Madrid and member of the Study Group, noted that Alternatives A and B referred to the existence of an interest, whereas Alternative C provided priority rules, and that it might be preferable for the Protocol to be consistent in its approach.

45. The Study Group decided to remove paragraph 2 and note the issue in the Official Commentary that it was the practice in the application of Private International Law Conventions that the courts of any State apply the law of the Contracting State as implemented by the Contracting State, including all declarations made by that Contracting State. The Study Group agreed to redraft paragraph 3 to provide that "Where immovable-associated equipment is, or becomes, associated with immovable property located in a non-Contracting State, the domestic law of the non-Contracting State governs the priority rules".

46. *The Secretary-General* suggested that Alternatives B and D should be redrafted to make them substantive law provisions rather than conflict of law provisions. He noted that the Alternatives in Article XI of the Aircraft Protocol provided substantive law provisions and that the association with immovable property article should do the same. *Mr Deschamps* noted that such a

redrafting would have the effect that a Contracting State would have to choose A, B, C or D as their substantive law. He noted that this was a superior approach and provided more certainty.

47. *Mr Boger* noted that while such an approach would create a substantive law provision, the provision itself would still refer to the domestic law of the declaring State.

48. *Professor Mooney* noted that this issue was related to the definition of immovable-associated equipment, and the substantive provision being created would essentially reflect the *lex rei sitae* principle.

49. Consistent with the view he expressed at the intersessional conference call, *Professor Von Bodungen* suggested that text modelled on Article XXV paragraph 6 (Public service railway rolling stock) should be added to the Article. He noted that adding such text would require Contracting States to take into account the protection of the interests of creditors and the availability of credit in making a compulsory declaration under the Protocol. The *Secretary-General* queried whether such text was necessary. The Study Group decided that such a provision was not necessary.

50. *Professor de las Heras* queried how the listing of interests under paragraph 4 of Alternative B would operate in practice, as Article 40 of the Cape Town Convention dealt with specific non-consensual interests, whereas paragraph 4 required the listing of types of interests arising from association with immovable property. *Mr Deschamps* noted that Contracting States had experienced issues in relation to Article 40 under the Cape Town Convention and suggested it would not be prudent to replicate such an approach in the MAC Protocol. The *Secretary-General* concurred, and noted that Article 40 dealt with categories of interests, such as taxes, unpaid wages etc, which was not the case in relation to Alternative B, paragraph 4. *Professor Anna Veneziano*, Deputy Secretary-General at UNIDROIT, noted that Contracting States would be able to give information on this issue to the depositary, which could be displayed on the UNIDROIT website, and as such the paragraph should not be retained. The Study Group decided to delete the paragraph, as well as paragraph 5 in Alternative D.

51. *Professor Riffard* noted the 'loss of legal identity' aspect of Alternative D, and queried how this interacted with the definition of immovable-associated equipment in Article 2 of the Protocol. *Professor Mooney* noted that Alternative D still referred to the domestic law of the State in which the immovable was located to determine whether the equipment loses its individual identity.

52. Several Study Group members queried the language used in Alternative C. *Mr Brydie-Watson* noted that Alternative C had been based upon provisions from the United States Uniform Commercial Code and the language needed to be adapted to be consistent with Cape Town Convention language. *Professor Mooney* noted that Alternative C would only work where the declaring State had amended their domestic law to allow for the interest in the MAC equipment to be registerable in the domestic immovable property register, and as such would not be a self-executing provision.

53. *Mr Wilson* noted that this issue arose in relation to local domestic law reforms that the International Finance Corporation had been implementing in emerging economies. He noted that it was a good policy position, but from a practical standpoint, it was the experience of the IFC that most countries did not have an immovable property registry that had the capacity to allow for the registration of interests in equipment. *Professor Mooney* noted that the provision could be amended to be consistent with the approach in the Geneva Securities Convention on control agreements and designated entries where a declaring State would also have to positively declare that it was possible to register the interest in the equipment in the domestic immovable property register. However, he noted if this was only going to be used by the United States and Canada, then he queried whether it was appropriate to continue to include Alternative C.

54. *The Secretary-General* noted that Alternative C was more of an Alternative A+ declaration, as it retained the default regime that prioritised the international interest over the interest arising out of association with immovable property, as long as certain requirements were satisfied.

55. *Mr Bazinas* noted that the UNCITRAL Secured Transaction Guide gave priority to the specialised registries for notices of security interests, but these registries should be notice-base registries and registration would be relevant for perfection rather than creation of the security interest. He noted that coordination between the international and domestic registry was a difficult issue and queried whether Alternative C was practically workable.

56. *Mr Dubovec* noted that Alternative C was originally inserted to give the intergovernmental committee further options in how to address the association with immovable property issue, and concurred that if it was to be retained it would require further amendment. He also noted that in recent domestic law reform projects he had worked on, the real property registers in the relevant jurisdictions were so dysfunctional, that the secured transactions legislation provided that an interest in a fixture would be registered as a personal property interest in the collateral registry and completely avoid registration in the real property register to avoid issues of coordination.

57. *Mr Brydie-Watson* noted that it was decided at the previous Study Group session that Alternative C would be useful as it would be an approach that emerging economies reforming their domestic law could work towards; however, if Alternative C was practically unable to achieve this goal, then he queried whether there was any value in retaining it.

58. *Mr Wilson* noted that an additional challenge would be that in many countries a notice based registration system was seen as a lesser system to a document-registration system. As such, local legal, banking and registry communities would have to support such an approach. He noted that the approach of Alternative C in allowing for a fixture-filing to retain priority would only be useful to the extent it was accompanied by the drafting of local regulations providing directions to local registries how to accommodate such filings, which did not appear possible to do in this context.

59. *Professor de las Heras* queried whether the 'readily removable equipment' language in Alternative C paragraph 3 should be retained, as it constituted a divergent approach to the 'loss of individual identity' test in Alternative D.

60. *Mr Boger* noted that the current order of Alternatives was illogical, and suggested the alternatives should instead be ordered A, C, D, B.

61. *Professor Mooney* suggested that Alternative C could be stripped down and simplified to only include the provision allowing the registration of the international interest in the immovable property register in the Contracting State to preserve the priority of the international interest. He explained the readily removable exception was initially included to cover the circumstance whether the registration of the international interest in the international registry was second in-time in registration of the immovable property in the land registry, but the equipment was readily removable, so there would be no damage to the property owner by removing it from the land.

62. *Mr Dubovec* noted that it was important for the Study Group to provide the various options on association with immovable equipment to the Governing Council, however in his view even if the MAC Protocol did not include an explicit article dealing with this issue, it still would remain a viable and valuable instrument that could be widely ratified.

63. The Study Group decided to remove Alternative C from Article VII.

64. *Professor Mooney and Mr Boger* noted that Alternative D provides for a useful middle-ground between the extremes of Alternative A (maintaining the priority of the international interest) and Alternative B (complete deferral to domestic law).

65. *Mr Dubovec* noted that the compensation mechanism included in Alternative B paragraph 3 and Alternative D paragraph 3 was very country specific in that it arose out of the input received from Japan during the jurisdictional consultations. He further noted that it was an approach untested in Japanese courts and queried whether it was prudent to include such a country-specific mechanism in the Protocol.

66. *Mr Dubovec* noted that under Alternative D subparagraph 4(a) the interests in the immovable property registrable under domestic law in the domestic registry would limit the types of national interests that would be protected, as there were other types of interests that did not require registration to be effective against third parties. He queried whether this was the desired outcome of the provision to limit the types of national interests in this way. He suggested adapting the text to protect the additional types of domestic interests. *The Deputy Secretary-General* noted that her understanding of subparagraph 4(a) was that it was designed to only protect prior registered interests, not other interests effective against third parties. *Mr Boger* queried whether these other types of non-consensual interests would be governed by Article 39 of the Cape-Town Convention. *Mr Dubovec* responded that non-consensual interests would be governed by Article 39, however an equitable mortgage which simply requires delivery of the mortgage document to the creditor without any form of land registration would not be covered. *Mr Deschamps* queried whether the Protocol should be protecting equitable mortgages, and whether such instruments exist in most jurisdictions. *Professor von Bodungen* noted that the provision was crafted with particular industry needs in mind from the German banking sector and advised against changing the language. The Study Group decided not to change the language in this regard.

67. The Study Group noted that the declarations under Article VII should be simple declarations applying an alternative in its entirety, without requiring anything further by declaring States.

68. *Mr Wilson* noted that under the drafting of Article VII parties would have to search 3 registries; the domestic secured transactions registry, the domestic real property registry and the international registry. He noted that the Protocol's implementation strategies should be developed to provide more guidance to assist parties with this issue. *Mr Dubovec* noted that the IFC could assist in this regard that in building domestic collateral registries, electronic alerts should be built in to give parties guidance to circumstances in which an international interest could exist and direct the party towards the international registry. *The Secretary General* noted that this was an issue of due diligence for the transactional lawyers involved and was not a matter that the Study Group should be seized with.

69. *The Study Group decided to retain the draft Article governing association with immovable property, and requested that the Secretariat make the amendments to the draft Article as agreed. The draft Article was amended during proceedings and re-presented to the Study Group on the third day of the meeting, where further minor changes were made. The Study Group agreed with the drafting of the updated article (as reflected in Article VII of the sixth annotated draft Protocol).*

F. Accessions

70. *Mr Brydie-Watson* explained that following the categorisation of the preliminary list, Tier 1 of the February 2016 Preliminary List contained three HS codes that purported to cover accessions (820713, 842641 and 842919). He noted that the financing industry had indicated that

the types of complete equipment under HS codes 820713 and 842641 were not separately financeable, whereas only the tractor blades under HS code 842919 were not separately financeable. However, further consultations with the private industry would need to be conducted.

71. *Mr Durham* suggested that the Study Group should consider the column containing information on whether equipment was separately financeable by the industry. He noted that given private industry had indicated that the equipment under HS codes 820713 and 842641 were individually financed, they should be retained.

72. *Mr Brydie-Watson* noted the differentiation between accessions and implements, and noted that implements such as harvesters or ploughs simply towed by tractors should not be considered accessions as they were not installed on an object, and were more analogous to different rail carriages being connected to each other as in the Rail Protocol context.

73. *Professor von Bodungen* referred back to the scope of the MAC Protocol as possibly conflicting with the scope of the Rail Protocol, in relation to the subsequent affixation of MAC equipment on railway rolling stock. He clarified the potential clash between the two Protocols should be addressed by a specific provision. *The Secretary-General* replied that it could then be assumed that any court would decide based on the criterion of first in time, in the unlikely case of competing interests under different Protocols.

74. *Mr Dubovec* noted that if the MAC Protocol contemplated covering objects that could be installed on each other, then the logic of Article 3 of the Space Protocol (covering the reservation of rights and interests in space assets which were installed on other space assets) could be useful for the MAC scenario.

75. *Professor von Bodungen* queried whether Article 60 of the Cape Town Convention could be utilised to address these issues. He suggested that an additional paragraph could be added amending Article 60 to cover an international interest created under one Protocol via-a-vis another Protocol. *Mr Dubovec* clarified that in case affixation happens after both protocols are in effect, there would not be any pre-existing interest. He noted that Article 60 applied to an interest that pre-existed the Protocol itself and therefore that provision would not be useful in the current context. *Mr Boger* agreed with *Mr Dubovec* and took the view that Article 29 (7) of the Cape Town Convention would be the relevant rule.

76. *The Study Group* noted the additional information in relation to accessions in the Preliminary List of HS codes.

G. Insolvency Alternatives

77. *Mr Brydie-Watson* explained that over the course of subsequent meetings it had been decided to keep Alternatives A, B and C in the draft MAC Protocol, to maintain consistency with the insolvency remedies in the previous Protocols. He noted that the only issue requiring further consideration was whether the Protocol should allow Contracting States to apply different insolvency alternatives to different annexes. He noted that such an option was most likely to be utilised by States wanting to apply domestic insolvency law to agricultural equipment in Annex 1.

78. *Mr Brydie-Watson* continued that in order to address this concern, Article X paragraph 3 had been drafted, which provided that 'where a Contracting State declares the application of different Alternatives to different Annexes, a Contracting State shall also declare which Alternative applies to HS codes contained in more than one Annex.' He noted that the rule provided certainty in relation to equipment that was listed under more than one Annex. A final declaration would therefore need to be made by the States. He concluded that in practice in regard to the Aircraft Protocol, the

application of Alternative A had been preferred by almost all of the Contracting States, and it appeared unlikely that the application of different insolvency remedies to different annexes would occur often.

79. *Professor de las Heras*, referred to Article X, Option 1, paragraph 3 and queried whether the term 'HS codes' could be replaced by the terms 'equipment' or 'object'. *Mr Dubovec* agreed and wondered whether there should also be a definition of 'HS system'. He additionally suggested that the places of sentences 1st and 2nd in paragraph 3 of the subject matter article be reversed given that the 2nd sentence stated a general rule whereas the 1st sentence stated the implementation of that rule.

80. *The Secretary General* questioned whether it was necessary to keep such a level of complexity in the first place. *Mr Dubovec* noted that the rule had been drafted in reaction to the comparative study on insolvency regimes which provided that certain jurisdictions had insolvency laws specifically addressed to farmers.

81. *Professor Mooney* took the view that it was a question of whether it was an unnecessary complexity that should only be included if it would be the only way to progress the Protocol through the diplomatic conference or if it would allow additional Contracting States to become parties to the treaty without sacrificing their local agricultural insolvency laws. He proposed that the paragraph be removed, but a reference to it be maintained in the footnotes to the draft Protocol to alert the Intergovernmental Committee that the issue had been considered by the Study Group.

82. *Professor von Bodungen* suggested that Article X should be worded similar to the amended version of Article VII (association with immovable property) to ensure it was easily understandable with minimal complexity. *Mr Spyridon Bazinas* agreed with Professor von Bodungen.

83. *The Secretary General* reflected upon Professor Mooney's comment and preferred there was no footnote explanation and that Option 1 be removed all together. *Professor Riffard* concurred, and noted that in the absence of a request from States for such a provision, it would be removed.

84. *Professor de las Heras* referred to paragraph 5 of Article X and queried whether it should be retained in the Protocol. *Mr Boger* noted that the provision had been included in the previous Protocols, and should simply be relocated, depending on the Study Group's conclusion on the declarations issue.

85. *The Study Group decided that the draft MAC Protocol should retain insolvency Alternatives A, B and C, and that the Protocol did not need to allow Contracting States to apply different insolvency remedies to different Annexes to the Protocol.*

H. Application to sales

86. *Mr Dubovec* presented to the Study Group his report on the legal effect of registration of a notice of sale under domestic law. He explained that the most likely scenario where a notice of sale could affect interests involved a sale of an object under which the seller retained possession of the object, and subsequently sold the object to a second buyer. He noted that in certain jurisdictions, for the subsequent buyer to get the priority under domestic law, the subsequent buyer would have to acquire the object in good faith. Most laws examined in the report, he explained, had a component of good faith protection that involved purchasing the object without knowledge of a prior interest. *Mr Dubovec* highlighted that the report concluded that the registration of a notice of sale may not affect the rights of parties in Colombia, but may affect their rights in France, Germany, Mexico, Spain, the United Kingdom and United States.

87. *Professor von Bodungen* noted that the Rail Protocol had allowed for the registrations of notices of sale to maximise the benefits of the International Registry, and to generate additional fees. He concluded that it was up to the Study Group as to whether this rationale would be sufficient to retain notices of sale in the MAC scenario in line with the Rail Protocol.

88. *Mr Bazinas* requested further clarification on a scenario in which seller A sells to buyer B under the law of France, then seller A also sells to buyer C who registers an international interest. *Professor Mooney* replied that the buyer C could register a notice of sale but it would not be an international interest and would only implicate domestic law. The Protocol would, therefore, only allow them to give public notice of the transaction rather than setting a priority rule.

89. *Mr Michel Deschamps*, queried whether it was the role of an international convention to allow for actions that affected domestic interests under local law without having substantive legal affect under the treaty.

90. The *Deputy Secretary-General* queried whether, if the provision was not included in the draft what would be the practical result of not having it. *Professor von Bodungen* clarified that there would not be any possibility for the international registry to provide for the registration of notices of sale without a provision as such.

91. The *Deputy Secretary-General* clarified that there was a general consensus to retain the notice of sale provision. She also noted that if the article on notices of sale was not inserted in the draft Protocol, then it would constitute a further deviation from the previous Protocols (which either allowed the registration of notices of sales without any substantive effect, or require such registrations for the purposes of applying the priority rules).

92. The *Study Group* decided to retain the provision allowing for the registration of notices of sale in the draft MAC Protocol.

I. Interaction between MAC and Rail Protocols

93. *Mr Brydie-Watson* introduced the topic, and explained that at the third Study Group meeting it was decided that a strict rule should be included in the draft Protocol that prevented overlap between the MAC Protocol and previous Protocols to the Cape Town Convention. It was decided that in order to avoid any possible overlap with previous protocols, the MAC Protocol should not allow for any registration of an interest in any equipment if it was registrable under a previous Protocol (i.e. a total carve-out rule). He noted that this rule was reflected in Article XXI of the draft Protocol. He noted that an issue left unaddressed was what would happen where a piece of equipment, subject to an international interest under the MAC Protocol, was subsequently affixed to railway rolling stock, an interest in which then became registered under the Luxembourg Rail Protocol. He requested that the Study Group give further consideration to this issue.

94. *Mr Boger* referred to Article XXI and queried whether instead of not allowing the registration of certain types of interests with respect to equipment covered by the MAC Protocol, it would be wiser to not allow for the creation of a security interest under the MAC Protocol at all. He suggested that the Article could be rephrased to provide that equipment considered objects under the existing three Protocols to the Cape Town Convention may not be subject to an international interest under the MAC Protocol. He further suggested the replacement of 'relationship with previous protocols' with 'relationship with other protocols' given that it was possible that future Protocols would be created after the MAC Protocol. *Professor von Bodungen* and *Professor de las Heras* agreed that the Protocol should completely carve out the previous Protocols as a matter of scope, rather than simply prevent registration of interests under the MAC Protocol that were registerable under the previous protocols.

95. *Professor Mooney* took the view that certain hypothetical scenarios should be worked through. He queried whether the approach should depend on whether a Contracting State had become party to all Protocols to the Convention. Under such an approach, if the debtor's State had enacted the MAC Protocol but not the Rail Protocol, an interest in an object that was registerable under both the MAC Protocol and Luxembourg Rail Protocol could be registered in the MAC Protocol until the Rail Protocol came into force.

96. *Mr Dubovec* took the view that the 'exclusion' approach in Article II of the Space Protocol which deals with the relationship between the Space and Aircraft Protocols could be used as a drafting model.

97. *The Deputy Secretary-General* queried whether it was wise to also carve out future Protocols, without anticipating what their scope would cover, or how their scope would be crafted. She suggested that it would be advisable to use a term such as 'existing protocols' and not try to address future protocols.

98. *Mr Brydie-Watson* reflected back on the previous comments and clarified that the question of whether the MAC Protocol should be subject to a limited scoping issue was discussed extensively during the last Study Group meeting. In order to avoid uncertainty, the group took the view that the separation between the MAC Protocol and previous protocols should be strict, and not dependent on which Protocols were in force in the relevant Contracting State. In relation to future protocols, he thought having a blanket deferral to future Protocols did not appear necessary. *Professor von Bodungen* agreed that future Protocols should not be addressed by the provision.

99. *Professor Mooney* warned that one single instrument creating an interest in an object could potentially create an interest under all other protocols, and therefore the MAC Protocol needed to be carefully drafted to separate the scopes of the Protocols to prevent this from happening.

100. *The Deputy Secretary-General* referred to the list of equipment, and queried whether all equipment with a potential to be subject to other protocols could be excluded from the MAC Protocol. *Professor Mooney* replied that it could be dealt with by providing that the MAC Protocol would not apply to the type of equipment that were covered by any other protocol if at the time of creation the relevant Contracting State was party to the other protocol. Therefore, the MAC Protocol could apply to all equipment covered by an HS codes listed in its Annexes, but when that State became a party to the Rail Protocol, transactions after that would be governed by the Rail Protocol. He argued that this would lead to a more certain 'scope' provision without limiting the scope of the MAC Protocol when it was the only protocol in effect. *Mr Deschamps* agreed with *Professor Mooney*.

101. *The Deputy Secretary-General* replied with reservation to the remarks of *Professor Mooney*, and noted that such an approach could lead to greater complexity. *Professor von Bodungen* suggested that a very clear approach should be adopted to avoid any uncertainty.

102. *Professor Riffard* added that *Professor Mooney's* approach would create an additional burden on secured creditors who wanted to create an international interest in equipment under the MAC Protocol, as they would have to check which Protocols were in force in a State and the order in which they entered into force. He noted that such a complication could potentially harm the project. *Mr Bazinas* added that the additional burden on the secured creditor would increase costs. *Mr Brydie-Watson* agreed, and shared his concerns about adopting an approach which relied on the order in which the protocols came into force.

103. *The Study Group* concluded that the interaction between the MAC Protocol and previous Protocols to the Cape Town Convention should be dealt with as a matter of scope, and the provision in Article XXI of the fifth annotated draft Protocol should be moved to Article II. *The Study Group*

further concluded that the rule should be modelled on Article II of the Space Protocol, and should prevent creation of an interest under the MAC Protocol, rather than prevent the registration of such an interest.

J. Amendment Procedures

104. *Mr Brydie-Watson* explained the comparative analysis on the ECT and Trade in Civil Aircraft Agreement in relation to amendment procedures, as well as the process contained in Article 24 of the Montreal Convention. He noted that the Study Group concluded at its 3rd meeting that the MAC Protocol should adopt a simplified mechanism which would allow for amendments and changes to the Annex, but without expanding the scope of the agreement and without the need for the creation of an amending protocol through a formal treaty action. He noted that the opposite approach appeared to have been adopted by the Trade in Civil Aircraft Agreement, since the expansion of the agreement to new HS codes was achieved by the Committee issuing certifications, whereas the realigning of the Annex to reflect an update of the HS System had required the creation of formal protocols amending the treaty.

105. He further explained that the ECT adopted different processes for amending different aspects of the treaty and its annexes. However, all amendment measures were governed by the Charter Conference. Adoption of amendments to the texts of the treaty, approval of modifications to Annexes EM and NI and approval of technical changes to all the Annexes in general required a unanimous vote from all the Contracting Parties. The transferral of items from Annexes EM I to EM II and Annexes EQ I to EQ II also required unanimity. Yet, approval of modifications to Annex EQ I only required the Contracting Parties to reach a consensus.

106. *Mr Brydie-Watson* referred to Article XXVIII of the draft text and noted that it had been kept as consistent as possible with the drafting in previous Protocols. He explained that the additional paragraph 4 attempted to implement the suggested mechanism from the Montreal Convention which would allow for the realigning of the Harmonised System without going through a formal process.

107. *The Secretary General* reflected on the paragraph and took the view that the wording was too rigid. He thought that an objection procedure should only be considered for substantive expansion of the scope of the Protocol to cover new types of equipment. He further noted that three amendment procedures could be envisaged. Firstly, a substantive amendment to the Protocol would require a fully-fledged diplomatic conference. Secondly, the situation where a new nomenclature is adopted by the WCO. He suggested that when this occurred, the Depositary would consult with the WCO. Once it had been satisfied that the Annexes corresponded with the updated nomenclature, the Annexes could be amended by the Depositary without intervention by Contracting States. Thirdly, a process to give the Supervisory Authority a mandate to propose the inclusion of new types of MAC equipment which would then be possibly subjected to the objection procedure reflected in Article 24 of the Montreal Convention. *Professor Riffard* agreed to the proposed three-layer amendment procedure. *Professor Mooney* continued that when there was no expansion of the scope of the Protocol an automatic action by the Depositary would be advisable.

108. *The Deputy Secretary-General* wondered how exactly a distinction was to be made between mere cosmetic changes and changes related to the expansion of the scope. *Professor Mooney* proposed the addition of a materiality component. He gave the example of the category of cars and referred to hybrid cars that should also be included in the same category as they were materially the same, although with a totally innovative functionality. Therefore, if there was no expansion or if the expansion was immaterial, then the second amendment procedure that did not require consent of the Contracting States should be used. *Mr Deschamps* gave the example of the google car which would also fit within the 'material' meaning of car, and as such an expansion should

be capable of being executed by the Supervisory Authority without involvement of the Contracting States.

109. *Professor Mooney* referred to a mining machine that used a drill and provided the example of the invention of a new type of mining machine that utilised lasers. Both were utilised for mine digging and there is no principled reason not to include the laser-based mining machine in the Protocol, and that adding an HS code covering such equipment would not be a material expansion and thus would not be an expansion of the scope of the Protocol. *Mr Deschamps* continued that in this case it would be a new HS code but falling within the scope and it should not be required to go through the objection procedure.

110. *Mr Deschamps* wondered, in case of a new code, whether the addition of that code should go through the State process if it would apply to a piece of equipment that is of the type already covered by the scope of the protocol and whether a defining line should be drawn in this respect.

111. *Professor Mooney* replied that in case of a revision, the coverage would either be identical to the previous coverage or it would not, leaving no other possible alternative. In the case where the coverage is identical, concerning a possible amendment process, there would be no reason for Contracting State intervention. He therefore preferred an intermediary 'non-cosmetic yet no-State-intervention' approach which would be subject to a proposal from the Depositary and an objection procedure from dissenting States.

112. *The Deputy Secretary General* reacted by asking whether the terminology of 'material modification' would be used in the drafting and whether the Supervisory Authority would be involved in making the assessment of 'materiality'. She also queried whether such a process of making modifications and later allowing Contracting States to express opposition was cumbersome.

113. *Mr Brydie-Watson* intervened by reiterating that the new amendment mechanism could be built based on the three-tier approach, whereby identical changes are done without consultation which shall be automatically effective. Secondly, there will be a notification process for material changes and thirdly, the usual treaty amendment process for the changes in the protocol itself. It could further be noted in the draft that the intergovernmental committee was invited to consider whether the 'grey area' changes which are new types of equipment but are substantively within the scope of the protocol, fall into the first category, alternatively the second category of amendment procedures.

114. *Professor de las Heras* noted that a certain criterion would be needed in order to make a clear distinction whereby providing three tiers of procedures without a criterion would potentially create uncertainty. She proposed the use of the terminology 'formal changes' versus 'material changes'.

115. *Professor Mooney* further clarified that when there would be a conceptual expansion, yet the new HS code would be substantially similar in coverage to the equipment covered by the existing HS codes in the Annexes, that such an expansion could be taken as a formal rather than material change. If, however, the substantial similarity would be missing then the State intervention process could be utilised. *Mr Dubovec* agreed with the previous remark and noted that the 'likelihood' of a Contracting State objecting to a prospective change could be taken into account which would be quite improbable in cases where there would be no expansion of the scope of the protocol. He took the view that the test of materiality could be very complicated and the term 'substantially similar' might be better.

116. *The Deputy Secretary-General* suggested that at the intergovernmental round of meetings it was likely that governments would be more prone to defend their own prerogative to

decide on the scope of protocols. Therefore, it ought to be clarified who would decide on the 'substantiality' of the possible changes.

117. *Mr Brydie-Watson* queried what would occur in relation to the first category of the amendment procedure (the tier where consultation with Contracting States would not be required), what would be a State's recourse if they disagreed with the expansion. He noted that it was his understanding that a formal review conference would be required. Professor Mooney agreed and reiterated the practicality of the 'substantial similarity' test.

118. *The Deputy Secretary-General* queried when and at what level States would be informed about the implementation of changes. *Mr Deschamps* replied that when the Supervisory Authority would make a change on its own, it could be communicated via its website. *The Deputy Secretary-General* noted that in relation to the linguistic adaptation in both Spanish and French texts of the Cape Town Convention itself, slight linguistic changes relating to the translation of the Convention were discussed with France and Spain by the Depositary, and the changes were then made.

119. *Mr Brydie-Watson* raised the issue of removal of codes. He noted, in relation to changes to the nomenclature of the Harmonised System, if an old code which had previously been listed in the annex would no longer correspond with the equipment which it initially covered, it should be removed. However, as previously discussed, any interest created under a code which was subsequently removed would in any case continue to exist. He further queried whether the amendment process would also capture the deletion of a code and if so, how it would fit in.

120. *Mr Dubovec* pointed out that the annexes would not reflect the deletions and would only reflect the new codes. *Professor Riffard* clarified that the deletion of a code and the modification of a code should follow the same procedure of technical adjustment and modification. *Professor Mooney* agreed.

121. *Professor de las Heras* referred to the last line of paragraph 4 in Article XXVIII and queried whether it would be advisable to include the time of coming into force of a revision through the notification of the Depositary. She proposed the six month period applied for subsequent declaration procedures. *Professor von Bodungen* suggested a minimum three-month period. *Mr Brydie-Watson* noted that given there would be no requirement for a notification, the coming into force of a revision should be three months. *Professor Mooney* then clarified that the notice to the States would be the notice of the revision and the revision would come into force three months after the notification. *Professor Mooney* continued that given that the 2017 version of the HS codes were put together in 2015, perhaps the Depositary could specify the time of entry into force for formal changes to the Annexes in order to obtain better coordination. Therefore, the annexes could preferably come into effect after the revised HS code nomenclature itself came into force.

122. *Mr Dubovec* asked about the meaning of the 'States parties' who could possibly object to the expansion of the Protocol. He queried whether all States parties to the MAC Protocol would be entitled for an objection procedure even if they have opted out of a particular annex. *The Deputy Secretary General* doubted whether the notice of a change should be communicated to all States parties even in cases where they were not a party to a specific annex. *Professor Mooney* referred to Article II paragraph 3 and suggested the addition of a general statement clarifying that such would only concern those States that had signed up to a specific annex which was being subjected to a revision. *Professor Mooney* proposed that the definition of 'the Contracting States' in Article II of the draft Protocol should be added providing that 'Contracting State' would mean a Contracting State that had ratified a relevant Annex. The effect of this definition would be that Contracting States would only be considered Contracting States in relation to the Annexes they had ratified, and as such would not have any standing in relation to the other Annexes.

123. *Professor de las Heras* further suggested that it would be advisable to have a public announcement of the coming into force of a revision given that the future opt-ins by Contracting States to apply the MAC Protocol to additional Annexes they had not originally ratified should also be foreseen. *The Deputy Secretary General* noted that the notice of the change would be general to all Contracting States.

124. *The Study Group* agreed that the MAC Protocol should contain a three tiered amendment procedure, and requested that the Secretariat alter the article governing amendment procedures to adopt the three tiered approach.

K. Supervisory Authority

125. *Mr Wilson* noted that the IFC was working with UNIDROIT in exploring the possibility of the IFC acting as the Supervisory Authority to the Protocol. He mentioned a number of considerations, namely whether such a role would fall within the sphere of activity of the IFC and its articles of agreement, given that IFC's exclusive focus was on investment in the private sector. However, he noted that parts of the IFC's mandate was to promote the development of the private sector, which could possibly be read to allow for a slightly broader range of activities. He also noted that from a bureaucratic perspective if the IFC was to perform the role of Supervisory Authority, actions would have to be taken to avoid possible conflicts of interest, as the IFC would be both a user of the International Registry and its Supervisory Authority.

126. *The Study Group* noted the discussions between the Secretariat and the International Finance Corporation in relation to the role of Supervisory Authority.

L. Aquaculture Equipment

127. *Mr Brydie-Watson* briefly explained the report prepared by the Secretariat on the possibility of covering aquaculture equipment within the scope of the MAC Protocol. He specifically noted that from a policy perspective only the equipment in the cultivation phase, as opposed to the post cultivation phases (which would include processing equipment) would potentially be covered. He concluded that if such additional equipment would not potentially bear any risk of increasing legal complexity and barriers in the context of the MAC Protocol, the scope could possibly be expanded to cover aquaculture equipment, pending further consultation with the private sector and manufacturers of aquaculture equipment.

128. *Professor von Bodungen* took the view that Asia, being the largest market in relation to the production and use of aquaculture equipment would be a sensible starting point in consultations. He supported the idea of giving the topic further consideration.

129. *Professor Riffard* queried whether aquaculture should be considered as a branch of agriculture or whether it should be taken as an autonomous industry. In the case of French legal understanding, aquaculture would be considered as a sub category of agriculture. He further suggested further study on corresponding HS codes for aquaculture equipment, if any.

130. *Mr Dubovec* agreed with the above remarks, but also noted potential complications in relation to enforcement actions against aquaculture equipment. *Professor Mooney* suggested the creation of a special task force for an elaborated study on this industry. He further suggested the creation of a working group exclusively concentrating on the Harmonised System prior to the intergovernmental committee meetings. *Mr Dubovec* reiterated that if insufficient information was gathered before the intergovernmental negotiations began, the aquaculture issue might hold back

the adoption of the MAC Protocol as a whole. *Mr Deschamps* agreed. *Professor Mooney* intervened by saying that one could consider moving on, based on the assumption of being able to locate relevant HS codes for aquaculture equipment. *Mr Brydie-Watson* concluded that the HS codes would be studied before the upcoming Governing Council meeting.

131. *The Study Group noted the report on aquaculture equipment. The Study Group agreed that aquaculture could be included under the definition of agriculture for inclusion in the MAC Protocol, however further research on the relevant HS codes and further consultation with the aquaculture private sector was required.*

VI. Review of the fifth draft protocol

132. *Mr Brydie-Watson* referred to the alphabetical order for annexes of the protocol as being agriculture, construction and mining and queried whether it should be followed. *The Secretary General* referred to the acronym MAC and doubted whether it should also be altered to ACM accordingly. It was decided that a footnote, explaining that the alphabetical order would be respected for the annexes yet the acronym would be kept as MAC, while ultimately leaving the final decision to the Governing Council.

Preamble

133. *Mr Brydie-Watson* noted that at the second Study Group meeting in April 2015 it had been decided that limited additional wording should be added to the preamble. At the third meeting various wording had been discussed, including 'emerging economies', 'developing countries' and 'emerging markets'. The Study Group noted that the terminology should be consistent with that used in the most recent United Nations instruments. He noted that following further analysis of United Nations documents, it appeared the language used by the United Nations was 'developing countries.' The Study Group decided to use the term 'developing countries' in the fourth line of the preamble.

Article I – Defined Terms

134. *Mr Dubovec* suggested that the term 'item' has been used differently throughout the Cape Town Convention and should therefore be replaced by the term 'object'. He further proposed the recast of definitions for the three categories of equipment. *Professor Mooney* clarified that the Space Protocol has utilised the term 'asset', whereas the Aircraft Protocol has used the term 'object' and the Rail Protocol has followed the term 'rolling stock'. *Mr Bazinas* preferred the term 'asset' as it referred to an object which had value. The term 'object' was decided upon by the Study Group.

135. *Mr Bazinas* referred to paragraph 1 '... except where the context otherwise requires...' and took the view that the meaning of this language should be clarified further.

136. *Mr Dubovec* said that other definitions of the Rail and the Space Protocols had previously included 'parts and components'. In the context of the MAC Protocol, as the codes corresponding to 'parts' had been downgraded to Tier 2, he questioned whether it would be advisable to further expand the scope of the definition. *The Secretary General* doubted whether it would be advisable to expand the coverage of the definition given that the MAC definitional approach was different from previous protocols. He suggested a minimalistic approach towards the definition might therefore be more plausible.

137. *Professor von Bodungen* queried whether the definitions would include data, manuals and records, as provided in the definition of railway rolling stock without which an asset may not be operational. *The Secretary General* suggested an explanatory footnote on the issue.

138. *Mr Brydie-Watson* noted that as agreed earlier in the meeting, an additional definition would be drafted concerning the Harmonised System by making a reference to the most updated version released by the WCO.

139. *Mr Boger* referred to the wording of subparagraph 2(e) and suggested that it should be simplified by omitting the phrase ‘...capable of being subject to an interest under this Protocol.’

140. *Mr Brydie-Watson* clarified that an additional definition was agreed to be drafted for the term ‘Contracting States’. *Professor Mooney* argued that such a definition would be required through a general and broad statement and preferably be added to Article II. *The Secretary -General* suggested that the definition could use the language ‘... for the purpose of certain articles (precise article numbers to be given), the term ‘Contracting States’ would mean States which have implemented specific annexes.’ The Study Group agreed to add a definition of Contracting State to Article I.

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

141. *Mr Brydie-Watson* explained that it had been agreed that an additional article would be drafted which would govern the interaction between the MAC Protocol and the previous protocols in relation to the ‘scope’ issue. *Professor von Bodungen* reaffirmed that the newly restructured Article XXI should be moved to Article II. As per its wording, *Professor Mooney* further clarified that the provision should indicate that the Protocol would not apply to categories of equipment that were capable of being subject to the terms of the other three protocols whether or not they were in force. *Professor von Bodungen* suggested that Article II paragraph 3 of the Space Protocol could simply be employed in this respect.

142. The Study Group decided to change the word ‘exclude’ to ‘restrict’ in Article II paragraph 3.

Article V – Identification of agricultural, mining or construction equipment

143. *Mr Deschamps* raised a point in regards to paragraphs (c) and (d) of the asset description. He noted that in a security agreement it would be considered quite common to state that the security interest would cover all the present and future assets of the grantor or of the debtor, which would satisfy paragraph (c). He noted that paragraph (c) has also been included in both the Rail and the Space Protocols, however not the Aircraft Protocol. It was decided to keep the structure as it is, being consistent with the Rail Protocol.

144. *Mr Bazinas* reacted to the point previously raised and clarified that paragraphs (a) and (b) were parts of the description rules, whereas the paragraphs (c) and (d) had been formulated as examples, therefore they could not be considered as equivalent.

145. *Mr Bazinas* referred to the phrase ‘...without the need for any new act of transfer’ in paragraph 2 and explained that it should only be included if the transfer in question would include a security interest. *The Secretary General* emphasised that keeping the phrase would be consistent with previous protocols, as well as the language of the UNIDROIT Convention on International Factoring.

Article VIII – Modification of default remedies provisions

146. *Mr Dubovec* referred to paragraph 2 which provided for a remedy of export without prior consent. In cases of fixtures and in the case of a mortgagee who had priority under a Contracting States declaration under Article VII, he queried whether the remedy would be exercisable without the consent of the mortgagee that had the priority. *Mr Deschamps* referred to the definition of a registered interest in the Cape Town Convention as defined as an international interest which has been registered in the international registry. Therefore, no consent would be needed from a mortgagee. The Secretary General, noted that it might be advisable to leave it as it appeared given the sensitivity of the issue.

Article IX – Modification of provisions regarding relief pending final determination

147. *Mr Dubovec* made a suggestion based on the remark in the Official Commentary page 406 which noted a drafting error in paragraph 6(a), the reference to Article VII(1). The reference should instead be replaced by Article 13 of the Convention under which the provisional relief has been granted. The Study Group agreed that the amendment should be made.

Article X – Remedies on insolvency

148. *Mr Brydie-Watson* noted that subject to the decision made, paragraph 3 would be deleted. Additionally, paragraph 5 of Alternative 2 would be moved to the article on declarations.

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

149. *Mr Brydie-Watson* queried whether the 'model designation' in paragraph 1 should be a compulsory requirement as per the input from the private sector. *Mr Durham* replied that the information received had not been sufficient to make a conclusive comment. *Mr Brydie-Watson* continued to query whether in the absence of sufficient information from the private sector it would be advisable to delete the 'model designation' and the manufacturer's serial number would be sufficient. *The Secretary General* noted that 'model designation' could be moved to a footnote. As consistent with the decision earlier in the meeting, it was confirmed that paragraph 2 should be deleted from the text and would instead be placed in a footnote.

Article XVII – Additional modifications to Registry provisions

150. *Mr Brydie-Watson* noted that 'model designation' would similarly be moved to a footnote for consistency.

151. *Mr Boger* referred to the phrase 'supplemented as necessary to ensure uniqueness' and queried whether it should be moved into the footnotes. *Mr Dubovec* suggested that if the language was kept in the text of Article XVII, it would also be advisable to take a similar approach for Article XVI as it should first be mandated as information to be provided by the registration before making it a part of the search criteria. *Mr Boger* agreed, and stated that the two identification requirements in Articles XVI and XVII should be parallel to each other. The Study Group agreed to amend Article XVII to be consistent with the language in Article XVI.

Article XXI – Relationship with previous Protocols to the Cape Town Convention

152. *Mr Brydie-Watson* clarified that this provision had been restructured and moved to 'scope'.

Article XXV – Territorial units

153. *Mr Brydie-Watson* briefly explained that paragraph 6 of the corresponding article in the Space Protocol had not been included.

Article XXVI – Declarations

154. *Mr Brydie-Watson* introduced the topic, and noted that the fifth annotated draft Protocol had adopted the new, innovative approach to the making of declarations under the Protocol which departed from the status quo in the previous three Protocols. He noted that the new approach had led to some difficulties in the drafting of the Protocol, and may have created some additional confusion. *Mr Deschamps* reaffirmed his support for the approach, and noted that it would make the Protocol more user-friendly for Contracting States.

155. *The Deputy Secretary-General* noted that perhaps the original structure should be maintained since it had been consistently used across all three previous protocols. *Professor Mooney* agreed with *the Deputy Secretary General*. *Professor von Bodungen* concluded that the MAC Protocol is different in this context from the rest of the protocols but is still part of the Cape Town Convention family and therefore sticking to what the previous Protocols adopted would be the most suitable approach.

156. The Study Group decided that the draft Protocol should revert to the original declarations structure reflected in the three previous Protocols to the Cape Town Convention.

Article XXIX – Subsequent Declarations

157. *Professor de las Heras* intervened to point out that the term 'State Party' could be replaced by the term 'Contracting State'. *The Secretary General* clarified that under the Vienna Convention on the Law of Treaties the two terms had been given different meanings. 'State party' referred to a State that had consented to be bound by a Convention and for which that Convention is in force. 'Contracting State' referred to a State which had consented to be bound by a Convention, whether or not that Convention had entered into force for that State. The Study Group decided that the MAC Protocol should remain consistent with the usage of Contracting State and State Party in the previous three Protocols to the Convention.

Article XXVIII – Review conferences, amendments and related matters

158. The Study Group decided to adopt the three tiered amendment structure, as agreed earlier in the meeting.

Annexes to the Protocol

159. *Mr Brydie-Watson* noted that paragraphs 1, 2 and 3 of the Annexes would be deleted, as their substance were now dealt with in earlier articles of the Protocol.

VII. Closing of the meeting

160. The Study Group decided that the Protocol as amended to reflect the decisions made at this meeting was sufficiently developed to recommend to the Governing Council that a Committee of Governmental Experts be formed to give the MAC Protocol further consideration.

161. *Mr Brydie-Watson* noted that the annotated draft Protocol would be amended and a sixth draft would be circulated in advance of the 95th session of the Governing Council in May 2016 to reflect the Study Group's conclusions.

162. Mr Brydie-Watson noted that an academic advisory group would be created to provide input on the MAC Protocol, and that all Study Group members were invited to join the group once it had been formed.

163. *The Secretary-General* thanked all attendees for their participation and closed the fourth meeting of the MAC Protocol Study Group on 9 March 2016.

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

Mr Michel DESCHAMPS
Partner, McCarthy Tétrault
Montreal, *Canada*
mdeschamps@mccarthy.ca

Professor Charles MOONEY
Charles A. Heimbald Jr. Professor of Law
University of Pennsylvania, *United States of America*
cmooney@law.upenn.edu

Professor Jean-François RIFFARD
Professor, Université de Clermont-Ferrand
Clermont-Ferrand, *France*
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.rodriguezdelasheras@uc3m.es

Professor Benjamin VON BODUNGEN
Of Counsel at Bird & Bird LLP
Frankfurt, *Germany*
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

OBSERVERS

Mr Spyridon BAZINAS
Senior Legal Officer, United Nations Commission on International Trade Law Secretariat
Vienna, *Austria*
Spiros.Bazinas@uncitral.org

Mr Ole BÖGER
District Court Judge, Federal Ministry of Justice and Consumer Protection
Berlin, *Germany*
boeger-ol@bmjv.bund.de

Mr Marek DUBOVEC
Senior Research Attorney, National Law Center for Inter-American Free Trade
Tucson, *United States of America*
mdubovec@natlaw.com

Ms Megumi HARA
Professor of Law
Gakushuin University, *Japan*
megumi.hara@gakushuin.ac.jp

Professor Kumiko KOENS
Yamagata University, *Japan*
koens@human.kj.yamagata-u.ac.jp

Mr John WILSON
Senior Operations Officer, Finance and Markets
International Finance Corporation, World Bank Group
Panama City, *Panama*
jwilson4@ifc.org

Unidroit Secretariat

Mr José Angelo ESTRELLA FARIA (*temporary chair*)
Secretary-General
ja.estrella-faria@unidroit.org

Professor Anna VENEZIANO
Deputy Secretary-General
a.veneziano@unidroit.org

Mr William BRYDIE-WATSON
Legal Officer
w.brydie-watson@unidroit.org

Unidroit Interns and Researchers

Ms Golnaz JAFARI
Intern, Iran
jafarigolnaz@gmail.com

Mr Julian MÜLLER
Intern, Germany
Julian.mueller.privat@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 third 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 – Uniquely Identifiable
 - E. Association with Immovable property
 - F. Accessions
 - G. Insolvency Alternatives
 - H. Application to sales
 - I. Interaction between MAC and Rail Protocols
 - J. Amendment Procedures
 - K. Supervisory Authority
 - L. Aquaculture Equipment
6. Review of the fifth draft Protocol
7. Closing of meeting