



**EN**

**MAC Protocol  
Committee of Governmental Experts  
First session  
Rome, 20 – 24 March 2017**

UNIDROIT 2017  
Study 72K – CGE1 – W.P. 2  
Original: English  
20 March 2017

**DAILY REPORT  
FOR  
20 MARCH 2017**

*(prepared by the UNIDROIT Secretariat)*

**Agenda Item 1: Opening of the Session and election of the officers**

1. Mr José Angelo Estrella-Faria, Secretary-General of UNIDROIT, opened the first session of the Committee of Governmental Experts (hereinafter the “Committee”) for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (hereinafter the “MAC Protocol”) at the Headquarters of the Food and Agriculture Organisation of the United Nations in Rome, on 20 March 2017 at 10.07 a.m. He commended the work done by the Study Group on the formulation of the preliminary draft MAC Protocol and emphasised the importance of the Cape Town Convention (hereinafter the “Convention”) in facilitating asset-based financing in countries where it is not readily available. He concluded by noting that the MAC Protocol project had great promise, which was reflected by the fact that 130 delegates from 42 countries registered to attend the session.

2. The Secretary-General opened the floor for nominations for Chair of the session. *Mr Dominique D’Allaire (Canada) was elected as Chair of the Committee.*

3. The Chair nominated Sir Roy Goode (United Kingdom) for the position of Reporter. He acknowledged the work done by Sir Roy Goode in writing the Official Commentaries to the various Protocols of the Convention. *Sir Roy Goode was appointed by the Committee as Reporter.*

**Agenda Item 2: Adoption of the annotated draft agenda and organisation of the session**

4. *The draft agenda (Study 72K – CGE1 – Doc. 1) was adopted.*

**Agenda Item 3: Introduction to the Convention on International Interests in Mobile Equipment and project history of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment.**

5. The Chair invited the Reporter to make an introductory presentation on the Convention. The Reporter explained the umbrella nature of the Convention and its application to specific types of assets as provided for by its additional protocols. He then explained several other fundamental

concepts, such as the priority afforded to international interests under the Convention, the operation of the international registry, and the Convention's default and insolvency remedies.

6. The Reporter's presentation was followed by a presentation on the origin of the MAC Protocol project by William Brydie-Watson, Legal Officer at the UNIDROIT Secretariat. He explained the development of the Protocol from its genesis in 2005 up until the first session of the Committee, with particular reference to the work completed by the Study Group.

7. The Secretary-General introduced the various documents prepared for the session.

8. The Chair opened the floor for questions. One observer noted that the private sector had been significantly involved in the development of the preliminary draft Protocol to ensure that its provisions were commercially feasible.

**Agenda Item 4: Consideration of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment.**

9. The Chair urged the Committee to refrain from drafting during the plenary. He noted that a Drafting Committee would be convened later in the week to develop and propose draft provisions addressing issues identified by the Committee.

10. The Chair opened the floor for general comments on the preliminary draft Protocol.

11. An observer noted the potential for the MAC Protocol to broaden access to credit for the financing of high value MAC equipment globally.

Article I

12. The Chair opened the floor for discussion of Article I. One delegation proposed that the definitions of agricultural, construction and mining equipment contained in Article I(2)(a),(b) and (h) be amended to cover accessories, parts or data, manuals and records. The proposal was supported by several other delegations.

13. *The Chair concluded that the definitions of agricultural, construction and mining equipment in Article I(2)(a)(b) and (h) should be amended to cover parts, components, data and manuals. The Committee referred the matter to the Drafting Committee.*

14. One delegation proposed that the Harmonised System (hereinafter "HS") codes listed in the Annexes to the preliminary draft Protocol be moved from the Annexes to a resolution of the Diplomatic Conference, and that the process for their amendment be provided for by the regulations. The delegation noted that this approach would avoid treaty law issues and make amending the HS codes an easier process.

15. One observer noted the definition of "immovable-associated equipment" contained in Article I(2)(f) of the preliminary draft Protocol. He noted that many jurisdictions subordinated interests in movable assets to land mortgages where the movable asset became physically connected to land. He suggested that the definition be amended to require physical affixation. One delegation and another observer cautioned against this approach, on the basis that some jurisdictions allowed interests in immovable property to extend to movable assets used on the immovable property, even where there was no physical affixation.

16. *The Chair concluded that the definition of "immovable associated equipment" should be revisited during the discussion of Article VII.*

17. One delegation suggested that the term "agricultural, construction and mining equipment" used throughout the preliminary draft Protocol be simplified. Other delegations opposed the suggestion on the basis that it might cause problems in relation to a States' ability to opt out of the Protocol's application to all three categories of equipment.

18. *The Committee agreed that application of the preliminary draft MAC Protocol should be defined with reference to HS codes. The Committee noted that this approach would assist in confining the application of the Protocol to high value mobile equipment.*

#### Article II

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

20. One delegation noted that the wording of paragraph 3 was unclear in achieving the policy objective of allowing Contracting States to exclude the application of the Convention to an entire Annex. The intervention was supported by another delegation.

21. *The Committee agreed to refer the matter to the Drafting Committee to ensure that the preliminary draft Protocol adequately reflected this objective.*

22. The Committee discussed whether the preliminary draft Protocol appropriately dealt with inventory.

23. *The Committee agreed that the preliminary draft Protocol as currently drafted could apply to MAC equipment held as inventory, however further input from the private sector was needed to determine whether the current approach was commercially operable.*

#### Annexes 1, 2 and 3

24. The Chair opened the floor for discussion of Annexes 1, 2 and 3.

25. *The Committee adopted the Annexes as proposed in the preliminary draft Protocol.*

#### Article XXXII

26. The Reporter explained the operation of Article XXXII. The Chair opened the floor for discussion of Article XXXII.

27. One delegation proposed that paragraph 3 be amended to provide that Contracting States that had opted out of the application of the Protocol to a certain Annex would not have the power to vote on an amendment to that Annex.

28. One delegation proposed that the wording "other than the Annex" in paragraph 3 should be removed. This intervention was supported by another delegation.

29. Another delegation queried why the minimum number of Contracting States for entry into force in the preliminary draft Protocol was set at 5, which differed from previous Protocols to the Convention. The Secretary-General explained that due to various factors, the entry into force provisions were different in all previous Protocols. The Chair suggested that the matter be discussed further when the Article governing entry into force was presented to the Committee.

30. *The Committee agreed to put the number "3" in square brackets in the meantime, which would be consistent with the Entry into Force provision of the Convention itself.*

31. An observer noted that the HS codes listed in the Annexes to the preliminary draft Protocol were based upon the 2012 addition of the HS, and that the 2017 edition of the HS had entered into force on 1 January 2017. He explained that the majority of the codes listed in the Annexes were unaffected by the changes made to the 2017 edition. He illustrated how the amendments system as provided in Article XXXII would apply to those codes affected by changes in the HS.

32. Several delegations queried whether the word "may" in paragraph 4 gave the Depository discretionary powers as to whether it would abide by recommendations made in the annual reports provided for in paragraph 1. Delegations also queried whether annual reports were actually required, as changes to the HS only occurred every five years. The Chair noted that yearly reporting may not be an onerous task where little action had occurred that required reporting on.

33. The Secretary-General explained the different amendment processes provided for in Article XXXII, depending on the type of amendment being considered. He noted that the Study Group had envisioned three different amendment processes, depending on the nature of the provision being amended. He explained that paragraph 3 reflected the normal formal treaty amendment process for changes to the text of the Protocol itself, as consistent with the amendment procedures in the previous three Protocols. He then explained that paragraph 4 provided a more expeditious amendment process which would allow amendment to the Annexes to the Protocol to include new HS codes covering MAC equipment that was "materially similar" to MAC equipment covered in HS codes already contained in the Annexes. Finally, he noted that paragraph 5 provided for a more efficient mechanism for amending the Annexes to the Protocol, where such amendments would not have any effect on the scope of the Protocol, but would realign the HS codes in the Annexes to reflect numbering changes to the HS itself.

34. The Committee extensively debated the proposed provisions in the preliminary draft Protocol. One delegation proposed that the HS codes to which the MAC Protocol applied should be listed in the regulations to the Protocol, rather than listed in Annexes to the Protocol itself. The delegation expressed its intention to provide a textual proposal to that effect for the consideration of the Committee.

35. Another delegation queried how paragraph 6 operated, and whether it was intended that a domestic law interest constituted in MAC equipment covered by an HS code which subsequently became listed in an Annex to the MAC Protocol would lose priority against a later registered international interest. The Committee discussed whether Article 60 of the Convention would protect the domestic interest in this scenario. It was explained that paragraph 6 was initially drafted by the Study Group to protect international interests in MAC equipment that was covered by an HS code which was subsequently removed from the Annexes, however the counterfactual scenario had not been considered.

36. A delegation queried whether paragraph 6 intended to apply to international interests under the Protocol, or only registered interests. A delegation contrasted the paragraph against other Articles in the Protocol, and remarked that it was intended to cover both unregistered and registered international interests.

37. *The Committee reached consensus that the procedure for amending the provisions of the Protocol itself was adequate. The Committee did not reach consensus on the procedure for amending the Annexes to the Protocol. The Committee decided that it was necessary to identify a procedure that properly balanced flexibility and innovation in amending the Annexes with acceptable treaty*

*practice. The Committee noted that a drafting proposal on Article XXXII was expected from one delegation on the second day of the Committee meeting.*

### Article III

38. The Chair opened the floor for discussion of Article III.

39. A delegation noted that the Article was based upon the drafting of Article III of the Luxembourg Rail Protocol which allowed derogation from only subsections (3)-(4) of the Article governing “modification of default remedy provisions”. It was queried why this approach differed from the Aircraft Protocol, which at Article IV(3) allowed for derogation from subsections (2)-(4) of the Article governing “modification of default remedy provisions”. *The matter was referred to the Drafting Committee.*

40. *The Committee adopted Article III as proposed in the preliminary draft Protocol, aside from the matter referred to the Drafting Committee.*

### Article IV

41. *The Committee adopted Article IV as proposed in the preliminary draft Protocol.*

### Article V

42. *The Committee adopted Article V as proposed in the preliminary draft Protocol.*

### Article VI

43. *The Committee adopted Article VI as proposed in the preliminary draft Protocol.*

44. The Chair concluded the session at 16:47 PM.