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Item No. 7 on the agenda: Allocation of functions for the Supervisory Authority of the future International Registry to be established under the MAC Protocol

(prepared by the Secretariat)

Summary	*Report on options regarding how UNIDROIT's organs can discharge the Supervisory Authority responsibilities under the MAC Protocol*
Action to be taken	*The General Assembly is invited to decide which UNIDROIT organs should undertake specific functions for the Supervisory Authority of the future International Registry to be established under the MAC Protocol, on the basis of a recommendation made by the Governing Council*
Mandate	*Work Programme 2023-2025*
Priority level	*High*
Related documents	*UNIDROIT 2021 – C.D. (100) B.12; UNIDROIT 2022 – C.D. (101) 15; UNIDROIT 2023 – C.D. (102) 17; UNIDROIT 2023 – A.G. (82) 5; UNIDROIT 2024 – C.D. (103) 17; UNIDROIT 2025 – C.D. (105) 17*

I. INTRODUCTION

1. Following the approval of both the UNIDROIT Governing Council and General Assembly in 2023, the Preparatory Commission for the Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (the MAC Protocol) formally designated UNIDROIT as the Supervisory Authority of the international registry to be established under the MAC Protocol in April 2024. This designation will take effect upon the entry into force of the Protocol.

2. In advance of actively becoming Supervisory Authority, UNIDROIT must determine how it will discharge its responsibilities in this capacity. The purpose of this document is to present different possible options for the consideration of the General Assembly as to how UNIDROIT's organs could discharge the various Supervisory Authority functions.

II. BACKGROUND

3. UNIDROIT was designated as Supervisory Authority on approval by both the UNIDROIT Governing Council and the UNIDROIT General Assembly in 2023, following several years of careful consideration of the matter. In 2021 the MAC Protocol Preparatory Commission requested that UNIDROIT consider whether it would accept the role of Supervisory Authority, having verified that there were no other existing international organisations that were able to undertake the role. The UNIDROIT Governing Council considered the matter between 2021 and 2023 and eventually recommended to the General Assembly by majority vote that UNIDROIT should be designated as the MAC Protocol Supervisory Authority. The UNIDROIT General Assembly agreed to the Governing Council's recommendation at its 82nd session in December 2023 and instructed the Secretariat to inform the MAC Protocol Preparatory Commission that it would be willing to accept the role of Supervisory Authority, on the precondition that the costs associated with undertaking the function would be fully compensated.[1] At its sixth session in April 2024, the MAC Preparatory Commission formally designated UNIDROIT as the Supervisory Authority under the MAC Protocol, to take effect on entry into force of the Protocol.

4. At its 105th session in May 2025, the Governing Council discussed a detailed report on different options as to how UNIDROIT's organs could discharge the Supervisory Authority functions (see UNIDROIT 2025 – C.D. (105) 17). At that session, the Governing Council decided that (i) it would be preferable for the UNIDROIT General Assembly to create a Committee of States to undertake both the general and formal functions of the MAC Protocol Supervisory Authority, and (ii) this Committee should have the ability, under certain circumstances and in consultation with the Governing Council, to refer decisions back to the General Assembly. Accordingly, the Governing Council decided to recommend to the General Assembly that it consider creating such a Committee, which would undertake the Supervisory Authority's general and formal functions upon entry into force of the MAC Protocol.[2]

5. Comprehensive background information on the process to designate UNIDROIT as Supervisory Authority is available in Governing Council document UNIDROIT 2023 – C.D. (102) 17 and General Assembly document UNIDROIT 2023 – A.G. (82) 5. An initial analysis of the incorporation of the Supervisory Authority functions into UNIDROIT's structure is available in UNIDROIT 2022 – C.D. (101) 15 (paragraph 53 – 56). An analysis of the anticipated costs of undertaking the Supervisory Authority functions (which will be fully compensated through extrabudgetary funding outside UNIDROIT Member State contributions) is available in UNIDROIT 2024 – C.D. (103) 17 (paragraphs 20 – 34). The 2025 update on the implementation and Status of the MAC Protocol is available in document UNIDROIT 2025 – C.D. (105) 16.

III. SUPERVISORY AUTHORITY RESPONSIBILITIES

6. Article 17(2) of the Cape Town Convention on International Interests in Mobile Equipment sets out the core responsibilities of the Supervisory Authority, as listed below. The Supervisory Authority has no responsibility for the interpretation of the Convention or its Protocols, their implementation in matters not pertaining to the International Registry, nor any other function or activity not related to the Registry. Similarly, the Supervisory Authority is not responsible for adjudicating on a particular registration, nor does it give instructions to the Registrar to change any data relating to a particular registration. Instead, its competences are the following:

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[1] See the UNIDROIT General Assembly 82nd session Report (UNIDROIT 2023 – A.G. (82) 11), paras 58–76.

[2] See UNIDROIT 2025 – C.D. (105) Misc. 3, paragraph 29.

(i) establish or provide for the establishment of the International Registry;

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

(iii) 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;

(iv) 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;

(v) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;

(vi) supervise the Registrar and the operation of the International Registry;

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

(viii) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;

(ix) 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

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

7. In essence, the Supervisory Authority's functions under Article 17(2) of the Convention can be divided into three categories:

(i) Formal functions are the functions which are essential for the registry to operate at all, such as (a) the appointment or dismissal of the Registrar, (b) the approval or modification of the Registry Regulations, and (c) the setting of fees;

(ii) General functions are the ongoing supervisory functions which are designed to ensure the smooth and efficient operation of the registry, such as the supervision of the Registrar and the operation of the International Registry, the approval of periodical reports and the establishment of complaint procedures; and

(iii) Administrative functions are the routine clerical functions which relate to the Supervisory Authority's reporting, publication and communication responsibilities, such as the publication of regulations and the communication of periodical reports to Contracting States.

8. Additionally, Clause 9 of the draft registry contract (between the Supervisory Authority and the Registrar) requires the Supervisory Authority to collaborate with the appointed Registrar to develop a programme to promote ratification of, or accession to, the MAC Protocol, by (a) working with interested parties to prepare promotional materials, (b) coordinating with interested parties to encourage the provision of incentives for transactions to which the Protocol applies, (c) liaising with the host State of the Registry, (d) identifying appropriate opportunities to promote the Protocol, and (e) participating in any bodies created to oversee and coordinate efforts to promote ratification/accession. This additional activity could be undertaken by whichever UNIDROIT organ is chosen to undertake the formal and general functions, or could be delegated to the Ratification Task Force (which already exists, and could have its mandate extended).

9. Assistance to the Supervisory Authority: Resolution 2 of the MAC Protocol Diplomatic Conference Final Act invites the Supervisory Authority to establish a Commission of Experts with the task of assisting the Supervisory Authority in the discharge of its functions. As such, UNIDROIT will establish such a Committee of Experts upon entry into force of the Protocol, using the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) established by ICAO (in its capacity as the Supervisory Authority under the Aircraft Protocol) as a model.[3] Work to establish the Commission will begin once an entry into force date has been determined.

IV. THE STATUTE, IMMUNITIES AND COSTS

10. UNIDROIT has a significant degree of flexibility in its governance structure and operation. The independent legal advice procured by the Secretariat in 2023 concluded that UNIDROIT's Statute does not need to be amended for UNIDROIT to perform the role of Supervisory Authority.[4] Further, the legal advice found that the Statute does not pose any specific internal limitations in relation to how UNIDROIT can organise the discharge the Supervisory Authority responsibilities within its institutional structure.[5] On this matter, the legal advice concluded that it would be for the Governing Council to determine how UNIDROIT should discharge the Supervisory Authority at an internal institutional level, which would then have to be approved by the General Assembly.[6]

11. In relation to immunities, the legal advice found that 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. Further, Governing Council members and their delegates, General Assembly representatives, and Secretariat members would continue to enjoy the same level of protection under UNIDROIT's Headquarters Agreement when performing the Supervisory Authority functions.[7] In terms of liability under international law, the legal position of Governing Council members, General Assembly representatives, and the Secretariat members who perform the Supervisory Authority functions is the same as that for performing any other function of the organisation. The legal advice further found that the associated legal risk is very low and could be mitigated to almost non-existent through the careful drafting of the relevant legal documents.[8] In addition, the legal advice found that international law rules on the attribution of conduct to international organisations do not distinguish between the various functions that an organisation may perform through its "agents", so long as the latter act in an official capacity. Accordingly, the acts involving Governing Council members, General Assembly representatives or Secretariat members in relation to the exercising of the Supervisory Authority functions would in principle be attributable to UNIDROIT. It would thus be the organisation rather than the individuals who would bear responsibility for them under international law.[9] On this basis, it is clear that regardless of how the Supervisory Authority functions are structured within UNIDROIT's institutional framework, there would be no liability for the Governing Council, General Assembly representatives or Secretariat members. Regardless of which option is chosen, the Secretariat would also continue to perform the Depositary function under the MAC Protocol.

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3 A similar body has now been established for the Luxembourg Rail Protocol. To facilitate the functioning of the Committee in the initial phase of entry into force of the treaty, the Committee is composed of experts nominated by contracting Parties and additional experts appointed by the Chair of the Supervisory Authority.

4 UNIDROIT 2023 – C.D. (102) 17, Annexe 1, paragraph 5.57. The Governing Council is reminded that the Governing Council Committee formed to consider the public international law issues adopted the conclusions of the independent legal advice.

5 UNIDROIT 2023 – C.D. (102) 17, Annexe 1, paragraphs 4.1 – 4.6.

6 UNIDROIT 2023 – C.D. (102) 17, Annexe 1, paragraph 4.6.

7 UNIDROIT 2023 – C.D. (102) 17, Annexe 1, paragraph 13(2).

8 UNIDROIT 2023 – C.D. (102) 17, paragraph 13(3).

9 UNIDROIT 2023 – C.D. (102) 17, Annexe 1, paragraph 3.7.

12. In relation to costs, Article XVIII(2)(a) of the MAC Protocol provides that the Supervisory Authority has the right to recover the reasonable costs associated with the performance of its functions, exercise of its powers and discharge of its duties. As noted above, UNIDROIT has only accepted designation as the Supervisory Authority under the MAC Protocol on the basis that the Institute's costs associated with undertaking the function are fully compensated through extrabudgetary funding outside UNIDROIT Member State contributions. As set out in UNIDROIT 2024 C.D. (103) 17, the Secretariat has estimated the annual Supervisory Authority costs would be approximately EUR 210,000. The Secretariat does not anticipate that these costs would significantly change based on the operational model chosen for UNIDROIT to discharge its Supervisory Authority functions, as the staff costs, meeting costs, translation/editing/printing costs and overhead costs would be relatively similar under each option.[10]

VI OPTIONS

13. Given the flexibility that the UNIDROIT Statute provides in relation to how the Institute can organise itself to discharge its Supervisory Authority functions, there are several different structural models that UNIDROIT could implement to discharge the Supervisory Authority's formal and general functions (involving the Governing Council, General Assembly and/or the creation of new subgroups by either organ).

14. Under each of the options outlined below, the administrative functions (such as the publication of regulations and the communication of periodical reports to Contracting States) would be discharged by the Secretariat. As stated above, and consistent with Resolution 2 of the MAC Protocol Diplomatic Conference Final Act, it is anticipated that UNIDROIT will establish a Commission of Experts to advise the relevant body (whether it be the Governing Council, the General Assembly or a Committee created by the General Assembly) in the discharge of its functions as Supervisory Authority.

Options involving primarily the Governing Council

15. Options 1A, 1B, and 1C below place the general Supervisory Authority functions with the Governing Council. In discharging its obligations under these Options, the Governing Council could also consider creating a subcommittee of interested Governing Council members to undertake most of the supervisory work and advise the other UNIDROIT organs in the discharge of their functions.

16. **Option 1A** would be for the Governing Council to undertake the Supervisory Authority's formal functions and general functions. The strengths of Option 1A are that (i) the Governing Council is a very effective decision-making body and (ii) the Governing Council would be able to develop the necessary technical expertise to undertake the general and formal Supervisory Authority functions, as advised by the Commission of Experts. The weaknesses of Option 1A are that (i) there is no formal role for States in the process and (ii) requiring the Governing Council to undertake both the general and formal functions might place a relatively large additional workload on the body.

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

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[10] The ability for the Governing Council to make decisions via written procedure might lower the administrative burden of UNIDROIT discharging the Supervisory Authority functions.

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

Options primarily involving the General Assembly

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

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

21. **Option 2C** would be for the General Assembly to create a Committee of interested UNIDROIT Member States to undertake the general functions and the formal functions. Under Option 2C, the Committee would report to the Governing Council and General Assembly on its work, and would have the right to defer any significant decisions related to its formal functions (such as a decision to change Registrar, or make a major change to Registry fees) to the General Assembly, on advice of the Governing Council. The strengths of Option 2C are that (i) it allows States to participate in the Supervisory Authority's functions and (ii) would not unduly burden the General Assembly. The UNIDROIT Governing Council has recommended that the General Assembly adopt this option. It is also the Secretariat's recommended option.

22. MAC Protocol Contracting States that are not UNIDROIT Member States would only be able to attend the UNIDROIT General Assembly or a Committee created by the General Assembly as observers and would have no formal vote in relation to the General Assembly undertaking any functions as Supervisory Authority. Contacting States that want to exercise a vote in relation to the Supervisory Authority undertaking its functions would be encouraged to become Members of UNIDROIT. Alternatively, or in addition, Contracting States could also seek to have an official elected to the Commission of Experts advising the Supervisory Authority.

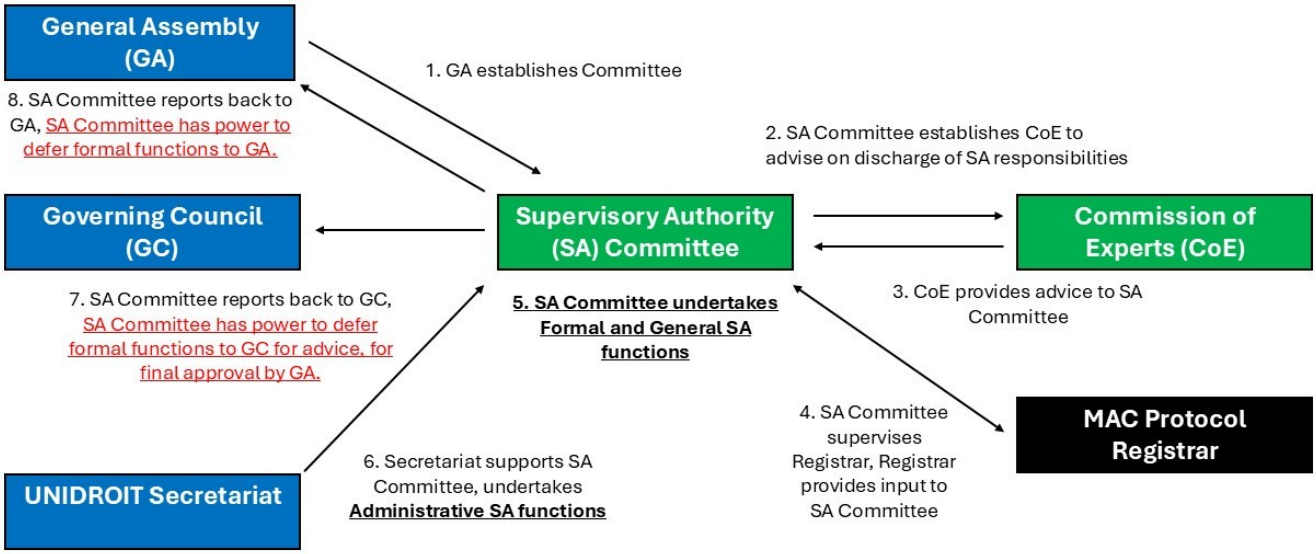
Governing Council and Secretariat Recommendation

23. It is the view of both the Governing Council and the Secretariat that Option 2C would be the preferable approach. A Committee of Member States (the "SA Committee") undertaking the majority of the Supervisory Authority work would allow interested States to be directly involved in the Supervisory Authority functions. Similarly to the operation of the Finance Committee, UNIDROIT Member States could nominate to join the SA Committee, which would then have its membership confirmed by the General Assembly. Interested Governing Council members and interested MAC Protocol Contracting States that are not UNIDROIT Member States could observe the SA Committee. The SA Committee would report back to the Governing Council and General Assembly annually (as consistent with UNIDROIT's working methodology). Under Option 2C, the SA Committee would have

the power to discharge both the general and formal functions, which would be the most efficient structural model in discharging the SA functions. Given that in the vast majority of circumstances the discharge of both the general and formal functions will be non-contentious (for example, minor changes to the Regulations, or reappointment of the Registrar when the Registry is operating smoothly), it does not seem necessary to require the General Assembly to approve all formal functions, as provided in Option 2B. Several mechanisms could be included to ensure that major decisions are considered by the full General Assembly, for example by requiring non-routine formal functions (such as a decision to not reappoint a Registrar, or to significantly change the Registry's feed structure) to be deferred to the General Assembly.

24. The below table provides a summary of how the Governing Council's recommended approach would operate:

Organisation of MAC Protocol Supervisory Authority responsibilities – Option 2C



VII. NEXT STEPS

25. Once the General Assembly has made its decision on how UNIDROIT should structure the Supervisory Authority functions within its organs, the Secretariat will undertake the necessary preparations to execute the General Assembly's decision. If the General Assembly follows the recommendation of the Governing Council to adopt Option 2C, the Secretariat will prepare draft rules of procedure for the Supervisory Authority Committee to be established by the General Assembly. The draft rules of procedure would be considered and approved by both the Governing Council and the General Assembly.

26. Once the MAC Protocol is closer to entry into force (for example, once the treaty has three Contracting States), the Secretariat will undertake further work to finalise the staffing arrangements required for the discharge of the Supervisory Authority functions, and work with interested parties to confirm arrangements for UNIDROIT to be provided with the requisite interim funding to discharge the Supervisory Authority functions until Registry Fees are sufficient to cover the Supervisory Authority costs.

VIII. ACTION TO BE TAKEN

27. *The General Assembly is invited to consider which UNIDROIT organs should undertake specific functions for the Supervisory Authority of the future International Registry to be established under the MAC Protocol. It is invited to decide adopting Option 2C, as recommended by the Governing Council and the Secretariat.*