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**DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE  
DRAFT PROTOCOL TO THE CONVENTION  
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT  
ON MATTERS SPECIFIC TO MINING, AGRICULTURAL  
AND CONSTRUCTION EQUIPMENT (THE "MAC  
PROTOCOL")**

Pretoria, 11-22 November 2019

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**SUMMARY REPORT  
FOR 14 NOVEMBER 2019**

**SIXTH MEETING OF THE COMMISSION OF THE WHOLE**

**Item No. 8 on the Agenda: consideration of the draft Protocol (continued)**

1. The Chair opened the session at 09:05 by summarising the third day's discussions.
2. The Chair opened the floor to continue the Commission's consideration of Article X.
3. *The Commission adopted Paragraph 1, 2, and Alternative A of Article X without modification, and requested that the Drafting Committee remove the square brackets around Paragraph 8.*
4. The Chair opened the floor for discussion on Alternative B of Article X.
5. An observer from the MAC Working Group drew the attention of the Commission to the Working Group's written comments in DCME-MAC – Doc. 15. He reminded the Committee that there had only been one ratification in the history of the Cape Town Convention system of any insolvency alternative other than Alternative A. This observer stated that Alternative B and Alternative C did not serve any purpose, as only Alternative A produced economic benefits for Contracting States. The observer further noted that the European Union Member States which had ratified the Aircraft Protocol had mostly realigned their domestic insolvency laws to be consistent with Alternative A. The observer emphasised that Alternative B and Alternative C depended upon, to differing extents, domestic insolvency legislation, and hence caused additional complexity while hindering the potential economic benefits of the Cape Town system. The MAC Working Group proposed deletion of Alternative B and Alternative C in order to give States a clear binary choice between Alternative A and their own insolvency laws.
6. One delegation noted that there was merit in the proposal of the MAC Working Group, given the infrequent usage of Alternative B and Alternative C under the existing Protocols.
7. One delegation queried the relationship between Article X of the draft Protocol and the reorganisation regimes in Contracting States. The Secretariat noted, with reference to the definition of "insolvency related event" in Article I(2)(i), that there were two types of reorganisation proceedings, (i) those that occurred within formal insolvency proceedings, and (ii) those that took

place outside such proceedings. It was added that reorganisation proceedings, as such, could be included either within formal insolvency proceedings or as a hybrid out of court procedure. The Secretariat then explained that any reorganisation proceedings taking place within the court system would be covered, while the inclusion in the definition of reorganisation proceedings out of court would depend upon whether they fell within the scope of Article I (2)(i) sub (ii).

8. An observer from a regional economic integration organisation, recognising that the proposal from the MAC Working Group had not been considered at the Committee of Governmental Experts in 2017, expressed its openness to consider the proposal, but reserved its position.

9. One delegation suggested that Article X be redrafted to clarify that a State which did not make a declaration would continue to apply its domestic insolvency laws. It was explained that while this principle was already stated in the Official Commentary to the Aircraft Protocol, additional clarity on the matter would be useful. An observer from a regional economic integration organisation suggested that the text of Paragraph 1 be retained and that Paragraph 2 could be redrafted to elucidate the application of domestic law in the absence of a declaration.

10. Several delegations expressed support for the deletion of Alternative B, noting that there was little value in retaining alternatives which did not provide economic benefits and had not been implemented by States under the existing Protocols. A delegation suggested that Article X would require linguistic amendments if it only retained Alternative A.

11. An observer supported the deletion Alternative B, noting that States wishing to continue to rely on domestic insolvency law could choose to make no declaration under Article X and continue to apply their domestic laws as appropriate.

12. *The Chair summarised the discussion noting that there was consensus on deleting Alternative B, as well as consensus on the need for additional clarity to confirm that States which did not make a declaration under Article X would continue to apply their domestic insolvency laws. The Chair referred the matter to the Drafting Committee.*

13. The Chair opened the floor for discussion on Alternative C.

14. Several delegations suggested that the same rationale applied to the consideration of Alternative B should be applied to Alternative C. These delegations reaffirmed that in the absence of a strong economic rationale for its retention, Alternative C should be deleted.

15. *The Commission agreed that Alternatives B and C of Article X should be deleted. The matter was referred to the Drafting Committee.*

#### Article VIII(5)

16. The Chair reopened the floor for discussion on Article VIII(5).

17. One delegation noted that the language of Article X(8)(b) could be used as a model for redrafting Article VIII(5) on the basis that Article X(8)(b) had already been approved by the Commission and was substantively similar to Article VIII(5). Several delegations expressed support for the proposal.

18. Several delegations reaffirmed that Article VIII(5) should be applicable subject to an optional declaration made by Contracting States rather than mandatorily applicable to all Contracting States. Some delegations favoured Article VIII(5) being an opt-in declaration, while others favoured it being an opt-out declaration.

19. A delegation suggested that Article VIII(5) should be an opt-in declaration modelled on language of Article IX(1), under which Contracting States could clarify the application of the rule in its declaration. This delegation suggested that remodelling Article VIII(5) as an opt-in declaration consistent with Article IX(1) would provide Contracting States with the flexibility necessary to support the proper functioning of the provision. The delegation suggested that it would allow States that had slight reservations to not completely opt-out from Article VIII(5) and therefore send a positive signal to creditors rather than a negative one.

20. An observer from a regional economic integration organisation noted that the flexibility offered by the Cape Town Convention's system of declarations was one of the most attractive qualities of the treaty framework. She gave the example of Article 13 and Article 43 of the Cape Town Convention, which were subject to a declaration under Article 55. The observer cited a declaration made under Article 55 as a good example of how allowing for detailed declarations provided valuable flexibility for Contracting States.

21. Several delegations raised concerns with remodelling Article XIII(5) on the language of Article IX(1) on the basis that it would cause complexity and uncertainty. One delegation suggested caution in this regard on the basis that the situations covered by the two Articles were not analogous because declarations under Article IX(1) only contemplated States providing a specific number of days with respect to the application of the provision.

22. The Reporter noted that Contracting States could qualify their declaration under Article IX as they deemed appropriate, and that under the Aircraft Protocol most States had applied the corresponding provision as it appeared in the text. An observer noted that under Article X of the Aircraft Protocol, declarations by Contracting States had been almost binary. The observer cautioned that remodelling the declaration in Article VIII(5) on the declaration in Article IX(1) would create complexity, as Contracting States could make broad or vague declarations. The observer noted that such a situation would be undesirable and that similar issues had arose in relation to the declarations made by Contracting States in Article 39 of the Cape Town Convention.

23. One delegation queried whether Article VIII(5) meant that administrative authorities in a Contracting State could be held accountable for not providing the assistance in the export and physical transfer of MAC equipment from the relevant State. The delegation suggested that the provision in its present form would enable creditors to seek assistance from courts against administrative authorities which did not offer the assistance provisioned, which would be an important mechanism for creditors in situations where administrative authorities were not being cooperative. Another delegation queried whether retaining the "Contracting State" language in Article VIII(5) would create a binding obligation on enacting States under international public law. The first delegation confirmed that this was their understanding of Article VIII(5).

24. *The Chair noted that no consensus had been reached in relation to Article VIII(5) and that the matter should be deferred to a later time.*

#### Article XI

25. The Reporter summarised the operation Article XI.

26. *The Commission adopted Article XI without modification.*

#### Article XII

27. The Chair opened the floor for discussion on Article XII.

28. The Executive Secretary explained that the Secretariat had proposed a redrafted version of Article XII in DCME-MAC – Doc. 5 corr., because deficiencies had been identified in the existing Article XII as provided in the draft MAC Protocol.

29. The Chair noted there were two policy matters the Commission needed to consider in relation to Article XII. First, the Commission needed to decide whether a Contracting State that wished to opt-out of the Protocol's application to inventory financing should be able to opt-out of the application of the Protocol in its entirety or only partially. Second, the Commission needed to decide whether Article XII should additionally allow Contracting States to preserve their domestic take-free rules in relation to MAC equipment held by a dealer as inventory.

30. One delegation noted that, with respect to the first issue raised by the Chair, it was in the interest of States wishing to protect their existing inventory financing practices to allow for a complete opt-out rather than a partial one. In relation to the second issue, the delegation suggested that the MAC Protocol was not intended to create consumer protection rules, but rather facilitate financing of MAC equipment used in commercial enterprises and should not defer to local take-free rules. An observer from the MAC Working Group concurred with the delegation, noting that a clean opt-out ensured the preservation of inventory financing practices in States where such rules already functioned effectively.

31. Several delegations supported a complete opt-out, noting that a partial opt-out could create significant complexity in the Protocol. Additionally, several delegations suggested that the Protocol should not allow States to separately retain their domestic take free rules, as States would already be able to largely preserve their domestic take free rules in relation to equipment held by a dealer as inventory by opting out of the Protocol's application to inventory.

32. A delegation added that a take free rule would negatively impact the clear priority rules set out by the Cape Town Convention system. This delegation also noted that the Secretariat's redraft in DCME-MAC – Doc. 5 corr. did not necessarily correspond with the civil law practice of take-free rules and might result in difficulties in determining the "equivalent interest" for application of the buyer-take free rule. Furthermore, it was noted that the draft only provides for taking free from the interest created by the dealer while in civil law jurisdictions the buyer would take free of all interests, which might create difficulties in its implementation.

33. One delegation queried whether Article XII should provide a take-free rule for States that did not opt-out of the Protocol's application to inventory. The delegation suggested that States that wanted to offer protection to buyers of inventory while not wanting to opt-out of the Protocol's application to inventory should be able to do so through a declaration to that effect.

34. An observer from the MAC Working Group noted that the Working Group had conducted a survey of financiers and manufacturers across the various jurisdictions which comprised their membership. The observer explained that survey had noted no interest in the draft Protocol retaining a take free rule. One delegation noted that the interest of users of equipment might not accurately be reflected in a survey primarily distributed to financiers and manufacturers.

35. An observer noted that partial systems involving a mixture of laws were inefficient, lead to unnecessary complexities in the comprehension and application of the law and hinder the potential economic benefits of the relevant legal text. As such, a partial opt-out was not a suitable solution. The observer also noted that there are differences in the approaches to the take free rule, such as whether the buyer takes free of all and any interests, or only those created by the dealer, additionally noting that such domestic rules have not been developed to cover lessees of inventory from dealers. A delegation noted that, if there is no domestic rule protecting lessees, the international interest should have priority.

36. Several delegations highlighted that any State looking to preserve its domestic inventory financing regimes, would opt-out of the application of Article XII and thereby preserve its own domestic take-free rules in relation to equipment held as inventory by dealers. These delegations affirmed that there was no need to include such a rule in the draft Protocol.

37. *The Commission agreed that Article XII should provide for Contracting States to make a declaration completely disapplying the Protocol to inventory financing. The Commission also agreed that Article XII should not provide a take-free rule as such a rule could create unnecessary complexity and undermine the integrity of international interests in MAC equipment. The Commission referred the matter to the Drafting Committee.*

38. *The Chair noted that the Diplomatic Conference would return to Articles I(2)(c) and I(2)(j) at a later point in time.*

#### Article XIII

39. The Chair opened the floor for discussion on Article XIII. The reporter provided an explanation of the rationale and history behind Article XIII.

40. *The Commission adopted Article XIII without modification.*

#### Article XIV

41. The Chair opened the floor for discussion on Article XIV. The reporter provided an explanation of the rationale and history behind Article XIV.

42. The Secretary-General noted that Article XIV should provide for flexibility in the designation of a Supervisory Authority. He explained that several possibilities existed in relation to the identity of the future Supervisory Authority. He noted that the future Supervisory Authority could be an existing international organisation, or, in the case there were no other practicable options, UNIDROIT could perform the role of the Secretariat of the Supervisory Authority, as consistent with the role of OTIF under the Rail Protocol, or, if necessary, directly act as Supervisory Authority. He concluded that the language in Article XIV should be modified to contemplate the various possibilities.

43. One delegation noted a minor drafting issue in Paragraph 1 in regard to how the “Diplomatic Conference” was referred to in the provision.

44. Another delegation noted that Paragraph 2 should be redrafted to allow for a new entity to take on the role of a Supervisory Authority, in case the entity initially designated as the Supervisory Authority was no longer willing or able to perform the role. A third delegation supported the proposal.

45. One delegation noted the importance of ensuring consistency with other Protocols with respect to the Supervisory Authorities’ immunities and privileges.

46. *The Chair summarised the discussion and referred the matters to the Drafting Committee. The Chair also noted that the matters raised might also be addressed in the Diplomatic Conference’s final resolutions.*

47. The Chair adjourned the meeting at 12:30.