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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 13 NOVEMBER 2019**

FIFTH MEETING OF THE COMMISSION OF THE WHOLE

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

1. The Chair opened the session at 09:05 and summarised the second day's discussions.

Article II (continued)

2. The Chair opened the floor for further comments on Alternatives B and C of Article VII.

3. An observer from the MAC Working Group re-emphasised that Alternatives B and C continued to be regarded as unattractive for the financing community and would not result in a reduction of risk for creditors. The observer suggested that any Contracting State that made a declaration applying Alternatives B and C might not be eligible for a discount under any future export credit agency finance agreement negotiated under the relevant framework of the OCDE. In order to maximise the economic impact of the future MAC Protocol, the observer suggested that delegations consider the deletion of Alternatives B and C.

4. One delegation noted the importance of Alternative B to their national banking sector. The delegation explained that for States unable to adopt Alternative A, Alternative B would in most circumstances provide stronger protections for creditors than Alternative C. The delegation noted that a discount under any export credit agency finance agreement negotiated in the future might extend to Alternative B. Another delegation concurred with the view expressed, noting that it was important to retain Alternative B in the draft Protocol.

5. *The Commission agreed that, in the light of the absence of support for its removal, Alternative B should remain in the Protocol and be referred to the Drafting Committee for further consideration of its language.*

6. The Chair opened the floor for discussion on Alternative C, noting that the Commission also needed to consider the definition in Article I(2)(h) of "immovable-associated equipment".

7. One delegation noted that Alternative C was important for States which wanted to preserve the application of their national law to cases involving immovable-associated equipment. The delegation added that Alternative C as drafted did not encompass situations where national laws allowed for the removal of equipment associated with immovable property by a creditor but imposed limits such as notice requirements or obligations to pay for damage caused by removal. The delegation recommended the addition of language to Alternative C to ensure that it covered conditions for the removal of immovable-associated equipment imposed by national law. Another delegation noted that the same policy consideration should also be adopted in relation to Alternatives A and B. A third delegation agreed with the policy, but suggested that the matter was sufficiently addressed by the language “is otherwise affected” in Article VII. *The matter was referred to the Drafting Committee.*

8. One delegation noted that Alternative C as drafted was not sufficiently clear in relation to whether it applied to situations where international interests in equipment were created before as well as after the equipment’s association with immovable property. Another delegation suggested that the matter be addressed in the definition of “immovable-associated equipment”, to ensure that it would be clarified in all of the Article VII Alternatives. Several delegations expressed their support for the proposal to clarify the scope of application, noting that other changes might also need to be made to the text of the Article VII to ensure the matter was fully addressed. *The Chair summarised the discussion and asked the Drafting Committee to consider improving the language of Article VII in order to address the policy decision agreed upon by the Commission.*

9. One observer sought clarification on the interaction between Article VII and the treatment of proceeds under Article 29(6) of the Cape Town Convention. A delegation noted that Article VII was not a substantive priority rule, but rather addressed the relationship between international interests in immovable-associated equipment and interests in immovable property. If, on application of Article VII, it was determined that the Protocol’s rules were applicable, the Convention’s priority rules in Article 29 would continue to apply. Several delegations agreed with this interpretation and noted that Article VII as drafted was sufficiently clear in addressing the matter, but that the Official Commentary could consider including this explanation for the sake of clarity in interpretation. *The Commission confirmed this understanding.*

10. The Chair queried whether Article 29(7) of the Convention was intended to apply to immovable property and whether the word “item” should be construed as including immovable property. Several delegations confirmed that the drafting of Article 29 (7) made it sufficiently clear that the word “item” did not refer to immovable property, on the basis that immovable property could not be “installed on equipment”. *The Commission confirmed this understanding.*

Article VIII

11. After the Reporter introduced Article VIII, the Chair opened the floor for discussion.

12. One delegation queried the use of the word “territory” in paragraph 1, with reference to the Protocol’s treatment of territorial units in Article XXV of the draft Protocol. It was suggested that Article VIII applied only to the export and physical transfer of equipment across national borders.

13. *Paragraphs 1-4, and Paragraph 6 of Article VIII were adopted without modification.*

14. The Chair opened the floor for discussion on Paragraph 5 of Article VIII.

15. Several delegations suggested that the sub-bracketed text “including but not limited to tax and customs authorities and transport infrastructure authorities” should be deleted. *The Commission agreed to delete the sub-bracketed text.*

16. One delegation proposed the deletion of the word “safety” on the basis that its deletion would ensure that all national laws were applicable in relation to the export and physical transfer of equipment. A few additional delegations expressed support for the deletion of the word “safety”. However, several other delegations opposed the deletion of the word “safety” on the basis that it would render the provision substantively meaningless and would create an inconsistency between the MAC Protocol and Rail Protocol.

17. An observer from the MAC Working Group noted the importance of administrative authorities providing assistance to creditors exercising their right to export and physical transfer of MAC equipment under the Protocol. He suggested that Article VIII (5) could be remodelled on the corresponding language in Aircraft Protocol, rather than the Rail Protocol language. The observer further suggested that the provision could be subject to a declaration rather than being mandatory, which would allow States which were not comfortable with its content to opt out. Several delegations expressed support for making Article VIII (5) an optional declaration for Contracting States.

18. One delegation noted that State support was necessary for removing railway rolling stock from a State but might not be necessary for the export and physical transfer of MAC equipment.

19. One delegation sought confirmation that the phrase “export and physical transfer” in Article VIII(1) should be read as one collective remedy rather than two separate remedies. Another State agreed with this interpretation of the phrase “export and physical transfer”. The Chair suggested that changes to the text were not required and that the matter could be dealt with in the Official Commentary.

20. One delegation noted the importance of consistency with other Protocols and suggested retaining the text as consistent with the Rail Protocol as either an optional or mandatory provision.

21. One delegation suggested that the word “ensure” in Article VIII(5) required further consideration as it might cause difficulties in some States. Other delegations and an observer shared the delegation’s concern regarding the term “ensure”. One observer suggested that the word “ensure” be deleted as it was not used in the corresponding provision in the Aircraft Protocol. Some delegations suggested that the phrase “the Contracting State shall ensure” be deleted from Article VIII(5). Other delegations favoured retaining the text on the basis that it was consistent with the corresponding Rail Protocol language.

22. Noting the challenges posed by Article VIII(5), one delegation suggested Article VIII(5) be deleted from the draft Protocol. Another delegation supported this proposition, whereas several other delegations disagreed. Several delegations noted the importance of retaining Article VIII(5), as it sent a strong signal that Contracting States would take responsibility to ensure the remedies of the Protocol’s remedies would be available to creditors. The Secretary-General cautioned that deletion of Article VIII(5) would constitute a significant deviation from the existing Protocols and should only be undertaken in case there was a sound MAC-specific reason and strong support from the Commission.

23. One delegation proposed the deletion of “Contracting State” from Article VIII(5). This was supported by another delegation. Another delegation responded that Article VIII(5) only imposed obligations on administrative authorities in Contracting States and that it would be inappropriate to refer to administrative authorities without reference to the Contracting State within which the authorities were located. This view was shared by another delegation.

24. One delegation noted that under public international law States had to act in good faith in relation to their treaty obligations. The delegation queried whether Article VIII(5) could be deleted on the basis that Contracting States would already be under an obligation to ensure the Protocol’s export and physical transfer remedy was available to creditors.

25. *The Chair summarised the discussion, noting that there was no clear consensus in regard to whether Article VIII(5) should be retained, deleted, redrafted or made an optional declaration. The discussion on Article VIII(5) was postponed until after the Commission had considered Articles IX and Article X, which also dealt with administrative authorities.*

Article IX

26. The Chair opened the floor for discussion on Article IX, noting that Paragraph 6 had been placed within square brackets by the Committee of Governmental Experts in 2017. The Reporter explained the history and rationale behind Article IX.

27. One delegation suggested that the Drafting Committee consider Paragraph 6 in light of the fact that administrative authorities deliver remedies as opposed to making them available. *The matter was referred to the Drafting Committee.*

28. *Article IX was adopted without any policy changes. The Drafting Committee was instructed to remove the square brackets around paragraph 6.*

Article X

29. The Chair opened the floor for discussion on Article X, noting that each Alternative within the Article could be discussed separately. The Reporter explained the history and rationale behind Article X.

30. The Commission, further to an intervention from one delegation, discussed the differences between the definition of “primary insolvency jurisdiction” in the Protocol and under other international instruments, 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.

31. An announcement was made in relation to the management of the Cape Town Convention Academic Project under the joint auspices of UNIDROIT, the Aviation Working Group, and the University of Cambridge Faculty of Law.

32. The Chair adjourned the meeting at 12:35.