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

UNIDROIT 2017  
Study 72K – CGE2 – W.P. 14  
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**DAILY REPORT  
FOR  
6 OCTOBER 2017**

*(prepared by the UNIDROIT Secretariat)*

**Opening of the Session**

1. The Chair opened the fifth 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 6 October 2017 at 9:15 a.m.
2. The Chair summarised his conclusions from the fourth day of the session.

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

Article XXXII

3. The Chair opened the floor for comments on Article XXXII of the preliminary draft MAC Protocol.
4. Two delegations submitted a joint drafting proposal. The delegations explained that the purpose of the submission was to highlight weaknesses in the existing text of Article XXXII. The delegations emphasised the need for Article XXXII to have a flexible and simple process to update the Annexes when a technical change had been made to a listed HS code. They noted that their proposal had several alternatives which contained different approaches to solving the existing issues in the text. They explained that the joint proposal improved on the existing text in several important areas: (i) it made a stronger distinction between how the Protocol would address technical and substantive changes to the HS System codes, (ii) it clarified the effect of a Contracting State exercising its right to opt-out of a change to the HS codes in the Annexes to the Protocol, (iii) it removed the requirement of constituting meetings for purely technical changes that would not affect the scope of the Protocol and (iv) it ensured that the Annexes would remain consistent with the most recent version of the HS System.
5. Delegations thanked the two delegations for their joint proposal. A number of delegations expressed the view that the effect of a Contracting State opting out of a change to a code in the Annexes under Article XXXII(4) was unclear. Several delegations noted that it would be problematic if the effect of the opt-out was that an outdated version of a HS code applied to the Contracting State that had exercised its right to opt-out. They stated that over time, such an approach would create a

complex and imprecise patchwork of obligations under the Protocol. They further stated that such an approach could create problems for private parties trying to determine whether the Protocol applied to a particular type of MAC equipment in a Contracting State. Several delegations noted that the continued existence of the right to opt-out of substantive changes to the Annexes was important.

6. Some delegations drew the Committee's attention to their written comments on Article XXXII (Study 72K - CGE2 – Docs. 10, 14 and 17). One delegation proposed that paragraph 5 of Article XXXII should require the World Customs Organisation to issue a certificate, which confirmed that a change to an HS code in the Annexes was of a technical nature and did not impact the scope of the Protocol. It explained that by having an expert neutral party verify the technical nature of an amendment, Contracting States could be fully confident that a change to the Annexes under paragraph 5 would not affect their obligations under the Protocol.

7. Several delegations noted the need for Article XXXII to balance the rights of Contracting States to control the scope of the Protocol with flexibility in amending the Annexes to relation to technical changes. They expressed their support for a flexible amendment mechanism that did not require a meeting of Contracting States where a change to a code in the Annexes was merely technical rather than substantive.

8. A number of delegations stated that while the joint proposal raised important issues that merited further consideration, the alternative options in the joint proposal should not replace the existing Article XXXII without further consideration. One delegation proposed that part of the joint proposal be added to Article XXXII in square brackets for further consideration. Other delegations disagreed with such an approach.

9. *The Chair summarised the discussion. He concluded that the Committee had not reached consensus on the adoption of the joint proposal in relation to Article XXXII and that the existing text would be retained and placed in square brackets. The Committee agreed that Article XXXII needed to balance the ability of Contracting States to control the content of the treaty, with a flexible mechanism for amending the Annexes to the Protocol in relation to technical changes made to the Harmonised System itself. The Committee reaffirmed that Article XXXII should contain different amendment mechanisms, adapted to the nature of the proposed change to the Annexes. The Committee further agreed that Article XXXII should ensure that the Annexes to the Protocol contained a list of codes that was coherent and precise to ensure the scope of the Protocol would be clear and predictable. The Committee tasked the Secretariat to work with interested States to develop an alternative text that was likely to attract wide support from negotiating States.*

#### Title

10. The Chair reopened the discussion on the title of the Protocol. One delegation reintroduced its proposal to rearrange the order of the words "Agricultural, Construction and Mining" in the title and throughout the text to "Mining, Agricultural and Construction", in order to formally reflect the acronym "MAC", rather than "ACM". Several delegations supported the proposal.

11. *The Committee decided that the words "Agricultural, Construction and Mining" in the title and throughout the text of the Protocol should be reordered to "Mining, Agricultural and Construction". The Committee further decided that Annexes 1, 2 and 3 should also be reordered to reflect the change.*

### Report of the Drafting Committee

12. The Chair opened the floor for discussion on the Report of the Drafting Committee.
13. Several delegations noted slight inconsistencies between the English and the French preamble text and proposed minor changes. *The Committee accepted the changes.*
14. One of the co-Chairs of the Drafting Committee noted an error in the Report at Article XI *bis* (4). The co-Chair explained that the reference to “that State” should be replaced with “a contracting State referred to in Paragraph (3)”. *The Committee accepted the change.*
15. The Secretariat noted that the Report had amended the Annexes to the Protocol to reflect the Committee’s decision to update the listed codes from the 2012 to the 2017 version of the HS System, and to rectify minor errors in the listing of the codes.
16. One delegation queried whether small aircraft used for plantations had been added to the Annexes. The Chair explained that, consistent with the decision of the Committee, delegations were invited to propose additional codes to the Secretariat and that these proposals would be considered by negotiating States on the basis of analysis and recommendations by the Secretariat.
17. *The Report of the Drafting Committee was adopted by the Committee. The Committee decided that the draft text contained in the Report of the Drafting Committee should be used during consultations by the Secretariat and for the purpose of reporting to the Governing Council.*

### **Agenda Item 5: Future Work**

18. The Chair invited the Committee to consider the additional work required to finalise the MAC Protocol. He explained that the Committee could decide to submit a recommendation to the UNIDROIT Governing Council to approve the convening of a diplomatic Conference to finalize and adopt the MAC Protocol, or submit a recommendation to the Secretariat to organise a third session of the Committee of Governmental Experts.
19. The Secretary-General a.i. explained that the Secretariat would plan its future activity based on the decision by the Committee. She noted that if the Committee decided to recommend to the UNIDROIT Governing Council that a diplomatic Conference be convened, the Secretariat would focus on organising bilateral and multilateral meetings with negotiating States to assist them in their consideration of the Protocol. She noted that such an approach would aim at ensuring the highest possible turnout of actively engaged delegations at the diplomatic Conference. She explained that, alternatively, if the Committee decided that a third session of the Committee was required, then the Secretariat would devote the majority of its resources to preparation of the third session.
20. Several delegations applauded the work done by the Secretariat and the Committee. A number of delegations noted that the Protocol was sufficiently advanced to recommend that the Governing Council approve the convening of a diplomatic Conference. One delegation suggested that a third meeting might be preferable.
21. One delegation noted that several legal issues had not been fully resolved, and queried whether a third session was required to address them. One delegation noted that it believed three issues warranted further consideration: (i) Article VII Alternative A, (ii) Article XV and (iii) Article XXXII. A number of delegations responded that the number of open legal issues was very small, and that the MAC Protocol currently had fewer unresolved legal issues as compared to previous Protocols to the Cape Town Convention at the time they were sent to diplomatic Conferences for finalisation. A number of delegations stressed that the majority of the open legal issues had been resolved, and the unresolved aspects did not warrant a third Committee meeting. Several delegations

recalled that the Committee had requested the Secretariat to progress the open issues intersessionally. One delegation suggested that the diplomatic Conference be scheduled sufficiently in advance to allow the Secretariat to progress the open issues.

22. *The Committee recommended that the UNIDROIT Governing Council approve the convening of a diplomatic Conference to finalize and adopt the MAC Protocol. The Committee instructed the Secretariat to assist negotiating States in their consideration of the Protocol through bilateral and multilateral fora in advance of the diplomatic Conference.*

#### **Agenda Item 6: Review of Report**

The Chair introduced the draft Report, as reflected in the Daily Reports (Study 72K –CGE2 - W.P. 2, Study 72K – CGE2 - W.P. 4 rev., Study 72K – CGE2 - W.P. 6 – Study 72K – CGE2 - W.P. 11 and Study 72K – CGE2 – W.P. 13).

23. *The Committee reviewed and adopted the Daily Reports.*

24. *The Committee entrusted the Secretariat with editing and correcting both linguistic versions of the Report and the preliminary draft Protocol.*

#### **Agenda Item 7: Any Other Business**

25. *No other business was raised.*

26. The Chair closed the final day of the second session of the Committee of Governmental Experts at 13:18 p.m.