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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 19 NOVEMBER 2019**

ELEVENTH MEETING OF THE COMMISSION OF THE WHOLE

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

1. The Chair opened the meeting at 09:10 by summarising the sixth day's discussion.
2. The Chair opened the floor for comments on DCME-MAC – Doc. 21 (Summary report for 12 November 2019).
3. An observer from a regional economic integration organisation recommended the replacement of "an observer" with "an observer from a regional economic integration organisation" in Paragraph 28.
4. With regard to Paragraph 47, a delegation proposed alternative language which would read as follows "... where the international interest was ~~created~~ after registered after the immovable property law interest and the equipment became associated with the immovable property prior to registration of the international interest."
5. One delegation noted that Paragraph 52 did not accurately list all the States which composed the Drafting Committee, and recommended that the list be corrected.
6. *All the recommended changes were accepted, and the Commission adopted DCME-MAC – Doc. 21.*
7. The Chair opened the floor for comments on DCME-MAC – Doc. 23 (Summary report for 13 November 2019).
8. With regard to Paragraph 30, one delegation suggested that further details be added to clarify why a change in the definition of "primary insolvency jurisdiction" was not necessary. The Secretary-General proposed the following text: "... such as the UNCITRAL Model Law on Cross Border Insolvency. The Commission agreed that there was no need to change the definition of "primary insolvency jurisdiction" since the criterion to determine jurisdiction in the UNCITRAL text (place of registration) and in the Protocol (place of statutory seat) were to be deemed equivalent."

9. *All of the recommended changes were accepted, and the Commission adopted DCME-MAC – Doc. 23.*

10. The Chair opened the floor for comments on DCME-MAC – Doc. 24 (Summary report for 14 November 2019).

11. With regard to Paragraph 5, a delegation recommended replacing the word “noted” with “stated” as the intervention from the observer was a statement rather than a note.

12. With regard to Paragraph 8, an observer from a regional economic integration organisation expressed her dissatisfaction with the articulation of the intervention. The observer noted that the intervention had expressed an open position with regard to the discussion and had reserved the right to declare a position on the matter at a later occasion. The observer suggested the intervention be redrafted to state the following: “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.” One delegation supported the proposal.

13. The observer from a regional economic integration organisation sought clarity from the Chair as to whether it could further explain its position in relation to Article X of the draft MAC Protocol. The Chair noted that the Commission was currently considering DCME-MAC – Doc. 24 and that matters unrelated to the adoption of that document should not be discussed.

14. The Chair noted that, in his view, the Commission’s discussion and conclusion regarding Article X was accurately reflected in DCME-MAC – Doc. 24. The Chair further explained that the Commission’s decision on Article X had also been reconfirmed in his daily summary on the following day without objection, and was reflected in the Drafting Committee’s interim report (DCME-MAC – Doc. 19), again without any delegation or observer expressing any reservations or objections. The observer from the regional economic integration organisation noted that it had not been able to express its position on the matter as it had not consulted its Member States at the time the matter was initially discussed but was now ready to state its position. A delegation also noted its intention to discuss the matter at depth, keeping in mind the new position of the observer. This same delegation suggested that the conclusion in Paragraph 12 no longer accurately reflected the discussion of the session.

15. Several delegations supported the observations by the Chair with regard to the conclusions of the Commission on this matter, as noted in Paragraph 12, and recommended that no changes be introduced in Paragraph 12, nor in Paragraph 15.

16. *All of the recommended changes were accepted, and the Commission adopted DCME-MAC – Doc. 24. The Commission also took note of two objections to the conclusions in DCME-MAC – Doc. 24 in relation to Alternatives B and C of Article X.*

Article XXVI

17. The Chair re-opened the floor for discussion on Article XXVI.

18. One delegation reiterated its request for clarification on 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 related to the revision or modification of HS codes listed in the MAC Protocols. The delegation further queried whether the time period specified by a Contracting State

under Paragraph 3 would restart every time an HS code listed in the Annexes were revised or modified and affected pre-existing rights and obligations.

19. A delegation noted the importance of ensuring coordination between the amendment mechanism of the Protocol and Article XXVI, noting that the Official Commentary could add more detail on the interpretation of this provision.

20. *The Commission agreed that, where a Contracting State made the requisite declaration, a new time period would start with respect to every adjustment or modification of the MAC Protocol Annexes. The Commission agreed that Article XXVI needed to be aligned with the amendment mechanism for adding additional HS Codes to the Protocol. The matter was referred to the Drafting Committee.*

Interim Report of the Final Clauses Committee

21. The Chair invited the co-Chairs of the Final Clauses Committee, a representative of South Africa and a representative of the United Kingdom, to present their second interim report to the Commission.

22. The co-Chairs noted that the Final Clauses Committee had considered Articles XXII to XXXIV, and had also further discussed the amendment Articles with the co-Chairs of the Drafting Committee to ensure the proposed text accurately reflected the Final Clauses Committee policy positions, as adopted by the Commission.

23. The co-Chairs highlighted three additional actions that the Final Clauses Committee had taken at its fourth meeting. First, the Final Clauses Committee agreed that where a State became a Contracting State during an adjustment or modification process in relation to the MAC Protocol Annexes, it was determined that the State would become part of the ongoing process. Second, the Final Clauses Committee had requested the Drafting Committee to ensure consistency of the terms used in the Final Clauses and the rest of the Protocol. Third, the Final Clauses Committee had asked the Drafting Committee to ensure that all references to Protocol articles in the final clauses articles matched the latest draft of the Protocol.

Preamble

24. The Chair reopened the discussion on the preamble.

25. Several delegations, following informal consultations jointly, expressed support for retaining the existing language in paragraph 5, as it already covered States across all levels of development by using the term “global economy”.

26. *The Chair summarised the conclusions regarding the preamble, noting that paragraph 4 would be moved to the end, paragraph 5 would be retained, and some linguistic changes consistent with the discussions at the Commission would be made by the Drafting Committee.*

Interim Report of the Drafting Committee

27. The Chair invited the co-Chairs of the Drafting Committee, a representative of the United States of America and a representative of France to present an interim report.

28. The co-Chairs of the Drafting Committee noted that their interim report presented two new items, based on the interim report which the Final Clauses Committee had submitted in DCME-MAC – Doc. 17. These changes related to provisions necessary to accommodate changes to the MAC

Protocol Annexes: definitions for “Contracting State proposal”, “Depositary Proposal”, “HS revision”, and “implementation period”, and drafts for Articles XXXIIIbis and XXXIIIter.

29. The co-Chairs noted that Article XXXIIIbis dealt with changes necessary to align the MAC Protocol Annexes with revisions made to the HS Codes by the World Customs Organization. The co-Chairs explained that the provisions in Articles XXXIIIbis and XXXIIIter were complex, reflecting the complexities of the Harmonized System. It was further explained that the articles attempted to balance the need for having an expeditious procedure with the respect of State sovereignty. The co-Chairs noted that Article XXXIIIbis allowed for adjustments to the Annexes to reflect HS revisions made every 5 years.

30. The co-Chairs noted that Article XXXIIIter related to modifications which States might wish to propose to the Annexes of the Protocol. These provisions could run concurrently with the provisions in Article XXXIIIbis, but were not strictly bound by the World Customs Organization’s five year cycle. The co-Chairs noted that the French version of the text still needed to be refined.

31. Several delegations expressed their appreciation for the work of the Final Clauses Committee and the Drafting Committee, and noted their approval of the proposals presented. One delegation queried whether the powers conferred to the meeting of Contracting States in Article XXXIIIbis(4) and Article XXXIIIter(4), related strictly the Depositary or Contracting State proposal, or also extended to making additional proposals. It was clarified that the powers of a meeting of Contracting States were strictly limited to consider existing proposals for which the meetings had been called.

32. *The Commission approved the interim report of the Drafting Committee. The Commission noted that the Drafting Committee may wish to consider whether additional drafting changes were needed to clarify the scope and powers of meetings of Contracting States under Articles XXXIIIbis(4) and XXXIIIter(4).*

33. The Chair opened the floor for consideration of any outstanding matters.

34. An observer from a regional economic integration organisation notified the Commission that its Member States had not reached a common policy position on the matter of deleting Alternatives B and C of Article, X of the draft Protocol, as States held positions of support, neutrality, and opposition. As such, the observer stated that she would express a political position, rather than a technical one. Politically, the observer noted a preference to retain one of the two Alternatives, highlighting that doing so would facilitate the signature, and eventual ratification of the future Protocol by the regional economic integration organisation represented by the observer and subsequently, its Member States. The observer noted that competence in matters of insolvency rested with the regional economic integration organisation, rather than its Member States. The observer added that retention of one of the two Alternatives would make it easier to present the future Protocol to its governing organs. The observer noted that while Alternative B did not align fully with its own systems of insolvency, as amended by a recent regional instrument, retaining it in the Protocol could make the future Protocol a more attractive to the observer’s decision-making bodies. While recognising that Alternatives B and C of Article X had not been utilised for the Aircraft Protocol, as all options other than Alternative A did not bring economic benefits, the observer noted that mining, agriculture, and construction were different to the aviation sector. The observer suggested that due to the broader nature of stakeholders in the MAC sectors, it was likely that some Member States would not opt for a highly creditor-friendly regime, as put forward by Alternative A, but might still want to take advantage of the Cape Town Convention selecting other alternatives. Under such circumstances, States might want to consider Alternatives B or C.

35. The Chair noted that the discussion on Article X had been formally closed through the adoption of a decision by the Commission, which he had summarised twice, as well as through the

adoption of the drafting proposal for the Article, presented in the interim report of the Drafting Committee DCME-MAC – Doc. 19. The Chair welcomed other views on the matter.

36. One delegation expressed support for the position held by the observer from the regional economic integration organisation on this matter. The delegation identified five reasons for retaining Alternatives B and C:

(a) Any State which was not in a position to opt for the highly creditor friendly regime of Alternative A, and wanted to preserve some of its national laws while still aspiring to align itself with the Cape Town Convention System, could do so by selecting either Alternative B or C.

(b) The stakeholders in the MAC sectors were not the same as those in the aircraft sector. As such, a greater number of more vulnerable debtors were found in the MAC sectors, and States may wish to offer greater protection to these, as opposed to the aviation sector, which normally encompassed very strong debtors.

(c) It was important to retain political support at the level of the Presidency of the regional economic integration organisation, and this position would be held by the commenting delegation in the near future.

(d) Retaining Alternatives B and C did not negatively impact the draft Protocol, as the retention of similar Alternatives had been in all past Protocols, with no adverse effects.

(e) The proposal to delete Alternatives B and C was only presented for deliberation at a late stage and had not allowed adequate discussion to take place on the matter.

37. The delegation added that they would recommend the reopening of the discussion under Article X at the Commission, and also intended to raise the matter at the next meeting of the Plenum.

38. Several delegations noted that agreed with the conclusions presented to the Committee regarding the deletion of Article X Alternatives A and B, as confirmed by the Commission's adoption of the interim report of the Drafting Committee in DCME-MAC – Doc. 19. One delegation, speaking on behalf of all African States in the Commission, confirmed that all African States opposed reconsidering Article X on the basis that the matter had already been agreed by the Commission. One delegation noted that, while it had grave concerns regarding the reopening of matters that had already been decided by the Committee, if the reopening of Article X was voted upon, the delegation would abstain from voting.

39. One delegation suggested that, in order to reach a compromise, one solution could be to expressly clarify that those Contracting States that did not select Alternative A would then be fully subject to the application of their national laws under Article X(1).

40. The Chair summarised the discussion, noting that, following an observer from a regional economic integration organisation's intervention, one delegation had stated their intention to reopen a discussion which a majority of the Commission considered as already decided. He further noted that a large group of delegations opposed the reconsideration of Article X on the basis that the matter had already been decided by the Commission. The Chair cautioned that the matter involved several questions of procedure which could negatively impact on the spirit of the negotiations. The Chair recommended that informal discussions on the matter be conducted, and the issue be re-examined at a later point in time if necessary.

41. The Chair opened the floor for other outstanding issues.

42. One delegation sought the view of the Commission as to the need for any additional interpretation rules were required in order to ensure predictable application of Articles XII with respect to the location of the dealer in territorial units as defined in Article XXV. It was suggested that some of these issues might be addressed in the relevant declarations for territorial units. It was

also noted that factor-specific issues, such as those found in Article XII, might need to be covered in Article XXV. *As the matter had already been referred to the Drafting Committee by the Final Clauses Committee, the Drafting Committee was invited to take note of the comments made in the Commission of the Whole.*

43. The Chair adjourned the meeting at 12.30.

TWELFTH MEETING OF THE COMMISSION OF THE WHOLE

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

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

45. A delegation noted that informal discussions with respect to the reopening of matters under Article X were ongoing and requested more time for deliberations.

46. Several delegations, including a delegation representing all African States participating in the Diplomatic Conference, restated their view that discussions on Article X had been concluded. One delegation noted that further attempts to reconsider the Article on its merits would raise procedural issues. Nevertheless, delegations agreed to conduct additional informal consultations.

47. The Chair adjourned the meeting at 14:00.