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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 15 NOVEMBER 2019**

SEVENTH 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 09:10 by summarising the fourth day's discussion.
2. Some delegations sought clarification on the summary presented by the Chair in relation to whether the Commission had reached a consensus on the redrafting of Article VIII(5) as an opt-out rather than an opt-in provision. The Chair noted that as several opinions had been expressed regarding Article VIII(5), the matter was still open for further consideration.

Article I

3. The Chair opened the floor for discussion on the definitions of "dealer" in Article I(2)(c) and of "inventory" in Article I(2)(j).
4. *Article I(2)(c) and Article I(2)(j) were adopted without modification.*

Article XV

5. The Chair opened the floor for discussion on Article XV. The reporter explained the history and rationale behind Article XV.
6. *Article XV was adopted without modification.*

Article XVI

7. The Chair opened the floor for discussion on Article XVI. The reporter explained the history and rationale behind Article XVI.

8. An observer from the Aircraft Protocol International Registry made a number of legal and technical suggestions in relation to the future international registry to be established under the MAC Protocol. Concerning the designated entry points, the same observer noted that the MAC Registry would have a wider and more diverse universe of users as compared to the Aircraft Registry, and that the designated entry points could perform an important role in this new context. In order to support these users, he suggested that designated entry points could operate as local intermediaries to facilitate access to the international registry. The observer noted that the Protocol should support the proper operation of designated entry points by allowing the Supervisory Authority to set standards in the International Registry regulations to ensure that designated entry points met certain security standards, technical standards and complaint mechanisms. The observer noted that the draft Protocol did not identify a connecting factor with regard to designated entry points. He noted that the matter should be clarified and proposed the place of business of the debtor as a possible connecting factor.

9. Several delegations noted that designated entry points provided a useful mechanism for Contracting States to facilitate access to the registry for domestic stakeholders. One delegation noted that the provision should remain an optional declaration and that Contracting States should not be required to mandatorily designate an entry point.

10. One observer noted that domestic collateral registries could be established as designated entry points in Contracting States.

Connecting factor

11. One delegation noted the importance of establishing a defined connecting factor for designated entry points. The delegation suggested that the connecting factor could be the principal location of the debtor's business. Another delegation noted the difficulties associated with using the place of business of the debtor as the connecting factor.

12. One delegation noted that it would not always be possible to assume that a debtor's principal place of business could be ascertained by considering the registrations filed by the debtor, as registrants might enter addresses different to those of their principle place of business. With regard to whether the connecting factor should be set out in the draft Protocol, the delegation noted the need for flexibility and suggested that the matter could be dealt with in the regulations rather than in the text of the draft Protocol. The delegation concluded that the place of business of the debtor might not always be the most appropriate connecting factor and that in some situations the place of registration of the debtor might be a preferable connecting factor, given its clarity and predictability.

13. One delegation noted that it would not be necessary to establish a connecting factor if the use of entry points by registrants could only be optional and not mandatory.

14. *No consensus was reached on whether the Protocol should provide a connecting factor in relation to designated entry points. Consensus was also not reached on what such a connecting factor should be. The debate remained open for later discussion.*

Designation of the use of an entry point on a mandatory basis

15. Several delegations noted that the designation of the use of an entry point should be optional. Other delegations suggested that Contracting States should be able to decide whether the designation of the use of an entry point would be mandatory or optional.

16. The Reporter identified the text in Article XVI which might require modification. The Chair clarified that the present draft for Article XVI allowed for Contracting States to designate the use of

entry points on an optional basis, and also permitted the Supervisory Authority to define standards for such entry points through regulations under Article XV.

17. *No consensus was reached on whether the Protocol should allow Contracting States to designate the use of entry points on a mandatory or optional basis.*

Invalidation

18. Several delegations suggested that the failure to use a designated entry point or the improper use of a designated entry point should not invalidate registrations made in the international registry. One delegation stated that this principle would not seem to require changes to the text and it would be sufficient to reflect the lack of invalidity in the Official Commentary.

19. Another delegation, however, suggested that the matter be clarified in the text of the draft Protocol. The delegation added that while Contracting States could establish domestic repercussions for parties not *complying* with a designated entry point, at an international level it was essential to preserve the validity of registrations made in the international registry. Clarity needed to be achieved to ensure protection of the international registration.

20. On the understanding that the existing text of Article XVI would not invalidate registrations in the international registry that did not comply with a designated entry point, the Secretary-General queried what the outcome would be if a State enacted domestic laws that deemed such a registration invalid. It was suggested that additional language might need to be added to Article XVI to address such a situation, since the result could differ depending on national legislation and there was a need to achieve consistency across the board on such an important matter. This risk could be eliminated by including an express provision in the Protocol.

21. An observer suggested that in the case where a Contracting State established a designated entry point, the international registry could communicate with the entry point to ensure that all relevant registrations were made through the proper channel, which would nullify the issue of whether registrations that did not comply with a designated entry point would be invalid. Several delegations noted the challenges associated with the international registry providing feedback to national registries designated as entry points and did not consider it a feasible option.

22. The observer from the Aircraft Protocol International Registry noted that the Aircraft Registry regulations dealt with the issue of registrations which did not conform with the designated entry points system. He explained that such registrations could be deemed invalid under certain circumstances. He suggested that the matter be determined prior to designing a registry, as the registrar could preprogramme the registry to reflect whichever rule was agreed.

23. *The Commission agreed that the failure to make a registration in the international registry through the relevant designated entry point should not invalidate the registration.*

Standards

24. The observer from the Aircraft Protocol International Registry suggested that the Supervisory Authority should set standards for designated entry points in relation to issues such as dispute resolution, security standards, technical standards, operational standards and dealing with complaints.

25. One delegation noted that under the Aircraft Protocol, it had established a designated entry point, whereby an authorisation code is issued in order to process registrations. The delegation noted that similar standards for designated entry points under the future MAC Protocol registry could be established through regulations issued by the Supervisory Authority.

26. One delegation noted that the draft Protocol's text did not require designated entry points to be automatic and electronic which could lead to excessive fees and cumbersome manual processes. An observer suggested that flexibility be retained in relation to the matter. Another delegation noted that paper-based manual registries were not attractive and would encourage more registrants to file directly in the international registry. The delegation suggested that the setting up of domestic entry points which simply collected fees for forwarding registrations to the international registry should be discouraged. Another delegation supported this intervention.

27. After discussion, the Chair concluded that there was consensus that the Supervisory Authority should have the power to issue regulations which set standards in relation to the establishment and operation of designated entry points.

Location of designated entry points

28. Several delegations suggested that the MAC Protocol should allow for a designated entry point to be located in a foreign jurisdiction. The observer from the International Registry noted that while the Aircraft Protocol required the designated entry point to be on the territory of the designating State, the MAC Protocol could provide for flexibility on the matter. The observer noted that the location of a designated entry point in a foreign jurisdiction would not affect the connecting factor issue because registrants would need to determine whether or not they needed to use a designated entry point based on their own location, rather than the location of the designated entry point itself.

29. A delegation sought clarity on how designated entry points operated under the Aircraft Protocol registry. An observer from the Aircraft International Registry confirmed that the early versions of the Aircraft Registry Regulations provided for two types of designated entry points; (i) entry points that authorised registrants to register, and (ii) direct entry points which transmitted data to the international registry. He explained that only one direct entry point had ever been established and it charged a large fee to process transactions. He noted the direct entry point eventually changed to become an authorising entry point. The observer noted that the MAC registry could be different and should contemplate direct entry points. The observer concluded with urging delegations to retain maximum flexibility in the draft Protocol in this regard. Several delegations agreed with the need for flexibility in the way in which this provision was drafted.

30. One delegation recommended postponing the decision on Article XVI and the registry regulations. Another delegation supported this proposition.

31. *The Chair summarised the discussion. He noted that many of the matters raised could be dealt with by the Supervisory Authority in issuing regulations under Article XV. The Chair postponed consideration of Article XVI.*

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

FOURTH MEETING OF THE PLENUM

Item No. 7 on the Agenda: examination by the Conference of the Report of the Credentials Committee

33. The President invited the Chair of the Credentials Committee to present the second interim report of the Credentials Committee.

34. The Chair of the Credentials Committee noting that as of 15 November at 13:20, 41 States, one regional economic integration organisation, three intergovernmental organisations, four international non-governmental organisations and one technical adviser registered for the

Conference. Formal credentials had been submitted by 33 States, one regional economic integration organisation, three intergovernmental organisations, four international non-governmental organisations and one technical adviser. Additionally, seven States had presented full powers to sign the international legal instrument to be adopted by the Conference.

35. The President thanked the Chair of the Credentials Committee, and encouraged other States, which had not yet presented their letters of credentials in proper form to do so as soon as possible.

36. The President thanked the Chair of the Credentials Committee, and the Conference endorsed the recommendation of the Committee that, in conformity with Rule 4 of the Rules of Procedure, all delegations registered be permitted to participate in the Conference pending receipt of their credentials in due and proper form. The Conference also encouraged States which had not yet presented their letters of credentials in proper form to do so as soon as possible.

37. The President opened the floor for general statements. One delegation noted its strong interest in the MAC Protocol, expressing confidence that its adoption would enhance the availability of finance in the mining, agricultural and construction sectors. The delegation expressed support for the additional HS Codes proposed for inclusion in the draft MAC Protocol through DCME-MAC – Doc. 6, and noted that their inclusion would increase the economic benefits of the draft Protocol.

38. The President adjourned the meeting of the Plenum at 14:00.

EIGHTH MEETING OF THE COMMISSION OF THE WHOLE

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

39. The Chair opened the session at 14.03.

Article XVII

40. The Chair opened the floor for discussion on Article XVII. The Reporter explained the history and rationale behind Article XVII.

41. The observer from the Aircraft Protocol International Registry expressed that the provision was adequate for the purposes of the draft Protocol.

42. *The Commission adopted Article XVII without modification.*

Article XVIII

43. The Chair opened the floor for discussion on Article XVIII. The Reporter explained the history and rationale behind Article XVIII, noting the corresponding provision in the Aircraft Protocol had raised some complexities with respect to the limitations placed on who could request the discharge of a registered international interest.

44. The observer from the Aircraft Protocol International Registry suggested that Article XVIII(2) of the draft Protocol should be amended to expand the parties that had the right to apply for the discharge of a registration. He noted that several cases had been brought against the Registry in relation to discharge in circumstances where both the creditor and debtor no longer existed. The observer noted that summaries of cases against the International Registry were available on the Cape Town Convention Academic Project website. A delegation suggested that the matter be referred to the Drafting Committee.

45. The Chair noted that in order to address the issue raised by the Reporter and the observer from the Aircraft Protocol International Registry, language could be added to the draft Protocol which would note that any person adversely affected by, and who has an interest in, may seek discharge. One delegation expressed agreement with the Chair's policy proposition. Another delegation noted that it required further time to consider the matter.

46. *The Commission agreed that the MAC Protocol should amend Article 25 of the Cape Town Convention, as applicable to the MAC Protocol, to the effect that persons other than the debtor could discharge registrations. The matter was referred to the Drafting Committee.*

47. The Chair noted that there was language in square brackets in Paragraph 3 of article XVIII which concerned the ability of the Depositary to recover costs associated with the performance of its functions under the Protocol.

48. One delegation noted that the language in square brackets in Article XVIII(3) deviated from previous Protocols. While noting that Depositary work was not normally compensated, the delegation recognised that the MAC Protocol placed obligations on the Depositary that went beyond the normal depositary functions under most international treaties, especially in relation to the Protocol's use of the HS code system. The delegation noted that rather than deleting the language in Article XVIII(3) entirely, it should be confined to the Depositary functions that related directly to the Supervisory Authority and the Registry.

49. Several delegations agreed that the draft Protocol created several new obligations for the Depositary. As such, it was reasonable for the Depositary to recover costs for such expenses from the fees charged by the Registry. One noted that there should be a governance process to ensure that the Depositary's right to cost recovery did not unreasonably increase Registry fees.

50. One delegation proposed that the new text of the final part of Art. XVIII's third paragraph of art. XVIII could read as follows: "... and 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 XXXIV(2)(c) of this Protocol." The delegation noted that this language covered the relationship between the Depositary, Registry and the Supervisory Authority, and as such covered the unique costs the Depositary would incur in acting as the Depositary for the MAC Protocol. Several delegations supported the proposal, noting, however, that it was important to finalise Article XXXIV before making a final decision.

51. An observer from the Aircraft Protocol International Registry reminded that there could be quite an active relationship between the Registry and the Depositary. As an example, the observer explained that declarations under Article 39 of the Cape Town Convention had to be relayed to the Registry by the Depositary in order to ensure rights which enjoyed priority without registration were listed on the Registry's website for each State which had made the relevant declaration.

52. One delegation noted that it needed further time to review the additional language proposed for inclusion in Paragraph 3.

53. *The Chair tasked the Secretariat with the preparation of a note including the current tasks and outlining the additional tasks associated with the future MAC Protocol which the Depositary would be expected to incur in fulfilling its obligations to the Registry and the Supervisory Authority.*

54. With regard to Paragraph 1, the observer from the Aircraft Protocol International Registry noted that limiting the Protocol's primary search criteria to the manufacturer's serial number was unnecessarily restrictive and should be amended to offer more flexibility. The observer suggested that such flexibility could be achieved by adding "and such additional information as specified in the Regulations" to the end of Article XVIII(1). One delegation agreed with this proposition, noting that

only the search process was determined by Article XIII(1), rather than the identification criteria which were stated in Article XVII. The changes proposed by the observer would also allow for the draft Protocol to be more adaptable to accommodate future technological advances.

55. This same delegation concurred that while additional language could be added to Article XVIII(1), to the extent that that would not entail incorporating another set of criteria for searches for the purposes of Article 19(6) of the Convention.

56. Another delegation also urged caution in considering amendments to Article XVIII(1), noting that it was unclear whether potential future technologies would actually replace serial numbers, rather than just alter their form. The delegation agreed for the need for flexibility in applying Article XVIII(1). Another delegation agreed with the need for flexibility in XVIII(1) in order to allow for consistency with other Protocols under the Cape Town Convention.

57. A delegation emphasised that the primary search criterion should continue to be the manufacturer's serial number, as this was the requirement for filing a registration. The delegation noted that additional search tools would only filter and refine the search to a greater extent and should not replace the manufacturer's serial number as the primary search criterion, noting that "manufacturer's serial number" was not defined in the draft Protocol, and should be defined by the regulations. Another delegation confirmed that the additional information with regards to searches would only be for the purposes of further refining the search.

58. *The Chair concluded that there was no consensus on Article XVIII(1) and noted that the Commission would return to it at a later point.*

Item No. 10 on the Agenda: examination by the Conference of the Report of the Final Clauses Committee

59. The co-Chairs of the Final Clauses Committee, a representative of South Africa, and a representative of the United Kingdom, presented the Interim Report of the Final Clauses Committee as found in DCME-MAC – Doc. 17.

60. The Chair commended the Final Clauses Committee on its work, thanking all the delegations which had taken part in its proceedings. The Chair opened the floor for discussion on the report.

61. Several delegations thanked the co-Chairs and all the delegations which took part in the work of the Final Clauses Committee, noting that the work had resulted in the preparation of a solution on amendments which all States were willing to accept. Many delegations expressed their support for the policy proposals made in DCME-MAC – Doc. 17, noting that they struck the right balance between considerations of commercial certainty, and allowing States to retain control over their obligations under the treaty. Several delegations noted the need for the policy objectives of DCME-MAC – Doc. 17 to be referred to the Drafting Committee before they could be considered in detail.

62. *The matter was referred to the Drafting Committee which was invited to prepare a draft for the amendment mechanism of the draft Protocol based on the policy objectives outlined by the Final Clauses Committee in DCME-MAC – Doc. 17.*

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

63. The Chair invited the co-Chairs of the Drafting Committee, a representative of France and a representative of the United States of America to present DCME-MAC – Doc. 19.

64. The co-Chairs of the Drafting Committee expressed their gratitude to all those who had participated in its meetings, noting that the Committee had considered Articles I to XII of the Protocol, as well as Article XXVII as instructed by the Commission. The co-Chairs noted that three categories of changes had been considered: (i) technical amendments in order to improve the readability and style of the Protocol; (ii) substantial changes to reflect the policy positions which had been expressed by the Commission; and (iii) issues which the Commission asked the Committee to examine, but the Committee had decided not to make. The co-Chairs explained that the Drafting Committee had decided that there was no need to change the definition of “immovable-associated equipment”. In this regard, the Drafting Committee reached the conclusion that, in order to apply the policy objective of allowing creation of international interests both before and after the association of equipment to immovable property, changes should be made directly in Article VII rather than in the definition. A similar approach was taken to the Article which was now II(3), where no amendment was envisaged. Similarly, the Committee also did not suggest any changes to Articles VI and VII Alternative C, noting that the extensive current text in both cases was sufficient to address the concerns raised by the Commission. Another similar instance was found in Article X(1) and Article X(2) where no change was deemed necessary to reflect that, in the absence of a declaration, national law applied, as this was a common understanding under the Cape Town Convention system.

65. The Chair opened the floor for comments on the Drafting Committee’s interim report as found in DCME-MAC – Doc. 19.

66. Several delegations thanked the co-Chairs of the Drafting Committee for their work.

67. *The Commission adopted changes to Article I without modification.*

68. *The Commission adopted changes to Article II without modification.*

69. With regards to Article VII, one delegation noted that while it accepted the Drafting Committee’s view that Article VII Alternative C already addressed the concerns this delegation had previously raised to the Commission, it was proposed that these matters should be expressly included in the report of the Commission and also possibly in the Official Commentary.

70. One delegation expressed some concern on the change of language in Article VII(1) in order to cover the creation of international interests at all points in time. The delegation queried if this change in language went too far and caused additional confusion with regard to the determination of instances where an international interest could exist. The delegation requested reconsideration of this point, and provided some suggestions to the Committee. Another delegation shared this concern. *The co-Chairs expressed appreciation for the suggestion, and noted that the issue would be further considered by the Drafting Committee.*

71. *The Commission, noting that debate was still pending on Article VIII(5), agreed to postpone the discussion on Article XIII to a later time.*

72. *The Commission adopted changes to Article X without modification.*

73. An observer from the MAC Working Group noted that the redraft of Article XII(2) contained a policy-related provision which had not yet been resolved by the Commission, which concerned the use of the location of the inventory to ascertain its inclusion or exclusion in the regime, rather than the location of the dealer as recommended by Committee of Governmental Experts. The observer noted its strong preference for a debtor-based rule rather than an inventory-based rule.

74. One delegation raised a concern over a situation where a debtor who originally acquired MAC equipment as non-inventory subsequently held its used equipment in the ordinary course of its

business. The delegation suggested that the Official Commentary could clarify that such a situation should not result in the recharacterization of the MAC equipment as inventory for the purposes of Article XII.

75. The Chair noted that the issue raised by the MAC Working Group had not yet been considered and that a discussion on policy was necessary in the Commission. The Chair asked the observer from the MAC Working Group to provide additional elaboration on this matter.

76. The observer from the MAC Working Group suggested that the connecting factor in applying Article XII should be the primary location of the dealer, as it would be easily ascertainable and would allow for companies to restructure in different States in order to ensure that Article XII appropriately applied to their business.

77. Several delegations supported the use of the primary location of the dealer as the connecting factor to determine the application of Article XII. Other delegations favoured the use of the location of the inventory as the connecting factor. One delegation noted that the Cape Town Convention generally avoided the use of the *lex rei sitae* in determining its application and should therefore not be the connecting factor under Article XII as a matter of consistency.

78. Another delegation noted that the underlying policy rationale of Article XII was to allow States to preserve their own inventory financing systems, which were intrinsically tied to businesses operating within those States. It was suggested that in the vast majority of cases the place where a debtor was located and had its principal place of business more often than not aligned with the location of the inventory. On some rare occasions however, dealers with a principal place of business in one State might establish dealerships in other States.

79. Several delegations recognised the challenges posed by this issue and recommended postponing a decision on Article XII to a later time.

80. Noting no consensus on the matter, the Chair deferred a decision on Article XII to later time.

81. The Chair opened the floor for discussion on the Summary Report for 11 November 2019 DCME-MAC – Doc. 18.

82. *DCME-MAC – Doc. 18 was adopted without modification.*

83. The Chair adjourned the meeting at 17:04.