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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

UNIDROIT 2019  
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**SUMMARY REPORT  
FOR 20 NOVEMBER 2019**

**THIRTEENTH 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 10:45 by summarising the seventh day's discussion.

Article X

2. The Chair re-opened the floor for discussion on Article X.
3. One delegation suggested that a compromise solution could be reached by adding a sentence to the end of Article X(1) to state that in the absence of a declaration pursuant to Article X, the insolvency law of that State shall continue to apply in its entirety. The delegation explained that the proposed approach would satisfy the concerns raised by the representative of the regional economic integration Organisation, without formally requiring the Commission to reopen the discussion.
4. Another delegation noted that informal discussions were continuing in relation to Article X and requested that the discussion be further deferred.
5. Noting the request for additional time, the Chair deferred the discussion on Article X.

Summary Reports

6. The Chair opened the floor for comments on DCME-MAC – Doc. 32 (Summary Report for 15 November 2019).
7. With regard to paragraph 2, one delegation noted that the reference to Article XIII(5) was incorrect, and that the reference should be to Article VIII(5) instead.
8. With regard to paragraph 16, the Reporter recommended the language be shortened and the intervention modified to read as follows: 'The Reporter identified the text in Article XVI which might require modification. The Chair .....

9. With regard to paragraph 25, one delegation noted that the language in this paragraph suggested that every State used an authorising entry point model under the Aircraft Protocol, which was not the case. As such, the delegation proposed amending the language to read as follows: '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. ....'
10. With regard to paragraph 50, one delegation noted while the initial proposal under consideration referenced Article 62(c) of the Convention and Article XXXIV(C) of the Protocol, the subsequent discussion on this proposal clarified that the reference was for Article 62(2)(c) of the Convention and Article XXXIV(2)(c) of the Protocol. As such, the reference in the report should be to the corrected provisions.
11. With regard to paragraph 55, one delegation proposed the following language to replace the existing text: '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.'
12. With regard to Paragraph 62, the Chair proposed the following language: '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.'
13. With regard to paragraph 71, one delegation noted that the reference should be changed to Article VIII(5) rather than Article XIII(5).
14. *All the recommended changes were accepted, and the Commission adopted on DCME-MAC – Doc. 32 (Summary Report for 15 November 2019).*

#### Article X

15. The Chair re-opened the floor for discussion on Article X.
16. One delegation noted that informal discussions were continuing in relation to Article X and requested that the discussion be further deferred.
17. The Chair suggested that the Commission consider establishing a taskforce to resolve matters related to Article X. One delegation noted that additional discussion on the matter was not necessary and as such, a taskforce should not be created. The Chair, noting agreement on the conclusion of informal discussions on Article X, suggested proceeding to the next item while noting that all delegations were not in agreement on the matter of Article X.
18. One delegation, noting the conclusion of informal discussions on Article X, proposed the Commission consider formally reopening discussions on Article X.
19. One delegation, speaking on behalf of the African region, noted that their position remained the same and continued to oppose the formal reopening of discussions of Article X.
20. The Chair queried whether there was any support for reopening formal discussions on Article X. One delegation noted that it did not support reopening the formal discussion on Article X.
21. Noting the lack of support in the Commission to formally reopen discussions, the Chair closed the discussion on Article X.

22. One delegation, noting that the discussion on the consideration of reopening formal discussion on Article X had been closed, queried whether it was possible to make a formal statement regarding a proposal to amend Article XXVII.

23. The Chair noted that the Commission of the Whole was not tasked with considering Article XXVII, as the Article fell within the mandate of the Final Clauses Committee. However, the Chair invited the delegation to make its statement, keeping in mind that Article XXVII would not be discussed in the Commission of the Whole, and would only serve to inform the Final Clauses Committee.

24. The delegation, noting that Article XXVII(3) would need to be modified in order to implement the changes made to Article X, suggested that a second sub-paragraph be added to Article XXVII(3), under which States could declare when they are applying their domestic laws in the event of insolvency, they would still adhere to the set of standards established in the Model Law on Insolvency and the World Bank Principles on Insolvency. The delegation suggested that allowing States to make such a declaration would allow States that did not want to apply the MAC Protocol's insolvency rules would still be able to allow the creditor to protect its interests in the event of an insolvency.

#### DCME-MAC – Doc. 34 (Report of the Drafting Committee)

25. The co-Chairs of the Drafting Committee presented the report of the Drafting Committee (DCME-MAC – Doc. 34). They noted that the Drafting Committee report reflected the changes it had been requested to make by the Commission of the Whole and had also made several changes to ensure consistency in cross-references and style within the final document.

26. The Chair opened the floor for discussion on the report of the Drafting Committee.

27. One delegation queried the use of the term 'global economy' within the preamble of the Protocol. One of the Drafting Committee co-Chairs clarified that the paragraph referencing the 'global economy' had been moved to Paragraph 2 of the preamble instead of Paragraph 6.

28. One delegation noted that the tenses were inconsistent in Article VII(5). They recommended changing the word 'became' to 'become', and 'was' to 'is' in the second last sentence of the paragraph in order to ensure consistent use of the present tense. Another delegation disagreed with the proposed modification and requested the Drafting Committee to give it further consideration.

29. One delegation noted that in the French text, consideration could be given to reducing the redundant use of the 'inventory' in Articles II and XII. One of the co-Chairs of the Drafting Committee clarified that efforts had been made to reduce the redundancy in the French text, and that the language used was now consistent with the meaning of 'inventory' in the English version.

30. *The Commission adopted DCME-MAC – Doc. 34 (Report of the Drafting Committee).*

#### Draft Resolution 1 (DCME-MAC – Doc. 25)

31. The Secretary-General introduced Draft Resolution 1 to the Commission, which related to the setting up of a Preparatory Commission for the establishment of the International Registry for mining, agricultural and construction equipment. He noted that the proposed composition of the Preparatory Commission was designed to strike a balance between ensuring that the Preparatory Commission was composed of a strong group of experienced experts from different States whilst also ensuring that membership in the Preparatory Commission would be limited to ensure it could efficiently complete its technical work.

32. The Chair adjourned the meeting at 12.30, noting that Draft Resolution 1 would be discussed in the next session.

#### **FOURTEENTH MEETING OF THE COMMISSION OF THE WHOLE**

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

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

34. The Chair opened the floor for discussion on Draft Resolution 1 (DCME-MAC – Doc. 25).

35. The delegation of Spain expressed its interest in being the host State of the International Registry for mining, agricultural and construction equipment to be set up under the Protocol. Spain noted its strong interest in being a member of the Preparatory Commission for the establishment of the International Registry for mining, agricultural and construction equipment to be set up under Draft Resolution 1.

36. One delegation, whose representative had served as the Chairman of the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) under the Aircraft Protocol, commended the work of the Secretariat in its drafting of Draft Resolution 1. Based on the delegate's experience during the Aircraft Protocol Preparatory Commission, the delegation made two proposals:

(a) adding the sentence '*appointed by UNIDROIT and*' in point (1) of the 'Resolves' section. The delegations suggest that the proposed additional wording would improve the efficiency of establishing the Preparatory Commission.

(b) amending point (2) of the 'Resolves' section to clarify that the UNIDROIT Secretariat, as the Secretariat of the Preparatory Commission, would also be tasked with 'providing administrative assistance and facilities as may be necessary, to the extent feasible, so that the Preparatory Commission can carry out its functions.'

37. Several delegations supported the two proposals made and expressed support for the Draft Resolution in general.

38. One delegation proposed using the wording '*appointed by UNIDROIT from those*' instead of 'and' in point (1) of the 'Resolves' section.

39. Noting that the subclauses also included regional economic integration Organisations, one delegation recommended deleting the word 'States' from point (1) in the 'Resolves' section.

40. *The Resolution, subject to the agreed upon amendments and additional non-substantive changes, was adopted.*

##### Draft Resolution 2 (DCME-MAC – Doc. 26)

41. The Secretary-General introduced Draft Resolution 2 which related to the Establishment of the Supervisory Authority of the International Registry for Mining, Agricultural and Construction Equipment. He explained that in light of the interest and participation of the World Bank Group's International Finance Corporation (IFC) in the negotiation of the Protocol, and in light of preliminary consultations, the Draft Resolution allowed for the IFC to accept the functions of the Supervisory Authority, while at the same time allowing the Preparatory Commission to consider alternative

options in the event that the IFC decided not to become the Supervisory Authority or no positive response had been received within 6 months of Protocol's adoption.

42. The Secretary-General noted that if no existing international entity was willing to perform the role of Supervisory Authority, UNIDROIT could be considered as an alternative entity to act as Supervisory Authority on an interim basis. In such a situation, whether UNIDROIT would act only as the Secretariat of the Supervisory Authority, as performed by OTIF under the Luxembourg Rail Protocol, or whether UNIDROIT would be the Supervisory Authority itself, would need to be determined through consultations with the governing bodies of the Institute.

43. The Secretary-General noted that if UNIDROIT had to act as Supervisory Authority, it would only be able to do so if the Institute received the requisite funding and resources to perform the role. He added that such funding would only be required for a limited amount of time during which the International Registry would be in its setup phase; after which, the costs of the Supervisory Authority would be recovered from the proceeds to the International Registry, as generated by search and registration fees.

44. The Secretary-General noted that Draft Resolution 2 also allowed for the setup of a Commission of Experts to support the work of the Supervisory Authority. In order to ensure the compatibility of the Protocol and Draft Resolution 2, the Secretary-General proposed several amendments to Article XIV of the Protocol:

(a) Removal of the words 'at, or' and removal of the sentence 'provided that such Supervisory Authority is able and willing to act in such capacity' from Article XIV(1), as it implied the appointment of a Supervisory Authority.

(b) As consistent with Article XVII(2) of the Aircraft Protocol, an amendment should be made to allow for an existing Supervisory Authority to transfer the role to another entity. The Secretary-General suggested that this could be achieved by adding the a Paragraph (2) to Article XIV which would provide: 'Where the international entity referred to in the preceding paragraph is not able and willing to act as Supervisory Authority, a Conference of Signatory and Contracting States shall be convened to designate another Supervisory Authority.'

45. The Chair opened the floor for discussion on Draft Resolution 2.

46. One delegation, with regard to paragraph 2 of the 'Resolves' section, noted that the time span of six months might be too short for the IFC to decide whether to perform the role of Supervisory Authority. They noted that the delegation, whose representative had been the Chairman of the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) under the Aircraft Protocol, and the ICAO, the Supervisory Authority under the Aircraft Protocol, would be ready to give a presentation to the Board of the IFC to illustrate the workings of a Supervisory Authority under a Protocol of the Cape Town Convention. The representative noted that a similar presentation could also be made to UNIDROIT, if it decided to take on the role. Furthermore, with regard to paragraph 3 of the 'Resolves' section, the delegation proposed adding the words 'appointed by the Supervisory Authority' within the first sentence.

47. The Secretary-General noted that the current language used did not prohibit the IFC from being appointed as the Supervisory Authority after the six-month period, but only allowed for the Preparatory Commission to consider alternatives. As such, it only served to provide flexibility.

48. One delegation noted that the Resolution itself did not and should not discuss the possibility of UNIDROIT becoming the Supervisory Authority, as this matter should be dealt with by other decision-making bodies and not the Diplomatic Conference.

49. Several delegations expressed support for the additional wording proposed by the Secretary-General to Article XIV. One delegation objected to the proposed deletions in the last sentence of Article XIV(1) and suggested that the Drafting Committee further consider Article XIV.

50. *Subject to the changes proposed, Draft Resolution 2 (DCME-MAC – Doc. 26) was adopted.*

#### Draft Resolution 3 (DCME-MAC – Doc. 27)

51. The Secretary-General introduced Draft Resolution 3 relating to Technical Assistance with regard to the implementation and use of the International Registry for Mining, Agricultural and Construction Equipment. He noted the importance of knowledge sharing and assistance with respect to the widespread implementation of the Protocol, to ensure its understanding and use in developing countries. He called upon the Conference and all States present to assist in that task.

52. Several delegations expressed their support for Draft Resolution 3.

53. *Draft Resolution 3 was adopted as proposed.*

#### Draft Resolution 4 (DCME-MAC – Doc. 28)

54. The Secretary-General introduced Draft Resolution 4 relating to the Official Commentary on the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment. He explained that given the eminence of the Reporter and his important role in writing the Official Commentaries for the three existing Protocols to the Cape Town Convention, the Draft Resolution proposed that the Reporter prepare the MAC Protocol Official Commentary.

55. Several delegations, noting the importance of the Official Commentary, expressed their support for Draft Resolution 4, subject to the Reporter being willing to prepare such an Official Commentary. The Reporter noted that he would be pleased to undertake the task of preparing the Official Commentary for the MAC Protocol.

56. One delegation noted the need for consistency between the English and the French versions of the Resolution, and suggested the use of the word 'suitable', instead of 'sound' in the fourth paragraph.

57. *Subject to the changes proposed, Draft Resolution 4 was adopted.*

#### Draft Resolution 5 (DCME-MAC – Doc. 31)

58. The Secretary-General introduced Draft Resolution 5 relating to expressing the gratitude of the Conference to the Government of the Republic of South Africa for hosting and organising the Conference.

59. Several delegations expressed support for Draft Resolution 5, and further expressed their gratitude to the Government of the Republic of South Africa, and DIRCO for organising the Conference. The delegation of the Republic of South Africa thanked all the delegations for their appreciation, and thanked UNIDROIT and its Secretariat for its work in facilitating the Conference, as well as to all the delegations for their efforts in making the Conference a success.

60. *Draft Resolution 5 was adopted as proposed.*

Article XXVII(3)

61. The Chair invited the co-Chairs of the Final Clauses Committee to comment on the proposal reflected in Paragraph 24 of this report.

62. The co-Chairs of the Final Clauses Committee, with respect to the proposal reflected in Paragraph 24 of this report, noted that the proposal did not relate to the process of making the declaration, which was the primary purpose of Article XXVII(3). The co-Chairs suggested that as the proposal related to substantive matters, it might be preferable to discuss the proposal in the Commission of the Whole, rather than at the Final Clauses Committee.

63. The delegation which made the proposal reiterated that it did not believe that many States would choose to make a declaration under Article X, as such a declaration would apply to all three categories of equipment (mining, agriculture, and construction). It noted that a declaration under Article X might not offer adequate protection to debtors in the agricultural sector, especially those debtors who were farmers operating small and medium-sized enterprises. The delegation noted that their proposal to amend Article XXVII provided those States not willing to make a declaration under Article X an avenue to signal seriousness in the enforcement of international interests under the MAC Protocol, by stating adherence to internationally recognised insolvency best practices and principles, while at the same time persevering adequate debtor protection and time for restructuring. The delegation noted that the policy objectives behind such a proposal had already been discussed in the Commission and that the proposed declaration would be optional for Contracting States.

64. Several delegations expressed their lack of support in reopening Article XXVII for further discussion. Several delegations noted that the proposal relied on soft law instruments and standards, which would create challenges given the binding nature of the MAC Protocol. One delegation queried the value of allowing States to make a declaration noting that their domestic laws were in compliance with international norms of insolvency, whether or not that was actually the case.

65. The delegation which made the proposal noted that as States would be making these declarations, they would ensure that their implied domestic law compliance to international standards was genuine, and in the case which it was not, it would be up to the rules of public international law to determine the outcome. The delegation again emphasised that the proposed addition supported the creditor friendly operation of the MAC Protocol, while at the same time offering adequate debtor protections. The delegation added that the proposed amendment was in the spirit of the Cape Town Convention, as it indicated that the Convention and the Protocol did not function in a vacuum, but worked closely together with other internationally recognised principles of insolvency law.

66. One delegation, speaking on behalf of all African States present at the Conference, noted that they would not be in favour of reopening the discussion on Article XXVII(3).

67. *Noting the lack of support, the Chair concluded that discussion on Article XXVII(3) would not be reopened.*

DCME-MAC – Doc. 35 (Summary Report for 18 November 2019)

68. The Chair opened the floor for discussion on DCME-MAC – Doc. 35 (Summary Report for 18 November 2019).

69. With regard to paragraph 14, one delegation proposed adding the word 'approximately' before '75%' in the seventh line.

70. One delegation proposed the addition of the following text at the end of paragraph 18: '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.’

71. To make paragraph 19 consistent with the addition to paragraph 18, one delegation proposed an addition at the end of paragraph 19 as follows: ‘...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.’

72. With regard to paragraph 22, an observer recommended the addition of the words ‘in transit’ after ‘the financing of inventory’ in the second sentence to more accurately reflect the intervention made.

73. With regard to paragraph 27, one delegation proposed replacing the word ‘relocate’ with ‘operate through the same legal entity’.

74. With regard to paragraph 42, one delegation proposed the addition of the words ‘the Secretariat serving as’ in line three ahead of the word ‘Depository’.

75. With regard to paragraph 55, one delegation proposed the addition of the following text at the end of the paragraph: ‘and to specify the connecting factor that would determine the scope of registrations for which a State could make its designated entry point a mandatory designated entry point.’ One delegation disagreed with the proposed changes to paragraph 55, noting that while discussions along these lines took place, the consideration of connecting factors was not limited to mandatory designated entry points alone. The Secretariat proposed only adding limited additional text at the end of paragraph 55: ‘and to specify the connecting factor that would determine the scope of registrations for which a State could make its designated entry point.’ This was agreed upon by the Commission.

76. *All the recommended changes were accepted, and the Commission adopted on DCME-MAC – Doc. 35 (Summary Report for 18 November 2019).*

#### DCME-MAC – Doc. 36 (Summary Report for 19 November 2019)

77. The Chair opened the floor for discussion on DCME-MAC – Doc. 36 (Summary Report for 19 November 2019).

78. With regard to paragraph 3, one delegation suggested deletion as it was merely the correction of a typo, which need not be reflected.

79. With regard to paragraph 35, one delegation proposed the following changes in line 6: ‘...of the future Protocol by the *regional economic integration organisation represented by the observer* ....’

80. With regard to Paragraph 38, one delegation noted that it should be listed as 37(c) rather than paragraph 38.

81. With regard to paragraph 44, two delegations proposed deleting the words ‘and VII’.

82. One delegation noted that between Paragraph 45 and 46, the word ‘twelfth’ had been misspelled.

83. *All the recommended changes were accepted, and the Commission adopted on DCME-MAC – Doc. 36 (Summary Report for 19 November 2019).*

DCME-MAC – Doc. 30 (Draft Final Act)

84. The Chair opened the floor for discussion on DCME-MAC – Doc. 30 (Draft Final Act).

85. One delegation noted a discrepancy between the final paragraph of the Aircraft Protocol Final Act and of the MAC Protocol Draft Final Act, and proposed the following addition of the following sentence at the end of the document: 'The Protocol shall be deposited with the International Institute for the Unification of Private Law. A certified copy of the instrument shall be delivered by the said Organisation to the Governments of each of the negotiating States.' An observer noted that Article XXXVII of the Protocol already addressed this concern, and as such, it did not need to be included in the Final Act.

86. One delegation noted that it would be useful for the Secretariat to ensure full consistency between the English and the French version of the Final Act.

87. An observer from a regional economic integration organisation noted that it would be important to note that the observer also presented credentials in due and proper form. The Secretariat clarified that the draft document did not imply that the regional economic integration organisation did not present credentials in due and proper form, as all the international organisations mentioned below the regional economic integration organisation had also presented credentials. However, consideration would be given to this matter.

88. One delegation noted the need for a correction to the name of the Chairperson for the Credentials Committee.

89. *All recommended changes were accepted and the Commission adopted DCME-MAC – Doc. 30 (Draft Final Act).*

Article XIV

90. The co-Chairs of the Drafting Committee noted that the Drafting Committee had considered the language proposed by the Secretariat as part of the discussions under Draft Resolution 2. The Drafting Committee approved the language proposed, with the only change being to refer to an 'international entity' in Article XIV(1).

91. The co-Chairs noted that they would work with the Secretariat to make non-substantive changes to the text in order to ensure consistency and accuracy of cross references before the final adoption of the Protocol.

92. *The Chair of the Commission of the Whole declared the work of the Commission completed, and adjourned the meeting at 16:50.*

**FIFTH MEETING OF THE PLENUM****Item No. 10 on the agenda: Examination by the Conference of the Report of the Final Clauses Committee**

93. The President invited the co-Chairs of the Final Clauses Committee to present their report.

94. The co-Chairs of the Final Clauses Committee presented their Final Report DCME-MAC – Doc. 33. The co-Chairs thanked all the representatives which had participated in the work of the Committee, and noted that the Committee had successfully resolved all issues that had been referred

to it. The co-Chairs explained that the Final Clauses had been submitted to the Drafting Committee for consideration and incorporation within the final text of the Protocol.

95. The President thanked the co-Chairs and participants of the Final Clauses Committee for their work throughout the Conference.

**Item No. 9 on the agenda: Examination by the Conference of the Report of the Commission of the Whole**

96. The President invited the Chair of the Commission of the Whole to present his report.

97. The Chair of the Commission of the Whole presented his oral report. He noted that the Commission of the Whole had discussed the first five chapters of the Protocol, as well as the Annexes to the Protocol. The Commission of the Whole had worked in coordination with the Final Clauses Committee, as well as the Drafting Committee, and had also set up a Working Group to discuss the HS Codes listed in the Annexes of the Protocol. The Chair noted that the Commission also considered and approved the Daily Reports of the Conference, as well as the Final Act, and the Draft Resolutions to the Protocols. The Chair thanked the UNIDROIT Secretariat for its assistance, and also expressed his gratitude to all the delegations who participated in the deliberations.

98. The President thanked the Chair of the Commission of the Whole for his work throughout the Conference.

99. The Secretary-General expressed his sincere gratitude to the work of the Reporter, Sir Roy Goode, and the Chair of the Commission of the Whole, Mr Dominique D’Allaire, for their hard work and commitment throughout the Conference.

100. *The President adjourned the meeting at 17.15.*