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Point n° 7 de l'ordre du jour: Nomination d'une Autorité de surveillance pour le Registre du Protocole MAC

(préparé par le Secrétariat)

Sommaire	*Rapport sur les questions liées à l'établissement d'une Autorité de surveillance en vertu du Protocole portant sur les questions spécifiques aux matériels d'équipement miniers, agricoles et de construction à la Convention du Cap (Protocole MAC)*
Action demandée	*L'Assemblée Générale est invité à décider si elle souhaite:* *i) adopter la recommandation du Conseil de Direction qu'UNIDROIT accepte d'être nommé Autorité de surveillance du Registre international qui sera établi en vertu du Protocole MAC; ou* *ii) refuser le rôle d'Autorité de surveillance et autoriser UNIDROIT à assumer le rôle de Secrétariat pour une nouvelle entité internationale créée pour être l'Autorité de surveillance*
Documents connexes	*MACPC/2/Doc. 7; MACPC/2/Doc. 8; MACPC/3/Doc. 2; UNIDROIT 2021 - C.D. (100) B.11; UNIDROIT 2021 - C.D. (100) B.12; UNIDROIT 2022 - C.D. (101) 15; UNIDROIT 2023 - C.D. (102) 17*

TABLE DES MATIÈRES

I. INTRODUCTION

1. Adopté lors d'une Conférence diplomatique en novembre 2019, le Protocole portant sur les questions spécifiques aux matériels d'équipement miniers, agricoles et de construction à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles (Protocole MAC) est le traité le plus récent d'UNIDROIT. Il établit un cadre juridique international pour les garanties légales portant sur du matériel d'équipement minier, agricole et de construction et aura des avantages économiques significatifs pour les pays en développement une fois entré en vigueur.

2. L'une des conditions de l'entrée en vigueur du Protocole MAC est la désignation d'une entité chargée de superviser le Registre international qui sera établi en vertu du traité (l'"Autorité de surveillance"). En 2021, en l'absence d'autres entités internationales viables, la Commission préparatoire pour le Protocole MAC a demandé à UNIDROIT d'examiner s'il accepterait le rôle d'Autorité de surveillance.

3. Afin qu'UNIDROIT accepte le rôle d'Autorité de surveillance, le Conseil de Direction d'UNIDROIT et l'Assemblée Générale d'UNIDROIT doivent tous deux l'approuver. Le Conseil de Direction d'UNIDROIT a examiné la question lors de ses 100ème, 101ème et 102ème sessions entre 2021 et 2023. Lors de sa 102ème session en mai 2023, la majorité du Conseil de Direction a décidé qu'il serait préférable qu'UNIDROIT soit désigné comme Autorité de surveillance du Protocole MAC [1].

4. Sur cette base, le Conseil de Direction: i) a recommandé à l'Assemblée Générale qu'UNIDROIT assume le rôle d'Autorité de surveillance, et ii) a chargé le Secrétariat de fournir à l'Assemblée Générale des documents sur les avantages et les inconvénients de la désignation d'UNIDROIT comme Autorité de surveillance, par rapport à la création d'une nouvelle entité internationale. Les membres de l'Assemblée Générale pourraient souhaiter noter que le Secrétariat d'UNIDROIT considère les deux options comme valides, tout en étant également d'avis, pour les mêmes raisons exprimées par la majorité des membres du Conseil de Direction, qu'il pourrait être préférable qu'UNIDROIT soit désigné comme Autorité de surveillance, plutôt que de créer une nouvelle entité internationale.

5. L'objectif de ce document est de fournir aux membres de l'Assemblée Générale les éléments pertinents afin que l'Assemblée Générale puisse prendre une décision informée sur la question de savoir s'il faut suivre la recommandation du Conseil de Direction de désigner UNIDROIT comme Autorité de surveillance du Registre international devant être établi en vertu du Protocole MAC, ou alternativement si une nouvelle entité internationale devrait être établie pour assumer cette fonction.

6. La Partie II du document fournit des informations générales sur la question de l'Autorité de surveillance et des informations complémentaires sur l'examen de la question par le Conseil de Direction. La Partie III donne un aperçu du fonctionnement et des fonctions de l'Autorité de surveillance au sein du système de la Convention du Cap. La Partie IV présente l'évaluation par le Secrétariat de l'aptitude d'UNIDROIT à assumer le rôle d'Autorité de surveillance, tandis que la Partie V fournit une évaluation comparative de la question de savoir s'il serait préférable qu'UNIDROIT assume le rôle d'Autorité de surveillance ("**Option A**"), ou qu'une nouvelle entité internationale soit établie pour assumer ce rôle avec UNIDROIT comme Secrétariat ("**Option B**"). La Partie VI décrit les étapes futures nécessaires à la nomination de l'Autorité de surveillance pour le Protocole MAC et la partie VII propose les mesures à prendre par l'Assemblée Générale. L'Annexe I (en anglais seulement) fournit un avis juridique indépendant sur les questions de droit international public qui s'y rapportent. L'Annexe II résume les travaux du Comité *ad hoc* de droit international public créé par le Conseil de Direction pour examiner les questions de droit international public pertinentes. Les Annexes III et IV fournissent des informations complémentaires sur le fonctionnement des Autorités

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[1] Les discussions ainsi que les différentes opinions exprimées par les membres du Conseil de Direction figurent dans le rapport de la 102ème session (UNIDROIT 2023 – C.D. (102) 25, paras 238 – 271)

de surveillance en vertu du Protocole aéronautique et du Protocole ferroviaire de Luxembourg à la Convention du Cap.

7. D'emblée, il convient de noter que ni l'option A ni l'option B n'auront d'incidences financières pour les États membres d'UNIDROIT, étant donné qu'UNIDROIT bénéficierait d'un financement externe intégral pour toutes les fonctions supplémentaires requises dans le cadre des deux options.

II. HISTORIQUE

8. La Convention d'UNIDROIT relative aux garanties internationales portant sur des matériels d'équipement mobiles ("Convention du Cap") est un traité qui connaît un très grand succès, ayant attiré 86 États contractants depuis son adoption en 2001. La Convention du Cap fournit un cadre juridique international pour la constitution, la protection et l'exécution des garanties internationales portant sur différentes catégories de biens à usage commercial. Quatre Protocoles individuels ont été adoptés dans le cadre de la Convention du Cap, qui adaptent les règles de la Convention à différents secteurs [2]. Comme condition préalable à l'entrée en vigueur, chaque Protocole à la Convention du Cap exige i) la création d'un registre électronique international spécifique à un bien pour l'inscription des garanties internationales, et ii) la désignation d'une Autorité de surveillance pour contrôler le fonctionnement du Registre international.

9. En vertu des Protocoles antérieurs à la Convention du Cap, les entités internationales existantes chargées de la catégorie de biens concernée ont été désignées comme Autorités de surveillance [3]. Contrairement aux trois Protocoles précédents, le Protocole MAC couvre les garanties internationales portant sur des matériels d'équipement utilisés dans trois secteurs différents (minier, agricole et de construction). Il n'existe donc pas d'entité internationale ayant des responsabilités dans ces trois secteurs qui pourrait être désignée comme Autorité de surveillance pour le Protocole MAC.

10. Au cours des sept dernières années, UNIDROIT a déployé des efforts considérables pour identifier un organisme international existant disposé à assumer le rôle d'Autorité de surveillance pour le Protocole MAC. Depuis 2017, de nombreux candidats ont été envisagés pour ce rôle [4], notamment la Société financière internationale (SFI) du Groupe de la Banque mondiale, l'Organisation mondiale du commerce (OMC), l'Agence multilatérale de garantie des investissements (AMGI), l'Organisation de coopération et de développement économiques (OCDE), l'Organisation mondiale des douanes (OMD), le Fonds international de développement agricole (FIDA) et la Conférence des Nations Unies sur le commerce et le développement (CNUCED). Il semble qu'il n'existe pas d'organisations ou d'entités appropriées prêtes à assumer le rôle d'Autorité de surveillance, étant donné qu'aucune de ces organisations n'est responsable au premier chef des trois secteurs minier, agricole et de construction.

11. La Conférence diplomatique qui a adopté le Protocole MAC en novembre 2019 a établi une Commission préparatoire composée d'États pour agir en tant qu'Autorité de surveillance provisoire

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[2] Le Protocole aéronautique (2001), le Protocole ferroviaire de Luxembourg (2007), le Protocole spatial (2009) et le Protocole MAC (2019).

[3] Par exemple, l'Organisation de l'aviation civile internationale (OACI) a été désignée comme Autorité de surveillance en vertu du Protocole aéronautique. Il est prévu que l'Union internationale des télécommunications (UIT) soit désignée comme Autorité de surveillance en vertu du Protocole spatial. L'Organisation intergouvernementale pour les transports internationaux ferroviaires (OTIF) sera le Secrétariat de l'Autorité de surveillance qui sera établie en vertu du Protocole ferroviaire de Luxembourg (bien que cet arrangement soit légèrement différent, comme expliqué ci-dessous).

[4] Pour plus d'informations sur les discussions récentes concernant les candidats potentiels, voir les documents MACPC/2/Doc. 7 et MACPC/2/Doc. 8.

jusqu'à l'entrée en vigueur du Protocole [5]. La Commission préparatoire a également été chargée de désigner une Autorité de surveillance [6]. Lors de la troisième session de la Commission préparatoire (juin 2021), en raison de l'absence d'autres candidats viables, la Commission a examiné l'aptitude d'UNIDROIT à assumer le rôle d'Autorité de surveillance. Suite à ses délibérations, la Commission préparatoire a invité UNIDROIT à entamer ses procédures internes afin de déterminer si l'Institut était prêt à accepter ce rôle.

Examen par le Conseil de Direction et le Comité de droit international public

12. Lorsque la Commission préparatoire MAC a invité UNIDROIT à envisager de devenir l'Autorité de surveillance, la question a d'abord été transmise au Conseil de Direction pour examen (conformément à la méthodologie de travail habituelle d'UNIDROIT).

13. Le Conseil de Direction a examiné une série de questions liées à l'établissement d'une Autorité de Surveillance dans le cadre du Protocole MAC lors de ses 100ème et 101ème sessions en 2021 [7] et 2022 [8] . En particulier, le Conseil de Direction a examiné s'il serait préférable qu'UNIDROIT assume le rôle d'Autorité de surveillance (c'est-à-dire l'Option A), ou qu'une nouvelle entité internationale soit établie pour assumer ce rôle avec UNIDROIT comme Secrétariat (c'est-à-dire l'Option B). Au cours de ces sessions, le Conseil de Direction n'a pas été en mesure de parvenir à un consensus sur cette question. Afin de travailler entre les sessions et de permettre au Conseil de Direction de prendre une décision lors de sa 102ème session, le Conseil de Direction a décidé d'établir un comité *ad hoc* ("le Comité"), composé de membres du Conseil de Direction intéressés et d'experts en droit international public et en droit des traités, pour discuter des questions de droit international public non résolues.

14. Le Comité, composé de sept membres du Conseil de Direction et de quatre experts en droit international public, s'est réuni durant cinq sessions entre novembre 2022 et avril 2023 [9]. En outre, le Secrétariat a demandé qu'un expert en droit des traités prépare un avis juridique indépendant sur les questions de droit international public, pour discussion par le Comité. Le Secrétariat a demandé au Dr Orfeas Chasapis Tassinis (Research Fellow, Université de Cambridge) de préparer l'avis juridique.

15. L'avis juridique indépendant et le Comité ont tous deux conclu qu'il n'y a pas d'obstacles juridiques insurmontables en droit international public concernant l'Option A ou l'Option B. L'avis juridique final du Dr Chasapis Tassinis est disponible à l'Annexe I du présent document (en anglais), et un résumé des travaux et des conclusions du Comité est disponible à l'Annexe II.

16. Comme indiqué ci-dessus, lors de sa dernière 102ème session en mai 2023, le Conseil de Direction a examiné plus avant les travaux du Comité et les avis juridiques de droit international public. Après un examen plus approfondi des considérations juridiques, politiques et pratiques pertinentes, le Conseil de Direction a décidé qu'il serait préférable qu'UNIDROIT soit désigné comme Autorité de surveillance du Protocole MAC. La décision n'a pas été unanime; 16 membres du Conseil de Direction ont appuyé la désignation d'UNIDROIT comme Autorité de surveillance, tandis que trois

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[5] La Commission préparatoire est actuellement composée de 16 États: Afrique du Sud, Allemagne, Australie, Canada, Espagne, États-Unis d'Amérique, France, Gambie, Japon, Nigéria, Paraguay, Irlande, République de Corée, République du Congo, République populaire de Chine et Royaume-Uni.

[6] Voir la Résolution 2 de l'Acte final de la Conférence diplomatique du Protocole MAC: https://www.unidroit.org/wp-content/uploads/2023/02/Resolutions-MAC.pdf.

[7] Voir UNIDROIT 2021 – C.D. (100) B.24 – Rapport, paras. 160–186.

[8] Voir UNIDROIT 2022 – C.D. (101) 21 – Rapport, paras. 285–310.

[9] Les cinq sessions se sont tenues le 4 novembre 2022, le 16 décembre 2022, le 7 février 2023, le 21 mars 2023 et le 6 avril 2023.

membres du Conseil de Direction ont soutenu l'établissement d'une nouvelle entité internationale qui serait l'Autorité de surveillance, avec UNIDROIT comme Secrétariat.

III. FONCTIONS DE L'AUTORITÉ DE SURVEILLANCE

17. Le paragraphe 2 de l'article 17 de la Convention énonce les principales responsabilités de l'Autorité de surveillance:

> *a) établir ou faire établir le Registre international;*
>
> *b) sous réserve des dispositions du Protocole, nommer le Conservateur et mettre fin à ses fonctions;*
>
> *c) veiller à ce que, en cas de changement de Conservateur, les droits nécessaires à la poursuite du fonctionnement efficace du Registre international soient transférés ou susceptibles d'être cédés au nouveau Conservateur;*
>
> *d) après avoir consulté les États contractants, établir ou approuver un règlement en application du Protocole portant sur le fonctionnement du Registre international et veiller à sa publication;*
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> *e) établir des procédures administratives par lesquelles les réclamations relatives au fonctionnement du Registre international peuvent être effectuées auprès de l'Autorité de surveillance;*
>
> *f) surveiller les activités du Conservateur et le fonctionnement du Registre international;*
>
> *g) à la demande du Conservateur, lui donner les directives qu'elle estime appropriées;*
>
> *h) fixer et revoir périodiquement la structure tarifaire des services du Registre international;*
>
> *i) faire le nécessaire pour assurer l'existence d'un système électronique déclaratif d'inscription efficace, pour la réalisation des objectifs de la présente Convention et du Protocole; et*
>
> *j) faire rapport périodiquement aux États contractants sur l'exécution de ses obligations en vertu de la présente Convention et du Protocole.*

18. Les fonctions de l'Autorité de surveillance en vertu paragraphe 2 de l'article 17 de la Convention peuvent être réparties en trois catégories:

> i) les fonctions formelles, telles que la nomination ou la révocation du Conservateur, l'établissement ou l'approbation des règlements et la fixation de la structure tarifaire;
>
> ii) les fonctions générales, telles que la surveillance des activités du Conservateur et du fonctionnement du Registre international, l'approbation des rapports périodiques et l'établissement de procédures de réclamation;
>
> iii) les fonctions administratives, telles que la publication du règlement et la communication de rapports périodiques aux États contractants.

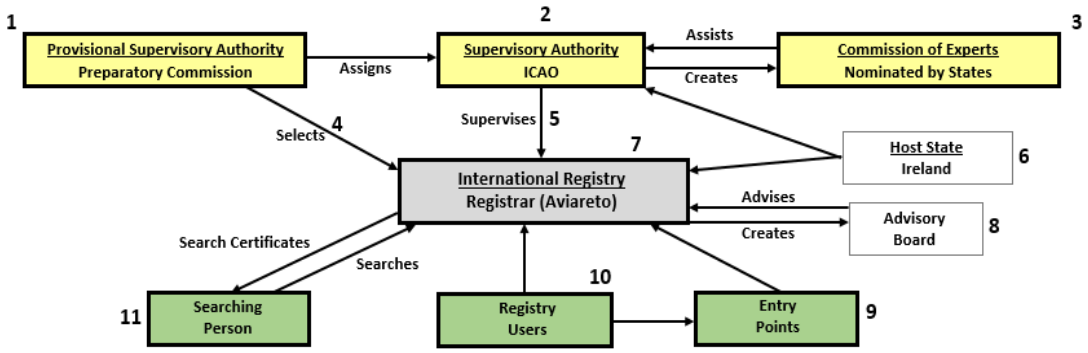
19. L'Autorité de surveillance n'est pas responsable de l'interprétation de la Convention ou de ses Protocoles, de leur mise en œuvre dans des domaines ne relevant pas du Registre international, ni de toute autre fonction ou activité non liée au Registre. De même, l'Autorité de surveillance n'est pas chargée de statuer sur une inscription particulière, ni de donner des instructions au Conservateur pour qu'il modifie les données relatives à une inscription particulière.

Assistance à l'Autorité de surveillance

20. Dans l'exercice de ses fonctions principales, l'Autorité de surveillance est assistée par un comité d'experts nationaux. Dans le cas du Protocole aéronautique, la Commission d'experts de l'Autorité de surveillance du Registre international (CESAIR) continue de fournir des conseils et une assistance à l'Autorité de surveillance sur les questions liées à son rôle.

21. L'organe supplémentaire qui assiste l'Autorité de surveillance du Protocole aéronautique est le Comité consultatif international du Registre (IRAB), qui donne des conseils principalement au Registre international. Le Comité est composé d'éminents experts en matière de registres, de praticiens du droit commercial international et d'universitaires. En plus de conseiller le Registre international, l'IRAB donne des conseils à la CESAIR pour l'aider à faire des recommandations à l'OACI en tant qu'Autorité de surveillance.

22. Le tableau ci-dessous [10] illustre les étapes de la procédure d'établissement du Registre international en vertu du Protocole aéronautique et constitue un bon point de référence pour comprendre les relations entre l'Autorité de surveillance, le Registre international, la Commission d'experts et le Comité consultatif.



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.

[10] *Review of Cape Town Core Principles*, Jeffrey Wool, Secrétaire Général, AWG/GTA. Séminaire sur la Convention du Cap et son Protocole aéronautique – Aspects pratiques et opportunités liés à la ratification canadienne, Toronto, 29/30 avril 2013 (en anglais seulement).

23. Afin de reproduire le succès de la CESAIR en matière de conseil à l'Autorité de surveillance du Registre du Protocole aéronautique, la Résolution 2 de l'Acte final de la Conférence diplomatique du Protocole MAC invite l'Autorité de surveillance à établir une Commission d'experts composée d'un maximum de 15 membres au plus nommés par l'Autorité de surveillance parmi les personnes désignées par les États signataires et contractants du Protocole, possédant les qualifications et l'expérience nécessaires, avec pour mission d'assister l'Autorité de surveillance dans l'exercice de ses fonctions.

24. Le Protocole aéronautique et le Protocole ferroviaire de Luxembourg ont adopté des approches différentes en ce qui concerne la question de l'Autorité de surveillance. La désignation de l'OACI en tant qu'Autorité de surveillance en vertu du Protocole aéronautique est similaire à la désignation proposée d'UNIDROIT en tant qu'Autorité de surveillance en vertu du Protocole MAC dans l'Option A. La création d'une nouvelle entité internationale avec l'Organisation intergouvernementale pour les transports internationaux ferroviaires (OTIF) comme Secrétariat en vertu du Protocole ferroviaire est similaire à la proposition de créer une nouvelle entité internationale avec UNIDROIT comme Secrétariat pour exercer la fonction d'Autorité de surveillance dans l'Option B. Une analyse plus approfondie du modèle du Protocole aéronautique et du modèle du Protocole ferroviaire de Luxembourg figure respectivement dans les Annexes III et IV.

IV. ÉVALUATION PAR LE SECRÉTARIAT DE L'APTITUDE D'UNIDROIT À EXERCER LES FONCTIONS D'AUTORITÉ DE SURVEILLANCE

25. Le Secrétariat est d'avis que, si on le lui demandait, UNIDROIT serait en mesure d'assumer, sur le plan légal et de façon adéquate, le rôle d'Autorité de surveillance pour les raisons ci-dessous développées.

i) **Cela est conforme à l'obligation de l'Institut de mettre en œuvre ses instruments, sachant que la nomination d'une Autorité de surveillance est nécessaire pour assurer l'entrée en vigueur du Protocole MAC**. En tant qu'organisation internationale ayant une fonction principalement législative, un indicateur de performance clé pour UNIDROIT est le succès de ses instruments. Si le succès d'un instrument international peut être évalué de différentes manières, pour les traités, les principaux marqueurs de succès sont i) l'entrée en vigueur et ii) le nombre de ratifications/adhésions. En tant que tel, UNIDROIT a la responsabilité de veiller à la mise en œuvre du Protocole MAC et à son entrée en vigueur. Le Protocole MAC ne peut entrer en vigueur sans la nomination d'une Autorité de surveillance. Comme indiqué ci-dessus (Partie II), malgré les efforts considérables du Secrétariat d'UNIDROIT pour identifier une autre organisation existante appropriée, il ne semble pas y avoir d'autre organisation appropriée capable et désireuse d'assumer ce rôle, du moins à court ou moyen terme. Si une Autorité de surveillance n'est pas nommée dans un avenir proche, le risque existe que cela retarde l'entrée en vigueur du traité. Dans ces circonstances, il serait raisonnable qu'UNIDROIT envisage d'assumer le rôle d'Autorité de surveillance pour permettre l'entrée en vigueur de son traité le plus récent.

ii) **UNIDROIT dispose de l'expérience et de l'expertise nécessaires pour assumer ce rôle**. Il n'existe pas d'autre organisation ayant plus d'expertise sur la Convention du Cap et son Protocole MAC, ou d'expérience dans la compréhension du futur fonctionnement du Registre MAC qu'UNIDROIT. L'élaboration et la négociation de la Convention du Cap et de ses quatre Protocoles se sont déroulées sous l'égide d'UNIDROIT. UNIDROIT est également le Dépositaire de la Convention et de ses quatre Protocoles. Par conséquent, UNIDROIT possède le plus haut niveau possible de connaissances et d'expertise concernant le fonctionnement et la mise en œuvre du Protocole MAC et de son Registre.

iii) **La structure institutionnelle d'UNIDROIT lui permettrait d'affecter avec souplesse différents organes à l'exercice des fonctions d'Autorité de surveillance selon les besoins**. L'article 4 du Statut organique prévoit que les organes d'UNIDROIT sont 1) l'Assemblée Générale, 2) le Président, 3) le Conseil de Direction, 4) le Comité Permanent, 5) le Tribunal Administratif et 6) le Secrétariat. Les organes centraux sont le Conseil de Direction et l'Assemblée Générale. Le Statut organique prévoit la composition du Conseil de Direction et de l'Assemblée Générale et les questions essentielles dont ils sont chargés. L'Assemblée Générale approuve les Comptes et le Budget annuels de l'Institut et approuve le Programme de travail de l'Institut tous les trois ans. Le Statut organique prévoit des règles très limitées quant à la définition de la structure de fonctionnement et des fonctions essentielles de l'Assemblée Générale et du Conseil de Direction. En tant que tel, UNIDROIT a une structure de gouvernance relativement souple qui lui permettrait d'adopter un processus de décision interne qui conviendrait le mieux aux fonctions de l'Autorité de surveillance. Il y a plusieurs options différentes pour la façon dont les fonctions de l'Autorité de surveillance pourraient être incorporées dans la structure de gouvernance d'UNIDROIT. Si l'Assemblée Générale décide qu'UNIDROIT devrait accepter le rôle d'Autorité de surveillance, le Conseil de Direction discuterait de la façon de répartir les fonctions d'Autorité de surveillance au sein de la structure institutionnelle d'UNIDROIT.

iv) **Cette fonction n'aurait pas d'incidences financières négatives pour l'Institut**. Le rôle d'Autorité de surveillance entraîne divers coûts, notamment les salaires du personnel, les frais de réunion, les frais de traduction, les frais généraux et les dépenses administratives. Cependant, aucun des coûts associés à l'exercice du rôle d'Autorité de surveillance ne serait supporté par UNIDROIT. Ceci est conforme à la pratique du Protocole aéronautique, selon laquelle l'OACI n'a pas encouru de coûts dans l'exercice de son rôle d'Autorité de surveillance qui n'aient pas été entièrement recouvrés. De même, il convient de noter qu'en vertu de l'Option B, aucun des coûts associés à l'exercice du rôle de Secrétariat d'une nouvelle entité internationale créée pour exercer le rôle d'Autorité de surveillance ne serait supporté par UNIDROIT.

v) **UNIDROIT dispose des immunités nécessaires pour assumer ce rôle**. La question est traitée dans l'avis juridique et confirmée par le Comité de droit international public (voir Annexes I et II ci-dessous).

vi) **Le rôle n'est pas en conflit avec le rôle d'UNIDROIT en tant que Dépositaire en vertu du Protocole MAC**. La question est traitée dans l'avis juridique et confirmée par le Comité de droit international public (voir Annexes I et II ci-dessous).

V. ÉVALUATION COMPARATIVE DE L'OPTION A ET DE L'OPTION B

26. La présente section fournit l'évaluation comparative par le Secrétariat de l'Option A et de l'Option B, en tenant compte de considérations juridiques, pratiques et politiques. Cette section a été fournie au Conseil de Direction lors de sa 102ème session.

A. Considérations d'ordre juridique

27. L'avis juridique indépendant et le Comité ont tous deux estimé qu'il n'y avait pas d'obstacles juridiques insurmontables en droit international public en ce qui concerne l'Option A ou l'Option B. Par conséquent, les Options A et B devraient être considérées comme juridiquement viables. Toutefois, il existe certaines différences juridiques entre les deux modèles. Le tableau ci-dessous présente quelques-unes des principales similitudes et différences sur le plan juridique:

	Question juridique	Option A	Option B
1	Le Protocole MAC permet-il cette Option sans qu'il soit nécessaire de le modifier?	Oui	Oui
2	Le Statut organique d'UNIDROIT permet-il cette Option sans qu'il soit nécessaire de le modifier?	Oui [11]	Oui
3	UNIDROIT serait-il en mesure d'assumer à la fois le rôle de Dépositaire et cette Option?	Oui	Oui [12]
4	Les privilèges et immunités d'UNIDROIT s'appliqueraient-ils à cette Option?	Oui	Non [13]
5	Les protections existantes d'UNIDROIT contre la responsabilité personnelle des personnes exerçant des fonctions au sein de l'Autorité de surveillance (Secrétariat, membres du Conseil de Direction) s'appliqueraient-elles dans le cadre de cette Option?	Oui	Peut-être pour les fonctionnaires d'UNIDROIT, probablement pas pour les autres personnes [14]
6	Un État qui ratifie le Protocole MAC adhère-t-il automatiquement à cette Option, sans qu'il soit nécessaire d'obtenir un consentement distinct ?	Oui	Peut-être [15]

B. Considérations d'ordre pratique

28. En supposant qu'une nouvelle entité internationale jouant le rôle d'Autorité de surveillance soit établie et fonctionne de manière similaire à ce qui est prévu dans le Protocole ferroviaire de Luxembourg, les Options A et B fonctionneraient pragmatiquement de manière assez similaire.

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[11] Comme indiqué ci-dessus, alors que la majorité du Comité a approuvé la conclusion de l'avis juridique selon laquelle le Statut organique d'UNIDROIT n'aurait pas besoin d'être amendé pour qu'UNIDROIT puisse assumer le rôle d'Autorité de surveillance, deux membres du Comité n'ont pas soutenu cette conclusion.

[12] Le Comité n'a pas expressément examiné cette question. Cependant, étant donné que le Comité a conclu qu"*aucun conflit de droit international public ne surviendrait si UNIDROIT assumait à la fois le rôle d'Autorité de surveillance et de Dépositaire en vertu du Protocole MAC*" (Question 1), il semblerait très improbable qu'un conflit de droit international public survienne si UNIDROIT assumait à la fois i) le rôle de Secrétariat d'une nouvelle entité établie pour remplir le rôle d'Autorité de surveillance, et ii) le rôle de Dépositaire en vertu du Protocole MAC.

[13] Voir la conclusion de l'avis juridique concernant la question 7: "*Les immunités d'UNIDROIT ne garantiraient pas qu'une nouvelle entité internationale dotée d'une personnalité juridique distincte et créée pour remplir le rôle d'Autorité de surveillance bénéficie du même niveau d'immunité en ce qui concerne l'exercice de ses fonctions en tant qu'Autorité de surveillance*". Étant donné qu'une nouvelle entité internationale serait créée dans le cadre de l'Option B, il serait probablement nécessaire de conclure un accord distinct sur les privilèges et immunités avec le Gouvernement italien si l'entité était basée à Rome et qu'UNIDROIT en assurait le Secrétariat.

[14] Voir la conclusion de l'avis juridique concernant la Question 7: "*Si UNIDROIT décidait de jouer le rôle de Secrétariat pour cette nouvelle entité internationale, une attention devrait être portée à la rédaction des documents juridiques pertinents afin de s'assurer que les organes et les fonctionnaires d'UNIDROIT impliqués dans l'exercice de ces fonctions continuent d'être couverts par l'accord de siège d'UNIDROIT existant*".

[15] Voir la conclusion de l'avis juridique concernant la Question 6: "*… si une nouvelle organisation est effectivement créée conformément à l'article XIV(1) du Protocole MAC, aucun consentement séparé des États parties ne serait nécessaire pour que cette organisation puisse jouer le rôle d'Autorité de surveillance; au lieu de cela, tout ce qui serait nécessaire dans ce cas serait le consentement de l'État au Protocole MAC lui-même. Nonobstant la conclusion selon laquelle le Protocole MAC ne constitue pas une condition d'adhésion à la nouvelle organisation, les États devront toujours donner leur consentement séparément pour devenir membres de cette entité, s'ils le souhaitent ou si les statuts de cette nouvelle organisation les y obligent*". Ainsi, en supposant que la nouvelle entité internationale ait besoin d'au moins quelques membres, un consentement séparé serait nécessaire pour que les États qui ratifient le Protocole puissent en devenir membres.

Toutefois, il y aura des différences entre les deux Options en ce qui concerne la charge administrative et les implications financières.

i) **Domicile (pas de différence):** dans l'Option A comme dans l'Option B, l'Autorité de surveillance serait établie et domiciliée au siège d'UNIDROIT à Rome, Italie. L'Autorité de surveillance se réunirait probablement une fois par an à Rome et serait assistée par une Commission d'experts.

ii) **Processus de mise en place (en faveur de l'Option A):** le processus de mise en place serait plus long et plus complexe et, par conséquent, le coût de mise en place plus élevé dans le cadre de l'Option B. Le Secrétariat devrait aider la Commission préparatoire du Protocole MAC à établir un processus de création d'une nouvelle entité internationale, à assurer un consensus international, à préparer et à approuver un statut et un projet de procédures pour que la nouvelle entité internationale remplisse le rôle d'Autorité de surveillance et négocie les privilèges et les immunités avec le Gouvernement italien. L'Autorité de surveillance et le Secrétariat devraient également préparer un accord détaillant les relations entre les deux entités. Dans le cadre de l'Option A, le Secrétariat devrait déterminer et formaliser la manière dont les fonctions de l'Autorité de surveillance seraient exercées au sein de la structure de gouvernance existante d'UNIDROIT, y compris éventuellement l'établissement de nouveaux sous-groupes (créés par le Conseil de Direction ou l'Assemblée Générale).

iii) **Fonctionnement et charge administrative (en faveur de l'Option A, temporairement)**: dans l'Option A comme dans l'Option B, le Secrétariat d'UNIDROIT serait responsable de tous les aspects administratifs et opérationnels de l'Autorité de surveillance et de la Commission d'experts, y compris l'accueil des réunions de l'Autorité de surveillance ainsi que des réunions de tout organe subsidiaire qui pourrait être créé, la publication des avis de réunion, des ordres du jour, et la préparation et la diffusion des documents pour, et résultant de, ces réunions, ainsi que la fonction de point de contact, vis-à-vis des tiers, pour l'Autorité de surveillance et la Commission d'experts. L'Option B entraînerait une charge administrative permanente plus importante, car le Secrétariat devrait mettre en place des processus entièrement nouveaux pour soutenir le fonctionnement de la nouvelle entité internationale. Dans le cadre de l'Option A, la charge administrative pour le Secrétariat serait moindre, car les fonctions de l'Autorité de surveillance seraient intégrées dans les processus et procédures existants pour les organes d'UNIDROIT. La charge administrative dans le cadre de l'Option A et de l'Option B diminuerait probablement avec le temps, car le personnel du Secrétariat deviendrait plus efficace dans l'exercice des nouvelles fonctions.

iv) **Coûts (potentiellement aucune différence)**: en vertu de l'Option A, UNIDROIT serait remboursé pour ses coûts en tant qu'Autorité de surveillance. Dans l'Option B, UNIDROIT serait remboursé pour ses coûts en tant que Secrétariat d'une entité internationale distincte. Compte tenu de la charge administrative plus élevée de l'Option B, les coûts de l'Option B sont susceptibles d'être légèrement plus élevés. Toutefois, cet avantage de l'Option A ne doit pas être surestimé, car le remboursement intégral des coûts est une condition préalable pour qu'UNIDROIT puisse jouer un rôle dans l'un ou l'autre modèle. Ainsi, aucune des deux options ne crée de problèmes budgétaires pour UNIDROIT.

C. Considérations de politique générale

29. Étant donné que l'Option A et l'Option B ne se heurtent pas à des obstacles juridiques ou pratiques insurmontables, la décision quant à l'option préférable pourrait en fin de compte être basée sur des considérations de politique générale. Les membres du Conseil de Direction et les États membres d'UNIDROIT peuvent prendre en compte différentes considérations de cet ordre.

30. Les considérations politiques suivantes ont été soulevées lors des discussions avec les représentants du Conseil de Direction au cours des trois dernières années:

i) **Extension du mandat d'UNIDROIT (pourrait éventuellement être en faveur de l'Option B)**: alors que la base juridique du Statut organique d'UNIDROIT pour l'Option A a été clarifiée, certains États membres d'UNIDROIT pourraient avoir une préférence pour la création d'une nouvelle entité internationale pour remplir le rôle (Option B), au motif que permettre à UNIDROIT de remplir le rôle constituerait un "détournement de mission". Du point de vue du Secrétariat d'UNIDROIT, l'Option A serait cohérente avec la responsabilité d'UNIDROIT de mettre en œuvre ses instruments, et l'Option A et l'Option B ne seraient pas significativement différentes dans leur fonctionnement quotidien. En tant que tel, le Secrétariat ne considérerait pas l'Option A ou l'Option B comme une extension déraisonnable de son mandat. Toutefois, les États membres pourraient raisonnablement adopter un point de vue différent.

ii) **Risque de réputation (en faveur de l'Option B):** dans le cadre de l'Option A, le risque de réputation serait plus élevé pour UNIDROIT. Si UNIDROIT devenait l'Autorité de surveillance en vertu de l'Option A et devait prendre une décision difficile ou controversée dans l'exercice de ses fonctions (par exemple, décider de ne pas reconduire le Conservateur sur la base d'une mauvaise exécution, ou approuver une modification importante des frais d'inscriptions), toute retombée politique d'une telle décision pourrait avoir un impact sur UNIDROIT. Ce risque de réputation serait considérablement réduit si une nouvelle entité internationale était créée pour assumer le rôle d'Autorité de surveillance dans le cadre de l'Option B. Dans l'évaluation de cette considération, il convient de noter que le rôle de l'Autorité de surveillance est largement administratif et que la probabilité que l'Autorité de surveillance ait à traiter une question importante, controversée ou politiquement sensible, est faible.

iii) **Flexibilité structurelle (en faveur de l'Option B)**: des deux options, l'Option B offrirait une plus grande flexibilité structurelle, puisque la nouvelle entité internationale pourrait être conçue spécifiquement pour exercer les fonctions d'Autorité de surveillance, alors qu'en vertu de l'Option A, les fonctions d'Autorité de surveillance devraient être incorporées dans la structure institutionnelle et de gouvernance d'UNIDROIT. Bien que l'Option B offre davantage de flexibilité que l'Option A, cet avantage ne devrait pas être surestimé, étant donné qu'UNIDROIT dispose d'un degré significatif de flexibilité dans sa structure de gouvernance et son fonctionnement et qu'il existe plusieurs modèles structurels différents qu'UNIDROIT pourrait mettre en œuvre pour s'acquitter des fonctions d'Autorité de surveillance (impliquant le Conseil de Direction, l'Assemblée Générale et/ou la création de nouveaux sous-groupes par l'un ou l'autre des organes).

iv) **Nécessité (en faveur de l'Option A)**: comme l'expliquent les Annexes, la raison d'être de la création d'une nouvelle entité internationale pour exercer le rôle d'Autorité de surveillance avec un Secrétariat séparé est quelque peu unique aux circonstances du Protocole ferroviaire de Luxembourg. Ces mêmes circonstances (lorsqu'une organisation intergouvernementale existante est disposée à assumer le rôle d'Autorité de surveillance mais ne dispose pas de la représentation géographique requise parmi ses membres pour remplir ce rôle) n'existent pas pour le Protocole MAC.

D. Recommandation du Secrétariat

31. Le Secrétariat d'UNIDROIT considère que les Options A et B sont toutes deux viables. De l'avis du Secrétariat, il n'y a pas de considérations juridiques, pratiques ou politiques insurmontables qui empêcheraient le Secrétariat de mettre en œuvre l'une ou l'autre option. D'un point de vue pragmatique, il est probable que les deux options auraient des conséquences relativement similaires

pour l'Institut en termes de personnel et d'organisation. Le Secrétariat n'a donc aucun intérêt fondamental à ce que l'Option A ou l'Option B soit mise en œuvre.

32. Compte tenu des considérations juridiques, pratiques et politiques ci-dessus, le Secrétariat reste d'avis que l'Option A serait légèrement préférable à l'Option B. Pour parvenir à cette conclusion, le Secrétariat considère que l'Option A pourrait offrir une plus grande sécurité juridique, pourrait être plus simple et plus rentable à mettre en place et à gérer, et, surtout, éviterait d'avoir à entreprendre un processus complexe de création d'une nouvelle entité internationale. Le Secrétariat reconnaît que certains avantages politiques favorisent l'Option B, mais il considère que les avantages juridiques et pratiques de l'Option A l'emportent peut-être sur ces avantages politiques potentiels. Toutefois, cette question relève en définitive de l'Assemblée Générale et, bien entendu, le Secrétariat exécutera fidèlement l'option choisie, quelle qu'elle soit.

VI. ÉTAPES FUTURES

33. Que l'on choisisse l'Option A ou l'Option B, il existe un processus en quatre étapes pour que l'Autorité de surveillance commence à fonctionner.

34. Première étape – sélection de l'Autorité de surveillance (2023): l'Assemblée Générale (lors de sa 82ème session en décembre 2023) décidera si elle devra adopter la recommandation du Conseil de Direction selon laquelle UNIDROIT devient l'Autorité de surveillance, ou si UNIDROIT devrait devenir le Secrétariat d'une nouvelle entité internationale établie pour être l'Autorité de surveillance.

35. Deuxième étape – nomination formelle de l'Autorité de surveillance (2024): une fois qu'UNIDROIT aura décidé de l'approche préférable, la question sera renvoyée à la Commission préparatoire. La Commission préparatoire décidera alors de nommer formellement une Autorité de surveillance (soit UNIDROIT, soit une nouvelle entité internationale avec UNIDROIT comme Secrétariat).

36. Troisième étape – organisation de l'Autorité de surveillance (2024-2025): une fois qu'une Autorité de surveillance aura été formellement nommée par la Commission préparatoire, le Secrétariat commencera à préparer les instruments, la documentation et les procédures nécessaires au fonctionnement de l'Autorité de surveillance. Si UNIDROIT est désigné dans le cadre de l'Option A, ce processus sera entrepris sous la supervision du Conseil de Direction et devrait durer environ 12 mois. Ce processus comprendra également un examen de la manière dont les fonctions de l'Autorité de surveillance devraient être exercées au sein de la structure institutionnelle d'UNIDROIT. Si une nouvelle entité est créée dans le cadre de l'Option B, ce processus sera entrepris sous la supervision de la Commission préparatoire et devrait prendre environ 24 mois.

37. Quatrième étape – l'Autorité de surveillance devient opérationnelle (2025 – 2027): l'Autorité de surveillance deviendra opérationnelle dès que le Protocole MAC entrera en vigueur. Il est prévu que le Registre soit opérationnel d'ici 2025, ce qui permettrait au Protocole MAC d'entrer en vigueur au plus tôt (en notant que cinq ratifications sont encore nécessaires pour l'entrée en vigueur). Dans l'intervalle, la Commission préparatoire continuera à faire office d'Autorité de surveillance provisoire jusqu'à l'entrée en vigueur du Protocole MAC.

VII. ACTION DEMANDÉE

38. *L'Assemblée Générale est invitée à décider si elle doit*:

i) adopter la recommandation du Conseil de Direction selon laquelle UNIDROIT accepte d'être nommé Autorité de surveillance du Registre international qui sera établi en vertu du Protocole MAC; ou,

ii) refuser le rôle d'Autorité de surveillance et autoriser UNIDROIT à assumer le rôle de Secrétariat pour une nouvelle entité internationale créée pour être l'Autorité de surveillance.

ANNEXE I

INDEPENDENT LEGAL ADVICE ON MATTERS OF PUBLIC INTERNATIONAL LAW REGARDING THE APPOINTMENT OF A SUPERVISORY AUTHORITY UNDER THE MAC PROTOCOL

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UK

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3 April 2023

Dear Secretary-General,

Please find below my legal advice on matters of public international law, as discussed with the ad hoc Committee regarding the appointment of a Supervisory Authority under the MAC Protocol and for the consideration of the Governing Council.

Sincerely,

Dr Orfeas Chasapis Tassinis

Questions related to UNIDROIT undertaking the role of Supervisory Authority

1. Would there be any conflict under public international law created by UNIDROIT undertaking both the role of Supervisory Authority and Depositary under the MAC Protocol?

1.1. The first question asks whether a conflict would arise under public international law if UNIDROIT assumed both the role of Supervisory Authority and Depositary under the MAC Protocol.

1.2. The primary instrument of public international law that should be consulted in that regard is the MAC Protocol itself. The Protocol contains numerous provisions describing the roles of Depositary and Supervisory Authority, as well as the interactions between the two. The question thus becomes whether a conflict would arise under this treaty if both of these roles were performed by the same institution, namely UNIDROIT.

1.3. For a conflict to arise between two or more provisions of the same treaty, these must, when '[t]aken together, …. amount to a contradiction which could only be resolved by a judicial decision giving preference to one or to the other set of provisions'.[1] Nevertheless, such a conflict does not exist if it turns out that 'upon examination, there was no inconsistency', or if 'any apparent inconsistency could … be resolved by reference to other provisions of the treaty.'[2] In other words, a conflict between provisions originating in the same treaty can be deemed to exist only if all other avenues for reconciling the meaning of its provisions has been exhausted.

1.4. Nevertheless, the question posed asks whether there would be any conflict 'under public international law' and not just the MAC Protocol. Public international law includes in this case customary international law on the functions of depositaries, as reflected in Art 76(2) of the Vienna Convention on the Law of Treaties of 1969 ('VCLT'). According to this Article, '[t]he functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.' Although UNIDROIT is not itself a party to the 1969 convention, the rule still applies to it as customary international law.[3]

1.5. A conflict between assuming the role of the Supervisory Authority under the MAC Protocol and duty under customary international law to act impartially in performing the duties of the depositary would exist only if it was impossible for UNIDROIT to simultaneously comply with its obligation under both sources.[4] Regardless of the existence of such a conflict, the duties of the depositary under customary international law also form part of the 'relevant rules of international law applicable in the relations between the parties'. Thus, they should also be taken into account when interpreting the respective provisions of the MAC Protocol, as Article 31(3)(c) of the VCLT provides.[5]

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[1] Herch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYIL 48, 81.

[2] Ibid, id.

[3] The customary nature of the norm reflected in that provision is generally recognized in international legal scholarship. See eg: Mark E. Villinger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 921 et seq; Lucius Caflisch 'Article 76' in O Corten and P Klein (eds) *The Vienna Convention on the Law of Treaties: A Commentary*, Vol II (OUP 2011) 1705.

[4] For classic definitions of conflicts of norms in that sense see Wilfred Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 BYIL 401, 426. See also WTO Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS59/R, WT/DS64/R, adopted on 23 July 1998, at note 649.

[5] VCLT 1969 Article 31 also reflects customary international law and is applicable as such when interpreting the MAC Protocol. On the customary law status of Article 31, see, indicatively, *Arbitral Award of 31 July 1989*

1.6. As drafted, the MAC Protocol provides for the functioning of both the Depositary and the Supervisory Authority. Article XXXVII of the Protocol describes the principal functions of the Depositary, whereas Article XIV those of the Supervisory Authority. The Protocol further provides that the Depositary and the Supervisory Authority are called upon to interact with each other in certain cases and describes the nature of those interactions.

1.7. There are seven possible instances of interaction provided in the Protocol: six direct and one indirect. All six direct forms of interaction involve some form of communication between Supervisory Authority and Depositary:

a. Article XXV(1)(b) provides that the Supervisory Authority 'shall deposit with the Depositary a certificate confirming that the International Registry is fully operational.'

b. Article XXXIV(1) provides that the Depositary 'shall, in consultation with the Supervisory Authority, prepare reports for the States Parties as to the manner in which the international regime established in the Cape Town Convention as amended by the MAC Protocol operates in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.'

c. Article XXXIV(2) provides that '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 Depositary, in consultation with the Supervisory Authority.'

d. Article XXXV provides that 'upon the acceptance of a Harmonized System revision, the Depositary shall consult the World Customs Organization and the Supervisory Authority in relation to any Harmonized System codes listed in the Annexes that might be affected by the revision.'

e. Article XXXVII(2)(c) provides that the Depositary 'shall provide the Supervisory Authority 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.'

f. Article XXXVII(2)(d) provides that the Depositary 'shall inform the Supervisory Authority and the Registrar of any pending processes under Article XXXV or Article XXXVI and of the outcomes of any such processes.'

1.8. These direct forms of interaction are supplemented by an indirect one, namely the Supervisory Authority's responsibility to set the fees for the International Registry. According to Article XVIII(2)(b), these fees will be set so as to recover, among other things, 'the reasonable costs of the Depositary associated with the performance of the functions, exercise of the powers and discharge of the duties'. In other words, part of the proceeds from the fees charged for using the International Registry will be go towards covering the costs of the Depositary.

1.9. A faithful interpretation of the MAC Protocol should follow the customary rules for the interpretation of international treaties enshrined in Articles 31 and 32 of the VCLT. Such an interpretation reveals that there is no irreconcilable conflict exists under the protocol itself.

(Guinea-Bissau v. Senegal), [1991] ICJ Rep 70; *Oil Platforms (Preliminary Objections) (Islamic Republic of Iran v. United States of America)* [1996] ICJ Rep 812.

1.10. The direct forms of interaction between the Supervisory Authority and the Depositary fall into two broad categories: information sharing and consultation. The rationale of these provisions, seen against the light of the treaty's object and purpose as a whole, indicates that these functions are meant to be complementary rather than competitive in nature. This is not the case where a legislator intervenes to ensure the separation of powers so as to protect a public good from a potential abuse of power. For instance, this would be the case when the legislator asks the police to produce a warrant signed by a judge before conducting a house search. Nevertheless, what is envisaged in the MAC Protocol seems different. This is the case where two roles that encompass different functions need to communicate on certain occasions so as to ensure the smooth running of both, with the object of offering the best possible service to all those concerned. In other words, the reasoning behind the interaction between the Supervisory Authority and the Depositary is an effort to mitigate the effects of a potential separation.

1.11. A case in point are the duties of supplying information. Article XXV(1)(b) provides that the Supervisory Authority will notify the Depositary when the International Registry is fully operational. Moreover, Article XXXVII(2)(c) provides that the Depositary shall provide the Supervisory Authority a copy of each instrument of ratification, acceptance, approval or accession, along with the relevant details. Finally, XXXVII(2)(d) provides that the Depositary shall inform the Supervisory Authority and the Registrar of any pending processes under Article XXXV or Article XXXVI and of the outcomes of any such processes. The purpose of these provisions is to bridge any gap that might exist between these two roles so as to ensure the smooth implementation of the Protocol, not create a chasm where none would exist.

1.12. A similar rationale seems to animate the duties of consultation that the Protocol provides for. The goal in these cases is to enlist the expertise of the Supervisory Authority wherever that may be relevant for the Protocol's application in practice. Thus the Supervisory Authority must be consulted when preparing yearly reports on how the Protocol operates in practice (Article XXXIV(1)); when convening a Review Conference (Article XXXIV(2)); or when revisions to any Harmonized System codes are accepted (Article XXXV). The Depositary must also 'take into account' the reports of the Supervisory Authority concerning the international registration system when preparing its yearly reports on the operation of the Protocol (Article XXXIV(1)).

1.13. The logic of interaction here is that the Depositary should make informed decisions on these matters, and to that end, consult the Supervisory Authority in areas of its expertise. What needs to be preserved in all those instances is the actual flow of views from the enlisted expertise of the Supervisory Authority towards the entity responsible for preforming the functions of the depositary, regardless of whether these two roles happen to coincide under the same organizational roof or not. This also means that the obligation to consult the relevant experts persists, even if it has to be carried out within the confines of a single organization that has assumed both roles.

1.14. Practically, this means that, should UNIDROIT perform both functions, it would still need to formally adhere to the rules concerning the interaction between the Depositary and the Supervisory Authority. This might require the Secretariat member(s) responsible for the Depositary contacting the Secretariat member(s) responsible for the Supervisory Authority, and vice versa. For example, under Article XXXIV, the Depositary would still need to consult with the Supervisory Authority in preparing its yearly reports (Article XXXIV(1)), or in the convening of a Review Conference of the state-parties (Article XXXIV(2)). In those cases, the Secretariat member(s) responsible for the Depositary should consult with the Secretariat member(s), or other organs, responsible for carrying out the respective Supervisory Authority functions.

1.15. A possible objection to the account advanced so far is that it goes against the intentions of the parties to the Protocol, these intentions being inferred from the fact the two roles are mentioned as distinct in the Protocol. Nevertheless, there is no indication in the text of the Protocol itself that

the parties intended these roles to be performed by distinct legal persons. This interpretation is further evidenced by subsequent practice in relation to the Protocol. It is also consistent with international practice when facing similar problems.

1.16. As far as subsequent practice in relation to the Protocol itself is concerned, it should be noted it was the MAC Protocol Preparatory Commission that inquired whether UNIDROIT could assume the role of the Supervisory Authority. The Preparatory Commission did so in the knowledge that the Protocol also provides for UNIDROIT to perform the role of Depositary. The necessary inference from this is that the Preparatory Commission considered it in line with the Protocol if the two roles were performed by the same legal entity.

1.17. The Preparatory Commission derives its mandate from the states participating in the Diplomatic Conference for the Adoption of the MAC Protocol.[6] Moreover, a number of states that participated in the Diplomatic Conference also participate in the functioning of the Preparatory Commission itself. Therefore, the Preparatory Commission's practice is relevant for the interpretation of the Protocol, either under Article 31(3)(b) of the VCLT,[7] or alternatively as a supplementary means of interpretation under Article 32 by confirming the meaning arrived at by applying the standard rules of treaty interpretation.[8]

1.18. In terms of international practice in general, it should be noted that it is not uncommon for a treaty to describe two different roles that end up being performed by the same legal person. Indeed, this is the case with many treaties with regard to the role of depositary and state-party. For example, Switzerland is both depositary and 'High Contracting Party' to the Additional Protocol I to the Geneva Conventions ('AP I').

1.19. In practice this may create overlaps in duties and redundant exigencies, but this is not by itself generally thought as problematic. For instance, AP I Article 97 provides that:

> Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

As per this provision, if Switzerland proposes an amendment to the AP I, it would need to communicate this to the depositary, which is itself. Moreover, if another state communicates a proposed amendment, then Switzerland needs to consult with all the High Contracting Parties, including itself. Yet none of this has ever been considered paradoxical or as threatening the legal coherence of the Protocol: different roles can be performed by the same actor so long as the parties have not explicitly excluded that scenario. The same reasoning would apply in the case that UNIDROIT assumed both the role of the Supervisory Authority and the Depositary under the MAC Protocol.

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[6] See Diplomatic Conference for the Adoption of the Draft MAC Protocol, Resolution 1 Relating to the Establishment of the Preparatory Commission for the Establishment of the International Registry for Mining, Agricultural, and Construction Equipment, November 2019.

[7] Article 31(3)(c) of the VCLT: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. […] 3. There shall be taken into account, together with the context: […] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

[8] Article 32 of the VCLT: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

1.20. Furthermore, there seems to be no conflict between the function of the Supervisory Authority and the Depositary's general duty of impartiality under customary international law. Even if a real conflict arose in practice, then the customary rule, reflected in Article 76(2) of the VCLT, that depositaries should 'act impartially' in the performance of their duties should guide UNIDROIT.

1.21. Indeed, the matter has arisen in the past with states doubling as both depositaries and state-parties. In such cases, the state in question should 'reconcile its individual diplomatic stance towards certain issues with its neutral duties as the custodian of a treaty; the performance of depositary functions should not occasion an extension of national objectives.'[9] As another authority puts it, 'when performing depositary functions, a state or international organization must therefore avoid favouring its own political objectives'.[10]

1.22. In conclusion, the potential for conflict between different roles does not *ipso facto* disqualify a state or international organization from performing these roles. Rather it places on it the burden to act impartially when carrying out its duties. As already mentioned, this principle is part of customary international law and is thus binding on UNIDROIT in the performance of its duties as depositary of the MAC Protocol.

1.23. Finally, special mention should be made to the Supervisory Authority's competence to set the fees for the International Registry, from which the costs of running the Depositary are also to be covered. As Article XVIII(2) provides,

> 2. The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover:
>
> (a) the reasonable costs of establishing, operating and regulating the International Registry, and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by Article 17(2) of the Convention; and
>
> (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.

1.24. This provision may create the impression of a conflict of interest created by UNIDROIT assuming both the role of Supervisory Authority, that is the entity that sets the fees, and the Depositary, that is the entity that will benefit from the fees thus set. Nevertheless, such an argument would be flawed from the perspective of international law.

1.25. There is abundant practice to suggest that setting fees and recovering costs by an international institution does not by itself breach any rules of public international law, so long that it does not contravene an organization's own constitution. For example, the World Intellectual Property Organization charges private parties for the registration of marks, industrial designs and patens. Revenues from this activity represent some 90% of the organizations' income. Similarly, the European Patent Organization finances itself by income derived from fees paid by private actors for its services.[11]

1.26. Closer to the subject at hand is the International Civil Aviation Organization ('ICAO') that has been designated as the Supervisory Authority under the Aircraft Protocol. ICAO both sets the fees

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[9] Richard Caddel 'Depositary' in *Max Planck Encyclopedias of International Law* (June 2006) para 8.

[10] Caflisch, supra note 3, 1712.

[11] For more examples see Henry G Schermers and Niels M Blokker, *International Institutional Law* (Martinus Nijhoff 2011) 678 et seq.

for the Aircraft Registry and recovers its costs for acting as Supervisory Authority. As already mentioned, the same provision is made for the Supervisory Authority under the MAC Protocol. This confirms the general practice that international institutions may recover their costs by setting fees for their services.

1.27. Equally important, it shows that the MAC Protocol drafters did not consider an identity between the fee-setter and the beneficiary as posing any problems from a legal standpoint. Indeed, the MAC Protocol, positively mandates the Supervisory Authority to set the fees so as to recover its own costs (as well as that of the Depositary). The situation would be the same regardless of whether the Supervisory Authority assumes a district legal personality from the Depositary or not. In both cases, it will be the organ entrusted with performing the role of the Supervisory Authority that will undertake this institutional responsibility. If it is part of the same legal person as the Depositary, then it is doing what it would be still be doing anyway for itself.

1.28. Finally, it should be noted that while we can presume a general freedom of international organizations recovering their costs through charging for their services, this freedom may be limited both by relevant provisions of an organization's constituent instrument as well as special rules of public international law. In that regard, UNIDROIT's Statute does not seem to contain any limit on the organization recovering its costs for services that it provides. In fact, the organization's Headquarters Agreement clearly contemplates the possibility of a revenue stream from services rendered by the organization.[12] Nevertheless, Article XVIII (2) of the MAC Protocol provides that only those costs that are 'reasonable' in relation to the International Registry, the Supervisory Authority and the Depositary are to be recovered. Should UNIDROIT accept the role of the Supervisory Authority, this provision will pose a limitation that must be borne in mind when setting fees for the International Registry.

2. Would UNIDROIT's immunities (deriving from its Statute and Headquarters Agreement) sufficiently ensure that UNIDROIT would enjoy the same level of immunity in relation to the exercise of its functions as Supervisory Authority?

2.1 Question (b) asks whether UNIDROIT's immunities, deriving from its Statute and Headquarters Agreement, shall continue to provide the same level of protection in relation to the exercise of its functions as Supervisory Authority, in case it assumes that role. The question is phrased in terms of immunities established by international treaty instruments, namely UNIDROIT's Statute ('the Statute') and the Headquarters Agreement.

2.2 UNIDROIT's Statute provides in Article 2 that '[t]he privileges and immunities which the Institute and its agents and officers shall enjoy shall be defined in agreements to be concluded with the participating Governments'. The UNIDROIT Secretariat has advised that there is no record of agreements concluded between UNIDROIT and any Member State, aside from an agreement concluded with Italy.

2.3 The agreement with the Italian State to that effect, entitled 'Agreement between the Italian Government and the International Institute for the Unification of Private Law in respect of the privileges and immunities of the Institute' ('Headquarters Agreement') was concluded in Rome on 20 July 1967.[13] This agreement was approved by the Italian Chamber of Deputies (La Camera dei

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[12] See Article 3(8) of the Headquarters Agreement.

[13] Before the conclusion of the Headquarters Agreement, UNIDROIT was subject to one legal proceeding before an Italian court (Marré vs the International Institute for the Unification of Private Law (1965). A former employee brought an action against the Institute claiming underpayment of wages and benefits. The Italian Court found that the Italian court lacked jurisdiction to hear a claim brought by an

deputati) and the Italian Senate (Senato della Republica) with Law of 12 December 1969, No. 1074. Law no. 1074 replicates the text of the Headquarters Agreement and incorporates into the Italian legal system. The Headquarters Agreement was amended in 1995, following an exchange of Notes Verbales between the Italian Government and UNIDROIT. These amendments were also approved by the respective Italian institutions and passed into Italian law with Law of 16 June 1997, no. 193.

2.4 Both the Headquarters Agreement and its amendments are written in Italian. Even though I have consulted the original documents, my analysis will be based on an unofficial English translation provided by UNIDROIT's Secretariat.

2.5 The Headquarters Agreement, as it has been amended, contains a number of provisions on privileges afforded to the organization, as well as privileges and immunities for certain categories of persons.

2.6 As far as the organizations' privileges are concerned, Article 1 provides that the Institute's headquarters shall not be appropriated by the Italian Government without the agreement of the Institute's Governing Council. Article 2(1) further provides that the assets of the Institute that are 'intended for its functions' ('destinati al perseguimento dei propri fini institutionali), 'shall be exempt from investigation, expropriation, confiscation, and any administrative proceedings except where the latter refer to matters subject to Italian jurisdiction'. Finally, Article 2(2) provides that '[t]he premises and archive of the Institute, and in general all the documents which it owns, or which are in its possession, shall be inviolable'.

2.7 The privileges provided in Article 1 are absolute in terms of the protection they provide, with the only exception an agreement by the Governing Council to lift them. These privileges would continue to apply to the same extent should UNIDROIT assume the role of the Supervisory Authority.

2.8 Article 2(1) provides for a series of privileges with regards to assets owned by the Institute that are intended for fulfilling the organizations' functions. These privileges are defined in a functional manner ('[i] beni dell'Instituto direttamente destinati al perseguimento dei propri fini instituzionali'; '[t]he assets of the Institute intended for its functions'). In other words, so long as the assets are linked to the organization's exercise of its competences, then they are covered under this provision. Accordingly, if UNIDROIT deems that it can lawfully assume the functioning of the Supervisory Authority, then these privileges will also apply to any assets connected to performing that role.

2.9 The only exception to the aforementioned rule enshrined in Article 2(1) is for administrative proceedings when these 'refer to matters subject to Italian jurisdiction' ('a rapporti sottoposti alla giurisdizione italiana'). Given my lack of expertise in Italian law, I cannot opine as to what matters these would be. However, it should be noted that this exception applies across the board to all assets that are connected to the functions of the organization. In this case, this would also include the potential assumption of the role of the Supervisory Authority. The Headquarters Agreement does not distinguish between different types of institutional functions, meaning that the same level of protection applies to all of them, minus any relevant exceptions.

2.10 Article 2(2) regarding the premises, and the archives and documents of the Institute is phrased in absolute terms. Therefore, any of these items that may be related to the organization performing the role of the Supervisory Authority shall be covered under this Article.

2.11 Although the question posed could be interpreted as asking solely about UNIDROIT's immunities as an organization, the question of whether UNIDROIT personnel potentially involved in

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employee against UNIDROIT, because of the Institute's status as an international legal person and its absolute independence and extraneousness from the Italian legal system.

performing the work of Supervisory Authority will enjoy the same level of immunity as those who are otherwise engaged with the organization's work is also worth addressing. This is especially the case given that question (c) further asks about the liability certain categories of persons that may be involved in said work, making it appropriate to first explore the question of personal immunity.

2.12 Articles 6 and 7 of the amended Headquarters Agreement provide for a series of personal privileges and immunities for individuals connected with the work of the Institute.

2.13 Article 6(1) provides that 'the representatives of participating Governments, the representatives of international organizations, or Organizations that take part in the meetings convened by the Institute, as well as the Institute's own agents shall be accorded the following privileges and immunities: (a) jurisdictional immunity for all acts performed in their official capacity, including the spoken and written word …'.

2.14 Article 6(2) further provides that '[f]or the purposes of this article, the following shall be considered agents of the Institute: the President of the Institute, the Secretary-General, the members of the Governing Council or their delegates, the members of the Administrative Tribunal as well as the permanent members of the Institute at the other international Organisations. The names of the agents shall be communicated by the President of the Institute to the Ministry of Foreign Affairs.'

2.15 Article 7(1) provides that '[t]he officers of the Institute shall enjoy the following privileges and immunities on the territory of the Italian Republic: (a) jurisdictional immunity for acts performed in their official capacity and within the limits of their duties, including the spoken and written word; ...'. Article 7(2) further provides that '[t]he categories of officers of the Institute to whom the privileges and immunities referred to in this Article apply shall be decided by the President of the Institute together with the Minister of Foreign Affairs.'

2.16 The rationale for immunities in Articles 6 and 7 is a functional one. This conclusion derives from the ordinary meaning of the terms of these provisions. Indeed, these extend immunities to the protected categories of persons only insofar as they act 'in their official capacity' for Article 6, and 'in their official capacity and within the limits of their duties' for Article 7.

2.17 This functional delimitation is consistent with international doctrine, according to which 'the immunity of international organizations is generally founded on the principle of functional necessity: international organizations need immunity in order to be able to perform their functions … [t]hey would not be able to do so if a national court could interfere in their work.'[14]

2.18 Applying Articles 6 and 7 to the case at hand raises a number of possibilities. Ultimately is it up to the Institute to decide how to staff and set up the Supervisory Authority, should it undertake that role. Since this is mostly theoretical at this stage, the analysis itself is to some extent hypothetical. The general idea, however, is that, since the rationale for the organization's immunities is functional, then an official or agent performing the functions for the organization would be covered by the respective international immunities from the jurisdiction of national courts.

2.19 As Article 14(1) of the MAC Protocol Provides, a commission of experts nominated by the Signatory and Contracting States shall assist the Supervisory Authority in the discharge of its functions. As Article 14(3) further provides, the Supervisory Authority as well as these experts 'shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise'.

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[14] Niels Blokker 'International Organizations: The Untouchables?' in N Blokker and N Schrijver (eds) *Immunity of International Organizations* (Brill/Nijhoff 2015) 2.

2.20 Under these circumstances, the question could arise as to whether these experts would fall under one of the categories of persons described in Article 6 of the Headquarters Agreement and thus enjoy respective privileges and immunities. The answer to that will necessarily depend on the exact modalities of the role in which these experts are called upon to perform, a point that is still to some extent hypothetical.

2.21 To that effect it is not clear whether these individuals will be representing a specific government, and thus fall under the first category of persons mentioned in Article 6(1), or whether these individuals will just be nominated by the Signatory and Contracting States but act as independent experts.

2.22 Alternatively, again depending on the formal modalities of their involvement with the Institute, these experts could potentially qualify as 'officers' of the organization under Article 7, and thus enjoy the privileges and immunities enshrined in that Article. While members to a commission of experts created to assist the Supervisory Authority would most likely be covered by one of the relevant provisions of the Headquarters Agreement with respect to privileges and immunities, my advice is that the exact modalities should be subject to careful consideration and be clarified in advance with Italy so as to ensure legal certainty.

2.23 In sum, the individuals performing the functions of the Supervisory Authority within the organization, will still be covered by the same level of immunities as if they were performing any other function of the organization, so long as they fall within one of the categories of Article 6 and 7 (namely representatives of other organizations or states; the President of the Institute, the Secretary-General, the members of the Governing Council or their delegates; officials of the Institute, including those working for the Secretariat). This is because, again, the rationale for these immunities is functional and they are accorded automatically insofar as the person in question is acting in their official capacity.

2.24 A possibility for a different level of immunity could arise in the event that the Institute creates an entirely new category of officers to perform work related to role of the Supervisory Authority. As already mentioned, Article 7(2) provides that '[t]he categories of officers of the Institute to whom the privileges and immunities referred to in this article apply shall be decided by the President of the Institute together with the Minister of Foreign Affairs.' Although I have no knowledge of how this provision has been applied in practice, this could be understood to imply that an agreement is needed between the President of the Institute and the Italian Minister of Foreign Affairs with regard to adding any new categories of officials that are entitled to immunities. If that is indeed the case, then it would be advisable to entrust work related to the Supervisory Authorities to categories of officials that have already been agreed upon by the authorities mentioned in Article 7(2).

2.25 Before concluding, it should be noted that there is an extensive practice of Italian courts applying treaty provisions, as well as customary international law, on questions of immunity of international organizations.[15]

2.26 Part of that case law relates to the problem of whether international organizations enjoy immunity under customary international law, which is not part of the question at hand, and would

[15] For an introduction to that case law see Beatrice I Bonafé, 'Italian Courts and the Immunity of International Organizations' in N Blokker & N Schriver (eds) *Immunity of International Organizations* (Brill/Nijhoff 2015) 246 et seq. As already mentioned above, the case law includes one case with UNIDROIT as party (*Marré v. UNIDROIT*, 12 June 1965, Tribunale di Roma, *Rivista di diritto internazionale private e processuale* (1986) 149). Nevertheless, this case was decided before the Headquarters Agreement with the Italian State was concluded, which now governs the relations between the two parties regarding the privileges and immunities of the organization.

be of limited, if any relevance, in a case such as this one where there is an international treaty providing for privileges and immunities that is binding on Italy.

2.27 Another segment of the caselaw deals with inserting functional limitations to treaty provisions that enshrine absolute immunity for international organizations. While potentially interesting from a scholarly perspective, this caselaw does not speak to the analysis offered here. Rather, the present analysis seeks to answer a question phrased in a relative fashion, inquiring whether UNIDROIT would, while performing the role of the Supervisory Authority as part of its official functions, enjoy the same level of immunity as it would otherwise do. As already suggested, there is nothing in the text of the Headquarters Agreement to suggest that it would not, with the only exception potentially being the one developed in paragraph 2.25 of this legal opinion.

2.28 As a final note, it should be mentioned that question (b) addresses the question of whether UNIDROIT and its officials would enjoy the same level of immunity under the Headquarters Agreement in the event that UNIDROIT itself assumes the role of the Supervisory Authority. The question of immunities of UNIDROIT and its officials should UNIDROIT or its organs assist another organization with carrying out the functions of the Supervisory Authority under the MAC Protocol raises separate problems that are addressed below as part of question (g).

3. Could any individuals undertaking Supervisory Authority functions as part of UNIDROIT's organs (Governing Council members, General Assembly representatives or Secretariat members) incur personal liability in relation to the exercising of the Supervisory Authority functions?

3.1. Question (c) asks whether individuals who perform the Supervisory Authority functions as UNIDROIT's organs, namely Governing Council members, General Assembly representatives or Secretariat members could incur personal liability in relation to the exercise of those functions.

3.2. From the outset, it should be noted that the question of liability for these individuals is distinct from the question of personal immunity from the jurisdiction of national courts. As already developed in response to question (b), the Headquarters Agreement provides that agents of the Institute, as well as governmental representatives enjoy immunity from jurisdiction for all acts performed in their official capacity including the spoken and written word (Article 6(1)). As Article 6(2) further clarifies, the President of the Institute, the Secretary-General, the members of the Governing Council or their delegates, the members of the Administrative Tribunal as well as the permanent members of the Institute at the other international Organisations shall be considered as 'agents' of the organization for the purposes of jurisdictional immunities. Furthermore, Secretariat members also enjoy immunity from jurisdiction under Article 7 of the Headquarters Agreement for 'acts performed in their official capacity and within the limits of their duties, including the spoken and the written word'. Regardless of the answer to the question of liability, the fact that Governing Council members, General Assembly representatives and Secretariat members enjoy these immunities should be borne in mind, as it would mean in practice that they would not be liable to be sued individually before national courts for work they undertake on behalf of the Institute, including for potential work as part of the functioning of the Supervisory Authority.

3.3. The question of liability for these individuals could theoretically arise under both international and national law.

3.4. From the perspective of international law, the acts of the aforementioned individuals are normally attributed to the international organization itself. This means that it is the organization that will have to bear responsibility for these acts, and pay the requisite compensation, should they be deemed internationally wrongful. As Article 6 of the 2011 Draft articles on the Responsibility of International Organizations ('DARIO') provides: '[t]he conduct of an organ or agent of an

international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.' Although the DARIO are not themselves an international treaty, Article 6 reflects a fundamental principle of customary international law, that emanates from the very idea of legal personality of corporate entities. The principle has been confirmed time and again in judicial practice.[16]

3.5. This basic rule of attribution is supplemented by the notion that it falls upon the organization to compensate any injured party for acts of its own or acts of its organs, so long as they were acting in an official capacity. As the International Court of Justice ('ICJ') stated in its Advisory Opinion in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* case: ' [t]he United Nations may be required to bear responsibility for the damage arising from … acts performed by the United Nations or by its agents acting in their official capacity.'[17] Thus, according to the Court, the organization might bear responsibility not just for the conduct of its organs, but also of the individuals that the organization employs, so long as they are acting in their official capacity.

3.6. Whether an individual or organ acts in his or her official capacity in a given instance depends on the facts of each particular case.[18] However, there is a presumption that an act has been carried out in the respective individual's personal capacity, if (a) performing this act has become standard practice within the organization of performing one's duties; or (b) the act has been implicitly or explicitly endorsed by the organization.[19] A presumption to that effect could also be said to exist when the chief administrative officer of an organization determines that the said act fall's within an individual's official capacities. As the ICJ has held in relation to the United Nations ('UN'), 'it is up to [the Secretary General] to assess whether its agents acted within the scope of their functions … that finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts'.[20]

3.7. In conclusion, international law rules on the attribution of conduct to international organizations do not distinguish between the various functions that an organization may perform through its agents, so long as the latter act in an official capacity. In this case this would mean that the acts involving Governing Council members, General Assembly representatives or Secretariat members in relation to the exercising of the Supervisory Authority function would in principle be attributable to UNIDROIT. It would thus be the organization rather than the individuals who would bear responsibility for them under international law. Finally, ICJ case law suggests that in case a dispute arose as to whether one of these persons was acting in an official capacity, a respective finding by UNIDROIT' Secretary General would create a strong presumption in that regard.[21]

3.8. The question of liability under national law is a separate one. Leaving to the side the question of immunity that UNIDROIT's agents and officials as well as governmental representatives may enjoy from the jurisdiction of national courts, the question could theoretically arise concerning their liability

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16 See Draft articles on the Responsibility of International Organizations with commentaries, 2011 YILC vol II, Part Two, 55-56.

17 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights,* Advisory Opinion [2009] ICJ Rep 88-89.

18 Ibid 85.

19 Ibid 85-86.

20 Ibid 87.

21 The occurrence of any personal liability beyond that point would be of the same level and nature as that for performing any other function of the organization. For example, in theory, agents working for the organization would still be personally liable under international law for any acts that they perform that also violate international criminal law. This, however, seems to bear no practical relevance to the range of factual patterns discussed here.

under domestic law for acts committed in their official capacity. I am not in a position to render legal advice on how Italian law deals with this matter. Presumably the legal personality of UNIDROIT is recognized as such under domestic Italian law as well, following Article 2(3) of the Statute ('The Institute shall enjoy, in the territory of each participating Government, the necessary legal capacity to enable it to exercise its functions and to realise its purposes'). A recognition of UNIDROIT's legal personality for domestic purposes would most likely mean that any potential liability would fall on the organization rather than its officials, so long as they were acting in an official capacity when engaging in the conduct in question. In any event, there does not seem to exist a reason to differentiate between liability arising from acts linked to the function of the Supervisory Authority and acts linked to the other functions of the organization.

3.9. As a final note, I would like to suggest that, regardless of the conclusions reached above, careful attention should still be paid, as always, in the drafting of documents, including contracts, as well as procurement and end-user terms and conditions, that govern the relationship between the UNIDROIT as Supervisory Authority and (a) the contractor who is appointed as International Registrar; (b) potential bidders for that role; (c) end-users of the International Registry. That attention should be specifically focused on the matters of applicable law, understandings regarding personal or institutional liability, and potential arbitration clauses.

4. Does the UNIDROIT Statute impose any internal limitations on how UNIDROIT's organs could discharge the Supervisory Authority functions?

4.1. Question (d) asks whether the Statute imposes any internal limitations on how UNIDROIT's organs can discharge the Supervisory Authority functions, meaning whether there is anything in the Statute that would require certain Supervisory Authority functions to be vested specifically with General Assembly, the Governing Council or the Secretariat.

4.2. According to Article 17(2) of the Cape Town Convention, the core responsibilities of the Supervisory Authority are as follows:

(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;

(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.

4.3. Much can be said about which UNIDROIT organ would be the most appropriate to undertake these functions. Indeed, it might be the case that the organization elects to create altogether new bodies, committees, etc to be entrusted with this role. This would reflect the power of the organization to best organize the administration of its work.[22] It would also be consistent with the organization's own constituent instrument and practice. In this respect, article 11(1) of the Statute gives the Governing Council a wide discretion in determining the means of carrying out the organization's functions. Moreover, as the UNIDROIT Secretariat has advised, UNIDROIT organs routinely create temporary bodies for the execution of specific projects or the development of Instruments (Study Groups and/or Working Groups) which operate until the project is completed. The creation of the Governing Council ad hoc Committee to which this paper has been submitted is another example of a temporary body created by a UNIDROIT organ. A longer-term body that was recently created by the Governing Council is the 'Permanent Committee for Correspondents', created by the Governing Council as an informal-subcommittee composed of one Governing Council member for each region with a mandate to supervise the functioning of the UNIDROIT Correspondents Programme.[23]

4.4. Nevertheless, this question asked at this point does not concern what the most optimal distribution of labour within the organization would be; rather it inquires as to whether the Statute sets any limits to the organization's powers to organize internally, meaning limits that would positively require certain of these functions to be performed by a particular organ.

4.5. The Statute does not appear to pose any specific limitations in that sense, apart from those that result from normal the assumption and performance of any function by the organization. This means that the Supervisory Authority will be embedded into the overarching legal framework of the Institute. A couple of Articles from the Statute merit further consideration in that regard.

4.6. A first example of an internal division of labor that could affect the setting up of the Supervisory Authority can be found in Article 11(2) of the Statute, which, as already mentioned, provides that '[t]he Governing Council shall determine the means of carrying out the functions set out in Article 1'. Also relevant in that regard is Article 17(1), which provides that '[R]ules governing the administration of the Institute, its internal operations and the conditions of service of the staff shall be adopted by the Governing Council and must be approved by the General Assembly and communicated to the Italian Government'. An interpretation of these provisions according to the ordinary meaning of their terms suggests that, should the organization determine that performing the role of the Supervisory Authority falls within its functions, then it would be up to Governing Council to design how that would be implemented at an internal institutional level. This would then have to be approved by the General Assembly.

5. Would the UNIDROIT Statute need to be amended to allow UNIDROIT to accept the role of Supervisory Authority?

5.1. The fifth question asks whether UNIDROIT's Statute would need to be amended before allowing the organization to accept the role of Supervisory Authority. Since the only reason why the Statute would need to be amended is if accepting the role of Supervisory authority fell outside UNIDROIT's mandate, this question essentially concerns the scope of the mandate of the organization, as provided for in its Statute. In short, if accepting the role of Supervisory authority falls within UNIDROIT's mandate, then there is no need for amendment. Conversely, if this activity falls outside the mandate, then the Statute itself would need to be amended so as to explicitly provide for the

[22] See https://www.unidroit.org/english/governments/councildocuments/2021session/cd-100-b/cd-100-b-20-e.pdf , paragraph 23(c).

[23] See https://www.unidroit.org/english/governments/councildocuments/2021session/cd-100-b/cd-100-b-20-e.pdf , paragraph 23(c).

possibility of UNIDROIT accepting this new role. The problem thus presented is essentially one of treaty interpretation, the relevant treaty being UNIDROIT'S Statute.

5.2. There are well established rules and doctrines in international law on how to answer questions of treaty interpretation. Some of these rules have already been alluded to in the analysis above. As a matter of principle, the same rules apply to those treaties that happen to serve as constituent instruments of international organizations. As the ICJ has explained:

> In order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution. From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply.[24]

5.3. These 'well-established rules of treaty interpretation' are none other than those enshrined in Articles 31 and 32 of the VCLT. According to its terms, the VCLT also applies to treaties that are constituent instruments of international organizations, 'without prejudice to any relevant rules of the organization' (Article 5). Furthermore, as already mentioned, the rules contained in Articles 31 and 32 are generally considered to reflect customary international law.[25] They are thus relevant for the interpretation of a treaty instrument regardless of whether its parties are also parties to the VCLT.

5.4. Even though the same rules of interpretation to the constituent instruments of international organizations, the problems of interpretation that the latter present are often quite distinct in practice. As the ICJ has further clarified:

> constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[26]

5.5. In sum, the standard rules of treaty interpretation should govern the interpretation of the constituent instruments of international organizations, including the UNIDROIT Statute. When applying these rules special care should be taken to take into account the particular circumstances that exist owing to the fact that these treaties also create international legal persons. This has led to a fairly discrete body of practice and scholarly opinion that specifically addresses problems of interpretation in relation to constituent instruments of international organizations.

5.6. Before getting into the peculiarities that interpreting the constituent instruments of international organizations may raise, some preliminary remarks are in order regarding how the standard rules of treaty interpretation in public international law are to be applied.

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[24] *Legality of the Threat or Use by a State of Nuclear Weapons*, (Advisory Opinion) [1996] ICJ Rep 74 (emphasis added).

[25] See *Kasikili/Sedudu Island Case (Botswana/Namibia)*, [1999] ICJ Rep 1059; Conclusion 1, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties,* YILC, 2018, vol. II, Part Two, 2.

[26] *Nuclear Weapons Advisory Opinion*, supra note 24, 75.

5.7. Famously, Article 31 of the VCLT[27] contains a series of elements that should be taken into account when interpreting a treaty. Naturally, text plays an important role in treaty interpretation ('the ordinary meaning to be given to the terms of the treaty'). Nevertheless, the ordinary meaning to be given to the terms of a treaty is only one of many elements mentioned in Article 31. Most importantly, these factors include taking into account the treaty's context, its object and purpose, as well as any 'subsequent practice'.

5.8. Between these factors there exists no abstract hierarchy, such a literal interpretation of the terms of a treaty would override or preempt any other consideration. Instead, as the International Law Commission ('ILC') has affirmed time and again, the application of Article 31 is 'a single combined operation'.[28] The paragraphs of Article 31 are interlinked, but this 'represent[s] a logical progression, nothing more'.[29] In other words, literal interpretations of the text should not trump the other elements that ought to be taken into account, such as practice, even if the text usually forms the most reasonable starting point of an interpretative inquiry.

5.9. Most importantly, as the ILC has noted, practice too may contribute to 'the clarification of the meaning of a treaty. This may result in the narrowing, widening, or otherwise determining the range of possible interpretations…'.[30] When applying the rules enshrined in Article 31 'leaves the meaning ambiguous or obscure' or yields 'manifestly absurd or unreasonable' results, recourse may be had to supplementary means of interpretation, including (but not limited to) the preparatory work of the treaty in question.[31]

5.10. Applying these rules to international organizations' constituent instruments raises special problems in practice. As already mentioned, international organizations are set up by states to perform certain functions. However, it has often proved hard, if not also impractical, for states to foreshadow in the text of a constituent instrument all the situations in which an organization may

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[27] *Article 31 General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[28] *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries*, YILC 2018, vol II, Part Two, 17. See also the ILC's reluctance to adhere to a categorization of treaties based on their 'nature'. As the commission noted: '[t]he Commission, however, decided that the draft conclusion should not refer to the nature of the treaty in order to avoid calling into question the unity of the interpretation process and to avoid any categorization of treaties.' YILC 2018, vol II, Part Two, 23.

[29] Anthony Aust, *Modern Treaty Law and Practice* (CUP 2013) 207.

[30] Conclusion 7, supra note 28, 51.

[31] Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

find itself when trying to perform its functions. As the ICJ has explained in its landmark *Reparation for Injuries* Advisory Opinion in relation to the UN:

> Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. [32]

The principle was confirmed again by the ICJ in its 1996 Advisory Opinion on the *Legality of the Use by any State of Nuclear Weapons in Armed Conflict*:

> the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers.[33]

The idea goes back to an older Advisory Opinion, rendered by the Permanent Court of International Justice, which held that:

> the European Commission [of the Danube] is … an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.[34]

The general idea that international organizations must be deemed to enjoy those powers that are necessary for the performance of their functions has found wide acceptance in scholarship.[35] As the *Institut de Droit International* has authoritatively noted in that regard, 'international organizations may interpret their constituent instrument dynamically to address current challenges and fill unforeseen gaps.'[36]

5.11. These ideas have found extensive application in practice. In 1954, the ICJ held that a tribunal established by the UN General Assembly to hear disputes regarding contracts of employment of the organizations staff members had been lawfully created, even though the Charter was completely silent on the matter. As the ICJ reasoned:

> There is no express provision for the establishment of judicial bodies or organs and no indication to the contrary […] It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them. In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect

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[32] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 182.

[33] *Nuclear Weapons Advisory Opinion*, supra note 24, at 79.

[34] *Jurisdiction of the European Commission of the Danube* (Advisory Opinion) PCIJ Rep Series B no 14, 64

[35] See among others Jan Klabbers, An Introduction to International Organizations Law (CUP 2015) 56 et seq; Chittharanjan F Amerasinghe, Principles of the Institutional Law of International Organizations (CUP 2005) 48 et seq; Schermers and Blokker, supra note 11, 180 et seq.

[36] 'Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)?', Annuaire de l'Institut de Droit international, Session de La Haye, vol 80, 2019, operative clause 1.

> to the paramount consideration of securing the highest standards of efficiency, competence and integrity.[37]

5.12. What appears to matter for the Court is whether an activity promotes the general aims of the organization rather than whether this activity was specifically envisaged when drafting the organization's constitution.

5.13. Another example whereby an unprecedented activity was deemed *intra vires* because it corresponded to an established aim is the creation of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') by the UN Security Council.

5.14. According to Article 24 of the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security. In the 1990's the SC took a first-time step and deemed that in order to maintain international peace and security in the former Yugoslavia, an ad hoc international criminal tribunal had to be established. The ICTY Appeals Chambers found that the tribunal had been legally established:

> When, in resolution 827, the Security Council stated that it was 'convinced' that, in the 'particular circumstances of the former Yugoslavia', the establishment of the International Tribunal would contribute to the restoration and maintenance of peace, the course it took was novel only in the means adopted but not in the object sought to be attained.[38]

5.15. The Appeals Chamber's reasoning is clear, and in line with the previous jurisprudence of the ICJ: if an activity falls within the functions that an organization has been called upon by its member states to perform (or an organ of an organization) then it does not matter whether the measures it undertakes to carry out that function are themselves novel or unprecedented. It is also immaterial whether the organization has the capacity or expertise to carry it out in the first place (neither the UN General Assembly nor the Security Council had previous experience or expertise in the administration of justice). Rather, the fact that an activity can be classified as a means of performing an institutional function means that the organ or the organization has the power to develop the requisite capacity and expertise, by creating and staffing the relevant organs as required.

5.16. Constituent instruments of international organizations also raise special considerations not only because they are called to fulfill unforeseen gaps in order to effectively perform their functions but also due to the elevated role that practice tends to assume in their interpretation. As already mentioned, practice plays an important role in the interpretation of treaties in general, either as subsequent practice in accordance to Article 31 or as a supplementary means of interpretation, in accordance with Article 32.[39] As the ILC has noted:

> 1. Subsequent agreements and subsequent practice under Article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

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[37] *Effect of Awards of Compensation made by the United Nations Administrative* Tribunal (Advisory Opinion) [1954] ICJ Rep 47, at 56-57.

[38] Prosecutor vs Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 10.8.95, para 22.

[39] The idea that subsequent practice may also form a supplementary means of interpretation. See Conclusion 4, supra note 28. See also Villinger, supra note 3, 446.

> 2. Subsequent practice under Article 32 may also contribute to the clarification of the meaning of a treaty.[40]

5.17. Most importantly for the purposes of the question at hand, the ILC has further clarified that subsequent practice may be means of interpretation for the constituent instruments of international organizations, and that such practice 'may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument'.[41]

5.18. The importance of consulting the practice of an organization in interpreting its constituent has been consistently affirmed by the ICJ in practice.[42] For example, when interpreting the meaning of the words 'ship owning nations' in Article 60 of the constitution of the Inter-Governmental Maritime Consultative Organization, the ICJ reached its conclusion only after consulting the practice of the organization itself in interpreting this term.[43]

5.14 The landmark ICJ's *Namibia* Advisory Opinion is also case in point. Among other matters, the Court had to decide on the validity of a Security Council resolution that had passed without the affirmative votes of the five permanent members (P-5). The relevant provision of the Charter reads as follows:

> Decisions of the Security Council on all other matters [ie non-procedural] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members;

5.19. While the text of the Charter seemed to clearly indicate that all the P-5 needed to vote in favor of a resolution in order for it to pass, a different practice had developed within the organization. According to this practice, the P5 do not need to cast an affirmative vote for a resolution to pass. Instead they can also abstain (while of course if they vote negatively and exercise their 'veto' the resolution will fail). The Court resolved the question by assigning due weight to the practice that had developed within the organization:

> the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the

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40 Conclusion 7, supra note 28.

41 Conclusion12, supra note 28.

42 Indicatively see *Nuclear Weapons Advisory Opinion*, supra note 24, 74; *Competence of Assembly regarding admission to the United Nations* (Advisory Opinion) [1950] ICJ Rep 9; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 194; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) ICJ Rep 1960, 169; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) ICJ Rep 22. See also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 168.

43 'The practice followed by the Assembly in relation to other articles reveals the reliance placed upon registered tonnage [for determining the largest ship owning nations]'. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, supra note 42, 168.

> amendment in 1965 of article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.[44]

5.20. Equally important to the Court's conclusion is the fact that the relevant practice is evidenced by a combination of positive practice by the competent organ and lack of opposition or acquiescence by the general membership; rather than a formal decision by the organization's plenary organ (let alone a formal amendment). On the flipside, however, where a certain practice within the organization encounters opposition (as in negative votes when passing a resolution), its importance may be severely diminished, if not altogether negated.[45]

5.21. Furthermore, institutional practice may be relevant not only for interpreting particular provisions, but also elucidating the object and purpose of a treaty as a whole. As the ILC has explained:

> Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty or reconcile invocations of the 'object and purpose' of a treaty with other means of interpretation.[46]

5.22. The ICJ has also affirmed the idea that an organization's mandate may itself evolve over time through subsequent practice. When discussing the field of competence of the Lake Chad Basin Commission, the Court held that:

> Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts. […] From the treaty texts and the practice analysed […] it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security.[47]

5.23. As it emerges from this passage, an international organization can be lawfully called upon to carry out further tasks than those originally provided in its constituent instruments through subsequent practice.

5.24. Closely related to the idea that the mandate of an international organization may evolve through time through practice is the notion that the terms enshrined in its constituent instrument may have to be interpreted in an evolutionary way. This is a more general principle of treaty interpretation[48] that enjoys particular importance for international organizations in practice.

5.25. For example, when the ICJ was called upon to interpret terms such as 'the strenuous conditions of the modern world', the 'well-being and development of such peoples', and 'sacred trust' in Article 22 of the Covenant of the League of Nations, it held that:

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[44] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)* supra note 42, 22.

[45] See most famously *Nuclear Weapons*, supra note 24, 81. See also *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (2014) ICJ Rep 257.

[46] YILC 2018, vol II, Part Two at 53.

[47] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) [1998] ICJ Rep 306-307 (emphasis added).

[48] Conclusion 4, supra note 28. See also, indicatively, Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) and the collected volume by Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau and Clément Marquet (eds) *Evolutionary Interpretation and International Law* (Bloomsbury 2019).

> Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in article 22 of the Covenant […] were not static, but by definition evolutionary […]. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law.[49]

5.26. In sum, contemporary doctrine and case law supports the following three propositions regarding the interpretation of the constituent instruments of international organizations: (1) where a constituent instrument is silent or ambiguous, an international organization should be presumed to have any power that is deemed necessary for the performance of its mandate; (2) the meaning of the terms of a constituent instrument can be subject to refinement, clarification, and even evolution through subsequent practice; (3) the mandate of an organization itself can be subject to refinement, clarification, and even evolution through subsequent practice .

5.27. These considerations are of cardinal importance in interpreting UNIDROIT's Statute and determining whether the organization can lawfully assume the role of Supervisory Authority under the MAC Protocol.

5.28. Article 1 of the Statute establishes the purposes of UNIDROIT as well as the ways in which the organization shall pursue them. This article is important for determining the Statute's object and purpose, as provided for in article 31 of the VCLT, in light of which the terms of the Statute need to be interpreted. According to article 1 of the Statute, the Institute shall 'examine ways of harmonizing and coordinating the private law of States'. Furthermore, it shall 'prepare drafts of agreements with a view to facilitating international relations in the field of private law' (Article 1(a)) and 'take an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary' (Article 1(d)). These articles should also be read in conjunction with Article 11(1) of the Statute which gives wide discretion to the Governing Council to 'determine the means of carrying out the functions set out in Article 1'.

5.29. When interpreting these provisions, it should be born in mind that UNIDROIT was first set up in 1926 as an auxiliary organ of the League of Nations and re-established in 1940. Still, the Statute itself was drafted in abstract enough terms (eg 'harmonising' and 'coordinating' the private law of states; 'facilitating' international relations in the field of private law; take an interest in projects already undertaken … with which it may maintain relations 'as necessary') so as to potentially track further developments in the field. As the ILC has explained, citing the case law of the ICJ, 'the "generic" nature of a particular term in a treaty and the fact that the treaty is designed to be "of continuing duration" may … give rise to an evolving meaning [to its terms]'.[50]

5.30. Under these circumstances, the question is not whether the drafters of the Statute contemplated the existence of an electronic registry and the need for it to be supervised by an international organization, rather it is whether these activities could be reasonably interpreted as capable of fulfilling the functions of the organization as described in Article 1 of its Statute. As the *Institut de Droit International* notes in that regard, 'the dynamic interpretation by international organizations of their constituent instruments shall be consistent with those instruments and in particular their object, purpose, and functions.'[51]

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[49] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, supra note 42, 31.

[50] *Draft conclusions with commentaries*, supra note 28 at 65.

[51] Institut de Droit International, supra note 36, operative clause 3.

5.31. Faithfully applying articles 31 and 32 of the VCLT on treaty interpretation, it is hard up to come up with reasons as to why the setting up and running the Supervisory Authority of the International Registry would go against the declared goals of UNIDROIT and lie outside the Governing Council's wide discretion in determining the means of pursuing these goals. According to the Oxford English Dictionary, to harmonize is to 'bring into agreement (two or more things or one thing *with* another); to reconcile'.[52] In international law, the exact meaning of the term 'harmonization' varies across treaty regimes[53] but generally refers to adjustments in domestic legal orders in areas of common concern aimed at convergence in terms of regulation and facilitating compliance and enforcement across borders. Furthermore, to coordinate is to 'place or arrange (things) in proper position relatively to each other and to the system of which they form parts; to bring into proper combined order as parts of a whole; to act in combined order for the production of a particular result'.[54] As with 'harmonization', 'coordination' does not have a singular accepted definition in international legal parlance, and its meaning may differ depending on the context. Nevertheless, the concept is generally associated with the effective recognition and enforcement of legal interests across borders.[55]

5.32. There can be little doubt that the Cape Town Convention Project is aimed at 'harmonization' and 'cooperation' in the general senses identified above. According to the Preamble of the Cape Town Convention, the state-parties seek to 'faciliate … transactions[s] by establishing clear rules to govern them', are 'mindful of the need to ensure that interests in such equipment are recognised and protected universally', and are 'conscious of the need to establish a legal framework for international interests in such equipment and for that purpose create an international registration system for their protection'.

5.33. It follows from the above that the international registration system is seen as a fundamental means of ensuring the project's harmonization and coordination goals.[56] In turn, the 'international registration system' established by the Convention is, according to Chapter IV (entitled 'The international registration system'), made up of two components: the International Registry (CTC Article 16) and the Supervisory Authority (CTC Article 17). Thus, these two roles are equally, and indispensably, connected to and complement, the Convention's goals of harmonization and coordination regarding the legal regulation of large interests in mobile equipment across borders. These should also be construed to be the goals of the MAC Protocol that is ancillary to the CTC. As the Preamble of the MAC Protocol provides, the state-parties are 'extending the Convention to mining, agricultural, and construction equipment'.

5.34. To sum up: (1) UNIDROIT is, according to its statute, concerned *inter alia* with the 'harmonising' and 'coordinating' the private law of states; (2) the International Interests in Mobile Equipment Project is also concerned with international harmonization and coordination in matters relating to its field of application; (3) a key part of this harmonization and coordination under the CTC, and therefore the MAC Protocol, is the international registration system, of which, in turn, the

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52 Oxford English Dictionary at www.oed.com, accessed 30 January 2023.

53 For a discussion of 'harmonization' in the WTO and EU contexts, see Marcus Klamert, 'What We Talk About When We Talk About Harmonisation' 17 (2015) *Cambridge Yearbook of European Legal Studies* 360. See also Mads H Andenas and Camilla B Andersen (eds) *Theory and Practice of Harmonisation* (Edward Elgar 2011).

54 Oxford English Dictionary at www.oed.com, accessed 30 January 2023. The terms 'harmonization' and 'coordination' are not defined in the *Black's law dictionary* (9th ed) that I consulted.

55 For a general reference, see, for example, Talia Einhorn, Kurt Siehr et al (eds), *Intercontinental cooperation through private international law* (Springer 2004).

56 This is hardly a surprise; as the UNCITRAL Secured Transaction's Guide commentary and recommendations put it: '[t]he promotion of certainty and transparency of security rights in movable assets is a key objective of a modern secured transactions regime. Nothing is more central to the realization of this goal than the establishment of a general, notice-based, registry system…' UNCITRAL, Legislative Guide on Secured Transactions, UN Sales No E.09V.12 (2007).

Supervisory Authority forms one of the two constitutive components. Therefore, on the basis of a textual analysis of UNIDROIT's Statute and the relevant instruments, it follows that assuming the role of the Supervisory Authority would contribute to the harmonization and coordination of legal regulation across borders, and therefore fall within the organization's mandate as it currently stands.

5.35. As already mentioned, however, while a purely textual analysis of an organization's founding instrument is important, it is not necessarily conclusive. It is also crucial to examine how the meaning of the terms of the statute has been potentially informed by practice occurring within the organization. As already explained, subsequent practice plays an important role in treaty interpretation, especially when interpreting the constituent instruments of international organizations. The practice of the organization itself can assist in in interpreting and applying terms that may initially seem generic or abstract. Indeed, over the past twenty years, a rather extensive practice has developed in that regard within UNIDROIT.

5.36. To begin with, UNIDROIT has assumed a range of facilitator or coordinating roles in relation to the instruments it has helped draft. To my knowledge this practice includes the following instances, where UNIDROIT has assumed:

- the Depositary role for CTC
- the Depositary role for the Aircraft Protocol
- the Depositary role for the Rail Protocol
- the Depositary role for the Space Protocol
- the Depositary for the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva Securities Convention)
- the role of the Secretariat for the Rail Protocol Preparatory Commission (shared jointly with OTIF)
- the role of the Secretariat for the Space Protocol Preparatory Commission
- the role of the Secretariat for the MAC Protocol Preparatory Commission

5.37. The assumption of these roles clarifies how the meaning of the terms enshrined in Article 1 of the Statute has been understood in practice. These roles are quintessentially coordinator and facilitatory in their nature. Their purpose is to ensure the effective application and implementation of the respective treaty instruments.

5.38. This goes without saying for UNIDROIT assisting the various Preparatory Commissions by performing the role of the Secretariat for them. Each of these commissions is entitled to act 'with full authority as Provisional Supervisory Authority' while preparing for the eventual establishment of the respective protocol-specific permanent Supervisory Authority.[57] This includes preparing and approving all the necessary regulations for the effective operation of the International Registry, as well as selecting a Registrar.

5.39. Naturally, the role of the Depositary also serves the effective application and implementation of the respective treaty instruments. However, in addition to its traditional role, the Depositary in

[57] See eg Diplomatic Conference for the Adoption of the Draft MAC Protocol, Resolution 1 Relating to the Establishment of the Preparatory Commission for the Establishment of the International Registry for Mining, Agricultural, and Construction Equipment, November 2019; Diplomatic Conference for the Adoption of the Draft Space Protocol, Resolution 1 Relating to the Setting up of the Preparatory Commission for the Establishment of the International Registry for Space Assets, March 2019; Diplomatic Conference for the Adoption of the Draft Rail Protocol, Resolution 1 Relating to the Establishment of the Supervisory Authority and International Registry for Railway Stock, February 2007.

this case that has a responsibility under the respective protocols to concern itself with the practical operation and the effectiveness of the Cape Town Convention and its Protocols.[58]

5.40. To the best of my knowledge neither undertaking the role of the Depositary nor that of the Secretariat for the respective Provisional Supervisory Authorities, have encountered opposition within the organization. What is more, with the exception of assuming the role of the Depositary for the Cape Town Convention, it seems uncertain whether accepting these roles was ever authorized through a formal decision, or whether these acceptances just followed an already established understanding of the organization's mandate. In that regard, it should be born in mind that, as the ICJ and the Institut de Droit International have authoritatively noted on different occasions, a continued practice that meets no opposition within the organization creates a presumption that it is *intra vires*.[59]

5.41. The sole direct internal authorization for any of the activities mentioned above can be traced back to Decision No.8 taken by the Governing Council at its 80th session in 2001.[60] That decision authorized the UNIDROIT Secretariat to propose the organization as depositary for the Cape Town Convention.

5.42. The same decision also authorized the Secretariat to 'take […] any other action required to ensure the successful conclusion of the mobile equipment project.' Theoretically, it could be argued that this broad authorization can cover, according to its own terms, the remaining coordinator/facilitatory roles subsequently undertaken by UNIDROIT in relation to the mobile equipment project. Indeed, one could argue that undertaking the role of the Supervisory Authority for the MAC Protocol could also count as 'any other action required to ensure the successful conclusion of the mobile equipment project'. Alternatively, that authorization could be interpreted as being limited to the specific context of the diplomatic Conference to adopt a Mobile Equipment Convention.

5.43. Either way, Decision No. 8 of 2001 forms an important element of institutional practice. If, on the one hand, these roles are considered to have all been authorized by Decision No. 8 of 2001, then the role of the Supervisory Authority could also fall within the ambit of that authorization, since it qualifies as 'any other action required to ensure the successful conclusion of the mobile equipment project.' Alternatively, if it is considered that these roles were not explicitly authorized by Decision No. 8, then their number as well as the fact that they have been completely unopposed equally shows how the organization interprets its own mandate in practice as encompassing the assumption of these ancillary, but quite substantial, roles.

5.44. What is more, even if the authorization deriving from Decision No. 8 of 2001 is construed as limited to a specific time and project, it does show the Governing Council's understanding of the institutional mandate as including the undertaking of any actions that would help bring the mobile equipment project to fruition. This past practice of the Governing Council is especially important, as,

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[58] See Article 61 of the CTC; See article XXXVI for the Aircraft Protocol; Article XLVII of the Space Protocol; Article XXXIII for the Rail Protocol; Article XXXIV for the MAC Protocol.

[59] See eg *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, supra note 17, 86, where the Court found that taking note of a UN Special Rapporteur's reports and his methods of work, as well as a renewal his mandate, created a presumption that the official in question acted within the organizational mandate; *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* supra note 42, 22 analyzed above. The Institut de Droit International has summed up this practice as follows: 'unless otherwise provided in the constituent instrument of the international organization, when there is a general agreement among the membership of the international organization as to an interpretation, the interpretation should be presumed to be lawful and *intra vires*'. See Institut de Droit International, supra note 36, operative clause 7.

[60] See Item No. 8, Decisions taken by the Governing Council at its 80th session (Rome, 17 - 19 September 2001).

according to Article 11 of the Statute, it is the primary organ entrusted with determining the means of carrying out the functions of the organization.

5.45. Equally important to these instances of practice, is the role that UNIDROIT has performed in relation to the Space, Rail, and MAC Preparatory Commissions, apart from serving as their Secretariat.

5.46. According to the 2007 resolution establishing the Rail Protocol Preparatory Commission, the latter is supposed to act in consultation with UNIDROIT in discharging its 'full authority as Provisional Supervisory Authority'.[61]

5.47. UNIDROIT was entrusted with an even more expanded role in relation to the Space Protocol Preparatory Commission.[62] Following the respective resolution from 2019, UNIDROIT'S General Assembly was asked to guide the Preparatory Commission in performing its functions.[63]

5.48. Finally, the 2019 resolution on the establishment of a Preparatory Commission for the MAC Protocol provides that the latter shall act and perform its functions 'under the guidance and the supervision of the Governing Council and the General Assembly'.[64]

5.49. To the best of my knowledge, UNIDROIT has never opposed undertaking these roles and its organs have generally acted in conformity to them. Especially regarding the establishment of the MAC Preparatory Commission, it should be mentioned that it was the UNIDROIT Secretariat itself that prepared the draft text of the resolution, on the request of the Diplomatic Conference.

5.50. This practice is important because it further shows how UNIDROIT understands that its mandate goes even beyond providing assistance to the respective Provisional Supervisory Authority. It clearly encompasses the responsibility to 'consult' and 'guide' it, as well as, in the case of the MAC Protocol, 'guide and supervise' it.

5.51. This practice too informs the meaning of key terms of UNIDROIT'S Statute, including the organization's purposes of 'coordinating' the private law of states; 'facilitating' international relations in the field of private law; 'take an interest in projects already undertaken … with which it may maintain relations 'as necessary'. Moreover, it is hard to imagine that UNIDROIT would have the authority according to the Statute to 'guide and supervise' a Provisional Supervisory Authority but lack the authority to perform the role itself.

5.52. In sum, the internally unopposed assumption and uninterrupted performance of these roles that are quintessentially coordinator and facilitatory in their nature, coupled with the practice of the Governing Council and apparent practice/lack of opposition by General Assembly, illuminates how

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[61] See Diplomatic Conference for the Adoption of the Draft Rail Protocol, Resolution 1. Under the same resolution, the Preparatory Commission is to be composed by at least one representative of UNIDROIT.

[62] Diplomatic Conference for the Adoption of the Draft Space Protocol, Resolution 1. 'TO SET UP, pending the entry into force of the Protocol, a Preparatory Commission (the Commission) to act with full authority as Provisional Supervisory Authority for the establishment of the International Registry, in consultation with the International Institute for the Unification of Private Law (UNIDROIT)…'

[63] Diplomatic Conference for the Adoption of the Draft Space Protocol, Resolution 1, 'TO INSTRUCT the Preparatory Commission to carry out, under the guidance of the General Assembly of UNIDROIT, the following three specific functions'

[64] Diplomatic Conference for the Adoption of the Draft MAC Protocol, Resolution 1 'TO ESTABLISH, pending the entry into force of the Protocol, a Preparatory Commission to act with full authority as Provisional Supervisory Authority for the establishment of the International Registry for mining, agricultural and construction equipment, *under the guidance and supervision of the Governing Council and the General Assembly of* UNIDROIT'; 'TO INSTRUCT the Preparatory Commission to carry out, *under the guidance and supervision of the Governing Council and the General Assembly of* UNIDROIT, the following functions' (emphasis added).

the organization itself has interpreted its mandate in practice over a long period of time. The outward aspect of these roles exhibits how the organization and its members interpret the part of the mandate that refers to 'taking an interest in projects already undertaken in these field' and 'maintaining relations as necessary' by actually assuming additional institutional roles for the benefit of these projects when necessary. The performative aspect of these roles shows how the organization understands its statutory purposes of 'coordinating' the private law of states and 'facilitating' international relations in the field of private law. Construed in this manner through a long and uninterrupted practice, the meaning of these terms could well accommodate the cognate role of the Supervisory Authority, since the latter is, almost by definition, a role designed to 'facilitate international relations in the field of private law'.

5.53. At least three possible objections could be raised to the analysis advanced so far. First, it could be argued that UNIDROIT does not have the requisite expertise to perform the role of the Supervisory Authority. Second, it could be claimed that the roles of the Depositary and the Secretary for the Provisional Supervisory Authority, for which there is well-documented practice, are substantially different from the role of the Supervisory Authority itself. Third, it could be said that all the practice relating to the establishment and running of the Preparatory Commissions should not be taken into account because the latter's authority is only provisional in nature.

5.54. From a legal standpoint, it is not necessary for an international institution to already possess the expertise before engaging with a certain kind of activity, so long as the activity in question falls within its mandate. Thus, political organs such as the UN General Assembly or the Security Council have been able to set up whole parallel institutions in the form of the UNAT on the one hand, and the ICTY on the other, despite having no previous expertise on these matters. In both cases, as already developed, the creation of these tribunals was considered lawful and *intra vires*. Rather, if the activity is considered part of their mandate, these organs have the right to develop the requisite capacities so as to effectively carry it out. As mentioned above, other Supervisory Authorities are assisted by commissions of national experts in performing their tasks. One cannot see why it would be any different should UNIDROIT itself assume the role of the Supervisory Authority for the MAC Protocol. Finally, it should be noted again that UNIDROIT already 'consults; 'guides'; or 'guides and supervises' the respective Preparatory Commissions of the Rail, Space and MAC Protocols.

5.55. As far as the second potential objection is concerned, it should be clarified that the question being asked is neither whether the role of the Supervisory Authority is similar to those Depositary and the Secretary for the Provisional Supervisory Authority—in some respects it is, in others it is not—, nor whether there is precedent for UNIDROIT specifically assuming this role. The eight instances of practice of UNIDROIT assuming coordinator/facilitator roles are important because they all reveal the current understanding of the institutional mandate. The point is that the current understanding can also accommodate UNIDROIT undertaking the role of the Supervisory Authority that can be equally seen as 'taking an interest … and maintain relations as necessary' with a view to 'facilitating international relations in the field of private law'. In other words, UNIDROIT assuming the role of the Supervisory Authority is just a new means of achieving what is by now a well-established aim of the organization, and should thus be considered to fall within its mandate.

5.56. Third, it could be argued that all the practice relating to the three Preparatory Commissions should not be taken into account because these authorities were established only as provisional ones. Such an argument would be flawed. A given activity by an international organization can fall either inside or outside of its mandate; an otherwise *ultra vires* act is not rendered lawful just because it was assumed with a limited timeframe in mind. In this respect, it should be reminded that each one of these Preparatory Commissions had the capacity to 'act with full authority as Provisional Supervisory Authority'. UNIDROIT'S involvement with these could only have been lawful if participating in this kind of activity was within the organization's mandate to begin with. It thus serves as further

evidence as to how the general terms found in Article 1 of the Statute have been interpreted in practice, and how they should be interpreted in the future as well.

5.57. In conclusion, an examination of UNIDROIT'S Statute following the standard rules of international law on treaty interpretation, suggests that it would be lawful for the organization to assume the role of the Supervisory Authority in relation to the MAC Protocol. Accordingly, the Statute of the organization does not need to be amended to that effect.

6. If a new international organisation with separate legal personality is created along the lines of Article 12 of the Rail Protocol, would States need to consent (separately from their ratification of the MAC Protocol) to become members of that new entity?

6.1. Question (f) asks whether states would need to consent separately in order to become members of a new entity that would be established to act as Supervisory Authority under article XIV of the MAC Protocol. However, during the ad hoc Committee's fourth session, it became apparent that there was interest in also addressing certain interrelated questions, namely

(i) whether the MAC Protocol would have needed to explicitly mention the creation of a new international entity to perform the role of Supervisory Authority for that to be legally permissible

(ii) whether the MAC Protocol requires states to become members to the new entity in order for it to function as the Supervisory Authority;

(iii) whether, in the event that such membership is not deemed necessary, a MAC Protocol Contracting State would need to separately consent to a new entity performing the role of Supervisory Authority.

I will address these three questions in turn, before turning to the original formulation of question (f).

6.2. The question of whether the MAC Protocol would have needed to explicitly provide for the creation of a new international entity to perform the role of the Supervisory Authority should be answered in the negative. While the MAC Protocol does not itself provide for the establishment of a new international entity, this does not mean that state parties to the Protocol are not free to create a new organization, should they so choose, or entrust another entity (such as the Preparatory Commission) with the establishment of one. Indeed, the capacity of states to cooperate and organize on a collective level, including by creating new international organizations with legal personality, is an inherent attribute of their sovereignty. Restrictions on this capacity cannot be presumed unless explicitly provided for.

6.3. In this instance, it would be misleading to put too much emphasis on the difference in wording between the Rail and the MAC Protocols. While the former indeed explicitly provides for the creation of a new entity, the latter does not explicitly foreclose it. In fact, Resolution 1 of the MAC Protocol Diplomatic Conference Final Act appears to have been drafted broadly enough so as to allow for the creation of a new entity to be appointed as Supervisory Authority. According to the operative part of that resolution, the Diplomatic Conference resolves 'TO DIRECT the Preparatory Commission to prepare the establishment of the Supervisory Authority'.[65] Under these circumstances, it is fair to

[65] Diplomatic Conference for the Adoption of the Draft MAC Protocol, Resolution 1 Relating to the Establishment of the Preparatory Commission for the Establishment of the International Registry for Mining, Agricultural, and Construction Equipment, November 2019, UNIDROIT DCME-MAC-Doc. 24. At the preamble of the same resolution, the Diplomatic conference recognizes, among other things, the 'advantages of formulating the polices and procedures' employed 'in establishing the International Registry for railway rolling stock in order to facilitate the expeditious establishment of the International Registry for mining, agricultural and construction equipment.'

assume that the state parties did not preclude the possibility for establishing a new entity to serve as Supervisory Authority for the MAC Protocol.

6.4. The question of whether states would need to first become members of that new entity in order for it to function as the Supervisory Authority under the MAC Protocol should also be answered in the negative. While states would need to consent to another entity performing the role of the Supervisory Authority, that consent would not need to take the form of membership to the new organization (or for that matter to an already existing one that agrees to take up that role). Indeed, nothing in international law prevents a state from consenting to be bound by the decisions of an international organization while not being a member of it. This would essentially resemble the scenario that is envisaged in articles 35-36 of the 1969 Vienna Convention on the Law of Treaties (treaties providing for rights and obligations for third parties).[66]

6.5. The related question of whether a state would still need to separately consent to a new entity performing the role of Supervisory Authority should also be answered in the negative. As already mentioned, states would need to consent to the new entity performing its role, but that consent would not need to be expressed in a separate form from the consent expressed via ratifying the MAC Protocol. This is because Article XIV(1) explicitly provides that '[t]he Supervisory Authority shall be the international entity designated pursuant to a resolution of the Diplomatic Conference for the adoption of this Protocol provided that such Supervisory Authority is able and willing to act in such capacity.' Thus, when a state expresses its intention to be bound by the MAC Protocol, this *ipso facto* includes an expression of consent to the Supervisory Authority being designated pursuant to a resolution of the Diplomatic Conference.

6.6. It follows that, if a Supervisory Authority is indeed established following the mandate of that resolution, no separate consent of state parties would be necessary before that entity could lawfully assume its functions under the Protocol. Thus, when becoming a MAC Protocol Contracting State, a state accepts that the appointed international entity will perform the role of the Supervisory Authority in way that is not dissimilar to its acceptance that an international entity such as UNIDROIT, will perform the role of the Depositary, without there being an automatic need to become a member of that international organization in either case.

6.7. Having tackled the three preliminary questions, I will now turn to the question of whether states would need to consent separately in order to become members of a new entity that would be established to act as Supervisory Authority under article XIV of the MAC Protocol. This question should be answered in the affirmative.

6.8. As a general rule, states need to consent in order to become members of international organizations. For states participating in the creation of an international organization, this consent is normally expressed through acceptance of the legal document that first constitutes the organization. Most commonly this legal document is a treaty, often referred to as 'charter', 'constitution' etc.

6.9. States can also become members of an international organization through subsequent application and admission. Analytically, this process of admission encapsulates the consent of the candidate state to becoming a member of the organization in question. Despite the difference in process, the requirement of consent is equally necessary in both cases.

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[66] It should be noted that what is contemplated here does not seem to involve the imposition of any obligations or authority by the Supervisory Authority to the contracting states of the MAC Protocol, such as that would call for the application of article 35 of the VCLT 1969. As detailed in article 17 of the CTC, that describes the functions of the Supervisory Authority, the latter's mandate consists in supervising the International Registry, not in directly putting new obligations in place for parties to the relevant Protocols.

6.10. This requirement of consent is confirmed, rather than circumvented, in the more unusual case where states provide for the establishment of an international organization in a treaty that also addresses other matters. In such cases, the consent of states to the treaty as a whole includes their consent to become members to the organization in question. In these situations, no separate consent through application for admission is necessary.

6.11. A case in point is the International Civil Aviation Organization ('ICAO'). ICAO's constitution forms part of the Chicago Convention on International Civil Aviation that includes several rights and obligations for contracting states apart from establishing ICAO. Other examples include the Covenant of the League of Nations and the constitution of the ILO that were originally included in the 1919 peace treaties, as well as the constitution of the International Energy Agency that forms part of the Agreement on an International Energy Programme of 18 November 1974.

6.12. These cases are atypical only in that the constitution of the new organization is not contained in a separate legal document, and that, hence, the consent of states to be a part of the new organization is expressed in a single formal act, as part of their acceptance of a broader set of rights and obligations contained in the relevant treaty.

6.13. Similar to the examples just provided, the Rail Protocol also provides for the establishment of a new international entity (article XII). This new entity, which is designated to act as the Supervisory Authority under that Protocol, enjoys legal personality (CTC article 27(1)), and should be considered for all intents and purposes an intergovernmental organization.

6.14. Article XII(1) of the Rail Protocol lays out how this new international organization is to be established, as well as what its membership will be. The new organization's membership includes, according to article XXII(1)(a), one representative appointed by each state party to the Rail Protocol. If follows that by becoming a state party to the Rail Protocol, a state simultaneously consents to its membership of the new international entity to be established under article XXII, much like it would be with a state becoming a state party to the Chicago Convention on International Civil Aviation and joining ICAO.[67] Thus, under the Rail Protocol, no separate expression of consent appears to be necessary in order to become a member of the new organization that is supposed to function as the Supervisory Authority.[68]

6.15. Contrary to the Rail Protocol and the other examples just mentioned, the MAC Protocol does not itself provide for the establishment of a new international entity. However, as already explained above, this does not mean that state parties to the Protocol cannot establish a new organization, should they so choose, or entrust another entity (such as the Preparatory Commission) with the establishment of one in order to perform the functions of the Supervisory Authority.

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[67] Some doubts were expressed during the ad hoc Committee's fourth session as to whether the new entity established pursuant to the Rail Protocol is supposed to have an actual membership of states as opposed to simply operating as a committee of 'representatives'. In that regard, it should be noted that resolution no 1 of the Final Act of the Diplomatic Conference of the Rail Protocol provides that the new entity will have a membership composed of states following article XII of the Rail Protocol ('TO DIRECT the Commission to prepare the establishment of the Supervisory Authority, whose members shall be composed of States as provided under Article XII of the Protocol'). The draft Statute of the new entity also provides in Article 2 that the organization's 'membership is determined in accordance with Article XII()1 (b) and (c) of the Protocol'.

[68] This is the case for regular members that ratify the Rail Protocol. Article XII(1) of that protocol also provides for representatives to the new organization to be appointed 'by each of a maximum of three States to be designated by the International Institute for the Unification of Private Law (UNIDROIT)', and the same with OTIF. It should be noted that, in this case, UNIDROIT and OTIF only 'designate' those respective states that would then have to accept or otherwise express their consent to that designation. For states, becoming a member of an international organization is a prerogative of their sovereignty; it is inconceivable that a state would become a member of an international organization without its consent.

6.16. However, one should be careful to distinguish between the idea that the state parties potentially retained the freedom to create such an entity and the fact that they did not exercise that freedom in the MAC Protocol itself. While, as already mentioned, it is conceivable that a legal document enshrines both classic treaty obligations and the creation of a new organization —thus necessitating consent to be formally expressed only once to the instrument as a whole by interested states—, this is not what happened in this case. Instead we have a treaty that potentially leaves it up to the state parties to create a new international organization to serve as Supervisory Authority.

6.17. Accordingly, if it is decided that a new organization is established, this establishment would now have to assume separate legal form. In turn, this separate legal form would have to be covered separately by the consent of the state parties if they wish to become members to it.[69] Moreover, after the new organization is established, non-founding members that become parties to the MAC Protocol at a later date would in principle have to consent to their admission and membership to this new organization, as these would not follow automatically from the MAC Protocol itself.

6.18. It follows that the ratification of the MAC Protocol by a state cannot ipso facto make it a member to a new organization whose establishment is not mentioned at all in the protocol itself. Instead, a separate expression of consent that is directed specifically at the legal instrument that actually establishes the said organization would be necessary in order to attain such membership. The exact formalities for attaining membership after the constitution of the new organization, that is for states joining the MAC Protocol after the latter has entered into force and after an operational Supervisory Authority with its own legal personality has been set up, would be subject to the rules of that new organization's founding instruments. In any event, some process whereby the consent of the state to become such a member is confirmed would be necessary.

6.19. Although answering the question of consent to membership might seem somewhat superfluous given the conclusion that the MAC Protocol does not itself pose a requirement of membership for the Supervisory Authority to function, it is still important to consider for two reasons.

6.20. First, if states do indeed wish to create a new international organization to perform the functions of the Supervisory Authority it will still need to have *some* members, as it is hardly conceivable to have an international organization without members. These founding members would need to consent separately in order to become members of that new international organization. Once that nucleus of membership is formed and an international organization comes into existence then the considerations developed in paragraphs 6.5-6.6 could come into play (regarding whether a MAC Protocol Contracting State would need to separately consent to a new entity performing the role of Supervisory Authority).

6.21. Second, if states do indeed elect to create a new international organization, the problem of membership will inevitably arise. In this case, the avenue open to the drafters of the Statute of the Supervisory Authority for the Rail Protocol, namely that the membership is to be determined by reference to a specific treaty provision, will not be available, as the MAC Protocol does not feature a provision similar to article XII(1) of the Rail Protocol. In such a scenario, a reasonable alternative would be to provide that membership is open to all state parties of the MAC Protocol and then leave it up to them to decide if they would join that new organization. In that case, however, a separate expression of consent would indeed be necessary, as explained above.

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[69] Contrary to the case of accepting that the new entity will perform the role of the Supervisory Authority, it cannot be argued that states will become members to the new organization just by consenting to the MAC Protocol itself. The reason for this is that Article XIV refers only to the 'designation' of an entity as the Supervisory authority rather than any kind of membership. As suggested above, states arguably do consent to that designation by consenting to the MAC Protocol, but they will not ipso facto become members of the new organization.

6.22. In conclusion:

(i) States are free to establish a new international organization to perform the functions of the Supervisory Authority under the MAC Protocol.

(ii) Neither the MAC Protocol nor general international law require that state parties must also become members to the Supervisory Authority for the latter to be able to perform its role under the treaty.

(iii) If a new organization is established following article XIV(1) of the MAC Protocol, no separate consent by the state parties would be necessary for that organization to be able to perform the role of the Supervisory Authority.

(iv) Notwithstanding conclusion (ii), states would still need to consent separately in order to become members of a new international organization established to perform the role of the Supervisory Authority under the MAC Protocol, should they so desire, or should the statute of the new organization require them to do so.

7. Would UNIDROIT's immunities (deriving from its Statute and Headquarters Agreement) ensure that a new international entity with separate legal personality created to perform the role of Supervisory Authority would the same level of immunity in relation to the exercise of its functions as Supervisory Authority?

7.1. Question (g) asks whether a separate legal entity created to perform the role of Supervisory Authority ('new international organization') would enjoy the same privileges and immunities that UNIDROIT currently enjoys under its statute and its Headquarters Agreement.[70]

7.2. In answering this question, it should be born in mind that according to CTC article 27, the 'Supervisory Authority shall have international legal personality where not already possessing such personality'. The new Supervisory Authority will thus enjoy a legal personality of its own, separate from that of its member states as well as UNIDROIT. This would also be the case if UNIDROIT agrees to assist this new organization by acting as its Secretariat. The two legal persons would retain their own legal personality, even as they would operate together as part of a special relationship with potentially important legal consequences for both.

7.3. One issue that merits particular attention in that regard is the question of privileges and immunities. As far as UNIDROIT is concerned, these largely emanate from the Headquarters Agreement with the Italian State. The latter is a bilateral treaty that is, according to its own terms, concerned only with the privileges and immunities accorded to the Institute, rather than any other organization. It follows that if the new entity indeed enjoys its own legal personality, it will not be covered by the scope ratione personae and materiae of the Headquarters Agreement that refer exclusively to UNIDROIT. Therefore, the new organization would not enjoy UNIDROIT'S privileges and immunities as these emanate from the Headquarters Agreement.

[70] Article 2 of UNIDROIT's Statute provides that '[t]he privileges and immunities which the Institute and its agents and officers shall enjoy shall be defined in agreements to be concluded with the participating Governments'. In this respect, an agreement with Italy, entitled 'Agreement between the Italian Government and the International Institute for the Unification of Private Law in respect of the privileges and immunities of the Institute' ('Headquarters Agreement') was concluded in Rome on 20 July 1967. This agreement was approved by the Italian Chamber of Deputies (La Camera dei deputati) and the Italian Senate (Senato della Republica) with Law of 12 December 1969, No. 1074. Law no. 1074 replicates the text of the Headquarters Agreement and incorporates into the Italian legal system. The Headquarters Agreement was amended in 1995, following an exchange of Notes Verbales between the Italian Government and UNIDROIT. These amendments were also approved by the respective Italian institutions and passed into Italian law with Law of 16 June 1997, no. 193.

7.4. This situation does not change in view of the possibility that UNIDROIT acts as a Secretariat for the new organization. The fact that an international organization may enlist the assistance of another entity with its own legal personality, whether a state or an international organization, does not automatically make it enjoy the rights, privileges and immunities of the latter. The international organization enlisting this assistance would still retain its own legal personality, meaning that it would not be covered in this case by the bilateral agreement between UNIDROIT and the Italian State.

7.5. Despite the Headquarters Agreement not applying directly to the new organization, it is still worth considering whether certain provisions of it could provide at least some protection to the representatives of that new entity.

7.6. Article 6 of the Headquarters Agreement provides that '[t]he representatives of international institutes or Organizations that take part in the meetings convened by the Institute' shall be accorded certain privileges and immunities'. One could argue that if, for example, the meetings of the new organization are held by UNIDROIT in Rome, then the representatives of that new organization would be covered by the provisions of article 6.

7.7. There are two things worth noting here. First, there can be serious doubt as to whether this is the correct interpretation of article 6 of the Headquarters Agreement. If UNIDROIT is indeed acting as the new organization's Secretariat then those meetings would, arguably, be 'convened' by the new entity itself as far as the law is concerned, even if in practice it would be UNIDROIT that administered all the relevant details (essentially UNIDROIT would be helping the new organization to set up those meetings, that would be carried out in the latter's name). That would mean that the officials attending those meetings would be attending meetings technically convened by the new organization. Those meetings would thus constitute activities that fall outside the scope of article 6.

7.8. Second, even if that were the correct interpretation of article 6, it would not mean that the new organization as a whole enjoys the 'same' level of privileges and immunities as UNIDROIT, as the question posed to the ad hoc Committee asks. It would instead enjoy only a subset of those, namely those privileges and immunities provided in article 6 for its representatives, but not those provided for articles 1, 2, 3, 4, 5, and 7.

7.9. Under these circumstances, question (i) should be answered in the negative.[71] While there might be a way to argue that representatives of the new organization should enjoy some privileges and immunities of those accorded in article 6 of the Headquarters Agreement, this is open to interpretation, and would not, in any event, secure that the new organization as a whole enjoys the 'same' level of immunity with UNIDROIT. The new organization would arguably have to negotiate a new treaty with its host state in order to ensure that it and its officials enjoy a similar level of protection to that of UNIDROIT.[72]

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[71] Although this goes beyond what is being asked here, it should be noted that neither the CTC nor the MAC Protocol provide for any privileges and immunities in that regard for the Supervisory Authority. CTC article 27(2) provides that 'The Supervisory Authority and its officers and employees shall enjoy such immunity from legal or administrative process as is specified in the Protocol', yet the MAC Protocol itself does not specify any treaty-based immunities in that regard. Instead, article XIV provides that 'The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise.' Unless the new entity enters into treaties with states providing for such immunities, this would leave customary international law as the only potential source for immunities for the new organization. However, the status of such immunities under customary international is uncertain. See Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, CUP 2015) 148-9; Michael Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2013) 10 International Organizations Law Review 287. Fully exploring this question would go beyond what is being asked here, namely whether the privileges and immunities provided under UNIDROIT's Headquarters Agreement would also be applicable to a new international organization with its own distinct legal personality.

[72] See footnote above for the contested question of whether the new organization could claim some immunities under customary international law.

7.10. Although the question posed could be interpreted as asking solely about the immunities of the new organization, it might also be worth addressing in advance the question of whether UNIDROIT itself, as well as its organs and/or officials enlisted to assist this new organization would continue to normally enjoy their privileges and immunities under the Headquarters Agreement when performing acts for that new entity.

7.11. The danger here is that, because these organs and officials will be performing official functions for another international organization, they will no longer be covered by UNIDROIT's Headquarters Agreement insofar as the performance of these functions is concerned. A full exploration of this line of inquiry can only be hypothetical at this stage, as the details of the exact relationship between the new entity and UNIDROIT are themselves tentative.

7.12. At a fundamental level two models for the potential relationship between UNIDROIT and the new international organization seem more relevant. According to the first, UNIDROIT and the new entity work together and thus may both incur responsibility for possible internationally wrongful acts. According to the second, UNIDROIT places some of its organs and/or personnel at the disposal of the new organization, and any committed internationally wrongful conduct is, in principle, attributable to the new organization. Both models raise questions relating to UNIDROIT'S immunities that need attention.[73]

7.13. The first model approximates the relationships encountered in article 14 or 15 of the 2011 Draft articles on the Responsibility of International Organizations ('DARIO').[74]

7.14. Article 14 provides that: [a]n international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.

7.15. Article 15 provides: '[a]n international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.'

7.16. In terms of more practical examples, a situation that approximates the relationship described in article 14 and 15 of the DARIO is the one envisaged in article XII of the Rail Protocol. This article describes the setting up of a new international organization to act as Supervisory Authority for the Rail Protocol. It also provides for the Intergovernmental Organisation for International Carriage by Rail ('OTIF') acting as Secretariat for the new organization. Article XII(6) of the Rail Protocol describes the relationship as follows: '[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'. Although the language does not fit perfectly the categories established by the DARIO (notably

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[73] As already mentioned in paragraph 7.9, the new international entity would not appear to be automatically entitled to any conventional immunities. Thus, what follows explores solely the question of whether UNIDROIT can still benefit from the Headquarters Agreement while serving as the Secretariat of that new organization.

[74] See Draft articles on the Responsibility of International Organizations with commentaries, 2011 YILC vol II, Part Two, 66-67. See also article 14 on 'aid or assistance'. The 'articles' and not an international treaty but enjoy authority insofar as they reflect existing norms of customary international law and/or general principles of law. It is submitted here that article 7 is in fact an elaboration of a more general principle regarding attribution of conduct and responsibility in international law, an expression of which is also found in article 6 of the 2001 Articles of State Responsibility.

it refers to 'assistance … as directed', thus incorporating elements from both articles 14 and 15), this approximates a scenario of collaboration rather than of lending organs by one organization to another.

7.17. In this scenario, UNIDROIT would still be acting in its own name, even if the new entity might bear some responsibility for internationally wrongful acts committed in that capacity. Conversely, UNIDROIT could theoretically bear responsibility for any assistance it provides to wrongful acts committed by that new organization.

7.18. Most importantly, for UNIDROIT organs and officials to still be covered by the privileges and immunities contained in the Headquarters Agreement, it would have to be concluded that any related acts where performed while pursuing UNIDROIT's functions. In this case, it would have to be shown that performing acts under the direction and control, or in the assistance of, another international organization falls within UNIDROIT's functions. As my answer to question 8 demonstrates, that is the right position to take with respect to the Supervisory Authority functions of the MAC Protocol, but it should also be noted that this scenario is not free of potential complications when it comes to immunities.

7.19. The second possible model for the relationship between UNIDROIT and the new international entity is that of putting organs or personnel of an organization at the disposal of another organization. Article 7 of the DARIO describes such a scenario: '[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.'[75]

7.20. A practical arrangement that seems analytically closer to this model is the current role that the UNIDROIT Secretariat performs in relation to the Preparatory Commission for the MAC Protocol. According to the resolution establishing this Preparatory Commission, 'the UNIDROIT Secretariat' (and, notably, not UNIDROIT as an organization) will serve as 'the Secretariat of the Preparatory Commission'.[76] This seems to be a case where a single organ is placed at the disposal of another organization, rather than two organizations working together. (I do understand that in practice the difference between this and the first scenario may be imperceptible to all those involved in the daily running of things, but there is a distinction to be drawn from an analytical point of view).

7.21. If the factual circumstances of the relationship between the new organization and UNIDROIT support the application of article 7 of the DARIO, that would mean that any potentially wrongful conduct of UNIDROIT organs and/or officials placed at the disposal of the new organization would be, as a matter of international law, attributable to the new organization, and incur the latter's responsibility. In this scenario, it could even be argued that the question of invoking UNIDROIT's immunities would theoretically not arise for internationally wrongful acts performed by its organs while being at the disposal of the new organization, because there would be, legally speaking, no acts of UNIDROIT to begin with.[77] In other words, either UNIDROIT's actions will be attributable to the

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[75] See Draft articles on the Responsibility of International Organizations with commentaries, 2011 YILC vol II, Part Two, 56.

[76] Diplomatic Conference for the Adoption of the Draft MAC Protocol, Resolution 1.

[77] This conclusion is phrased with some caution as (a) the details of the legal relationship between UNIDROIT and the new organization can only be subject of speculation at this point; (b) the application of the relevant rules of attribution is very fact-sensitive, making it impossible to reach any definitive conclusions in advance; (c) the law itself is not entirely clear on some of the finer details of attribution, to some extent because the legal and factual possibilities cannot be predetermined in an exhaustive manner; as the commentary to article 7 of the DARIO suggests, 'Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded.' Draft articles on the Responsibility of International Organizations with commentaries, 2011 YILC vol II, Part Two, 54.

new organization, in which case there the questions of immunities would not arise, or even if somehow, the acts are still attributable to UNIDROIT, that would only mean that the relevant privileges and immunities under its Headquarters Agreement would continue to apply.

7.22. The situation is less straightforward with regard to personal privileges and immunities of UNIDROIT organs and officers[78] placed at the disposal and/or acting under the direction of the new organization.[79]

7.23. As already mentioned in my previous legal opinion, the personal privileges and immunities provided for in articles 6 and 7 of the Headquarters Agreement are functional in scope and purpose, meaning that they are there to ensure that the Institute is able to perform its mission unobstructed by domestic legal processes.

7.24. However, it could be argued that the moment that an officer of UNIDROIT is placed at the disposal of another organization, then they are no longer performing any related actions in a UNIDROIT official capacity, but rather in an official capacity of that new organization. This would mean the organ/person in question would no longer be covered by the immunities provided in the Headquarters Agreement.

7.25. A counterargument to this could be that performing an official capacity for another organization can still be viewed as falling within the official role and duties of the relevant UNIDROIT organs/officials because it was mandated by their parent organization (in other words, the duty/official capacity in this instance is to perform tasks for another organization). According to this line of argument, even if the acts of the relevant UNIDROIT organs/officials are attributable to the new organization as far as international responsibility is concerned, they would still count as acts carried out in a UNIDROIT official capacity for the purposes of establishing immunities. This would mean that they would be covered by articles 6 and 7 of the Headquarters Agreement.

7.26. On the balance of things, the second view appears to be the correct one. This means that UNIDROIT organs and personnel would continue to be covered by the Headquarters agreement, even when they are carrying out functions as the Secretariat of the new organization.

7.27. This boils down to the idea that even when on loan or at the disposal of another entity, organs of a state of an international organization do not technically cease to be organs of their parent institution. While article 7 of the DARIO institutes a legal fiction regarding the attribution of certain acts, it does not provide a definition of what an organ of an international organization is for all intents and purposes. Instead, the organs that are being transferred remain at all times organs of the parent institution, unless otherwise provided. This conclusion is also supported by article 2 of the DARIO, which provides that an '"organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization'.

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[78] It is beyond the scope of this work to assess the various factual patterns that would lead a scenario potentially involving the responsibility of such organs and officers to materialize. Theoretically, this could involve something as simple a traffic violation on the way to a meeting of the Supervisory Authority.

[79] The relevant documented international practice on such questions appears to be rather limited. Similar arrangements are found in international environmental law, where, for example, the UN Environmental Programme serves as the Secretariat for the Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Basel Convention Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, as well as others. Furthermore, apparently, the Secretariat of EFTA tends to borrow all its professional higher-level staff on secondment for terms of four to six years by its member states. On the EFTA see Henry G Schermers and Niels M Blokker, *International Institutional Law* (Martinus Nijhoff 2011) 374. Generally speaking, recorded instances of legal practice in relation to international organizations lending their personnel are very rare. The 2001 Articles on State Responsibility mention this only as a theoretical responsibility, whereas the DARIO mention only one example (that of the Pan American Health Organization in relation to the WHO).

7.28. Further insights on the meaning of the words 'acts performed in their official capacity and within the limits of their duties' that are found in article 7(1)(a) of the Headquarters Agreement can be provided by looking at how 'official capacity' is understood in the context of other articles of the DARIO. As the commentary to article 8 suggests, '[in order to determine whether certain conduct is "off-duty" or "on-duty"] … [o]ne would then have to examine whether the … conduct in question is related to the functions entrusted to the person concerned.' In this case, the organs and officers of the Institute would be performing these functions for the Supervisory Authority only because UNIDROIT organization 'entrusted' these functions to them.[80] They should thus be considered actions 'performed in their official capacity' and 'within the limits of their duties' for the purposes of the Headquarters agreement.

7.29. Regardless of this conclusion, the fact remains that this presents a legally complicated and, if not entirely unprecedented, certainly not well-documented scenario. In such a situation, great care must be devoted into minimizing the associated legal risk though the careful drafting of the relevant documents.

7.30. Ways to minimize this legal risk for UNIDROIT could include (a) the new organization signing a new Headquarters Agreement that explicitly includes persons working for the Secretariat (making thus certain that either way UNIDROIT personnel are covered) and/or (b) issuing an interpretative statement of the existing Headquarters Agreement that clarifies that UNIDROIT personnel continue to act in an official capacity when performing functions for other international organizations as part of their duties. The latter option could also take the form of a confirmatory joint decision by the President of the Institute together with the Minister of Foreign Affairs, pursuant to article 7(2) of the Headquarters Agreement.[81] In addition, attention should be paid to the terms of a potential agreement between the new organization and UNIDROIT that will detail the conditions for performing the tasks of the Secretariat. This agreement could specify that Secretariat officers remain under the administrative supervision of UNIDROIT at all times and that they are in fact acting in an official UNIDROIT capacity and within the limits of their duties, even when they are providing services for the new organization.

8. Would the UNIDROIT Statute need to be amended to allow for UNIDROIT to perform the role of Secretariat for a new international entity with separate legal personality created to perform the role of Supervisory Authority?

8.1. According article 1 of UNIDROIT's Statute, the purposes of the organization include, among other things, 'to examine ways of harmonising and coordinating the private law of States' and 'to this end … (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; … (d) take an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary'. Furthermore, article 11(1) of the Statute provides that '[t]he Governing Council shall determine the means of carrying out the functions set out in Article 1'.

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[80] As already mentioned, the documented international practice in that regard is rather scarce. A similar situation arose with the composition of the Arbitration Commission of the Peace Conference on Yugoslavia (also known as the Batinder Commission). According to the Commission's 1993 Terms of Reference, the reconstituted five-member "Arbitration Commission" was to comprise, among others, of one judge of the European Court of Human Rights designated by that Court's president. Because the appointment was *ex officio,* the appointed judge was arguably continuing to act in his/her official capacity, but still this most likely did not mean that the opinions rendered by the Commission were in attributable in any manner to the European Court of Human Rights.

[81] As article 7(2) provides: '[t]he categories of officers of the Institute to whom the privileges and immunities referred to in this article apply shall be decided by the President of the Institute together with the Minister of Foreign Affairs'.

8.2. Statutes of international organizations are international treaties, and thus subject to the relevant rules of interpretation, as analysed in my first legal opinion to the ad hoc Committee (see paras 5.1-5.27 of that opinion).

8.3. In that regard, it is important to take note of the organization's own interpretation of its constituent instrument as this has emerged from its past practice. Indeed, UNIDROIT has already been performing the role of the Secretariat for the Rail Protocol Preparatory Commission (shared jointly with OTIF), the role of the Secretariat for the Space Protocol Preparatory Commission, and the role of the Secretariat for the MAC Protocol Preparatory Commission itself. It should be noted that these 'Preparatory Commissions' are entitled to act with full authority as Supervisory Authorities until the latter are formally established. Hence, it seems that UNIDROIT has already been performing very similar, if not identical, roles in all but name.

8.4. Moreover, UNIDROIT has performed additional supervisory roles in relation to the Space, Rail, and MAC Preparatory Commissions. According to the 2007 resolution establishing the Rail Protocol Preparatory Commission, the latter is supposed to act 'in consultation' with UNIDROIT in discharging its 'full authority as Provisional Supervisory Authority'.[82] UNIDROIT was entrusted with an even more expanded role in relation to the Space Protocol Preparatory Commission.[83] Following the respective resolution from 2019, UNIDROIT'S General Assembly was asked to 'guide' the Preparatory Commission in performing its functions.[84] Finally, the 2019 resolution on the establishment of a Preparatory Commission for the MAC Protocol provides that the latter shall act and perform its functions 'under the guidance and the supervision of the Governing Council and the General Assembly'.[85]

8.5. It follows from the above that UNIDROIT has consistently interpreted its mandate as including important functions to be performed after the conclusion of the instruments whose drafting it has assisted. In this regard, as the International Court of Justice as well as the Institut de Droit International have authoritatively noted on different occasions, a continued practice that meets no opposition within the organization creates a presumption that it is *intra vires*.[86] To the best of my knowledge, no such opposition has been recorded within UNIDROIT in relation to this past practice. Past practice thus supports the notion that assuming the role of the Secretariat for the new organization would be *intra vires*, and thus not necessitate an amendment of UNIDROIT's Statute.

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[82] See Diplomatic Conference for the Adoption of the Draft Rail Protocol, Resolution 1. Under the same resolution, the Preparatory Commission is to be composed by at least one representative of UNIDROIT.

[83] Diplomatic Conference for the Adoption of the Draft Space Protocol, Resolution 1. 'TO SET UP, pending the entry into force of the Protocol, a Preparatory Commission (the Commission) to act with full authority as Provisional Supervisory Authority for the establishment of the International Registry, in consultation with the International Institute for the Unification of Private Law (UNIDROIT)…'.

[84] Diplomatic Conference for the Adoption of the Draft Space Protocol, Resolution 1, 'TO INSTRUCT the Preparatory Commission to carry out, under the guidance of the General Assembly of UNIDROIT, the following three specific functions'

[85] Diplomatic Conference for the Adoption of the Draft MAC Protocol, Resolution 1 'TO ESTABLISH, pending the entry into force of the Protocol, a Preparatory Commission to act with full authority as Provisional Supervisory Authority for the establishment of the International Registry for mining, agricultural and construction equipment, *under the guidance and supervision of the Governing Council and the General Assembly of UNIDROIT*'; 'TO INSTRUCT the Preparatory Commission to carry out, *under the guidance and supervision of the Governing Council and the General Assembly of UNIDROIT*, the following functions' (emphasis added).

[86] See eg *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, supra note 17, 86, where the Court found that taking note of a UN Special Rapporteur's reports and his methods of work, as well as a renewal his mandate, created a presumption that the official in question acted within the organizational mandate; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, supra note 43, 22 . The Institut de Droit International has summed up this practice as follows: 'unless otherwise provided in the constituent instrument of the international organization, when there is a general agreement among the membership of the international organization as to an interpretation, the interpretation should be presumed to be lawful and *intra vires*'. See Institut de Droit International, supra note 37, operative clause 7.

8.6. This conclusion is not contradicted by the text of UNIDROIT's Statute which gives a wide discretion to the Governing Council in devising the means for carrying out the functions of the organization (see article 11(1) in conjunction with article 1). At the same time, performing this role appears to be consistent with advancing the purposes of the organization, as the Supervisory Authority is, according to its own terms, an institution designed to help with coordination and harmonization in the field of application of the Cape Town Convention in general, and the MAC Protocol in this instance.[87]

8.7. In conclusion, performing the role of the Secretariat for a new international entity that would assume the role of the Supervisory Authority under MAC Protocol would be in conformity with the constitution of the organization. Accordingly, UNIDROIT'S Statute would not need to be amended so as to allow the organization to accept the role of the Secretariat for the new Supervisory Authority.

9. Summary of Conclusions

9.1. No conflict under public international law would arise if UNIDROIT undertook both the role of the Supervisory Authority and the Depositary under the MAC Protocol. In performing its role as the Depositary, UNIDROIT should be mindful of the general duties of depositaries under customary international law, as these are reflected in Article 76(3) of the VLCT.

9.2. UNIDROIT would continue to enjoy the same level of protection under its Headquarters Agreement in terms of privileges and immunities in relation to the exercise of its functions as Supervisory Authority. Governing Council members and their delegates, General Assembly representatives, and Secretariat officers would continue to enjoy the same level of protection under UNIDROIT'S Headquarters Agreement when performing the Supervisory Authority functions.

9.3. In terms of their liability under national and international law, the legal position of Governing Council members, General Assembly representatives, and the Secretariat officers who perform the Supervisory Authority functions is the same as that for performing any other function of the organization. My understanding is that, in practice, the associated legal risk is very low and could be mitigated to almost non-existent through the careful drafting of the relevant legal documents.

9.4. UNIDROIT'S Statute does not pose any specific limitations on how its organs could discharge the Supervisory Authority functions other than those general stipulations that normally apply to the undertaking and performing of any function by the organization.

9.5. An interpretation of the Statute according to well-established international law rules on treaty interpretation shows that assuming the role of the Supervisory Authority would fall within the organization's mandate. Accordingly, UNIDROIT'S Statute would not need to be amended so as to allow the organization to accept the role of the Supervisory Authority.

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[87] As explained in my first legal opinion, the Cape Town Convention Project is aimed at 'harmonization' and 'cooperation' of legal interests and regulations at a transnational level. According to the Preamble of the Cape Town Convention, the state-parties seek to 'facilitate … transactions[s] by establishing clear rules to govern them', are 'mindful of the need to ensure that interests in such equipment are recognised and protected universally', and are 'conscious of the need to establish a legal framework for international interests in such equipment and for that purpose create an international registration system for their protection'. It follows from the above that the international registration system is seen as a fundamental means of ensuring the project's harmonization and coordination goals. In turn, the 'international registration system' established by the Convention is, according to Chapter IV (entitled 'The international registration system'), made up of two components: the International Registry (CTC Article 16) and the Supervisory Authority (CTC Article 17). Thus, these two roles are equally, and indispensably, connected to and complement, the Convention's goals of harmonization and coordination regarding the legal regulation of large interests in mobile equipment across borders.

9.6. States are free to establish a new international organization to perform the functions of the Supervisory Authority under the MAC Protocol. At the same time, neither the MAC Protocol nor general international law require that state parties must also become members to the Supervisory Authority for that to be able to perform its role under the treaty. Moreover, if a new organization is indeed established following article XIV(1) of the MAC Protocol, no separate consent by the state parties would be necessary for that organization to be able to perform the role of the Supervisory Authority; instead all that would be necessary in that case would be state consent to the MAC Protocol itself. Notwithstanding the conclusion that the MAC Protocol does not pose a requirement of membership to the new organization, states would still need to consent separately in order to become members of that entity, should they so desire, or should the statute of that new organization require them to do so.

9.7. UNIDROIT's immunities would not ensure that a new international entity with separate legal personality created to perform the role of Supervisory Authority enjoys the same level of immunity in relation to the exercise of its functions as Supervisory Authority. If UNIDROIT decided to perform the role of the Secretariat for that new international entity, careful attention should be paid to drafting the relevant legal documents so as to ensure that UNIDROIT organs and officials involved in performing these functions continue to be covered by the existing UNIDROIT Headquarters Agreement.

9.8. An interpretation of the Statute according to well-established international law rules on treaty interpretation shows that assuming the role of the Secretariat for the new entity that will perform the role of the Supervisory Authority would fall within the organization's mandate. Accordingly, UNIDROIT'S Statute would not need to be amended so as to allow the organization to accept the role of the Secretariat for the new Supervisory Authority.

Orfeas Chasapis Tassinis

ANNEXE II

LE COMITÉ *AD HOC*

A. Établissement, composition et réunions

1. Comme indiqué dans la Partie I du présent document, à sa 101ème session (juin 2022), le Conseil de Direction d'UNIDROIT a décidé de créer un Comité *ad hoc*, composé de membres intéressés du Conseil de Direction et d'experts en droit international public et en droit des traités, pour examiner les questions de droit international public non résolues relatives à la nomination d'une Autorité de surveillance du Registre international qui sera établie en vertu du Protocole MAC (le "Comité").

2. En août 2022, le Secrétariat a écrit aux membres du Conseil de Direction pour les inviter à proposer des candidatures pour le Comité. Les membres du Conseil de Direction ont été invités à se nommer eux-mêmes et/ou à nommer un expert en droit international public pour participer aux travaux du Comité. Sur la base des nominations reçues, le Comité comprend 11 participants, dont sept membres du Conseil de Direction et quatre experts en droit international public.

Membres du Conseil de Direction au sein du Comité

- Maria Chiara MALAGUTI (Présidente d'UNIDROIT, Présidente du Comité)[1]
- Stefania BARIATTI (Italie)
- Hans-Georg BOLLWEG (Allemagne)
- Henry GABRIEL (États-Unis d'Amérique)
- Niklaus MEIER (Suisse)
- Kathryn SABO (Canada)
- Jingxia SHI (République populaire de Chine)

Experts de droit international public au sein du Comité

- Miguel ELIZALDE, Professeur de *Estudios de Derecho y Ciencias Políticas* and Director of *Máster Universitario en Derechos Humanos, Democracia y Globalización* (nommé par Alfonso-Luís CALVO CARAVACA)
- Chiara GIORGETTI, Professeure de droit, Faculté de droit de l'Université de Richmond (nommée par Henry GABRIEL)
- Anastasios GOURGOURINIS, Professeur Assistant de droit international, National and Kapodistrian School of Law, Département d'études internationales (nommé par Eugenia DACORONIA)
- Carmen MOLDOVAN, Professeure associée de droit international public à la Faculté de droit, Université Alexandru Ioan Cuza (nommée par Carmen Tamara UNGUREANU)

3. En outre, le Secrétariat a demandé qu'un expert en droit des traités prépare un avis juridique indépendant sur les questions de droit international public, pour discussion par le Comité. Le Secrétariat a demandé au Dr Orfeas Chasapis Tassinis (Research Fellow, Université de Cambridge) de préparer l'avis juridique, sur la base d'un document et d'une présentation qu'il avait faits lors de

[1] En raison d'autres engagements, la Présidente d'UNIDROIT a été représentée par le Secrétaire Général d'UNIDROIT, le Professeur Ignacio Tirado.

la 11ème Conférence académique annuelle de la Convention du Cap en septembre 2022. L'avis juridique final de M. Chasapis Tassinis est disponible à l'Annexe I du présent document (en anglais).

4. Le Comité s'est réuni à cinq reprises entre novembre 2022 et avril 2023 [2]. Chaque session s'est tenue en vidéoconférence. Lors de la première session, le Comité s'est prononcé sur les questions d'organisation et les questions juridiques qui devaient être examinées. Lors des deuxième et troisième sessions, le Comité a discuté et résolu les questions juridiques liées au fait qu'UNIDROIT assume le rôle d'Autorité de surveillance ("Option A"). Lors de la quatrième session, le Comité a discuté et résolu les questions juridiques liées à la création d'une nouvelle entité internationale pour assumer le rôle d'Autorité de surveillance avec UNIDROIT comme Secrétariat. Après la quatrième session, les membres du Conseil de Direction du Comité se sont réunis une dernière fois pour discuter d'autres questions liées à la nomination d'une Autorité de surveillance.

B. Questions juridiques examinées et conclusions

5. Le Comité a examiné huit questions juridiques liées à la nomination d'une Autorité de surveillance [3]. Pour chaque question juridique, le Comité a examiné l'avis juridique indépendant préparé par le Dr Chasapis Tassinis, a fourni des commentaires et a finalement décidé si le Comité soutenait les conclusions de l'avis juridique.

6. Le tableau ci-dessous résume les questions examinées par le Comité, la conclusion de l'avis juridique sur chaque question et la décision du Comité par rapport à chaque question. Le Comité a adopté les conclusions de l'avis juridique indépendant pour les huit questions. Pour sept des huit questions, le Comité a adopté à l'unanimité l'avis juridique. En ce qui concerne la question 5 (si le Statut organique d'UNIDROIT devait être amendé pour permettre à UNIDROIT d'accepter le rôle d'Autorité de surveillance), le Comité a adopté l'avis juridique par un vote partagé de 9 voix pour et 2 voix contre [4].

	Question juridique	**Avis juridique indépendant**	**Décision du Comité**
1	Y aurait-il un conflit en vertu du droit international public si UNIDROIT assumait à la fois le rôle d'autorité de surveillance et de dépositaire en vertu du Protocole MAC ?	Il n'y aurait pas de conflit en vertu du droit international public si UNIDROIT assumait à la fois le rôle d'Autorité de surveillance et de Dépositaire en vertu du Protocole MAC. Dans l'exercice de son rôle de Dépositaire, UNIDROIT devrait garder à l'esprit les obligations générales des dépositaires en vertu du droit international coutumier, telles qu'elles sont reflétées dans l'article 76(3) de la Convention de Vienne sur le droit des traités.	Adoption à l'unanimité de l'avis juridique

[2] Les cinq sessions se sont tenues le 4 novembre 2022, le 16 décembre 2022, le 7 février 2023, le 21 mars 2023 et le 6 avril 2023.

[3] Le Comité a décidé des questions juridiques lors de sa première session; cependant, la portée et la formulation exactes des questions juridiques ont évolué tout au long des discussions du Comité. Les questions juridiques énumérées dans le présent document reflètent les neuf questions juridiques finalisées abordées dans l'avis juridique indépendant figurant à l'Annexe I du présent document.

[4] Quatre experts en droit international public nommés par les membres du Conseil de Direction et cinq des membres participants du Conseil de Direction ont soutenu la conclusion de l'avis juridique. Deux membres du Conseil de Direction ont exprimé des réserves et n'ont pas soutenu la conclusion de l'avis juridique.

2	Les immunités d'UNIDROIT (découlant de son Statut organique et de l'Accord de siège) garantiraient-elles de façon suffisante qu'UNIDROIT jouirait du même niveau d'immunité dans l'exercice de ses fonctions d'Autorité de surveillance?	UNIDROIT continuerait à bénéficier du même niveau de protection en vertu de son Accord de siège en termes de privilèges et d'immunités dans le cadre de l'exercice de ses fonctions d'Autorité de surveillance. Les membres du Conseil de Direction et leurs délégués, les représentants de l'Assemblée Générale et les fonctionnaires du Secrétariat continueraient à bénéficier du même niveau de protection en vertu de l'Accord de siège d'UNIDROIT lorsqu'ils exercent les fonctions d'Autorité de surveillance.	Adoption à l'unanimité de l'avis juridique
3	Les personnes exerçant des fonctions d'Autorité de surveillance au sein des organes d'UNIDROIT (membres du Conseil de Direction, représentants de l'Assemblée Générale ou membres du Secrétariat) pourraient-elles voir leur responsabilité personnelle engagée dans le cadre de l'exercice des fonctions d'Autorité de surveillance?	En ce qui concerne leur responsabilité en vertu du droit national et international, la situation juridique des membres du Conseil de Direction, des représentants de l'Assemblée Générale et des fonctionnaires du Secrétariat qui exercent les fonctions de l'Autorité de surveillance est la même que celle des personnes qui exercent toute autre fonction de l'organisation. Dans la pratique, le risque juridique associé est très faible et pourrait être réduit à une quasi-absence par une rédaction minutieuse des documents juridiques pertinents.	Adoption à l'unanimité de l'avis juridique
4	Le Statut organique d'UNIDROIT impose-t-il des limites internes à la manière dont les organes d'UNIDROIT pourraient s'acquitter des fonctions d'Autorité de surveillance?	Le Statut organique d'UNIDROIT ne pose pas de limites spécifiques à la manière dont ses organes pourraient s'acquitter des fonctions d'Autorité de surveillance, autres que les stipulations générales qui s'appliquent normalement à la prise en charge et à l'accomplissement de toute fonction par l'organisation.	Adoption à l'unanimité de l'avis juridique
5	Le Statut organique d'UNIDROIT devrait-il être modifié pour permettre à UNIDROIT d'accepter le rôle d'Autorité de surveillance?	Une interprétation du Statut organique conformément aux règles de droit international bien établies en matière d'interprétation des traités montre que le fait d'assumer le rôle d'Autorité de surveillance relèverait du mandat de l'organisation si certaines conditions étaient remplies. En conséquence, le Statut d'UNIDROIT n'aurait pas besoin d'être amendé pour permettre à l'organisation d'accepter le rôle de l'Autorité de surveillance.	Adoption de l'avis juridique avec 9 voix en faveur et 2 contraires
6	Si une nouvelle organisation internationale dotée d'une personnalité juridique distincte est créée dans le sens de l'article XII du Protocole ferroviaire, les États devront-	Les États sont libres de créer une nouvelle organisation internationale pour remplir les fonctions d'Autorité de surveillance en vertu du Protocole MAC. Dans le même temps, ni le Protocole MAC ni le droit international général n'exigent que les États parties deviennent également membres de l'Autorité de surveillance	Adoption à l'unanimité de l'avis juridique

	ils consentir (indépendamment de leur ratification du Protocole MAC) à devenir membres de cette nouvelle entité ?	pour que celle-ci puisse jouer son rôle en vertu du traité. En outre, si une nouvelle organisation est effectivement créée en vertu de l'article XIV(1) du Protocole MAC, aucun consentement distinct des États parties ne sera nécessaire pour que cette organisation puisse jouer le rôle d'Autorité de surveillance; tout ce qui sera nécessaire dans ce cas sera le consentement de l'État au Protocole MAC lui-même. Nonobstant la conclusion selon laquelle le Protocole MAC ne pose pas de condition d'adhésion à la nouvelle organisation, les États devront toujours donner leur consentement séparément pour devenir membres de cette entité, s'ils le souhaitent ou si les statuts de cette nouvelle organisation les y obligent.	
7	Les immunités d'UNIDROIT (découlant de son Statut organique et de l'Accord de siège) garantiraient-elles qu'une nouvelle entité internationale dotée d'une personnalité juridique distincte et créée pour jouer le rôle d'Autorité de surveillance bénéficierait du même niveau d'immunité en ce qui concerne l'exercice de ses fonctions en tant qu'Autorité de surveillance?	Les immunités d'UNIDROIT ne garantiraient pas qu'une nouvelle entité internationale dotée d'une personnalité juridique distincte et créée pour exercer le rôle d'Autorité de surveillance bénéficie du même niveau d'immunité en ce qui concerne l'exercice de ses fonctions en tant qu'Autorité de surveillance. Si UNIDROIT décidait de jouer le rôle de Secrétariat pour cette nouvelle entité internationale, une attention particulière devrait être portée à la rédaction des documents juridiques pertinents afin de s'assurer que les organes et les fonctionnaires d'UNIDROIT impliqués dans l'exercice de ces fonctions continuent d'être couverts par l'Accord de siège d'UNIDROIT existant.	Adoption à l'unanimité de l'avis juridique
8	Le Statut organique d'UNIDROIT devrait-il être modifié pour permettre à UNIDROIT de servir de Secrétariat à une nouvelle entité internationale dotée d'une personnalité juridique distincte et créée pour jouer le rôle d'Autorité de surveillance?	Une interprétation du Statut organique conformément aux règles de droit international bien établies sur l'interprétation des traités montre que le fait d'assumer le rôle de Secrétariat pour la nouvelle entité qui assumera le rôle d'Autorité de surveillance relèverait du mandat de l'organisation. En conséquence, le Statut organique d'UNIDROIT n'aurait pas besoin d'être amendé pour permettre à l'organisation d'accepter le rôle de Secrétariat de la nouvelle Autorité de surveillance.	Adoption à l'unanimité de l'avis juridique

ANNEXE III

LE MODÈLE OACI DANS LE CADRE DU PROTOCOLE AÉRONAUTIQUE

1. La présente annexe examine les éléments structurels et opérationnels de la manière dont l'OACI exerce ses fonctions d'Autorité de surveillance en vertu du Protocole aéronautique.

2. En ce qui concerne le Protocole aéronautique, la Résolution 2 de la Conférence diplomatique de la Convention du Cap [1] a invité l'OACI à accepter les fonctions d'Autorité de surveillance dès l'entrée en vigueur de la Convention et du Protocole. Cela était conforme à la décision prise par le Conseil de l'OACI lors de sa 161ème session d'accepter le rôle d'Autorité de surveillance avant la Conférence diplomatique. La décision de l'OACI d'accepter le rôle d'Autorité de surveillance était soumise à deux conditions importantes:

i) le recouvrement intégral des coûts pour l'OACI dans l'exercice du rôle d'Autorité de surveillance. Il était important que l'OACI assumant le rôle d'Autorité de surveillance n'entraîne pas de coûts supplémentaires pour l'organisation. Le mécanisme de recouvrement des coûts, en vertu duquel les redevances perçues par le Conservateur couvrent les coûts de l'Autorité de surveillance dans l'exercice de ses fonctions, est inscrit dans la Convention du Cap et ses Protocoles. Pour l'OACI, le Conservateur a été en mesure de générer des recettes suffisantes au cours de sa deuxième année d'activité pour garantir que tous les coûts de l'OACI en tant qu'Autorité de surveillance soient correctement recouvrés.

ii) Aucune responsabilité supplémentaire pour l'OACI dans l'exercice de son rôle d'Autorité de surveillance. L'immunité de responsabilité est régie par la Convention du Cap et ses Protocoles.

3. Structurellement, le rôle d'Autorité de surveillance est assumé par le Conseil de l'OACI, avec l'aide de la CESAIR. Le Conseil de l'OACI est un organe permanent de l'organisation, responsable devant l'Assemblée de l'OACI. Il est composé de 36 États membres élus par l'Assemblée pour un mandat de trois ans. Lors de l'élection, une représentation adéquate est donnée i) aux États dont l'importance est primordiale dans le transport aérien, ii) aux États non inclus par ailleurs mais qui apportent la plus grande contribution à la fourniture d'installations pour la navigation aérienne civile internationale et iii) aux États non inclus par ailleurs dont la désignation garantit que toutes les grandes régions géographiques du monde sont représentées au sein du Conseil [2]. Les membres du Conseil de l'OACI nomment des représentants d'État, qui agissent au nom du pays membre. Ces représentants ne sont pas des experts dans le domaine de la conception, de l'exploitation ou de la supervision des registres, mais plutôt des experts en aviation [3].

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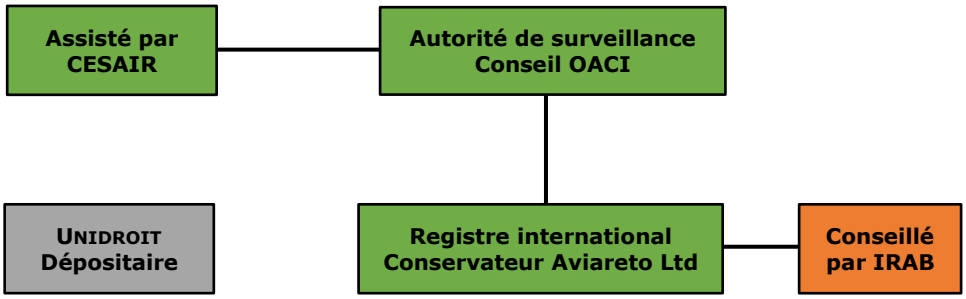
[1] Voir la Résolution 2 de la Conférence diplomatique pour l'adoption de la Convention du Cap et de son Protocole aéronautique à l'adresse suivante: https://www.unidroit.org/french/conventions/mobile-equipment/conference2001/finalact.pdf.

[2] Pour en savoir plus, consultez la page (en anglais): https://www.icao.int/about-icao/Council/Pages/council.aspx.

[3] Voir https://www.icao.int/about-icao/Council/CouncilStates/Pages/Council-State-Representatives_fr.aspx

La structure interne de l'OACI en tant qu'Autorité de surveillance est la suivante [4]:



4. Le Conseil de l'OACI est chargé de prendre toutes les décisions de fond concernant le rôle de l'OACI en tant qu'Autorité de surveillance. En particulier, le Conseil de l'OACI assume toutes les fonctions formelles (nomination/renouvellement du Conservateur et approbation du Règlement) et certaines fonctions générales (établissement de procédures de gestion des plaintes et examen des questions de responsabilité et d'assurance). Toutefois, le Conseil de l'OACI a délégué certaines fonctions générales et toutes les fonctions administratives (supervision du Conservateur, rapports périodiques, publication des règlements, etc.) au Secrétariat de l'OACI.

5. Le Conseil de l'OACI n'est appelé à agir sur une question que lorsqu'une décision doit être prise, ce qui se produit normalement moins d'une fois par an. Le Conseil de l'OACI est largement assisté par le Secrétariat de l'OACI [5] et la CESAIR dans l'exercice de son rôle d'Autorité de surveillance. Avant chaque décision à prendre, la CESAIR et le Secrétariat de l'OACI fournissent au Conseil de l'OACI des documents préparatoires détaillés.

6. Lorsque le Conseil de l'OACI exerce la plupart de ses fonctions formelles, les décisions sont souvent adoptées sur la base des documents préparés par le Secrétariat de l'OACI et des recommandations faites par la CESAIR. Les décisions qui tendent généralement à susciter des discussions au sein du Conseil de l'OACI incluraient i) des questions relatives à la détermination du montant de l'assurance que le Registre international devrait maintenir; et ii) la reconduction du mandat du Conservateur.

7. Le Conseil de l'OACI ne reçoit pas régulièrement un document de synthèse sur les questions relatives à l'Autorité de surveillance. L'Assemblée Générale de l'OACI ne joue aucun rôle dans la fonction d'Autorité de surveillance de l'OACI. Les rapports périodiques fournis au Conseil et à l'Assemblée Générale de l'OACI concernant la fonction d'Autorité de surveillance figurent dans le Rapport annuel de l'OACI.

8. Créé par la Résolution 2 de la Conférence diplomatique de la Convention du Cap et de son Protocole aéronautique, la CESAIR fonctionne sous l'égide du Conseil de l'OACI. Le Secrétariat de l'OACI assiste largement la CESAIR, qui a tenu 10 réunions depuis l'entrée en vigueur du Protocole aéronautique en 2006 [6]. Conformément aux Règles de procédure de la CESAIR, les membres sont nommés par les États signataires et les États contractants du Protocole aéronautique et sont approuvés par le Conseil de l'OACI. Tous les membres et observateurs de la CESAIR financent leur propre participation. Tous les experts participant à la CESAIR sont indépendants et participent à titre

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[4] Des détails supplémentaires figurent dans la présentation en anglais intitulée "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

[5] En particulier, le Bureau juridique de l'OACI.

[6] Ces réunions durent généralement 2 à 3 jours. La CESAIR mène souvent ses activités par visioconférence et dispose de dispositions dans ses Règles et Procédures pour prendre des décisions par le biais d'une procédure écrite.

personnel. Le Secrétariat de l'OACI recouvre tous les coûts associés au service de la CESAIR auprès du Registre international, dans le cadre du rôle de l'OACI en tant qu'Autorité de surveillance.

9. Le Secrétariat de l'OACI a indiqué que le manque d'implication de l'Assemblée Générale de l'OACI dans le rôle d'Autorité de surveillance n'a jamais été considéré comme un problème pour l'organisation. Le Secrétariat de l'OACI a suggéré que le Conseil de l'OACI assumant les fonctions formelles d'Autorité de surveillance, avec un soutien important du Secrétariat de l'OACI et de la CESAIR, a été un modèle opérationnel très réussi qui fonctionne bien pour l'organisation.

ANNEXE IV

ÉTABLIR UNE NOUVELLE ENTITÉ POUR EXERCER LE RÔLE D'AUTORITÉ DE SURVEILLANCE: LE MODÈLE DU PROTOCOLE FERROVIAIRE DE LUXEMBOURG

1. Cette section donne un aperçu du processus entrepris pour créer une nouvelle entité qui assumera le rôle d'Autorité de surveillance en vertu du Protocole ferroviaire de Luxembourg et du fonctionnement prévu de l'Autorité de surveillance du Registre ferroviaire et de son Secrétariat.

A. Établissement de l'Autorité de surveillance en vertu du Protocole ferroviaire de Luxembourg

2. L'Autorité de surveillance prévue par le Protocole ferroviaire de Luxembourg n'existe pas encore, car le Protocole ferroviaire de Luxembourg n'est pas encore entré en vigueur. En tant que telle, cette analyse est basée sur ses documents de base [1].

3. L'article XII du Protocole ferroviaire de Luxembourg prévoit comment l'Autorité de surveillance sera établie pour le Registre ferroviaire (voir l'Annexe 5 du présent document). Cet article prévoit qu'un nouvel organe sera établi pour assumer le rôle d'Autorité de surveillance (paragraphe 1), l'Organisation intergouvernementale pour les transports internationaux ferroviaires (OTIF) assumant le rôle de Secrétariat (paragraphe 6). Le fonctionnement de l'Autorité de surveillance sera régi par son projet de Statuts et son projet de Règles de procédure [2].

B. Raison d'être de la création d'une nouvelle entité internationale en tant qu'Autorité de surveillance

4. La justification de l'établissement d'une nouvelle entité internationale pour assumer le rôle d'Autorité de surveillance avec l'OTIF agissant en tant que Secrétariat est quelque peu unique au regard des circonstances du Protocole ferroviaire de Luxembourg. Dès 2001, il a été prévu que l'OTIF assumerait elle-même le rôle d'Autorité de surveillance [3]. L'OTIF était un candidat naturel pour ce rôle, dans la mesure où elle est l'organe international par excellence dont la mission est de promouvoir, d'améliorer et de faciliter le trafic ferroviaire. Tout au long de l'élaboration du Protocole, l'OTIF a soutenu l'instrument et a souhaité être désignée comme Autorité de surveillance. Or, à mesure que les négociations progressaient, des questions ont été soulevées quant à savoir si l'OTIF disposait d'une représentation géographique suffisante parmi ses membres pour garantir que l'Autorité de surveillance représenterait pleinement tous les États contractants [4] attendus. Sur cette base, il a été décidé qu'il serait préférable d'établir une nouvelle entité internationale jouissant d'une représentation géographique plus large pour être l'Autorité de surveillance, l'OTIF assumant le rôle de Secrétariat. La raison pour laquelle une nouvelle entité internationale a été établie pour être l'Autorité de surveillance avec l'OTIF agissant en tant que Secrétariat était de permettre à l'OTIF de jouer un rôle central dans la gestion du fonctionnement du traité en tant que Secrétariat, tout en évitant les problèmes qui pourraient survenir en raison de la nature géographique limitée des

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[1] Le Protocole ferroviaire de Luxembourg, les Statuts de l'Autorité de surveillance et son projet de Règles de procédure.

[2] Bien que le projet de Statuts et le projet de Règles de procédure aient été approuvés par la Commission préparatoire ferroviaire, ils restent à l'état de projet. Bien que ces documents ne devraient pas subir de modifications substantielles, il convient de noter qu'ils ne sont pas encore définitifs.

[3] Dans les premières versions du Protocole ferroviaire de Luxembourg, l'OTIF était désignée comme Autorité de surveillance.

[4] Les 50 États membres de l'OTIF sont tous situés en Europe, au Moyen-Orient et en Afrique du Nord.

membres de l'OTIF. Ce fut pour cette raison que la candidature d'UNIDROIT n'a jamais été envisagée pour le rôle d'Autorité de surveillance en vertu du Protocole ferroviaire de Luxembourg.

C. Composition

5. L'Autorité de surveillance se compose d'un groupe d'États, comprenant a) chaque État partie au Protocole ferroviaire de Luxembourg; b) jusqu'à trois États désignés par UNIDROIT; et c) jusqu'à trois États désignés par l'OTIF [5]. En désignant les États, UNIDROIT et l'OTIF doivent tenir compte de la nécessité d'assurer une large représentation géographique au sein de l'Autorité de surveillance [6]. Lorsque dix États au moins auront ratifié le Protocole, le mandat des États désignés par UNIDROIT et l'OTIF commencera à expirer [7]. Il est donc prévu que l'Autorité de surveillance ne sera finalement composée que d'États parties au Protocole ferroviaire de Luxembourg.

D. Fonctions

6. Outre les fonctions de l'Autorité de surveillance énoncées à l'article 17(2) de la Convention, l'article 5 des Statuts de l'Autorité de surveillance fournit une liste de tâches plus détaillée pour l'Autorité de surveillance:

> *1. définir les Règles de procédure;*
>
> *2. élire les responsables conformément aux Règles de procédure;*
>
> *3. nommer le Conservateur et pouvoir négocier et modifier périodiquement les accords avec le Conservateur;*
>
> *4. établir, réviser et modifier éventuellement de manière périodique le Règlement et déterminer comment il est publié;*
>
> *5. surveiller les activités du Conservateur et le fonctionnement du Registre international, y compris l'évaluation, l'autorisation, s'il y a lieu, et les services fournis par le Conservateur en plus de ceux requis au titre du Protocole;*
>
> *6. à la demande du Conservateur, lui donner les directives qu'elle estime appropriées;*
>
> *7. faire le nécessaire pour assurer l'existence d'un système électronique déclaratif d'inscription efficace pour la réalisation des objectifs de la Convention et du Protocole;*
>
> *8. conclure avec un auditeur externe et toute autre partie les accords nécessaires à l'exercice de ses fonctions;*
>
> *9. signer avec le Secrétariat un accord définissant les modalités détaillées pour l'exécution des tâches du Secrétariat et pouvoir négocier et modifier périodiquement cet accord avec le Secrétariat;*
>
> *10. mettre fin aux fonctions du Conservateur et veiller à ce que, en cas de changement de Conservateur, les droits nécessaires à la poursuite du fonctionnement efficace du*

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5 Protocole ferroviaire de Luxembourg, article XII(1), Statuts de l'Autorité de surveillance, article 2.

6 Protocole ferroviaire de Luxembourg, article XII(2).

7 Protocole ferroviaire de Luxembourg, article XII(3).

Registre international soient transférés ou susceptibles d'être cédés au nouveau Conservateur;

11. faire périodiquement rapport aux États contractants sur l'exécution de ses obligations au titre de la Convention et du Protocole;

12. faire périodiquement rapport à UNIDROIT afin de l'aider à préparer, en sa fonction de Dépositaire, les rapports à l'intention des États parties;

13. coopérer avec UNIDROIT, en sa fonction de Dépositaire, au sujet du statut et de la révision de la Convention et du Protocole.

E. Fonctionnement et assistance de la Commission d'experts

7. L'Autorité de surveillance sera domiciliée à Berne, en Suisse, au siège de l'OTIF [8]. L'Autorité de surveillance tiendra une réunion générale une fois par année civile à son domicile, étant entendu que le lieu de la réunion peut être modifié par un vote majoritaire des membres [9]. Des réunions intermédiaires supplémentaires peuvent être demandées par un vote d'un tiers des membres, qui peuvent être tenues par visioconférence si nécessaire [10]. La langue officielle et de travail de l'Autorité de surveillance est l'anglais [11]. Sauf décision contraire de l'Autorité de surveillance, les réunions ne sont pas ouvertes au public [12].

8. Pour s'aider à s'acquitter de ses fonctions, l'Autorité de surveillance peut établir une Commission d'experts composée de personnes ayant les qualifications, l'expertise et l'expérience nécessaires, choisies parmi les personnes désignées par les États parties, les États signataires ou le Président [13].

F. Statut juridique et immunités

9. L'article 27 de la Convention du Cap prévoit que l'Autorité de surveillance aura la personnalité juridique internationale si elle n'en est pas déjà dotée.

10. En outre, l'article 27 prévoit que l'Autorité de surveillance ainsi que ses responsables et employés jouissent de l'immunité contre toute action judiciaire ou administrative prévue par le Protocole. L'article XII(9) du Protocole ferroviaire de Luxembourg prévoit que le Secrétariat aura la personnalité juridique s'il n'en est pas déjà dotée, et jouit des mêmes exemptions et immunités dont jouissent l'Autorité de surveillance en vertu de l'accord conclu avec l'État hôte.

G. Le Secrétariat

11. L'article 8 des Statuts prévoit que l'Autorité de surveillance sera assistée dans l'exercice de ses fonctions par le Secrétariat. Si le Protocole ferroviaire du Luxembourg prévoit que l'OTIF exerce les fonctions de Secrétariat, il prévoit également que l'Autorité de surveillance puisse désigner un

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8 Statuts de l'Autorité de surveillance, article 4(1).

9 Projet de Règles de procédure, article 3(3).

10 Projet de Règles de procédure, article 3(2).

11 Statuts de l'Autorité de surveillance, article 7.

12 Projet de Règles de procédure, article 7.

13 Protocole ferroviaire de Luxembourg, article XII(4), Statuts de l'Autorité de surveillance, article 6(2).

autre Secrétariat si l'OTIF n'est plus en mesure ou n'est plus disposé à exercer ses fonctions [14]. Le Secrétariat aura la personnalité juridique s'il n'en est pas déjà doté, et jouit, pour ce qui est de ses fonctions en vertu de la Convention et de ce Protocole, des mêmes exemptions et immunités dont jouissent l'Autorité de surveillance en vertu du paragraphe 3 de l'article 27 de la Convention et le Registre international en vertu du paragraphe 4 de l'article 27 de la Convention [15].

12. L'article 8 des Statuts prévoit que les tâches du Secrétariat seront définies à l'article 12 du Contrat initial signé entre l'Autorité de surveillance et le Secrétariat. L'article 8 prévoit en outre que l'accord signé entre le Secrétariat et l'Autorité de surveillance détaille les modalités pour l'exécution des tâches du Secrétariat.

13. La clause 12 du projet de Contrat initial prévoit que le Secrétariat exerce trois fonctions: i) accueillir les réunions de l'Autorité de surveillance et de tout organe subsidiaire qu'elle pourrait créer, veiller au bon déroulement de ces réunions, notamment la publication des convocations et des ordres du jour, ainsi que la préparation et la distribution des documents pour ces réunions ou suite à celles-ci; ii) servir de point de contact, vis-à-vis des tiers, pour l'Autorité de surveillance; et iii) participer au Groupe de travail sur la Ratification. En outre, la clause 12 prévoit que le Registre est chargé du remboursement des frais raisonnables du Secrétariat liées à l'exercice de ses fonctions.

PROTOCOLE FERROVIAIRE DE LUXEMBOURG [16]

Article XII — L'Autorité de surveillance et le Conservateur

1. L'Autorité de surveillance est un organe établi par des représentants, nommés à raison de un:

a) par chaque État partie;

b) par chacun des trois autres États, au maximum, désignés par l'Institut international pour l'unification du droit privé (UNIDROIT); et

c) par chacun des trois autres États, au maximum, désignés par l'Organisation intergouvernementale pour les transports internationaux ferroviaires (OTIF).

2. Dans la désignation des États visés aux alinéas b) et c) du paragraphe précédent, il est tenu compte du besoin d'assurer une large représentativité géographique.

3. La durée de la nomination des représentants nommés conformément aux alinéas b) et c) du paragraphe 1 est fixée par les Organisations concernées. La nomination des représentants en fonction à la date de l'entrée en vigueur du présent Protocole pour le dixième État partie prend fin au plus tard deux ans après cette date.

4. Les représentants visés au paragraphe 1 adoptent les règles de procédure initiales de l'Autorité de surveillance. L'adoption requiert l'accord de:

a) la majorité de tous les représentants; et

b) la majorité des représentants nommés en vertu de l'alinéa a) du paragraphe 1.

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[14] Protocole ferroviaire de Luxembourg, article XII(6) et (7).

[15] Protocole ferroviaire de Luxembourg, article XII(9).

[16] La version complète du Protocole ferroviaire de Luxembourg est disponible ici: https://www.unidroit.org/fr/instruments/garanties-internationales/protocole-ferroviaire/.

5. L'Autorité de surveillance peut établir une Commission d'experts composée:

a) de personnes proposées par les États signataires et les États contractants et ayant les qualifications et l'expérience nécessaires, ainsi que

b) d'autres experts si nécessaire

et la charger d'assister l'Autorité de surveillance dans l'exercice de ses fonctions.

6. Un secrétariat (le Secrétariat) assiste l'Autorité de surveillance dans l'exercice de ses fonctions conformément aux instructions de cette dernière. Le Secrétariat est l'OTIF.

7. Lorsque le Secrétariat n'est plus en mesure ou n'est plus disposé à exercer ses fonctions, l'Autorité de surveillance désigne un autre Secrétariat.

8. Lorsque le Secrétariat considère que le Registre international est pleinement opérationnel, il dépose sans délai un certificat à cette fin auprès du Dépositaire.

9. Le Secrétariat aura la personnalité juridique s'il n'en est pas déjà doté, et jouit, pour ce qui est de ses fonctions en vertu de la Convention et du présent Protocole, des mêmes exemptions et immunités dont jouissent l'Autorité de surveillance en vertu du paragraphe 3 de l'article 27 de la Convention et le Registre international en vertu du paragraphe 4 de l'article 27 de la Convention.

10. Une mesure de l'Autorité de surveillance qui ne concerne que les intérêts d'un État partie ou d'un groupe d'États parties est prise si cet État partie ou la majorité de ce groupe d'États parties approuve également la mesure. Une mesure qui pourrait porter atteinte aux intérêts d'un État partie ou d'un groupe d'États parties prend effet dans cet État partie ou dans ce groupe d'États parties si cet État partie ou la majorité de ce groupe d'États parties approuve également la mesure.

11. Le premier Conservateur sera nommé pour une période non inférieure à cinq ans mais n'excédant pas dix ans. Par la suite, le Conservateur sera nommé ou reconduit dans ses fonctions pour des périodes successives n'excédant pas chacune dix ans.