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**Item No. 9 on the agenda: International Interests in Mobile Equipment**

**(d) UNIDROIT candidacy for the role of Supervisory Authority of the international registry to be established under the MAC Protocol**

(prepared by the Secretariat)

<i>Summary</i>	<i>Analysis of issues regarding UNIDROIT's suitability for the role of Supervisory Authority of the MAC Registry</i>
<i>Action to be taken</i>	<i>The Governing Council is invited by the MAC Preparatory Commission to have an initial discussion regarding (i) the suitability of UNIDROIT to undertake the role of Supervisory Authority of the International Registry to be established under the MAC Protocol, (ii) how the Supervisory Authority functions should be incorporated into UNIDROIT's governance structure and (iii) whether it would be necessary to amend the UNIDROIT Statute in order for UNIDROIT to undertake the role</i>
<i>Mandate</i>	<i>Work Programme 2020-2022</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<a href="#">UNIDROIT 2021 - MACPC/2/Doc. 7</a> ; <a href="#">UNIDROIT 2021 - MACPC/2/Doc. 8</a> ; <a href="#">UNIDROIT 2021 - MACPC/3/Doc. 2</a> ; <a href="#">UNIDROIT 2021 - C.D. (100) B.11</a>

**I. INTRODUCTION**

1. At its third session (3–4 June 2021), the MAC Protocol Preparatory Commission invited UNIDROIT to initiate its internal procedures to determine whether the Institute is willing to accept the role of Supervisory Authority of the International Registry to be established under the MAC Protocol (see Governing Council document [C.D. \(100\) B.11](#)).

2. The purpose of this document is to provide the Governing Council with further information related to UNIDROIT's candidacy for the role of Supervisory Authority. The Governing Council has three matters to consider (i) UNIDROIT's suitability for the role of Supervisory Authority, (ii) how UNIDROIT's governance structures would undertake the Supervisory Authority's functions and (iii) whether UNIDROIT's Statute would need to be amended for UNIDROIT to be appointed Supervisory Authority.

## II. BACKGROUND

3. Over the past five years, the UNIDROIT Secretariat has made strenuous efforts to identify an existing international body willing to undertake the role of Supervisory Authority. While the Aircraft Protocol, Luxembourg Rail Protocol and Space Protocols each apply to one category of equipment, the MAC Protocol applies to three categories of equipment (mining, agricultural and construction equipment). The fact that the MAC Protocol applies to three diverse categories of equipment has made it difficult to identify an appropriate Supervisory Authority, as no international entities exist that have responsibility for the three sectors (mining, agriculture and construction).

4. Since 2017, UNIDROIT has considered many different candidates for the role of Supervisory Authority,<sup>1</sup> including the World Bank Group (IFC), the World Trade Organization (WTO), the Multilateral Investment Guarantee Agency (MIGA), the Organisation for Economic Cooperation and Development (OECD), the World Custom's Organization (WCO) and the International Fund for Agricultural Development (IFAD). The United Nations Conference on Trade and Development (UNCTAD) is still examining the issue, although it is unlikely that UNCTAD will be in a position to accept the role.

5. It appears that there are no existing appropriate organisations or entities willing to undertake the role of Supervisory Authority. As such, UNIDROIT's candidacy is now being considered, as the MAC Protocol is unable to enter into force without the appointment of a Supervisory Authority. This situation was regarded as a possibility at the Diplomatic Conference in Pretoria, where UNIDROIT was explicitly discussed as an alternative Supervisory Authority candidate, should other solutions not be feasible.<sup>2</sup> As an alternative, if it is decided that UNIDROIT should not accept the role of Supervisory Authority, the Preparatory Commission will consider establishing a new international body to perform the role of Supervisory Authority, as consistent with the approach adopted for the Luxembourg Rail Protocol Supervisory Authority.<sup>3</sup>

## III. FUNCTIONS OF THE SUPERVISORY AUTHORITY

6. This section provides further details on the functions of the Supervisory Authority, to allow Governing Council members to properly assess the appropriateness of UNIDROIT undertaking the role.

7. Article 17 (2) of the Convention sets out the core responsibilities of the Supervisory Authority:

*(a) establish or provide for the establishment of the international registry;*

*(b) except as otherwise provided by the Protocol, appoint and dismiss the Registrar;*

*(c) ensure that any rights required for the continued effective operation of the international registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;*

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<sup>1</sup> For further information on recent discussions regarding potential candidates, please see documents [MACPC/2/Doc. 7](#) and [MACPC/2/Doc. 8](#).

<sup>2</sup> See [UNIDROIT 2019 – DCME-MAC – Doc. 24 rev., paragraph 42](#) and [UNIDROIT 2019 – DCME-MAC – Doc. 41, paragraphs 42-48](#).

<sup>3</sup> Paragraph 28 of UNIDROIT 2021 – MACPC/3/Doc. 6 provides: The Preparatory Commission requested that the Secretariat prepare further analysis on whether a new international body could be established to perform the role of Supervisory Authority with UNIDROIT acting as its Secretariat, as an alternative option if neither UNIDROIT nor any other existing organisation was able to accept the role.

*(d) after consultation with the Contracting States, make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the international registry;*

*(e) establish administrative procedures through which complaints concerning the operation of the international registry can be made to the Supervisory Authority;*

*(f) supervise the Registrar and the operation of the international registry;*

*(g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;*

*(h) set and periodically review the structure of fees to be charged for the services and facilities of the international registry;*

*(i) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol; and*

*(j) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.*

8. The Supervisory Authority has no responsibility for interpretation of the Convention or its Protocols, their implementation in matters not pertaining to the International Registry nor any other functions or activities not related to the Registry. Similarly, the Supervisory Authority is not responsible for adjudicating on a particular registration, nor does it give instructions to the Registrar to change any data relating to a particular registration.

#### Assistance to the Supervisory Authority

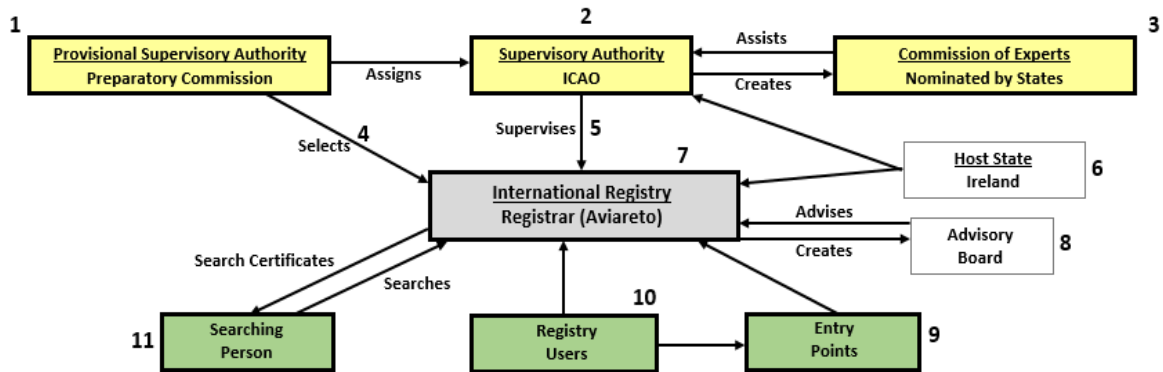
9. In performing its core functions, the Supervisory Authority is assisted by a committee of national experts. In the case of the Aircraft Protocol, the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) continues to provide guidance and assistance to the Supervisory Authority on matters related to its role.

10. An additional body assisting the Aircraft Protocol Supervisory Authority is the International Registry Advisory Board (IRAB), which gives advice primarily to the International Registry. The IRAB is composed of leading registry experts and international commercial law practitioners and academics. In addition to advising the International Registry, the IRAB provides advice to CESAIR to assist CESAIR in making recommendations to the ICAO as Supervisory Authority.

11. The following chart<sup>4</sup> illustrates the procedural steps taken to establish the International Registry under the Aircraft Protocol and is a good reference point for understanding the relationship between the Supervisory Authority, the International Registry, the Commission of Experts and the Advisory Board.

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<sup>4</sup> *Review of Cape Town Core Principles*, Jeffrey Wool, Secretary General, AWG. Seminar on the Cape Town Convention and its Aircraft Protocol – Practicalities and Opportunities relating to Canadian Ratification Toronto, 29/30 April 2013.



## Notes:

1. The Preparatory Commission (PCIR) was established by Resolution 2 of the Diplomatic Conference to act (pending entry into force of the Convention/Protocol), under the guidance and supervision of the ICAO Council, as the 'Provisional Supervisory Authority'. Its main task was to set up the International Registry.
2. ICAO was invited by Resolution 2 (see also Protocol Art XVII(1)) to act as Supervisory Authority (SA). ICAO accepted this function.
3. This body is established by virtue of Art XVII(4) of the Aircraft Protocol. The group meets every 1-2 years and its recommendations are submitted to the SA.
4. The selection occurred in May 2004. The initial Regulations and Procedures were also approved by the PCIR.
5. See Convention Art 17(2) for list of SA responsibilities.
6. Standard host state arrangements were put in place.
7. See Convention Art 17(5) for Registrar responsibilities.
8. The Aviation Working Group (AWG) accepted an invitation to chair the Advisory Board.
9. Entry points may or shall be used where a declaration has been made by the State in which an aircraft (airframe) is registered for nationality purposes.
10. Further information for users of the International Registry is available at <https://www.internationalregistry.aero/ir-web/home>
11. Any person may search the International Registry upon payment of the applicable fee.

12. To replicate the success of the CESAIR in advising the Supervisory Authority of the Aircraft Protocol Registry, Resolution 2 of the MAC Protocol Diplomatic Conference Final Act invites the Supervisory Authority to establish a Commission of Experts consisting of not more than 15 members appointed by the Supervisory Authority from among persons nominated by the Signatory and Contracting States to the Protocol, having the necessary qualifications and experience, with the task of assisting the Supervisory Authority in the discharge of its functions.

#### IV. ASSESSMENT OF UNIDROIT'S SUITABILITY FOR THE ROLE OF SUPERVISORY AUTHORITY

13. It is the Secretariat's view that, were it asked to perform the role, UNIDROIT would be in a position to lawfully and adequately undertake the role of Supervisory Authority, for the following reasons:

- (i) It is consistent with the Institute's responsibility for implementing its instruments, bearing in mind that the appointment of a Supervisory Authority is necessary to ensure that the MAC Protocol enters into force.
- (ii) UNIDROIT has the requisite experience and expertise to undertake the role.
- (iii) The role would not have any negative financial implications for the Institute.
- (iv) The role is not in conflict with UNIDROIT's role as treaty depositary under the MAC Protocol.
- (v) UNIDROIT has the requisite immunities to undertake the role.

### **UNIDROIT's obligation to implement its instruments**

14. As an international organisation with a primarily legislative function, a key performance indicator for UNIDROIT is the success of its instruments. While the success of an international instrument can be assessed in various ways, for treaties the main markers for success are (i) entry into force and (ii) the number of ratifications. As such, UNIDROIT has a responsibility ensure the implementation of the MAC Protocol and its entry into force.

15. The MAC Protocol cannot enter into force without the appointment of a Supervisory Authority. There does not appear to be any other appropriate existing organisations willing to undertake the role, at least in the short to mid-term. Notwithstanding the challenges posed by COVID-19, MAC Protocol implementation activities in States continue at pace (as demonstrated by the United States signing the Protocol in October 2020 and the expected signature by the European Union in the second half of 2021). If a Supervisory Authority is not appointed in the near future, there is a risk that the failure to appoint a Supervisory Authority could prevent entry into force of the treaty. Under these circumstances, it would be reasonable for UNIDROIT to consider undertaking the role of Supervisory Authority to allow its most recent treaty to enter into force.

16. Further analysis on the relationship between UNIDROIT's purpose as set forth in its Statute and the role of Supervisory Authority is contained in Part VI of this document (below).

### **UNIDROIT experience and expertise**

17. There is no other existing organisation with more expertise on the Cape Town Convention and the MAC Protocol, or experience in understanding how the MAC Registry will operate than UNIDROIT. UNIDROIT was responsible for the development and negotiation of the Cape Town Convention and its four Protocols. UNIDROIT also serves as the Depositary for the Convention and its four Protocols. Consequently, UNIDROIT has the highest possible level of knowledge and expertise concerning the functioning and operation of the MAC Protocol and its Registry.

### **Financial implications**

18. There are various costs associated with the role of Supervisory Authority, including staff salaries, meeting costs, translation costs, overhead and administrative expenses. However, none of the costs associated with undertaking the role of Supervisory Authority would be borne by UNIDROIT. This is consistent with the practice under the Aircraft Protocol, whereby ICAO has not incurred any costs in performing its role as Supervisory Authority which have not been fully recovered.

19. As consistent with the practice under the Aircraft Protocol and Resolution 1 of the MAC Protocol Diplomatic Conference Final Act<sup>5</sup>, any costs for the Supervisory Authority before entry into force of the Protocol must be provided for by voluntary contributions by States and the private sector. Once the MAC Protocol is operational, the costs incurred by the Supervisory Authority will be recovered through the fees paid to the International Registry by its users.

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<sup>5</sup> The final paragraph of Resolution 1 provides: "TO URGE the States participating in the Conference and interested private parties to make available, at the earliest possible date, the necessary start-up funding on a voluntary basis for the tasks of the Preparatory Commission and of UNIDROIT, required under this Resolution and to entrust UNIDROIT, with the task of administering such funds" (<https://www.unidroit.org/english/conventions/mobile-equipment/conference2019-mac/conferencedocuments/191122-ctc-mac-final-act-e.pdf>).

### *Initial costs*

20. UNIDROIT is currently supporting the work of the Preparatory Commission in its role as Provisional Supervisory Authority, as consistent with the role the Institute has undertaken for the Luxembourg Rail Protocol Preparatory Commission and the Space Protocol Preparatory Commission. The costs associated with UNIDROIT undertaking the role of the Secretariat of the Preparatory Commission are provided for by the Institute's ordinary budget. However, if UNIDROIT accepts the role of Supervisory Authority, the costs of it undertaking this role will be provided for outside the ordinary budget.

21. If UNIDROIT accepts the role of Supervisory Authority, it will not formally begin operation as the Supervisory Authority before 1 January 2023. It is anticipated that the MAC International Registry may be operational by 1 January 2024. If the MAC Protocol has also attracted the requisite 5 State Parties at that time, the treaty would normally enter into force in 2024. As such, it is anticipated that there may be a 12 month period (January – December 2023) where no registry fees are being generated and the costs of UNIDROIT undertaking the Supervisory Authority role will need to be provided for through voluntary contributions by States and the private sector. During Preparatory Commission negotiations, the UNIDROIT Secretariat has made it clear that UNIDROIT would not be in a position to accept the role of Supervisory Authority without a sufficient guarantee of external financing, in order to ensure that the role would not have any negative financial implications for the Institute.

22. Below is an initial estimate of the annual costs that UNIDROIT would incur in performing its duties as Supervisory Authority before entry into force of the Protocol (in Euros). A more detailed estimate will be provided to the UNIDROIT Finance Committee at its next session. It should be noted that this estimate by UNIDROIT constitutes less than 50% of the amount requested by ICAO in 2001 (\$360,000 USD).

Table: Estimated annual UNIDROIT expenses as Supervisory Authority before entry into force (€)

Staff costs <sup>6</sup>	
1 Professional Officer (P4) at 50% capacity	62.000
1 General Service Staff (Level 4) at 50% capacity	26.000
Meeting expenses	10.000
Translation services	10.000
Overhead and administrative expenses	5.000
Council and miscellaneous/unforeseen expenses	5.000
<b>Total</b>	<b>118.000</b>

### *After entry into force*

23. In determining the fees paid by users, the Supervisory Authority can ensure that the reasonable costs of establishing, operating and regulating the International Registry and of supervising the Registrar, alongside the costs associated with performing its functions under Article 17(2) of the Convention are fully recovered.

24. As Supervisory Authority of the Aircraft International Registry, ICAO has reported the following costs associated with the performance of its functions, exercise of its powers and discharge of its duties under Article 17 (2) of the Convention:

<sup>6</sup> These staffing costs include all possible allowances under the UNIDROIT Regulations and in practice are likely to be lower.

1 January 2014 to 31 December 2014: US\$ 230,340

1 January 2015 to 31 December 2015: US\$ 212,204

1 January 2016 to 31 December 2016: US\$ 235,252

25. These costs cover professional and secretarial support. ICAO has advised that they currently have one full-time professional staff member (at a P4 level on the UN officer scale) and one full-time secretary that work as the Secretariat of the Supervisory Authority. It is anticipated that UNIDROIT would require the same level of staffing to undertake the role of Supervisory Authority of the MAC Registry, and thus would incur similar costs to those incurred by ICAO.

26. The fees generated by the Aircraft International Registry have been significantly higher than the costs associated with running and supervising the registry. At the end of 2018, the International Registry had \$968,830 surplus of income over expenditure, enabling it to achieve an accumulated shareholders' fund of \$8,673,637.<sup>7</sup> On this basis, it is reasonable to assume that the future MAC International Registry will generate sufficient fees to compensate the Supervisory Authority for performing its functions under the MAC Protocol.

### **UNIDROIT as both Depositary and Supervisory Authority**

27. UNIDROIT serves as the Depositary of the MAC Protocol. The Depositary function is undertaken by the UNIDROIT Secretariat. The Secretariat reports on its Depositary functions to the General Assembly on an annual basis.

28. The Cape Town Convention and its Protocols have been drafted assuming that the Depositary and Supervisory Authority are separate entities. As such, there are several articles of the MAC Protocol that contemplate interaction between the Supervisory Authority and the Depositary, as set out in the table below.

29. It is the Secretariat's view that nothing in the text of the Cape Town Convention or the MAC Protocol would make it inappropriate for UNIDROIT to undertake the role of Depositary and Supervisory Authority. In reaching this assessment, the Secretariat notes the following points:

- (i) The relevant articles only contemplate reporting or consultation between the Supervisory Authority and Depositary that would not be impeded by UNIDROIT performing both roles.
- (ii) No potential conflicts of interest arise from UNIDROIT performing both roles (see the analysis on fees below).
- (iii) From a structural perspective, the decisions pertaining to the office of Supervisory Authority and the role of Depositary could be performed by different UNIDROIT organs. The Depositary function is performed by the UNIDROIT Secretariat, whereas the decision-making function of the Supervisory Authority would be performed by the UNIDROIT General Assembly/the Governing Council.<sup>8</sup> This structural separation would allow the Depositary to still "consult" or "inform" the Supervisory Authority, which would involve the Secretariat "consulting" or "informing" the General Assembly/Governing Council/Committee of various issues, acts which are entirely

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<sup>7</sup> Aviareto's annual statistical and financial reports are available at: <https://www.internationalregistry.aero/ir-web/>.

<sup>8</sup> Part V of this document (below) provides different options regarding how the Supervisory Authority's functions could be incorporated into UNIDROIT's structure.

consistent with the normal functioning of UNIDROIT. Moreover, in the very unlikely case of conflict, a strict pre-defined procedure with informational barriers between the different parts of the Secretariat would be envisaged.

- (iv) UNIDROIT would perform its role of Supervisory Authority with advice from a separate body in the Commission of Experts (composed of experts nominated by signatory and Contracting States), which provides an additional layer of independent input. It could be envisaged that, in case of potential conflict, the decision ought to be adopted by consensus between the Supervisory Authority and the Commission of Experts.

*MAC Protocol articles that contemplate interaction between the Supervisory Authority and Depositary*

Article	Text	Comment
Article XXV (1)(b)	the date of the deposit by the <b>Supervisory Authority</b> with the <b>Depositary</b> of a certificate confirming that the International Registry is fully operational.	The UNIDROIT General Assembly/Governing Council would be responsible for confirming that the International Registry is fully operational. It would then “deposit” the certificate with the Depositary. On a practical level, the certificate would be prepared by the member of the UNIDROIT Secretariat responsible for providing the administrative support to the Supervisory Authority and then “deposited” with the member of the UNIDROIT Secretariat responsible for the Depositary function.
Article XXXIV	(1) The <b>Depositary</b> , in consultation with the <b>Supervisory Authority</b> , shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the <b>Depositary</b> shall take into account the reports of the <b>Supervisory Authority</b> . Concerning the functioning of the international registration system. (2) At the request of not less than twenty-five per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the <b>Depositary</b> , in consultation with the <b>Supervisory Authority</b> .	Paragraph 1 merely requires the Depositary to consult with the Supervisory Authority in preparing annual reports and to take into account Supervisory Authority reports in preparing the Depositary reports.  Paragraph 2 requires the Depositary to consult with the Supervisory Authority in convening Review Conferences. This requirement would be satisfied by the UNIDROIT Secretariat (performing the role of Depositary) consulting with UNIDROIT General Assembly/Governing Council with the proposed details of the Review Conference.
Article XXXV (1)	Upon the acceptance of a Harmonized System revision, the <b>Depositary</b> shall consult the World Customs Organization and <b>Supervisory Authority</b> in relation to any Harmonized System codes listed in the Annexes that might be affected by the revision.	This article requires the Depositary to consult the Supervisory Authority in relation to changes to the Harmonized System that might affect the MAC Protocol Annexes. This requirement would be satisfied by the UNIDROIT Secretariat (performing the role of Depositary) consulting with the General Assembly /Governing Council
Article XXXVII (2)	The <b>Depositary</b> shall: (c) provide the <b>Supervisory Authority</b> and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available and assist in the performance of any related duties to ensure the proper operation of the Registry;	Paragraph (c) requires the Depositary to provide the Supervisory Authority with various documents associated with a State’s ratification, approval or accession of the MAC Protocol. This requirement would be satisfied by the UNIDROIT Secretariat (performing the role of Depositary) submitting the various documents to the General Assembly/Governing Council.  Paragraph (d) requires the Depositary to inform the Supervisory Authority of any processes for adjusting or modifying the MAC



	(d) inform the <b>Supervisory Authority</b> and the Registrar of any pending processes under Article XXXV or Article XXXVI and of the outcomes of any such processes;	Protocol Annexes. This paragraph would be satisfied by the UNIDROIT Secretariat (performing the role of Depositary) consulting with the General Assembly/Governing Council and informing it of any processes under Article XXXV or Article XXXVI.
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### The role of the Supervisory Authority in setting fees

30. The Supervisory Authority sets the fees for the International Registry, from which UNIDROIT will benefit as Depositary, only insofar as recovery of costs under Article XVIII(2)(b) is concerned. Article XVIII(2)(b) provides:

*2. The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover:*

...

*(b) the reasonable costs of the Depositary associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by Article 62(2)(c) of the Convention and Article XXXVII(2)(c) to (f) of this Protocol.*

31. Article XVIII(2)(b) does not create a conflict of interest as the funds recoverable by the Depositary can only cover the reasonable costs of the Depositary for performing certain functions. In other words, the criterion to determine the fees is regulated by law, and thus, in the absence of discretion, any potential conflict disappears. Moreover, as Article XVIII(2)(b) is a cost recovery mechanism, even if the Supervisory Authority increased the fees for using the Registry, the Depositary's costs would remain the same (therefore, the Depositary could not exploit its role as Supervisory Authority to somehow increase the costs it generates as Depositary). The Supervisory Authority would have to set the fees to cover the Registry costs, Supervisory Authority costs, and the Depositary costs, regardless of who performs the role of Supervisory Authority.

32. All Protocols to the Cape Town Convention already contemplate the Supervisory Authority setting the fees for the Registries and recover the costs of performing the role of Supervisory Authority from the registry fees. This is the case for ICAO, which both sets the fees for the Aircraft Registry, and recovers its Supervisory Authority costs annually from those fees. This is clearly analogous to a situation where the Supervisory Authority would set the fees and recover some of those fees due to it also performing the role of Depositary.

### Immunity

33. Under Article 27(2) of the Convention, the Supervisory Authority and its officers and employees enjoy such immunity from legal or administrative process as is specified in the Protocol. Article XIV(3) of the MAC Protocol provides that the Supervisory Authority and its officers and employees enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity. Article XIV is designed to provide strong immunity for the Supervisory Authority by reference to the Supervisory Authority's existing statute-based immunity.

34. Article 2(4) of the UNIDROIT Statute provides that "*The privileges and immunities which the Institute and its agents and officers shall enjoy shall be defined in agreements to be concluded with participating Governments.*" Articles 2, 6 and 7 of the UNIDROIT Headquarters Agreement (1969) set out the privileges and immunities of the Institute. The Secretariat understands these immunities to be sufficient to protect the Supervisory Authority, should UNIDROIT accept the role.

35. The immunity of the Supervisory Authority can be contrasted with the position of the Registrar, which under Article 28 of the Convention is held strictly liable for compensatory damages for loss suffered by a person directly resulting from an act or omission of the Registrar and its officers and employees or from a malfunction of the International Registry. The Registrar is required to cover this liability by insurance or a financial guarantee in an amount determined by the Supervisory Authority. In the case of Aviareto under the Aircraft Protocol, the current level of cover is \$150 million.

## V. INCORPORATING THE SUPERVISORY AUTHORITY FUNCTIONS INTO UNIDROIT'S STRUCTURE

36. Article 4 of the Statute provides that UNIDROIT's organs are (1) the General Assembly, (2) the President, (3) the Governing Council, (4) the Permanent Committee, (5) the Administrative Tribunal and (6) the Secretariat. The central organs are the Governing Council and General Assembly. The Statute provides how the Governing Council and General Assembly are composed and the core matters for which they have responsibility. In particular, the General Assembly approves the Institute's annual accounts and budget and approves the Institute's Work Programme every three years. The Statute provides very limited rules that set out the operating structure and core responsibilities of the General Assembly and Governing Council. As such, UNIDROIT has a relatively flexible governance structure.

37. The Supervisory Authority's functions under Article 17(2) of the Convention can be divided up into three categories:

- a. **Formal functions**, such as the appointment or dismissal of the Registrar, the establishment or approval of Regulations and the setting of fees.
- b. **General functions**, such as the supervision of the Registrar and the operation of the international Registry, the approval of periodical reports and the establishment of complaint procedures.
- c. **Administrative functions**, such as the publication of regulations and the communication of periodical reports to Contracting States.

38. Utilising its flexible governance structure, UNIDROIT would be able to adopt an internal decision-making process which best suits the Supervisory Authority's functions. There are several different options for how the Supervisory Authority functions could be incorporated into UNIDROIT's Governance Structure, set out below. Under all of the proposed options, the Supervisory Authority's administrative functions would be performed by the UNIDROIT Secretariat. As consistent with Resolution 2 of the MAC Protocol Diplomatic Conference Final Act, it is anticipated that UNIDROIT would establish a Commission of Experts to advise the relevant body (whether it be the Governing Council, the General Assembly or a Committee created by the General Assembly) in the discharge of its functions as Supervisory Authority. In devising the following options, regard has been given to the fact that, should more than one ordinary annual meeting be necessary, the Governing Council, due to its less cumbersome structure and its ability to work through a written procedure, would incur lower costs than the General Assembly.

### *Options involving the Governing Council*

**Option 1A** would be for the Governing Council to undertake the Supervisory Authority's formal functions and general functions. The strengths of Option 1A are that (i) the Governing Council is a very effective decision-making body and (ii) the Governing Council would be able to develop the necessary technical expertise to undertake the general and formal Supervisory

Authority functions, as advised by the Commission of Experts. The weaknesses of Option 1A are (i) there is no formal role for States in the process and (ii) requiring the Governing Council to undertake both the general and formal functions might place a relatively large additional workload on the body and might add 1-2 additional days to the Council's annual meeting.

**Option 1B** would be for the Governing Council to undertake the general functions but refer the formal functions to the General Assembly, with recommendations. The strengths of Option 1B are that (i) it is consistent with the process for approving the Institute's Work Programme, (ii) it would allow States to participate in the formal functions and (iii) it would not unduly burden the General Assembly with the Supervisory Authority's general functions. The weakness of Option 1B is that the General Assembly might not be the appropriate forum for the discharge of the Supervisory Authority's formal functions.

**Option 1C** would be for the Governing Council to undertake the general functions but refer the formal functions to a Committee established by the General Assembly, with recommendations. The General Assembly would create a Committee of interested UNIDROIT Member States to undertake the task of deciding on the formal functions. This solution features the advantages of Option 1B, and reduces its weaknesses by ensuring the participation in the decision making process of the member states that have shown a direct interest in the MAC Protocol.

*Options with exclusive participation of the GA and Member States*

**Option 2A** would be for the General Assembly to undertake both the Supervisory Authority's general functions and formal functions. The strength of Option 2A would be that it would allow States to participate in the Supervisory Authority's functions. The weaknesses of Option 2A are several: (i) the General Assembly might not be the appropriate forum for the discussion of technical matters related to the MAC International Registry, (ii) it may not be the appropriate body to assume competences which concern the general supervision of the Registry, given its complex meeting process, and (iii) it would unduly burden the General Assembly which generally only meets for half a day each year.

**Option 2B** would be for General Assembly to create a Committee of interested UNIDROIT Member States to undertake the general functions and refer the formal functions to the General Assembly with recommendations. The strength of Option 2B are that (i) it would allow States to participate in the Supervisory Authority's functions and (ii) it would still vest the formal functions in the General Assembly. The weakness of Option 2B is that the General Assembly might not be the appropriate forum for the discharge of the Supervisory Authority's formal functions.

**Option 2C** would be for the General Assembly to create a Committee of interested UNIDROIT Member States to undertake the general functions and the formal functions. The strengths of Option 2C are that (i) it allows States to participate in the Supervisory Authority's functions and (ii) would not unduly burden the General Assembly.

39. It is the Secretariat's view that Option 1C, Option 1B, or Option 2B, in that order, might be the preferable approaches. In the Secretariat's view, the Governing Council ought to play a role. The allocation of responsibility for the Supervisory Authority's functions to either the General Assembly, the Governing Council or a Committee created by the General Assembly could be clarified by amending the Institute's Statute, although such an approach is not recommended (see Part VI below).

40. MAC Protocol Contracting States that are not UNIDROIT Member States would only be able to attend the UNIDROIT General Assembly or a Committee created by the General Assembly as observers

and would have no formal vote in relation to the General Assembly undertaking any functions as Supervisory Authority. Contracting States that want to exercise a vote in relation to the Supervisory Authority undertaking its functions would be encouraged to become Members of UNIDROIT. Alternatively, Contracting States could also seek to have an official elected to the Commission of Experts advising the Supervisory Authority.

## VI. IMPLICATIONS FOR THE UNIDROIT STATUTE

41. If it is decided that UNIDROIT should accept the role of Supervisory Authority, the Governing Council may wish to consider whether the UNIDROIT Statute would need to be amended.

42. Article 1 of the UNIDROIT Statute sets out the Institute's purposes:

*The purposes of the International Institute for the Unification of Private Law are to examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law.*

*To this end the Institute shall:*

*(a) prepare drafts of laws and conventions with the object of establishing uniform internal law;*

*(b) prepare drafts of agreements with a view to facilitating international relations in the field of private law;*

*(c) undertake studies in comparative private law;*

*(d) take an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary;*

*(e) organise conferences and publish works which the Institute considers worthy of wide circulation.*

43. The Secretariat does not have a firm view on whether the UNIDROIT Statute should be changed for UNIDROIT to accept the role of Supervisory Authority. However, the Secretariat does believe that it would be possible for UNIDROIT to accept the role *without* amending the Statute.

44. As an international organisation with a primarily legislative function, the role of supervising an International Registry does not sit perfectly within the Institute's core purposes set out in Article 1. However, Article 1 adopts a minimalist approach in defining the Institute's purpose and should be interpreted broadly. UNIDROIT has undertaken a range of functions not explicitly provided for under Article 1. Article 1 does not explicitly include the implementation and promotion of its instruments as one of UNIDROIT's core purposes, although implementation and promotion are commonly understood to be core functions of the Institute, and as such have been allocated maximum priority status in the Institute's Work Programme. Further, Article 1 does not explicitly provide for UNIDROIT to prepare anything except laws, conventions and agreements even though it is accepted that UNIDROIT should be able to prepare other types of soft-law instruments, such as legal principles and rules. Finally, Article 1 does not explicitly provide for UNIDROIT to act as the depositary for any of its treaties, however there was no decision that the Statute needed to be amended for UNIDROIT to accept the role of depositary for the Cape Town Convention and Aircraft Protocol in 2001, the Rail Protocol in 2007, the Space Protocol in 2012 and the MAC Protocol in 2019.

45. It could be argued that, given its minimalist approach, Article 1 should be read broadly to include activities related to the implementation of its instruments as a core function. In the context of a broad reading, it would be reasonable for UNIDROIT to undertake functions that support the implementation of its instruments, including accepting the role of Supervisory Authority. This would

be consistent with the approach of not explicitly amending the Statute to allow UNIDROIT to become the depositary under the Cape Town Convention and its Protocols. At the very least, there is nothing in the Statute that would outright prohibit UNIDROIT from undertaking the role.

### **Options for amending the Statute**

46. If it is decided that it is necessary to amend the Statute, there are two options. The first option would be to simply add an additional subparagraph to Article 1 to the effect:

*[f] undertake actions required for the implementation of instruments it has prepared [, including, but not limited to, formal functions such as depositary or supervisory authority].*

47. The second option would be to insert a new article explicitly providing for UNIDROIT to accept the role of Supervisory Authority of the MAC registry or, more generally, for other Protocols of the Cape Town Convention. It is suggested that if a separate article is required, it should be fairly brief and limited in what it provides and should not set out any formal approach or structure in relation to how the role is undertaken by the Institute. This approach would be consistent with the overall approach adopted by the Statute, ensure that UNIDROIT has requisite flexibility to perform the functions of Supervisory Authority and allow for UNIDROIT to change its approach to undertaking the Supervisory Authority functions without requiring further amendments to the Statute.

### **Process for amending the Statute**

48. The amendment process is set out in Article 19 of the Statute:

1. – *Amendments to this Statute, passed by the General Assembly, shall come into force when approved by a majority of two thirds of the participating Governments.*
2. – *Each Government shall communicate its approval in writing to the Italian Government, which shall inform the other participating Governments and the President of the Institute.*
3. – *Any Government which has not approved an amendment to the Statute may denounce the Statute at any time within six months of the coming into force of the amendment. Denunciation shall take effect from the date of notification to the Italian Government, which shall inform the other participating Governments and the President of the Institute.*

49. There are certain time pressures created by the requirement in Article 19(1) for two-thirds of UNIDROIT Members to approve the amendment in writing. Previous amendments to the UNIDROIT Statute have indicated that a period of 18 months – 4 years might be required.<sup>9</sup> To avoid delaying the capacity of UNIDROIT to accept the role of Supervisory Authority, the General Assembly could adopt a resolution granting provisional effect to the amendment pending its entry into force. This approach was proposed by the Secretariat in 1989 in relation to the amendment of Article 6(1) of the Statute which expanded the number of Governing Council Members from 21 to 25. At the time,

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<sup>9</sup> One amendment adopted by the General Assembly in December 1967 entered into force in April 1968 (16 months), Another amendment adopted by the General Assembly in November 1984 did not enter into force until January 1986 (2.5 years). A third amendment adopted by the General Assembly in December 1989 did not enter into force until 1993 (4 years).

the Legal Department of the Italian *Ministero degli Affari Esteri e della Cooperazione Internazionale* (MAECI) did not see any legal objections to the adoption of such a resolution by the General Assembly.

50. If it is decided that it is necessary to amend the Statute, the following timeline is proposed:
- (i) December 2022 – the General Assembly passes the proposed amendment to the UNIDROIT Statute. The General Assembly also passes a resolution granting the amendment provisional effect pending its entry into force under Article 19(1).
  - (ii) January 2023 – the Italian *Ministero degli Affari Esteri e della Cooperazione Internazionale* (MAECI) writes to all UNIDROIT Member States informing them of the proposed amendment to the Statute and asking for their written approval.
  - (iii) January 2023 – UNIDROIT formally becomes the Supervisory Authority of the MAC Registry.
  - (iv) The amendment formally enters into force 6 months after two-thirds of UNIDROIT Member States approve of the amendment in writing.

## **VII. FUTURE STEPS**

51. The Preparatory Commission will continue to act as the provisional Supervisory Authority until a Supervisory Authority is appointed. It is important that a Supervisory Authority is appointed by January 2023 to ensure that it can work with the Registrar in developing the MAC Registry. It is anticipated that the Registry will be developed throughout 2023 and be online by January 2024.

52. To allow UNIDROIT to be appointed Supervisory Authority by January 2023, the Governing Council will be asked to make a formal recommendation to the General Assembly on this matter at its 101<sup>st</sup> session in May 2022. The General Assembly will be asked to make a formal decision on the matter at its 81<sup>st</sup> session in December 2022.

## **VIII. ACTION TO BE TAKEN**

53. *The Governing Council is invited by the MAC Preparatory Commission to have an initial discussion regarding (i) the suitability of UNIDROIT to undertake the role of Supervisory Authority of the International Registry to be established under the MAC Protocol, (ii) how the Supervisory Authority functions should be incorporated into UNIDROIT's governance structure and (iii) whether it would be necessary to amend the UNIDROIT Statute in order for UNIDROIT to undertake the role.*