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**Item No. 6 on the agenda: International Interests in Mobile Equipment**

**(d) Appointment of a Supervisory Authority for the MAC Protocol registry**

(prepared by the Secretariat)

<i>Summary</i>	<i>Analysis of issues regarding (i) UNIDROIT's suitability for the role of Supervisory Authority of the MAC Registry and (ii) the process to establish a separate entity to perform the role of Supervisory Authority.</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to discuss the suitability of UNIDROIT to undertake the role of Supervisory Authority of the International Registry to be established under the MAC Protocol. The Governing Council is further invited to consider whether it would be preferable to establish a new international entity to undertake the role, with UNIDROIT as its Secretariat.</i>
<i>Mandate</i>	<i>Work Programme 2020-2022</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<a href="#">MACPC/2/Doc. 7</a> ; <a href="#">MACPC/2/Doc. 8</a> ; <a href="#">MACPC/3/Doc. 2</a> ; <a href="#">UNIDROIT 2021 C.D. (100) B.11</a> ; <a href="#">UNIDROIT 2021 C.D. (100) B.12</a>

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## 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 would be 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. At its 100<sup>th</sup> session in 2021, the Governing Council discussed (i) the suitability of UNIDROIT undertaking the role of Supervisory Authority of the International Registry to be established under the MAC Protocol, and, to a limited extent, (ii) how the Supervisory Authority functions could be incorporated into UNIDROIT's governance structure. No consensus was reached on these matters. The Governing Council requested that the Secretariat prepare further detailed information on the specific tasks that would be required from the Institute, should UNIDROIT be appointed as Supervisory Authority, and an analysis of the suitability of establishing a new international entity to perform the role of Supervisory Authority, with UNIDROIT as its Secretariat.<sup>1</sup> The purpose of this document is to address these issues.

3. Part I of this document introduces the topic. Part II provides a short background to the issues. Part III sets out the functions of the Supervisory Authority, including additional analysis regarding how ICAO discharges its functions as the Supervisory Authority under the Aircraft Protocol. Part IV assesses the suitability of UNIDROIT to undertake the role of Supervisory Authority. Part V analyses how a new international entity will be established under the Luxembourg Rail Protocol with a separate Secretariat. Part VI compares (i) the advantages and disadvantages of establishing a new entity to perform the role of Supervisory Authority with UNIDROIT as its Secretariat with (ii) UNIDROIT undertaking the role of Supervisory Authority. Part VI concludes that the UNIDROIT Secretariat considers both UNIDROIT being appointed as Supervisory Authority, or a new entity being established with UNIDROIT acting as its Secretariat as viable options. However, for the reasons set forth below, the Secretariat suggests that UNIDROIT being directly appointed as Supervisory Authority would be the preferable option. Part VII outlines the future steps required to appoint Supervisory Authority for the MAC Protocol.

4. There are a number of associated matters regarding the possibility of UNIDROIT undertaking the role of Supervisory Authority which the Secretariat reported to the Governing Council at its 100<sup>th</sup> session in 2021. These matters include: (i) structural options for how UNIDROIT could discharge the Supervisory Authority functions; (ii) Costs and immunities; (iii) Compatibility of UNIDROIT serving as both Supervisory Authority and Depository; and (iv) implications for the UNIDROIT Statute. Analysis on these matters can now be found in the Annexes to this document. Due to the significant number of matters that require Governing Council consideration at its 101<sup>st</sup> session, it is suggested that the Governing Council focus on the matters in Parts I – V of this paper.

## II. BACKGROUND

5. 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 for the MAC Protocol. 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 there seem to

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<sup>1</sup> See [UNIDROIT 2021 – C.D. \(100\) B.24 – Report](#), paragraphs 160 – 186.

exist no international entities that have responsibility for the three sectors (mining, agriculture and construction).

6. Since 2017, UNIDROIT has considered many different candidates for the role of Supervisory Authority,<sup>2</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), the International Fund for Agricultural Development (IFAD) and the United Nations Conference on Trade and Development (UNCTAD). It appears that there are no existing appropriate organisations or entities willing to undertake the role of Supervisory Authority.

7. Having exhausted other avenues of inquiry, there appears to be two options left for establishing the Supervisory Authority for the MAC Protocol: (i) appoint UNIDROIT as the Supervisory Authority;<sup>3</sup> or (ii) create a new international entity to perform the role, with UNIDROIT as its Secretariat.<sup>4</sup>

### III. FUNCTIONS OF THE SUPERVISORY AUTHORITY

8. This section provides further details on the functions of the Supervisory Authority.

9. 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;*

*(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;*

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

<sup>3</sup> 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. See [UNIDROIT 2019 – DCME-MAC – Doc. 24 rev., paragraph 42](#) and [UNIDROIT 2019 – DCME-MAC – Doc. 41, paragraphs 42-48](#).

<sup>4</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.

*(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.*

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

- (i) **Formal functions**, such as the appointment or dismissal of the Registrar, the establishment or approval of Regulations and the setting of fees.
- (ii) **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.
- (iii) **Administrative functions**, such as the publication of regulations and the communication of periodical reports to Contracting States.

11. 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.

## **A. Assistance to the Supervisory Authority**

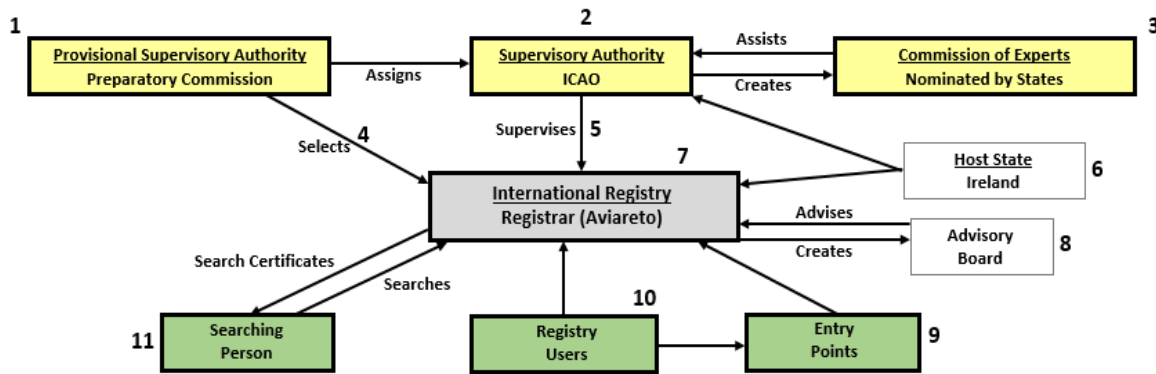
12. In performing its core functions, the Supervisory Authority is assisted by a committee of national experts. In the case of the Aircraft Protocol, the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) continues to provide guidance and assistance to the Supervisory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

13. 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.

14. The following chart<sup>5</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>5</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.

15. To replicate the success of 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.

## B. The ICAO Model under the Aircraft Protocol

16. This section examines the structural and operational elements of ICAO as Supervisory Authority of the Aircraft Protocol, including detailed information that should allow for a comparison with the proposal for UNIDROIT to undertake the role of Supervisory Authority of the MAC Protocol.

17. For the Aircraft Protocol, Resolution 2 of the Diplomatic Conference which adopted the Cape Town Convention and the Aircraft Protocol<sup>6</sup> invited ICAO to accept the functions of Supervisory Authority upon the entry into force of the Convention and the Protocol. This was in line with the Council of ICAO deciding at its 161st Session to accept the role of Supervisory Authority prior to the Diplomatic Conference. The ICAO decision to accept the role of Supervisory Authority was subject to two important caveats:

- (i) Full cost recovery for ICAO in undertaking the role of Supervisory Authority. It was important that ICAO undertaking the role of Supervisory Authority did not incur any additional costs for the organisation. The cost recovery mechanism, under which fees collected by the Registrar cover the costs of the Supervisory Authority performing its roles are enshrined in the Cape Town Convention and its Protocols. For ICAO, the Registrar was able to generate sufficient revenue in its second year of operation to

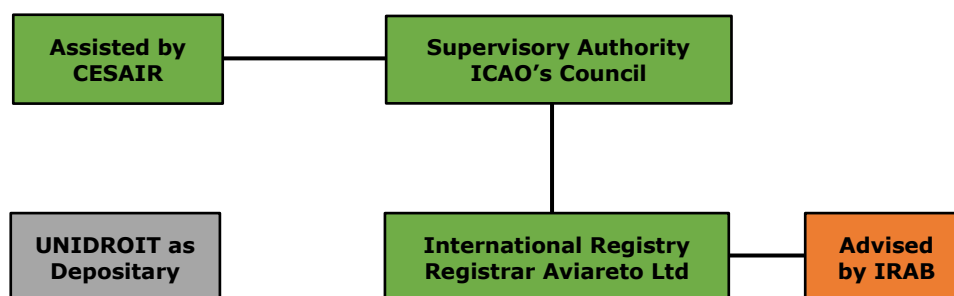
<sup>6</sup> See Resolution 2 of the Diplomatic Conference to adopt the Cape Town Convention and its Aircraft Protocol at <https://ctcap.org/wp-content/uploads/2020/04/Dcme-76-Final-Act.pdf>

ensure that all of ICAO's costs as Supervisory Authority were adequately recovered. While the financial implications for UNIDROIT undertaking the role of Supervisory Authority are outlined in Annexe 2 of this document, it is important to highlight that (i) the UNIDROIT Secretariat projects that UNIDROIT would be able to undertake the role of Supervisory Authority at 50% of the costs incurred by ICAO, and, in any case (ii) that full recovery of costs should be deemed a precondition to accept the role, as with the case of ICAO.

- (ii) No additional liability for ICAO in undertaking its role as Supervisory Authority. Immunity from liability is addressed by the Cape Town Convention and its Protocols. Additional analysis on this issue can be found in Annex 2 of this document.

18. Structurally, the role of Supervisory Authority is performed by the ICAO Council, with assistance from CESAIR. The ICAO Council is a permanent body of the organisation responsible to the ICAO Assembly. It is composed of 36 Member States elected by the Assembly for a three-year term. In the election, adequate representation is given to (i) States of chief importance in air transport, (ii) States not otherwise included but which make the largest contribution to the provision of facilities for international civil air navigation and (iii) States not otherwise included whose designation will ensure that all major geographic areas of the world are represented on the Council.<sup>7</sup> The members of the ICAO Council appoint State Representatives, who act on behalf of the member country. These Representatives are not experts in the area of registry design, operation, or supervision, but are rather aviation experts<sup>8</sup>.

The internal structure of ICAO as Supervisory Authority is as follows<sup>9</sup>:



19. The ICAO Council is responsible for taking all the substantive decisions regarding ICAO's role as Supervisory Authority. In particular, the ICAO Council undertakes all formal functions (appointment/reappointment of the Registrar and approval of the Regulations) and some general functions (establishing complaints management procedures and reviewing liability and insurance matters). However, the ICAO Council has delegated some general functions and all administrative functions (supervision of the Registrar, periodical reporting, publication of regulations etc) to the ICAO Secretariat.

20. The ICAO Council is only called upon to act on a matter when a decision needs to be taken, which normally occurs less often than once per year. The ICAO Council is extensively assisted by the ICAO Secretariat<sup>10</sup> and CESAIR in undertaking its role as Supervisory Authority. Ahead of every

<sup>7</sup> See more at <https://www.icao.int/about-icao/Council/Pages/council.aspx>

<sup>8</sup> See <https://www.icao.int/about-icao/Council/CouncilStates/Pages/Council-State-Representatives.aspx>.

<sup>9</sup> Additional details found in Presentation titled 'ICAO'S ROLE ON THE PATH TO CAPE TOWN AND BEYOND' – Cape Town After Ten Years: <https://www.unidroit.org/english/conventions/mobile-equipment/anniversaryseminar/wibaux.pdf>

<sup>10</sup> In particular, the ICAO Legal Bureau.

decision which needs to be taken, extensive preparatory material prepared by CESAIR and the ICAO Secretariat is provided to the ICAO Council.

21. When the ICAO Council undertakes most of its formal functions, often decisions are adopted based on the documents prepared by the ICAO Secretariat and the recommendations made by CESAIR. Reportedly, the decisions which tend to generally generate discussion at the ICAO Council would include (i) issues relating to determining the amount of insurance the International Registry should maintain; and (ii) reappointment of the Registrar.

22. The ICAO Council is not presented with a regular summary document on Supervisory Authority related matters. The ICAO General Assembly plays no role in ICAO's role as Supervisory Authority. The periodical reporting provided to the ICAO Council and ICAO General Assembly regarding the Supervisory Authority function is contained in the ICAO Annual Report.

23. Established by means of Resolution 2 of the Diplomatic Conference of the Cape Town Convention and its Aircraft Protocol, CESAIR functionally operates under the ICAO Council. The ICAO Secretariat extensively assists CESAIR, which has had 10 meetings since the entry into force of the Aircraft Protocol in 2006.<sup>11</sup> As per the Rules of Procedure of CESAIR, Members are nominated by Signatory and Contracting States of the Aircraft Protocol, and are approved by the ICAO Council. All CESAIR members and observers finance their own participation. All experts participating in CESAIR are independent and participate in their personal capacities. The ICAO Secretariat recovers all costs associated with servicing CESAIR from the International Registry, as part of ICAO's role as Supervisory Authority.

24. The ICAO Secretariat has indicated that the ICAO General Assembly's lack of involvement in the Supervisory Authority role has never been raised as an issue for the organisation. The ICAO Secretariat has suggested that the ICAO Council undertaking the formal Supervisory Authority functions, with extensive support from the ICAO Secretariat and CESAIR has been a very successful operational model that works well for the organisation.<sup>12</sup>

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

25. 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 (paras. 26-28 below).
- (ii) UNIDROIT has the requisite experience and expertise to undertake the role (para 29 below).
- (iii) UNIDROIT's institutional structure would allow it to replicate the successful ICAO Supervisory Authority operational structure (paras. 30-31 below).

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<sup>11</sup> These meetings generally last 2-3 days. CESAIR often conducts its business over videoconference and has provisions within its Rules and Procedures to take decisions via written procedure.

<sup>12</sup> Further analysis on whether the ICAO Supervisory Authority structure could serve as a potential model for UNIDROIT to undertake the role is available in Part IV below.



- (iv) The role would not have any negative financial implications for the Institute and UNIDROIT has the requisite immunities to undertake the role (see Annexe 2)
- (v) The role is not in conflict with UNIDROIT's role as treaty depositary under the MAC Protocol (see Annexe 3)

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

26. 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 most evident 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.

27. The MAC Protocol cannot enter into force without the appointment of a Supervisory Authority. As noted above (Part II), despite the UNIDROIT Secretariat's strenuous efforts to identify another appropriate existing organisation, there does not appear to be any other appropriate organisation 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 June 2022). If a Supervisory Authority is not appointed in the near future, there is a risk that this failure 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.

28. 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).

### **B. UNIDROIT's experience and expertise**

29. 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.

### **C. UNIDROIT's institutional structure would allow it to replicate ICAO's model**

30. An in-depth assessment of the operation of ICAO as Supervisory Authority under the Aircraft Protocol shows clear similarities with UNIDROIT's Governing Council undertaking the formal and general Supervisory Authority functions (Option 1A, set out in Annexe 1 of this paper). The UNIDROIT Governing Council bears several similarities to the ICAO Council. The ICAO Council is attended by aviation experts, therefore not by experts in the area of registry design, operation, or supervision. Similarly, the Members of the UNIDROIT Governing Council are experts in private international law, international commercial law and other areas in which UNIDROIT operates. One difference between the UNIDROIT Governing Council and the ICAO Council is that ICAO Council Members represent their States, whereas UNIDROIT Governing Council Members are elected in their individual capacities.

31. For members of the ICAO Council, the decision-making process to be able to fulfil their role as Supervisory Authority under the Aircraft Protocol is fully guided by the documents and advice

provided by CESAIR and the ICAO Secretariat. This would be the same for the Members of the UNIDROIT Governing Council who would arguably have several advantages over members of the ICAO Council in undertaking Supervisory Authority functions:

- (i) The UNIDROIT Governing Council has historically been closely involved with the negotiation, finalisation, and now implementation of the MAC Protocol, and therefore its Members have a closer knowledge of the Cape Town System than Representatives of the members of the ICAO Secretariat would be expected to have.
- (ii) As described above, the functions of the Supervisory Authority concern the functioning of a Registry of movable assets, and are less directly related with the sector of activity which originated the registration of the international interest. Hence, the knowledge of secured transactions and functioning of registries, which is expected of Governing Council Members, is arguably more relevant for the task than expertise in the sectors of activity (MAC, for our case, aviation, in the case of ICAO).
- (iii) Governing Council Members are appointed for 5-year terms, as compared to 3-year terms at ICAO.
- (iv) Similarly, for the UNIDROIT Governing Council, it is not anticipated that the matter of Supervisory Authority will require decisions to be taken every year, but rather that it will require some deliberation in the initial years of entry into force of the MAC Protocol, after which it will be required to deliberate upon this matter from time to time.

## **V. ESTABLISHING A NEW ENTITY TO PERFORM THE ROLE OF SUPERVISORY AUTHORITY: THE LUXEMBOURG RAIL PROTOCOL MODEL**

32. This section provides an overview of the process undertaken to create a new entity to perform the role of Supervisory Authority under the Luxembourg Rail Protocol and how it is anticipated that the Rail Registry Supervisory Authority and its Secretariat will function.

### **A. The Establishment of a Supervisory Authority under the Luxembourg Rail Protocol**

33. The Supervisory Authority under the Luxembourg Rail Protocol is not yet in existence as the Luxembourg Rail Protocol has not yet entered into force. As such, this analysis is based on its foundational documents.<sup>13</sup>

34. Article XII of the Luxembourg Rail Protocol itself sets out how the Supervisory Authority will be established for the Rail Registry (available in Annexe 5 of this document). Article XII provides that a new body will be established to undertake the role of Supervisory Authority (paragraph 1), with the Intergovernmental Organisation for the International Carriage by Rail (OTIF) performing the role of Secretariat (paragraph 6). The operation of the Supervisory Authority will be governed by its draft [Statute](#) and its draft [Rules of Procedure](#).<sup>14</sup>

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<sup>13</sup> The [Luxembourg Rail Protocol](#), the [Statute of the Supervisory Authority](#) and its [draft Rules of Procedure](#).

<sup>14</sup> While the draft Statute and the draft Rules of Procedure have been approved by the Rail Preparatory Commission, they remain in draft form. While it is not expected that either document will substantively change further, it should be noted that these are not yet final documents.

## **B. Rationale for establishing a new international entity to be the Supervisory Authority**

35. The rationale for establishing a new international entity to perform the role of Supervisory Authority with OTIF as its Secretariat is somewhat unique to the circumstances of the Luxembourg Rail Protocol. From as early as 2001, it was anticipated that OTIF itself would perform the role of Supervisory Authority.<sup>15</sup> OTIF was a natural candidate for the role, as it is the peak international body whose mission it is to promote, improve and facilitate traffic by rail. Throughout the development of the Protocol, OTIF remained highly supportive of the instrument and was actively seeking to be appointed Supervisory Authority. However, as negotiations progressed, questions were raised regarding whether OTIF had sufficient geographical representation in its membership to ensure that the Supervisory Authority would fully represent all expected Contracting States.<sup>16</sup> On this basis, it was decided that it would be preferable to establish a new international entity with broader geographical representation to be the Supervisory Authority, with OTIF performing the role of Secretariat. As such, the rationale for establishing a new international entity to be the Supervisory Authority with OTIF as its Secretariat was to facilitate OTIF undertaking a central role in administering the operation of the treaty as Secretariat, while avoiding any issues that could arise from the limited geographical nature of OTIF's membership. It was for this reason that UNIDROIT was never considered as a candidate for the role of Supervisory Authority under the Luxembourg Rail Protocol.

## **C. Composition**

36. The Supervisory Authority is a group of States, comprising (a) each State Party to the Luxembourg Rail Protocol; (b) up to three States designated by UNIDROIT; and (c) up to three States designated by OTIF.<sup>17</sup> In designating States, UNIDROIT and OTIF must take into account the need to ensure broad geographical representation on the Supervisory Authority.<sup>18</sup> Once at least 10 States have ratified the Protocol, the mandate of those States designated by UNIDROIT and OTIF shall begin to expire.<sup>19</sup> As such, it is intended that the Supervisory Authority will eventually be composed only of State Parties to the Luxembourg Rail Protocol.

## **D. Functions**

37. In addition to the functions of the Supervisory Authority set out in Article 17 (2) of the Convention, Article 6 of the Supervisory Authority's Statute provides a more detailed task list for the Supervisory Authority:

- 1. Establish Rules of Procedure.*
- 2. Elect its Officers according to the Rules of Procedure.*
- 3. Appoint the Registrar and negotiate and amend from time-to-time agreements with the Registrar.*

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<sup>15</sup> In early drafts of the Luxembourg Rail Protocol, OTIF was nominated as the Supervisory Authority.

<sup>16</sup> All of OTIF's 50 Member States are located in Europe, the Middle East and North Africa.

<sup>17</sup> Luxembourg Rail Protocol, Article XII(1), Supervisory Authority Statute Article 2.

<sup>18</sup> Luxembourg Rail Protocol, Article XII(2).

<sup>19</sup> Luxembourg Rail Protocol, Article XII(3).

4. *Establish, review and may, from time to time amend, the Regulations and determine the manner of their publication.*
5. *Supervise the Registrar and the operation of the International Registry, including the evaluation, authorization, where appropriate, and supervision of the provision by the Registrar of services additional to those required under the Protocol.*
6. *At the request of the Registrar, provide guidance to the Registrar.*
7. *Do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of the Convention and the Protocol.*
8. *Enter into agreements with an external auditor and any other party as may be requisite for the performance of its functions.*
9. *Sign with the Secretariat any agreement setting out the detailed conditions for performing the tasks of the Secretariat and negotiate and amend from time to time such agreement with the Secretariat.*
10. *Dismiss the Registrar and 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.*
11. *Report periodically to the Contracting States concerning the discharge of its obligations under the Convention and the Protocol.*
12. *Report periodically to UNIDROIT in order to assist it as the Depositary in preparing reports for the States Parties.*
13. *Cooperate with UNIDROIT as the Depositary with regard to the status and reviewing of the Convention and the Protocol.*

## **E. Operation and assistance from the Commission of Experts**

38. The Supervisory Authority will be domiciled in Berne, Switzerland, where OTIF is headquartered.<sup>20</sup> The Supervisory Authority will hold a general meeting once per calendar year at its domicile, although the location of the meeting can be changed by a majority vote of Members.<sup>21</sup> Additional interim meetings can be requested by a one-third vote of Members, which can be held via videoconference if necessary.<sup>22</sup> The official and working language of the Supervisory Authority is English.<sup>23</sup> Unless otherwise decided by the Supervisory Authority, meetings are not open to the public.<sup>24</sup>

39. To assist the Supervisory Authority with the discharge of its functions, the Supervisory Authority may establish a Commission of Experts of individuals with the necessary qualifications,

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<sup>20</sup> Supervisory Authority Statute, Article 4(1).

<sup>21</sup> Draft Rules of Procedure, Article 3(3).

<sup>22</sup> Draft Rules of Procedure, Article 3(2).

<sup>23</sup> Supervisory Authority Statute, Article 7.

<sup>24</sup> Draft Rules of Procedure, Article 7.

expertise and experience selected from persons nominated by States Parties, Signatory States or the Chair.<sup>25</sup>

## **F. Legal status and immunities**

40. Article 27 of the Cape Town Convention provides that the Supervisory Authority shall have international legal personality where not already possessing such personality.

41. Article 27 further provides that the Supervisory Authority and its officers and employees shall enjoy such immunity from legal or administrative process as specified in the Protocol. Article XII(9) of the Luxembourg Rail Protocol provides that the Secretariat shall have legal personality where not already possessing such personality and shall enjoy the same exemptions and immunities as are provided to the Supervisory Authority as provided by agreement with the host State.

## **G. The Secretariat**

42. Article 8 of the Statute provides that the Supervisory Authority shall be assisted in the discharge of its functions by the Secretariat. While the Luxembourg Rail Protocol provides that the Secretariat shall be OTIF, it also provides that the Supervisory Authority can designate another Secretariat if OTIF becomes unwilling or unable to perform the function.<sup>26</sup> The Secretariat shall have legal personality where not already possessing such personality, and shall enjoy, in relation to its functions under the Convention and this Protocol, the same exemptions and immunities as are provided to the Supervisory Authority under Article 27(3) of the Convention and to the International Registry under Article 27(4) of the Convention.<sup>27</sup>

43. Article 8 of the Statute provides that the Secretariat's tasks will be set out in Article 12 of the Initial Contract signed between the Supervisory Authority and the Secretariat. Article 8 further provides that the agreement signed between the Secretariat and the Supervisory Authority shall further detail the conditions for performing the tasks of the Secretariat.

44. Clause 12 of the draft Initial Contract, provides that the Secretariat has three functions: (i) hosting meetings of the Supervisory Authority and any subsidiary bodies it may create, and the customary work associated with such meetings, including the issuance of notices of meetings, agendas, and the preparation and dissemination of documents for, and resulting from, such meetings; (ii) serving as the point of contact, vis-a-vis third parties, for the Supervisory Authority; and (iii) participating in the Ratification Task Force. Clause 12 further provides that the Registry is responsible for the reimbursement of the reasonable expenses of the Secretariat associated with the performance of its functions.

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<sup>25</sup> Luxembourg Rail Protocol Article XII(4), Supervisory Authority Statute, Article 6(2).

<sup>26</sup> Luxembourg Rail Protocol Article XII(6) and (7).

<sup>27</sup> Luxembourg Rail Protocol Article XII(9).

## VI. ASSESSING THE OPTIONS: ESTABLISHING A NEW INTERNATIONAL ENTITY TO PERFORM THE ROLE OF SUPERVISORY AUTHORITY WITH UNIDROIT AS ITS SECRETARIAT COMPARED WITH UNIDROIT BEING APPOINTED SUPERVISORY AUTHORITY

45. Having exhausted other avenues of inquiry, and as noted above, there appears to be two options left for establishing the Supervisory Authority for the MAC Protocol: (i) to appoint UNIDROIT as the Supervisory Authority; or (ii) to create a new international entity to perform the role, with UNIDROIT as its Secretariat. On this basis, this section is drafted as a comparative analysis between these two options. The analysis assumes that both the creation of the new entity and UNIDROIT's appointment as Secretary to the newly establish entity are possible under international law and UNIDROIT's Statute.

### A. Similarities between the two options

46. Assuming that a new international entity to perform the role of Supervisory Authority would be established and operate in a similar way to what is anticipated under the Luxembourg Rail Protocol, pragmatically there would seem to be few differences between UNIDROIT being appointed as Supervisory Authority (the 'UNIDROIT Model') and a new entity being created with UNIDROIT as its Secretariat (the 'Rail Protocol Model'):

- (i) **Establishment and domicile:** Under both the UNIDROIT Model and the Rail Model, the Supervisory Authority would be established and domiciled at UNIDROIT's headquarters in Rome, Italy. The Supervisory Authority would meet once per year in Rome and be supported by a Commission of Experts.
- (ii) **Operation:** Under both the UNIDROIT Model and the Rail Model, the UNIDROIT Secretariat would be responsible for all administrative and operational aspects of the Supervisory Authority and the Commission of Experts, including hosting meetings of the Supervisory Authority as well as the meetings of any subsidiary bodies that may be created, the issuance of notices of meetings, agendas, and the preparation and dissemination of documents for, and resulting from, such meetings, as well as serving as the point of contact, vis-a-vis third parties, for the Supervisory Authority and the Commission of Experts.
- (iii) **Structure:** Under the Rail Protocol Model the Preparatory Commission would establish a body consisting of representatives from Contracting States to undertake the major decision-making responsibilities of the Supervisory Authority. While this would be a difference between the two models, under the UNIDROIT Model, UNIDROIT as Supervisory Authority could create similar structures within the Institute for the purposes of decision-making).
- (iv) **Costs:** Under the UNIDROIT Model, UNIDROIT would be reimbursed for its costs as the Supervisory Authority. Under the Rail Protocol Model, UNIDROIT would be reimbursed for its costs as the Secretariat to a separate international entity. These costs are unlikely to be significantly different, regardless of which option is chosen.
- (v) **Privileges and immunities:** Under both the UNIDROIT Model and the Rail Model, the Supervisory Authority is expected to enjoy privileges and immunities based on

UNIDROIT's privileges and immunities set out in the UNIDROIT Headquarters Agreement.<sup>28</sup>

## B. Differences between the two options

47. Notwithstanding the similarities noted above, there are some important differences between the two options that the Governing Council might wish to note:

- (i) **Flexibility:** Under the UNIDROIT Model, UNIDROIT would have a significant degree of flexibility and higher discretion in how best to discharge its functions. Given that the flexible governance structure and operation of UNIDROIT is one of its greatest institutional advantages, being able to utilise this flexibility to ensure that the Supervisory Authority operates as efficiently and effectively as possible would be an advantage. If UNIDROIT was appointed as Secretariat for a new international entity, the operating structure of the Supervisory Authority would be set out in its Statute, as agreed upon by the Preparatory Commission. As Secretariat, UNIDROIT would have much less influence in deciding how the Supervisory Authority would function and would not be able to alter or improve the operation of the Supervisory Authority.
- (ii) **High administrative burden:** There would be a higher administrative burden in the establishment and operation of the Supervisory Authority under the Rail Protocol Model. In relation to establishment, the Preparatory Commission would have to establish a process for the creation of a new international entity, ensuring a complex international consensus, and preparing and approving a Statute and draft Procedures for the new international entity to perform the role of Supervisory Authority. The Supervisory Authority and Secretariat would also have to prepare an agreement providing further detail on the relationship between the two entities. However, should the UNIDROIT Model be adopted, whereby all the activities are discharged by the UNIDROIT Governing Council during its regular annual meetings, the administrative burden on the Secretariat would be considerably less, when compared to establishing a new body which has its own separate meetings.
- (iii) **Legislative basis for a separate Secretariat:** The Luxembourg Protocol itself provides for the creation of a new entity to perform the role of Supervisory Authority with a separate Secretariat, whereas the MAC Protocol does not. The UNIDROIT Secretariat does not consider this to be an insurmountable impediment, as the arrangements set out in the Luxembourg Rail Protocol could be addressed in the MAC Protocol Supervisory Authority's Statute. However, it does add another layer of complication that would require further consideration if it was decided that the Rail Protocol Model be adopted.
- (iv) **Necessity:** As noted in the first section of Annexe A, the rationale for establishing a new international entity to perform the role of Supervisory Authority with a separate Secretariat is somewhat unique to the circumstances of the Luxembourg Rail Protocol. These same circumstances (where an existing intergovernmental organisation is willing to undertake the role of Supervisory Authority but does not have the requisite geographical representation in its membership to perform the role) do not exist for the MAC Protocol.

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<sup>28</sup> UNIDROIT may need to seek further advice from the Italian Government as to whether Supervisory Authority Members and Commission of Experts Members that are not UNIDROIT Member States would enjoy sufficient protection under the UNIDROIT Headquarter Agreement. This issue might require further consideration, regardless of whether UNIDROIT itself is appointed Supervisory Authority or a new international entity is created with UNIDROIT as its Secretariat.

## **C. Conclusion**

48. The UNIDROIT Secretariat considers both UNIDROIT being appointed as Supervisory Authority for the MAC Protocol International Registry, or a new entity being established with UNIDROIT acting as its Secretariat as viable options.

49. Pragmatically, it is likely that both options would have similar consequences for the Institute in terms of staffing and organisation. However, the Secretariat is of the view that UNIDROIT being appointed as Supervisory Authority would provide better flexibility for UNIDROIT to ensure the Supervisory Authority was functioning as effectively and efficiently as possible, and would have a lower administrative and costs burden. On this basis, the Secretariat considers the appointment of UNIDROIT as Supervisory Authority of the future MAC Registry to be the preferable option.

## **VII. FUTURE STEPS**

50. The Preparatory Commission will continue to act as the provisional Supervisory Authority until the entry into force of the MAC Protocol. It is anticipated that a Registrar will be appointed in early 2023 and that the Registry will begin operations in 2024. Previously, the Secretariat had suggested that a Supervisory Authority should be appointed by January 2023 to ensure that it can work with the Registrar in developing the MAC Registry. However, it now seems unlikely that a Supervisory Authority can be appointed in the next six months, which will mean that the Preparatory Commission (in its capacity as provisional Supervisory Authority) will have to undertake the contract negotiations with the Registrar in 2023.

51. To allow for the appointment of a Supervisory Authority by January 2024, the Governing Council will be asked to make a formal recommendation to the General Assembly on this matter at its 102<sup>nd</sup> session in 2023. The General Assembly will be asked to make a formal decision on the matter at its 82<sup>nd</sup> session in December 2023.

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

52. *The Governing Council is invited to discuss the suitability of UNIDROIT to undertake the role of Supervisory Authority of the International Registry to be established under the MAC Protocol. The Governing Council is further invited to consider whether it would be preferable to establish a new international entity to undertake the role, with UNIDROIT as its Secretariat.*



**ANNEXE 1****INCORPORATING THE SUPERVISORY AUTHORITY FUNCTIONS INTO UNIDROIT'S STRUCTURE**

53. 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.

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

- (i) **Formal functions**, such as the appointment or dismissal of the Registrar, the establishment or approval of Regulations and the setting of fees.
- (ii) **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.
- (iii) **Administrative functions**, such as the publication of regulations and the communication of periodical reports to Contracting States.

55. 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. This would be in line with ICAO's model. 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 that (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.

56. It is the Secretariat's view that Option 1A, 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). The structural options were not discussed in detail at the Governing Council's 100<sup>th</sup> session, although several Governing Council Members did note a preference for Option 1C.<sup>29</sup>

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<sup>29</sup> See [UNIDROIT 2021 – C.D. \(100\) B.24 – Report](#), paragraphs 169 and 172.

**ANNEXE 2****FINANCIAL IMPLICATIONS AND IMMUNITIES****Financial implications**

57. 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.

58. As consistent with the practice under the Aircraft Protocol and Resolution 1 of the MAC Protocol Diplomatic Conference Final Act<sup>30</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.

*Initial costs*

59. 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.

60. If UNIDROIT accepts the role of Supervisory Authority, it will not formally begin operation as the Supervisory Authority before 1 January 2024. It is anticipated that the MAC International Registry will also be operational by 1 January 2024. However, there is a possibility that the MAC Protocol may not have five Contracting States by 1 January 2024. As such, there may be period 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.

61. 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).

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<sup>30</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>).

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

Staff costs <sup>31</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*

62. 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.

63. 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:

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

64. 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.

65. 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>32</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.

**Immunity**

66. 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

<sup>31</sup> These staffing costs include all possible allowances under the UNIDROIT Regulations and in practice are likely to be lower.

<sup>32</sup> Aviareto's annual statistical and financial reports are available at: <https://www.internationalregistry.aero/ir-web/>.

the Supervisory Authority by reference to the Supervisory Authority's existing statute-based immunity.

67. 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. UNIDROIT will seek further guidance from the Italian Government on this issue.

68. 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.

**ANNEXE 3****UNIDROIT AS BOTH DEPOSITARY AND SUPERVISORY AUTHORITY**

69. 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.

70. 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.

71. 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>33</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 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

<sup>33</sup> Part V of this document (below) provides different options regarding how the Supervisory Authority's functions could be incorporated into UNIDROIT's structure.

		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; (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;	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 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.

### The role of the Supervisory Authority in setting fees

72. 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.*

73. 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.

74. 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.



**ANNEXE 4****IMPLICATIONS FOR THE UNIDROIT STATUTE**

75. If it is decided that UNIDROIT should accept the role of Supervisory Authority, or is appointed the Secretariat for a new international entity, the Governing Council may wish to consider whether the UNIDROIT Statute would need to be amended. While the Secretariat has not analysed the ICAO Statute, it is noted that ICAO did not make any changes to it in order to undertake the role of Supervisory Authority for the Aircraft Protocol.

76. This matter was briefly discussed at the Governing Council's 100th session. Several Governing Council Members suggested that UNIDROIT could undertake the role of Supervisory Authority without the need to amend the Statute,<sup>34</sup> whereas several other Governing Council Members suggested that the Statute would need to be amended.<sup>35</sup> No final decision on the matter was reached.

77. 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.*

78. It is the view of the UNIDROIT Secretariat that it would be possible for UNIDROIT to accept the role of Supervisory Authority or the role of Secretariat to a new international entity created to perform the role of Supervisory Authority without amending the Statute.

79. 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

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<sup>34</sup> See [UNIDROIT 2021 – C.D. \(100\) B.24 – Report](#), paragraphs 168, 171, 172 and 179.

<sup>35</sup> See [UNIDROIT 2021 – C.D. \(100\) B.24 – Report](#), paragraphs 174 and 175.

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 Geneva Convention on Substantive Rules for Intermediated Securities in 2009, the Space Protocol in 2012 and the MAC Protocol in 2019.

80. It could be argued that, given its minimalist approach, Article 1 should be read broadly to include all 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**

81. 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].

82. 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**

83. 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.

84. 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>36</sup> To avoid delaying

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<sup>36</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

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, 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.

85. If it is decided that it is necessary to amend the Statute, the process would have to be complete (or have provisional effect pending formal approval) by 1 January 2024 in order to allow UNIDROIT to undertake the role of either Supervisory Authority or Secretariat to a new international entity at that date.

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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).

**ANNEXE 5****LUXEMBOURG RAIL PROTOCOL<sup>37</sup>****Article XII – The Supervisory Authority and the Registrar**

1. The Supervisory Authority shall be a body established by representatives, one representative to be appointed:

- (a) by each State Party;
- (b) by each of a maximum of three other States to be designated by the International Institute for the Unification of Private Law (UNIDROIT); and
- (c) by each of a maximum of three other States to be designated by the Intergovernmental Organisation for International Carriage by Rail (OTIF).

2. In the designation of the States referred to in sub-paragraphs (b) and (c) of the preceding paragraph regard shall be had to the need to ensure broad geographical representation.

3. The term of appointment of the representatives appointed pursuant to sub-paragraphs (b) and (c) of paragraph 1 shall be that specified by the designating Organisations. The terms of those representatives serving on the date when this Protocol enters into force for the tenth State Party shall expire no later than two years after that date.

4. The representatives referred to in paragraph 1 shall adopt the initial rules of procedure for the Supervisory Authority. Adoption shall require agreement of:

- (a) a majority of all the representatives; and
- (b) a majority of the representatives appointed pursuant to sub-paragraph (a) of paragraph 1.

5. The Supervisory Authority may establish a commission of experts consisting of:

- (a) persons nominated by Signatory and Contracting States and having the necessary qualifications and experience; and
- (b) other experts as necessary

and entrust the commission with the task of assisting the Supervisory Authority in the discharge of its functions.

6. A secretariat (the Secretariat) shall assist the Supervisory Authority in the discharge of its functions, as directed by the Supervisory Authority. The Secretariat shall be OTIF.

7. In the event that the Secretariat becomes unable or unwilling to discharge its functions, the Supervisory Authority shall designate another Secretariat.

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<sup>37</sup> The complete version of the Luxembourg Rail Protocol is available here: <https://www.unidroit.org/instruments/security-interests/rail-protocol/>.

8. The Secretariat shall, on being satisfied that the International Registry is fully operational, forthwith deposit a certificate to that effect with the Depositary.

9. The Secretariat shall have legal personality where not already possessing such personality, and shall enjoy, in relation to its functions under the Convention and this Protocol, the same exemptions and immunities as are provided to the Supervisory Authority under Article 27(3) of the Convention and to the International Registry under Article 27(4) of the Convention.

10. A measure taken by the Supervisory Authority that affects only the interests of a State Party or a group of States Parties shall be taken if such State Party or the majority of the group of States Parties also approve of the measure. A measure that could adversely affect the interests of a State Party or a group of States Parties shall have effect in such State Party or group of States Parties if such State Party or the majority of the group of States Parties also approve of the measure.

11. The first Registrar shall be appointed for a period of not less than five or more than ten years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods each not exceeding ten years