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**MAC Protocol
Committee of Governmental Experts
Second session
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Study 72K – CGE2 – W.P. 13
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**DAILY REPORT
FOR
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(prepared by the UNIDROIT Secretariat)

Opening of the Session

1. The Chair opened the fourth day of the second session of the Committee of Governmental Experts (hereinafter the “Committee”) for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (hereinafter the “MAC Protocol”) at the Headquarters of the Food and Agriculture Organisation of the United Nations in Rome, on 5 October 2017 at 9:17 a.m.
2. The Chair summarised his conclusions from the third day of the session.
3. The Chair noted that, as explained in Study 72K – CGE2 – Doc. 6, the Annexes to the preliminary draft Protocol (hereinafter “the Protocol”) contained four HS codes (842481, 843230, 843240 and 870190) that had existed under the 2012 edition of the HS System but had been replaced by new codes in the 2017 edition. The Secretariat queried whether the Committee wished for the relevant codes in the Annexes to be replaced with the corresponding HS codes in the 2017 edition.
4. *The Committee agreed that the HS codes in the Annexes to the Protocol should be based on the 2017 edition of the HS System. The Committee requested that the Secretariat replace those HS codes that no longer existed in the 2017 edition with the corresponding new codes.*

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

Article XV (continued)

5. One delegation noted that if Article XV was to be retained in the Protocol, the provision should identify the connecting factor that would determine whether a party was obliged to use a designated domestic entry point in registering an interest in the International Registry. Several delegations noted their agreement with the proposition. A number of delegations suggested that the location of the debtor should be the connecting factor. One delegation suggested that the connecting factor should be explicitly provided in Article XV, whereas another delegation suggested that it could be addressed in the Regulations.
6. One delegation proposed the deletion of Article XV, on the basis that it was not necessary in the MAC Protocol context. The delegation further noted that in contrast to the aviation sector, it was

unlikely that there would be one single national authority with responsibility for agricultural, construction and mining equipment that could be designated as a domestic entry point. The proposed deletion of Article XV was supported by a number of delegations.

7. Other delegations queried whether deletion of Article XV was necessary, on the basis that it was not a compulsory Article and did not impose an obligation on Contracting States. A number of delegations also noted that the Article had been included in all three previous Protocols to the Cape Town Convention, and suggested that it should be retained to maintain consistency with the previous Protocols.

8. An observer noted that should the Committee decide to retain Article XV, States with modern personal property registries that wished to designate a domestic entry point should designate their personal property registry as that entry point.

9. One delegation noted that the deletion of Article XV would not prevent States from offering designated entry points, it would merely prevent them from making the use of such designated entry points compulsory.

10. The Chair summarised the discussion. He noted that the consensus of the Committee was that Article XV should be deleted.

11. At a later point, one delegation urged the Committee to reopen consideration of Article XV. It was suggested that after further informal discussions, several delegations had decided that they opposed its deletion. Several delegations confirmed their preference for Article XV to remain in the Protocol within square brackets and that the matter should be given further consideration in the future.

12. One delegation noted that the designation of a domestic entry point would ensure that parties used a domestic registration system that they were familiar with and that was operated in their local language to register interests in the International Registry. They suggested that this option would improve the operation of the International Registry and reduce likelihood of erroneous registrations.

13. *The Committee confirmed that its earlier decision to delete Article XV should be reversed. The Committee decided that Article XV should be retained and placed in square brackets.*

Article XVI

14. A number of delegations noted their support for the Intersessional Working Group on Registration Criteria and Transparency's (IWGRC) drafting proposal for Article XVI, as reflected in paragraph 3 of Study 72K – CGE2 – Doc. 11. The MAC Working Group expressed its appreciation for the excellent work undertaken by the IWGRC and also noted its support for the IWGRC's drafting proposal.

15. *The Committee accepted the revised text for Article XVI as proposed by the IWGRC. The matter was referred to the Drafting Committee.*

Article XVII

16. Several delegations noted their support for the IWGRC's drafting proposal for Article XVII(1), as reflected in paragraph 3 of Study 72K – CGE2 – Doc. 11. It was noted that it was logical for the identification criteria under Article XVI to be consistent with the International Registry search criteria under Article XVII(1), a policy objective that was achieved by the IWGRC's drafting proposal.

17. The MAC Working Group informed the Committee of a shift in the MAC sectors towards the use of 17 digit serial numbers in accordance with the standard of the International Organization for Standardization. It was explained that this shift would be beneficial to the MAC Protocol as it would allow the identification of a MAC asset using only the ISO number. The MAC Working Group expressed its support for the IWGRC's proposed removal of manufacturer names as a search criteria under Article XVII(1). However, the Working Group queried whether the proposed removal of the reference to supplementary information to ensure uniqueness in Article XVII(1) was also necessary. A delegation responded that the removal of the reference to the supplementary information in Article XVII(1) did not have a substantive effect on the operation of the provision, and that the identification criteria in Article XVI would still be consistent with the search criteria in Article XVII(1), should the IWGRC's recommendations be adopted.

18. One delegation proposed that users of the International Registry should also be able to perform searches based on the name of debtor under Article XVII(1). Several delegations opposed the proposal. It was noted that the Cape Town Convention and its Protocols was an asset-based system, rather than a debtor-based system. It was explained that allowing searches to be made on the name of the debtor might mislead users of the International Registry, as a debtor identified by such a search might have changed name or already transferred the relevant asset to a third party.

19. *The Committee accepted the revised text for Article XVII(1) as proposed by the IWGRC. The matter was referred to the Drafting Committee.*

20. One delegation proposed that the reference in Article XVII(3) to Article 62 of the Convention should be changed to Article XXXII. He suggested that it was practical for the Depositary to recover reasonable costs in relation to their additional duties under Article XXXII, but should not be able to recover costs associated with their regular duties as set out in Article 62. The Secretariat reminded the Committee that the additional text in square brackets at the end of Article XVII(3) had been added by the Committee at its first session, to denote that the Protocol should contemplate whether the Depositary should be able to recover costs associated with it performing its functions as Depositary. It was noted that the nature of the Cape Town Convention system with its various optional and mandatory declarations imposed a particularly heavy burden on the Depositary in assisting States to properly ratify or accede to the Convention and its Protocols.

21. *The Chair summarised that there was no support for the proposal to change the reference in Article XVII(3) from Article 62 of the Convention to Article XXXII of the Protocol. The Chair further concluded that there was no consensus to delete the bracketed text in Article XVII(3), and that the text should remain in square brackets for future consideration.*

Article XVIII

22. One delegation proposed the deletion of Article XVIII on the basis that it was not appropriate for the Protocol to allow for the registration of a notice of sale that had no legal effect under the Convention but might have an effect under domestic law. The Reporter explained that the provision had first originated in the Luxembourg Rail Protocol, and that the Aircraft Protocol and the Space Protocol both allowed for the registration of contracts of sale.

23. One delegation suggested that allowing for the registration of notices of sale might overburden the International Registry. Another delegation responded that the Article would not be burdensome on the International Registry as registrations were electronically automated. It was suggested that allowing the registration of notices of sale would actually have a beneficial economic effect on the International Registry as it would generate additional fees.

24. The MAC Working Group noted that private industry supported the Protocol allowing for the registrations of notices of sale. It further noted that Article XVIII was permissive in nature and did not impose an obligation on States.

25. One delegation opposed removing Article XVIII and emphasised the need for consistency with the approaches adopted in previous Protocols to the Cape Town Convention. She also noted that the Article would have practical utility in alerting creditors not to lend to perspective borrowers looking to finance an asset against which a notice of sale had already been registered. A number of other delegations also noted their support for retaining Article XVIII.

26. *The Chair concluded that the proposal to delete Article XVIII had not achieved consensus. The Committee adopted Article XVI as proposed in the Protocol.*

Article XIX

27. One delegation sought clarity as to the purpose of Article XIX. The Reporter explained that in circumstances where MAC equipment was owned by a State entity, Article XIX provided that the State entity could waive its sovereign immunity from jurisdiction, enforcement, or both.

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

Article XX

29. One delegation noted that the term “Conventions” was used in the title of Chapter V, even though Article XX, as the only Article in Chapter V, only applied to a single Convention. The delegation proposed that the title of Chapter V be amended, or that Article XX be moved to Chapter VI of the Protocol. The Chair noted that the Chapter was intended to cover the relationship between the draft Protocol and any other international treaty with which it could interact and as such the use of the plural in the title of the Chapter is likely justified.

30. *The Chair referred the matter to the Drafting Committee.*

Consideration of Working Papers 7, 8, 9 and 10

31. The Chair noted that four working papers had been distributed to the Committee for consideration.

Interim Report of the Drafting Committee (W.P. 7)

32. The Chair explained that W.P.7 was an interim Report of the Drafting Committee. He requested that the co-Chairs of the Drafting Committee present the Report to the Committee.

33. The co-Chairs of the Drafting Committee explained that the interim report dealt with three issues that had been referred to them: (i) the insertion of new provisions related to the Protocol’s treatment of inventory, (ii) the addition of text to Article II(3) and (iii) a redraft of Article VIII Alternative A.

34. The co-Chairs explained that the Drafting Committee had prepared three additional provisions to implement the Committee’s decision in relation to inventory. They noted that the Drafting Committee had prepared (i) definitions of “dealer” and “inventory” for addition to Article I(2) of the Protocol, (ii) a new Article XXIII*bis* to allow Contracting States to opt-in to excluding the Protocol’s application to inventory held by dealers (as debtors) of MAC equipment, and (iii) a new unnumbered Article *bis* that modified the Convention’s priority provisions in relation to inventory.

35. The co-Chairs stressed that the package of provisions would allow States with well-established laws pertaining to inventory financing to continue applying their domestic legislation to dealers who utilise such arrangements, and the provisions would prevent the MAC Protocol from unnecessarily disrupting existing practices.

36. The Chair opened the floor for discussion on the new definitions of “dealer” and “inventory” proposed for inclusion in Article I(2) of Protocol.

37. Several delegations noted their support for the proposed definitions. One delegation noted that both definitions used the phrase “in the ordinary course of business”, and suggested that the Official Commentary should address how the phrase should be interpreted.

38. *The Committee adopted the new definitions as proposed in W.P.7.*

39. The Chair opened the floor for discussion of the proposed new Article XXIII*bis* and the new unnumbered Article *bis*. A number of delegations noted their support for the substance of the proposed drafting.

40. One delegation noted that the new unnumbered Article *bis* contained bracketed language which, if included in the draft, would restrict the modification of the priority rules in the Convention to circumstances where the dealer was the debtor. As such, the inclusion of the bracketed text would not allow a party buying MAC equipment from a dealer to take free of an existing international interest. The MAC Working Group, alongside a number of delegations, suggested that the bracketed text be included in the proposed provision, as it would protect international interests registered by entities before the dealer financed the acquisition of the equipment as inventory. It was also noted that such cases would only arise in transactions relating to used equipment being held as inventory, and it was not unreasonable to expect a buyer to search the International Registry to determine whether there was a pre-existing international interest in such circumstances.

41. *The Committee agreed that the bracketed language in the new unnumbered Article bis should be maintained in the proposed Article and the brackets should be removed.*

42. One delegation queried the interpretation of the term “place of business” in the proposed Article XXIII*bis*. The Chair explained that “place of business” had a pre-existing meaning in the Cape Town Convention system, it would also be further discussed in a future Official Commentary and the travaux préparatoires of the MAC Protocol would also shed light on the intention of this Committee.

43. A number of delegations suggested reordering the subparagraphs under the proposed Article XXIII*bis* and the unnumbered Article *bis*. Several delegations suggested that the drafting should amend the Protocol rather than amending the text of the Convention. It was noted that by virtue of Article 6 of the Convention, where there was any inconsistency between the Convention and the Protocol, the Protocol would prevail. One delegation proposed the new Article XXXIII *bis* be combined with the new Article *bis* as a complete provision regarding the treatment of inventory. It was further suggested that the entire provision be included in Chapter II of the MAC Protocol. A number of other delegations supported this proposal.

44. *The Committee agreed that Articles XXIIIbis and unnumbered bis be added to the Protocol as a single Article in Chapter 2 and referred the matter to the Drafting Committee.*

45. The Chair opened the floor for discussion on the proposed additional text in Article II of the Protocol.

46. Several delegations noted that the proposed text achieved the policy goal of ensuring that the actual or intended use of MAC equipment would not affect the ability of a party to create an International Interest in the MAC equipment or affect an existing international interest in the equipment.

47. One delegation suggested that there might be an inaccuracy in the French text of the proposed additional text in Article II.

48. *The Committee adopted the changes proposed to Article II of the MAC Protocol. The Chair referred consideration of the consistency of the French text to the Drafting Committee.*

49. The Chair opened the floor for discussion on the redraft of Alternative A as proposed by the Drafting Committee.

50. One of the co-Chairs of the Drafting Committee explained that the new proposed drafting of Alternative A still maintained the same legal effect as the existing drafting of Alternative A, however it achieved the same legal effect in a much clearer and simpler manner. They noted that as instructed by the Committee, the Drafting Committee had removed the language “irreparable physical damage”, however instead of proposing a replacement term, an empty set of square brackets had been inserted in the proposed Article. The co-Chairs explained that the Drafting Committee had decided not to prepare any text that pertained to be a qualifier for the application of Alternative A. They suggested that the Secretariat should be requested to conduct research on the best possible formulation of the language that would be widely acceptable. Secretariat noted that it would undertake research on the issue for future consideration by negotiating States, and that it might present several alternative options if such an approach was appropriate. The Chair emphasised that the qualifier language should consider concepts such as “commercial reasonableness” and “economic viability”.

51. Several delegations complimented the simplified language in the proposed text.

52. One delegation suggested that the Official Commentary should clarify that compensation mechanisms for damage caused by the removal of MAC equipment was outside the scope of the MAC Protocol and should be considered under the relevant domestic law.

53. *The Committee approved the proposed changes to Article VII Alternative A. The Committee requested that the Secretariat further consider how the qualifier limiting the application of Alternative A should be formulated.*

Proposals related to Article VIII (5)

54. The Chair explained that Study 72K – CGE2 – W.P. 9 and Study 72K – CGE2 – W.P. 10 contained proposals by two different delegations in relation to Article VIII(5). The Chair invited the delegation which drafted W.P.10 to present its proposal to the Committee.

55. The delegation explained their proposed redraft of Article VIII(5) reflected three concepts: (i) a more precise but not exclusive identification of the administrative authorities that would be expected to provide assistance, (ii) a closer link to the relevant remedy of physical transfer and export and (iii) repurposing the provision to allow States to opt-out of its application. It was explained that the proposal suggested that the term “administrative authorities” be replaced with the word “authorities”, and that the meaning of authorities included but was not limited to tax and customs authorities and transport infrastructure authorities. It was noted that the two broad categories of authorities expressly referred to were discussed in Part 4Q of Study 72K – CGE2 – Doc. 4.

56. The Chair noted that the proposal should be considered alongside an alternative drafting proposal for Article VIII(5) as contained in Study 72K – CGE2 – W.P.9. It was explained that the alternative proposal replaced the reference to safety laws and regulations in the original draft of Article VIII (5) and instead made reference to the applicable laws and regulations of the Contracting State where the equipment was being used.

57. A number of delegations thanked the two delegations for submitting their thoughtful drafting proposals in relation to Article VIII(5). However, neither proposal received widespread support.

58. Several delegations expressed their support for the opt-out aspect contained in one of the proposals. It was noted that allowing Contracting States to opt-out of the provision might be valuable in Federal States, where it would be difficult for Contracting States to guarantee that local and provincial authorities would be able to provide the administrative assistance contemplated by the Article. However, a number of other delegations expressed their concern that a Contracting State opting-out of such a provision would create the impression that the State would not assist creditors in exercising their right of physical transfer and export under the Protocol.

59. *The Chair summarised the discussion and noted that no consensus had been reached. The Committee decided to place Article VIII(5) in square brackets, and include the additional sub-bracketed phrase "including but not limited to tax and custom authorities and transport infrastructure authorities" after "administrative authorities" in the Article. It was also decided to place Article IX(6), Article X Alternative A(8) and Alternative C(9) in square brackets on the same basis.*

One delegation noted that certain aspects of Article IX(6) would need to be maintained in the Protocol, even if the Committee eventually decided to remove the parts of the paragraph associated with administrative authorities.

Article 1(2)(f)

60. The Chair opened the floor for discussion of the definition of Immovable-Associated Equipment in Article I(2)(f) of the MAC Protocol.

61. *The Committee adopted the definition of Immovable-Associated Equipment as found in Article I(2)(f) of the MAC Protocol.*

Chapter VI – Final Provisions

62. One delegation commented that the discussions on the final provisions had been extensive and fruitful at the first session of the Committee of Governmental Experts (CGE1). It was noted that a number of issues had been addressed as a result of the review of the Chapter at the previous session.

63. *The Chair indicated that it was not unusual for final provisions to be the subject of careful and detailed consideration only when a draft convention was presented to a Diplomatic Conference.*

64. *The Chair then moved to discuss Article XXV of the Protocol.*

Article XXV

65. One delegation commented that Article XXV accurately reflected the comments made and the views expressed at CGE1.

66. *The Chair concluded that the text was accepted by the Committee and no changes were needed.*

67. The Chair concluded the session at 16:53 PM.