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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")**

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**SUMMARY REPORT  
FOR 18 NOVEMBER 2019**

**NINTH 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 fifth day's discussions.

Article XIX

2. The Chair opened the floor for discussion of Article XIX. The Reporter introduced the Article.
3. *The Commission adopted Article XIX without modification.*

Article XX

4. The Chair opened the floor for discussion of Article XX. The Reporter introduced the Article.
5. *The Commission adopted Article XX without modification.*

Article XXI

6. The Chair opened the floor for discussion of Article XXI. The Reporter introduced the Article.
7. *The Commission adopted Article XXI without modification.*

Article XXVI

8. The Chair suggested that Article XXVI be discussed by the Commission. He explained that even though it was located in Chapter 6 (Final Provisions), it covered substantive matters that warranted consideration by the Commission.
9. One delegation queried the relationship between Paragraphs 3 and 4 of Article XXVI. The delegation requested confirmation that the time period specified in Paragraph 3 during which pre-existing rights and interests were preserved would also apply to pre-existing rights and interests under paragraph 4.

10. Several delegations suggested that Paragraph 4 might require further consideration in light of the changes to the MAC Protocol amendment articles that had been proposed by the Final Clauses Committee. One delegation suggested that the reference to Article XXXIII(4) in Paragraph 4 would need to be corrected.

11. *The Chair postponed the discussion and concluded that Article XXVI would require further consideration by the Commission at a later time.*

#### Report of the Harmonized System Working Group (HS Working Group)

12. The Chair of the HS Working Group presented the Working Group's report, as contained in DCME-MAC – Doc. 20. He explained that the Working Group had evaluated the 42 HS codes listed in the draft MAC Protocol Annexes as well as proposals made by States to include additional HS codes in the MAC Protocol Annexes. On the basis of its evaluations, the Working Group had proposed 56 HS codes to be listed in the MAC Protocol Annexes, as provided in Appendix A of the Working Group's report.

13. Several delegations congratulated the Working Group for successfully completing its challenging and complex tasks. Delegations also expressed their gratitude to all those States which participated in the process of ensuring that the MAC Protocol Annexes covered mining, agricultural and construction equipment relevant to economies across the world. One delegation noted that there would be future opportunities to consider the addition of further HS codes to the MAC Protocol Annexes. Another delegation noted that it was important for the MAC Protocol to provide an appropriate amendment mechanism for the addition of HS codes in the future.

14. One delegation noted the significant overlap between the HS codes covering mining equipment listed in Annex 1 and the HS codes covering construction equipment listed in Annex 3. The delegation explained that because every code listed in Annex 1 of the Draft MAC Protocol Annexes was also listed in Annex 3, a Contracting State that applied the Protocol to construction equipment covered by Annex 3 would also be applying the Protocol to all mining equipment listed in Annex 1. Conversely, a Contracting State that applied the Protocol to Annex 1 but not Annex 3 would still be applying the Protocol to approximately 75% of the equipment listed in Annex 3. The delegation suggested that Contracting States should take this matter into account in considering whether to limit the application of the Protocol to certain Annexes under Article II.

15. *The Conference adopted the report of the HS Working Group and requested the Drafting Committee to amend the HS codes listed in the MAC Protocol Annexes to reflect the report's recommendations.*

#### Article VIII(5)

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

17. One delegation proposed a compromise solution that retained the existing text of Article VIII(5) as an opt-out declaration for Contracting States on the basis that the Commission agreed to a common understanding that "the cooperation with assistance for the creditor necessary for the export and physical transfer of equipment from the territory in which it is situated (as mentioned in Article VIII(1) and (5)) requires, as a matter of principle, a non-discriminatory treatment of MAC equipment secured creditors concerning the exercise of these remedies, provided that their status as creditors under this Protocol does not require preferential treatment."

18. Several delegates expressed their support for the proposed solution. A number of delegations noted that they were satisfied with the current text of Article VIII(5) on the understanding that the

reference in Article VIII(1) to ‘physical transfer of equipment from the territory in which it is situated’, is a reference to physical transfer across the border of the State in which it is located, not to physical transfer within the jurisdiction.

19. *The Commission agreed that Article VIII(5) should be adopted with its existing text (not including the sub-bracketed text) as an opt-out declaration for Contracting States. The Commission further agreed that the cooperation with assistance for the creditor necessary for the export and physical transfer of equipment from the territory in which it was situated (as mentioned in Article VIII(1) and (5)) required, as a matter of principle, a non-discriminatory treatment of MAC equipment secured creditors concerning the exercise of those remedies, provided that their status as creditors under this Protocol did not require preferential treatment, and that the reference to ‘physical transfer’ of equipment in Article VIII(1) is a reference to physical transfer across the State’s border.*

#### Article XII

20. The Chair reopened the floor on Article XII. He explained that the only issue that the Commission had yet to resolve regarding Article XII was determining the connecting factor in relation to its application.

21. One delegation noted that the policy underpinning Article XII was clear in allowing for Contracting States with well-functioning inventory financing systems to opt-out of the Protocol’s application to interests in equipment held as inventory by a dealer. The delegation explained that the only open issue was whether the policy would best be achieved by applying Article XII based on the location of the dealer or the location of the inventory. The delegation noted a preference for principal place of business of the dealer as the connecting factor. It was further suggested that an alternative connecting factor could be the place of business of the debtor in which the inventory would be situated.

22. An observer explained that most domestic secured transactions regimes used *lex situs* as the connecting factor. However, he explained that in many States the financing of inventory in transit was done through the possession of bills of lading and the creditor usually relied on proceeds for which the connecting factor was the location of the debtor rather than the inventory. The observer suggested that Article XII should provide a clear and simple connecting factor that would increase certainty and reduce transactional costs of inventory financing.

23. One delegation agreed that Article XII should provide a clear and simple connecting factor and discouraged the Commission from adopting a complex rule. Several delegations agreed with the proposition.

24. One delegation suggested that in the vast majority of cases, the principal place of the dealer and the location of the inventory would be the same place.

25. Another delegation suggested that the principal place of business of the dealer would be the most appropriate connecting factor, on the basis that it was consistent with the Cape Town Convention philosophy in not relying on *lex situs*, and would be easier to determine. The Secretary-General agreed that if both connecting factors were equally attractive, the option that was consistent with the Cape Town Convention’s philosophy should be preferred.

26. An observer from the MAC Working Group agreed that the principal place of business of the dealer would be the most appropriate connecting factor as it would provide the most certainty and predictability when viewed in light of existing financing practices. He further noted that the dealer could restructure to ensure that it was located in a Contracting State that had opted out of the application of the Protocol to inventory financing under Article XII.

27. Several other delegations agreed that the principal place of business of the dealer would be the most appropriate connecting factor. One delegation noted that it was unlikely that the dealer would operate through the same legal entity across international borders, which would provide certainty and predictability in the application of Article XII.

28. One delegation noted that Article XII(5) of the draft MAC Protocol as approved by the Committee of Governmental Experts in 2017 could be utilised in establishing the principal place of business of the dealer as the connecting factor. The Chair queried whether Article XII(5) was legally equivalent to Article 4(1)(d) of the Cape Town Convention. Several delegations noted that notwithstanding the differences in drafting, the application of Article XII(5) and Article 4(1)(d) as the connecting factor would give rise to the same result. Some delegations noted their preference for the drafting in Article XII(5).

29. Referring to the Drafting Committee's revised version of Article XII, several delegations sought confirmation that Paragraph 3 would only apply where Paragraph 2 applied. *The Commission agreed with the proposition and referred the matter to the Drafting Committee.*

30. *The Commission agreed that the principal place of business of the dealer should be the relevant factor in determining the application of Article XII, on the basis that it was more consistent with business practices including financing against accounts receivable, simple and consistent with the Cape Town Convention.*

#### Article XVIII

31. The Chair reopened the floor for discussion on Article XVIII.

32. One delegation noted that the existing language in Article XVIII(1) should be retained. The delegation explained that an official search should only be possible in relation to the manufacturer's serial number and that any additional criteria provided for in the regulations to filter an official search would have no legal effect. Another delegation agreed that the manufacturer's serial number should be the sole criterion by which an official search could be made.

33. One delegation also supported the use of the manufacturer's serial number as the sole criterion by which an official search could be made, but suggested that the term "manufacturer's serial number" should be interpreted flexibly to accommodate future technological innovations. Another delegation agreed that "manufacturer's serial number" should be regarded as a flexible concept that went beyond a list of letters and numbers and could include innovations such as QR codes.

34. Another delegation suggested that additional language could be added to Paragraph 1 to the effect that the regulations to the MAC Protocol International Registry would specify the format of a manufacturer's serial number. An observer from the Aircraft Protocol International Registry agreed and suggested that the Commission might wish to consider inserting additional language in Paragraph 1 to ensure that the regulations could flexibly deal with the matter in responding to future technical innovations.

35. A third delegation agreed with the principle but suggested that the matter could be dealt with in the regulations without changing the text of Paragraph 1. The delegation also noted that any interpretive rules applied in relation to the term "manufacturer's serial number" would also need to be applied to Article XVII.

36. A delegation agreed that the format of a manufacturer's serial number could be specified in the regulations without the need to amend the text of Paragraph 1. The delegation further noted that if the concept of a manufacturer's serial number became obsolete in the future, it would be

appropriate to require a treaty amendment to change the search and registration criteria, as such a change would affect legal rights.

37. An observer noted that it was common for domestic debtor-based registries to use manufacturer's serial numbers as search criteria. The observer agreed that a review conference would be the appropriate mechanism to replace the manufacturer's serial number as the sole official search criterion. The observer noted that much of the equipment within the scope of the draft MAC Protocol had long operational lifespans and that the Protocol might need to contemplate the registration and indexing of manufacturer's serial numbers in different formats.

38. *The Commission agreed that the manufacturer's serial number should be the sole official search criterion for parties undertaking priority searches in the International Registry. The Commission agreed that the regulations could provide for additional search filters and that Articles XVIII(1) and XVII provided sufficient flexibility for the registry to require additional information from registrants to filter search results. The Commission agreed that the regulations allowed for a number of requirements to be set and granted flexibility beyond mere format.*

39. The Chair reaffirmed that Article XVIII(2) had been referred to the Drafting Committee to broaden the parties that could make demand for the discharge of a registration in the international registry. An observer from the Aircraft Protocol International Registry noted that the Commission might wish to consider the MAC Protocol amending Article 25 of the Convention to allow for the discharge of registrations where the holder of the interest no longer existed or could not be found. *The matter was referred to the Drafting Committee.*

40. The Chair reopened the floor for discussion on the bracketed text in Article XVIII(3).

41. The Executive Secretary introduced DCME-MAC – Doc. 22.

42. One delegation noted that DCME-MAC – Doc. 22 helpfully set out the various duties that might be expected of the Depositary under the MAC Protocol. On the basis that the MAC Protocol would impose unique and substantial additional duties on the Secretariat serving as the Depositary that went beyond the normal duties expected of a treaty depositary, the delegation noted that it would be willing to revise its earlier proposal in relation to the language in Article XVIII(3). The delegation proposed that additional text be added to Article XXXIV(2) to reflect the additional duties the Depositary would be expected to perform in relation to adjusting or modifying the HS codes listed in the MAC Protocol Annexes.

43. One delegation suggested that the following additional text be added to the end of Article XXXIV(2)(c) "and perform related duties to ensure the proper operation of the registry", and that a new paragraph (d) be added that provided "perform duties associated with the adjustment and modification of the Annexes, as referred to in Article XXXIIIbis and XXXIVter." The delegation further suggested that the expression "and Article XXXIV(2)(c) and (d)" be added to the bracketed text in Article XVIII(3).

44. Several delegations expressed support for the policy that the MAC Protocol provide a limited cost recovery mechanism in relation to specific extraordinary duties that the treaty imposed on the Depositary. Some delegations expressed their support for the proposal that identified the duties for which the Depositary could seek compensation.

45. *The Commission agreed that the MAC Protocol should provide a cost recovery mechanism in relation to a limited set of specific duties that the treaty imposed on the Depositary. The Commission referred the delegation's proposal to the Drafting Committee.*

46. *Paragraphs 4 – 8 of Article VIII were adopted without modification.*

47. The Chair adjourned the meeting at 12:30

## **TENTH MEETING OF THE COMMISSION OF THE WHOLE**

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

48. The Chair opened the session at 13:35.

#### Article XVI

49. The Chair re-opened the floor for discussion on Article XVI (designated entry points).

50. One delegation summarised their position on Article XVI, noting four points: (i) the MAC Protocol should allow for the possibility of establishing designated entry points, as consistent with the existing Protocols of the Cape Town Convention; (ii) the provision should retain its simplicity and flexibility; (iii) the registry regulations should allow the Supervisory Authority to set standards guaranteeing conformity with the Cape Town Convention system; and (iv) if a registrant acted in non-compliance with the designated entry point, this should not invalidate the registration in the international registry, but may raise issues for that registrant under the domestic law of the State that designated the entry point.

51. Several delegations expressed their agreement, noting that the connecting factor should be established in the registry regulations. An observer from the Aircraft Protocol International Registry noted that practitioners making registrations under the future MAC Registry would likely favour a definitive connecting factor established either in the draft Protocol itself or preferably by the regulations. Several delegations agreed that the connecting factor should be identified in the regulations.

52. One delegation suggested that it was not within the purview of the regulations to identify the connecting factor. An observer from the Aircraft Protocol International Registry noted that section 12.2(a) of the regulations for that registry identified the connecting factor for the designated entry point. The observer suggested that this practice could be followed by the future MAC Protocol.

53. One delegation emphasised the importance of confirming the validity of international interests where registrants did not act in full compliance with a designated entry point. The delegation preferred that the matter be directly addressed in the draft Protocol itself but accepted that, at a minimum, it should be explicitly stated in the report of the Diplomatic Conference and the Official Commentary. Several delegations expressed support for addressing the matter in the report of the Diplomatic Conference and the Official Commentary.

54. One delegation sought clarity on the relationship between national registers and the international registry.

55. *The Commission decided to retain Article XVI in the draft Protocol. The Commission agreed that the provision as drafted provided sufficient flexibility to ensure designated entry points would function effectively. The Commission confirmed that non-compliance with a designated entry point would not invalidate a registration, irrespective of any domestic issues a registrant may face, and that this policy be reflected by the Drafting Committee in the draft Protocol. The Commission agreed that pursuant to Article XV, the Supervisory Authority could draft regulations to provide standards ensuring that designated entry points were in conformity with the Cape Town Convention system and to specify the connecting factor that would determine the scope of registrations for which a State could make its designated entry point.*

### Preamble

56. The Chair opened the floor for discussion on the preamble of the draft Protocol.

57. Noting the significance and potential economic impact of the draft Protocol in developing countries, as well as recognising the improvements which the draft Protocol could bring to societies and communities who relied upon primary industries such as mining, agriculture, and construction for their livelihoods, one delegation recommended amending the fourth paragraph of the preamble to highlight the benefits of the draft Protocol for developing countries. The delegation noted that it would submit a written proposal to this effect at a later stage. Several delegations agreed. One delegation noted that any economic benefit that the treaty might have in developing countries was theoretical and further evidence was needed.

58. One delegation noted that the second paragraph of the draft Protocol contained an excessive amount of text, and recommend that it be examined by the Drafting Committee.

59. One delegation noted the need to simplify the language of fourth paragraph of the preamble. Another delegation proposed deleting it altogether, as it referred to a substantive matter. Another delegation suggested that the paragraph be retained, as it was common for treaties to refer to other instruments that they relied upon. One delegation suggested moving the fourth paragraph to the end of the preamble.

60. *The Chair summarised the discussion, noting a lack of consensus on the preamble of the draft Protocol. He requested the Drafting Committee to prepare an additional draft of these clauses for consideration by the Commission.*

61. The Chair adjourned the meeting at 14:25.