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**MAC Protocol
Committee of Governmental Experts
First session
Rome, 20 – 24 March 2017**

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**DAILY REPORT
FOR
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(prepared by the UNIDROIT Secretariat)

1. The Chair opened the second day of the first session of the Committee of Governmental Experts (hereinafter the "Committee") for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (hereinafter the "MAC Protocol") at the Headquarters of the Food and Agriculture Organisation of the United Nations in Rome, on 21 March 2017 at 9:15 a.m.
2. The Chair summarised his conclusions from the first day of the session.

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

Article VII

3. The Reporter introduced the Article. The Chair opened the floor for discussion of Article VII.
4. Several delegations noted that Paragraph 1 was overly deferential to the immovable property law of non-Contracting States. Some delegations queried whether paragraph 1 was necessary at all. Other delegations were of the view that the paragraph adopted a balanced and appropriate approach to resolving the situation whereby MAC equipment subject to an international interest became associated with immovable property in a non-Contracting State.
5. Some delegations queried whether States should be allowed to choose different Alternatives under Article VII to apply to different Annexes to the Protocol. Many delegations pointed out the benefits of a holistic approach that required States to apply the same to all Annexes. It was noted that allowing States to choose different Alternatives to apply to different Annexes would cause problems where HS codes were listed in multiple Annexes.
6. *The Committee agreed that a Contracting State's declaration applying an Alternative under Article VII should apply to all Annexes that would be applicable in that State. The matter was referred to the Drafting Committee.*
7. *The Committee endorsed the policy rationale reflected in paragraph 14 (paragraph 16 in the French version) of the Explanatory Report (UNIDROIT 2017 – Study 72K – CGE1 – Doc. 3 corr) which provided that where a Contracting State opts out of one Annex which covers a certain HS code,*

where that HS code is listed in a separate Annex which the Contracting State has not opted out of, the Protocol will continue to apply to MAC equipment under the HS code in the Contracting State, regardless of the end use of the equipment.

8. Some delegations adopted the view that the number of alternatives should be reduced, or that association with immovable property should be governed by one single provision without allowing for declarations. Other delegations argued that providing three alternatives was desirable.

9. *The Committee agreed that the overall number of Alternatives to Article VII should be revisited at a later stage, and that each Alternative as contained in the preliminary draft Protocol should be considered on its own merit.*

Alternative A

10. Several delegations and observers took the view that Alternative A should be adopted in its present form, whereas other delegations favoured its removal altogether.

11. Some delegations raised their concerns with the drafting of Alternative A. It was noted that it would be problematic to allow the holder of an international interest in equipment associated with immovable property to assert the priority of their interest under Alternative A and remove it from immovable property where its removal would cause damage. Other delegations noted that such action would not be permissible as Article VIII(3) of the preliminary draft Protocol required remedies to be exercised in a commercially reasonable manner.

12. One delegation proposed that Alternative A should only apply to “registered” international interests.

13. Some delegations queried whether Alternative A should apply where MAC equipment lost its legal identity. Other delegations responded that the timing of the association of the equipment with immovable property was relevant in determining the matter. It was noted that where MAC equipment was already associated with immovable associated equipment to the extent that it had lost its individual legal identity, an international interest could not be constituted in the equipment because Article 7 of the Convention required the chargor, conditional seller or lessor to have the power to dispose of the equipment.

14. The outcome was less clear where MAC equipment already subject to an international interest subsequently became associated with immovable property to the extent that the equipment lost its individual legal identity. The Reporter noted that in his view, once an asset was no longer mobile due to its affixation to an immovable, it was no longer capable of being subject to an international interest under the Protocol. One delegation proposed compensation for parties unfairly affected by the application of Article VII in relation to the subordination of their interest in MAC equipment.

15. *The Chair concluded that no consensus could be reached on whether Alternative A should be retained or removed. Similarly, no consensus could be reached on whether Alternative A should be limited to circumstances under which its application would allow creditors to remove immovable associated equipment only where its removal did not cause serious damage to the immovable property. There was also no consensus as to what would happen to an international interest in MAC equipment that subsequently became so associated with immovable property to the extent that the equipment lost its individual legal identity. The Committee referred Alternative A to the Drafting Committee for further consideration.*

Alternative B

16. Several delegations explained that in most civil law jurisdictions mobile equipment could become associated with immovable property even without any degree of physical annexation if it was operated to derive an economic benefit from the immovable. One example cited was a combine harvester operating on a farm.

17. Many delegations debated whether the loss of individual legal identity was a question of fact or a question of law. The Secretary General explained that the Study Group carefully avoided the use of physical affixation as a factor in determining whether an interest in immovable property had extended to MAC equipment. He noted that the use of the term “association” accommodated this drafting policy, and that the determination of whether MAC equipment had become associated with immovable property was a matter of law as determined by the State in which the immovable was located.

18. The Reporter explained that once an asset lost its individual legal identity, any international interest in the equipment would be extinguished.

19. One delegation noted that paragraph 1 referred to the domestic immovable property law to determine whether MAC equipment had become immovable-associated equipment, whereas Alternative B could be referring, depending on the circumstances of the case, to domestic movable property law to determine the same matter. It was queried whether there was a need to redraft the provisions to provide consistency on the matter.

20. *The Chair concluded that no consensus could be reached on whether Alternative B should be retained or removed. The Committee agreed that the loss of legal identity of MAC equipment under Alternative B was a legal question which called for a rule to be identified under the applicable law. It was noted that under the current draft, the identification of the applicable rule was left to the application of private international law rules. It was noted that such an approach could lead to the application of the private international law rules for movable property or immovable property, depending on the jurisdiction and this could result in different outcomes. The Committee requested that the Drafting Committee revise paragraph 3 of Alternative B to ensure that it referred to the lex situs of the immovable property in all cases. This approach was found to be consistent with the rule found in the definition of “immovable-associated equipment” in Article I(2)(f).*

Alternative C

21. One delegation requested that other delegations indicate whether Alternative C was a provision that they would consider choosing in ratifying the future MAC Protocol. Several delegations noted that they would consider Alternative C useful in ratifying the Protocol. One delegation noted that if a State was to choose Alternative C, it was possible that it would in effect actually be choosing Alternative B, if that State’s domestic law reflected the provisions contained in Alternative B.

22. *The Chair concluded that there was no desire to amend the text of Alternative C.*

Article XXXII

23. On the submission of an alternative drafting proposal from one delegation, the Chair reopened discussion on Article XXXII. The alternative drafting proposal amended the definitions of agricultural, construction and mining equipment in Article I of the preliminary draft Protocol by referring to HS codes contained in the Regulations to the Protocol, as identified initially in a Resolution to the Diplomatic Conference and subsequently through the addition of “materially similar” HS codes.

Additionally, the proposal suggested the removal of Article XXXII (4) from the preliminary draft Protocol and the amendment of Article XXXII (5) to provide for technical changes in the HS Codes.

24. The proposal attracted a variety of views from different delegations. Many delegations welcomed the suggestion that a flexible mechanism could be used to update the HS codes to which the Protocol would apply, but expressed doubts as to whether the new proposal was an adequate alternative. In particular, there were concerns regarding the precise meaning of “materially similar equipment”, the lack of oversight from Contracting States in the addition of new HS codes, the absence of a mechanism for addressing disagreements by States as to whether an HS code sufficiently covered materially similar equipment and how Contracting States would be notified of such changes to the HS codes to which the Protocol applied. Many delegations also objected to the amount of discretion the proposal gave to the Depositary and the Supervisory Authority to determine the scope of the Protocol, and cautioned against removing that role from Contracting States. In response, other States noted that Contracting States could be represented to some extent through the Supervisory Authority, which would allow Contracting States to maintain control over the amendment process, while not requiring a formal treaty process to amend the HS codes to which the MAC Protocol would apply.

25. The proposing delegation thanked the other delegations for their feedback on the proposal, and noted that they believed that the proposal could be revised to address the majority of the concerns being raised.

26. *The Chair concluded that the proposal in its current form was not acceptable to the Committee. However, he also noted that the Committee supported consideration of an amendment procedure that provided a fair balance between formal treaty amendment procedures and the need for a more flexible procedure for updating the HS codes. For example, it was pointed out that convening a Review Conference or proceeding with formal treaty amendment procedures might be too burdensome as it related to changes to the HS codes covered by the Protocol. On the other hand, other delegations were of the view that proceeding with changes to the list of HS codes in the Annexes could be seen as a modification of the scope of the protocol which should not be done through a simplified procedure.*

27. *The Committee agreed to refer this issue to an open-ended informal Working Group for further discussion.*

Article VIII

28. The Reporter introduced the Article. The Chair opened the floor for discussion of Article VIII.

29. Several delegations questioned whether Article VIII had any practical importance. Several delegations suggested that the term “administrative authorities” and the scope of the actions required of the administrative authorities were too broad and ill-defined.

30. An observer stressed the importance of such a clause, with particular reference to cases requiring export authorisations and abolishment of local licenses.

31. Another delegation suggested that Article VIII (5) should be deleted in its entirety and that disputes between creditors and debtors should be left to arbitration bodies and courts.

32. Many delegations voiced their support to keep Article VIII (5) in its present form. One delegation suggested that it conveyed an important message to Member States that administrative authorities should assist creditors in exercising their rights under the Protocol.

33. *The Committee requested that the Secretariat further review Article VIII to more clearly determine the types of circumstances that it would apply to, and to what extent domestic administrative authorities would need to cooperate and assist creditors in exercising their rights. The Committee requested that the Secretariat consult private industry in reviewing the matter.*

Article IX

34. *The Committee adopted Article IX as proposed in the preliminary draft Protocol, and noted that Article IX (6) would be affected by the same issues discussed under Article VIII.*

Article X

35. The Reporter introduced the Article, and emphasized its importance as one of the fundamental articles underpinning the success of the Cape Town System. The Chair opened the floor for discussion of Article X.

36. Delegations supported retaining the three Alternatives in Article X. One delegation enquired about how Article X resolved the circumstance in which multiple secured creditors each having registered international interests in MAC equipment were simultaneously seeking relief from an insolvent debtor.

37. One delegation noted that as consistent with the policy approach in Article VII, the Alternatives in Article X should also only be available on a holistic basis as opposed to an Annex by-Annex basis. The Chair suggested that this policy may already be implied in the draft, however it would be advisable for the Drafting Committee to further consider the issue.

38. *The Committee agreed that Article X should retain all three Alternatives, and that the application of an Alternative should apply to all Annexes applied by a Contracting State in their entirety, without allowing Contracting States to apply different insolvency Alternatives to different Annexes. The Committee referred the matter to the Drafting Committee.*

Article XI

39. *The Committee adopted Article XI as proposed in the preliminary draft Protocol.*

Article XII

40. *The Committee adopted Article XII as proposed in the preliminary draft Protocol.*

41. The Chair concluded the session at 16:24 PM.