



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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**PREPARATORY COMMISSION FOR THE  
ESTABLISHMENT OF THE INTERNATIONAL REGISTRY  
FOR MAC EQUIPMENT PURSUANT TO THE MAC  
PROTOCOL**

***First session (remote)***  
**Rome, 21-22 May 2020**

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**SUMMARY REPORT  
OF THE FIRST SESSION  
(Videoconference, 21-22 May 2020)**

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1. The first session of the Preparatory Commission for the establishment of the International Registry for Mining Agricultural and Construction (MAC) equipment pursuant to the MAC Protocol (hereafter the "Commission") took place via videoconference between 21 and 22 May 2020. The Commission was attended by 38 participants from eight Member States of the Commission, one observing State, one observing Regional Economic Integration Organisation, three observing organisations, and *ex officio* observers from the Diplomatic Conference (the List of Participants is available in Annex I).

### **Item No. 1    Opening of the session**

2. Acting as the provisional Chair (hereafter "Chair") under Rule 4 of the Provisional Rules of Procedure (MACPC/1/Doc. 2), the *UNIDROIT Secretary-General* welcomed delegations and observers to the first session. The Chair noted that the first session was being held exactly 6 months after the adoption of the MAC Protocol in Pretoria, South Africa on 21 November 2019. The Chair explained that the Diplomatic Conference had been the final step in the 13 year process to adopt the MAC Protocol, whereas the Preparatory Commission was the first step towards the treaty's implementation. Referring to the two year aspirational timeframe established in Resolution 1 of the Diplomatic Conference Final Act, the Chair emphasised the importance of the Commission quickly and efficiently undertaking the tasks assigned to it in order to secure the entry into force of the MAC Protocol at the earliest possible date. The Chair noted his satisfaction that the first session was being held within the 6-month timeframe established by Resolution 1 of the Final Act, notwithstanding the significant challenges created by the global COVID19 pandemic. Reflecting on the economic challenges that the COVID19 pandemic had created across the world, the Chair reaffirmed that the MAC Protocol was a valuable instrument that could assist in facilitating access to credit and international investment in rebuilding the global economy.

3. *Having verified that representatives from Australia, China, Germany, Japan, Spain, South Africa, the United Kingdom and the United States were in attendance, the Chair declared that quorum had been constituted under Rule 21 of the Provisional Rules of Procedure and declared the session open.*

### **Item No. 2    Adoption of the order of business of the session**

4. *The Commission adopted the draft Order of Business (MACPC/1/Doc. 1, available in Annex II).*

5. The Chair suggested that before the Commission began its formal work, participants should be given the opportunity to update the Commission on domestic implementation activities that had taken place since the Diplomatic Conference.

6. The Chair described the various activities undertaken by the UNIDROIT Secretariat over the preceding six months, which had included (i) finalisation of the Diplomatic Conference documents, (ii) linguistic verification of the English and French versions of the text of the MAC Protocol to ensure they were in concordance with one another, (iii) the establishment of an error correction procedure under Article 79 of the Vienna Convention on the Law of Treaties to address minor errors in the text of the treaty, (iv) organisation and preparation of documents for the first session of the Commission and (v) promotion of the MAC Protocol. In relation to promotion, the Chair noted that the Secretariat had promoted the treaty at several international fora: (i) at the APEC Economic Committee in Malaysia in February 2020 as an instrument that could facilitate access to credit in the Asia-Pacific region; (ii) to the Ministry of Foreign Affairs and Bar Association of Mexico; (iii) as part of an international secured transactions coordination conference organised by the Kozolchyk National Law

Center (Natlaw), the International Insolvency Institute and several local partners in Colombia; (iv) during a webinar to US-based stakeholders hosted by the World Bank and Natlaw; and (v) on a bilateral technical level to several States considering implementation. He concluded by explaining that several other activities had been postponed as a result of the COVID19 pandemic.

7. *A representative of the United States* noted that the process of seeking authority to sign the Protocol had been initiated once the English and French texts of the treaty were verified in March 2020.

8. *A representative of Japan* noted that Japan had been active in the negotiation of the MAC Protocol and that its participation in the Commission demonstrated Japan's ongoing commitment to the treaty. In regard to implementation, the representative noted that while Japan had not yet ratified the Cape Town Convention, it was in the process of undertaking domestic secured transactions law reform and had a strong interest in following international standards in this area. Several coordination meetings between government officials, the private sector, and legal experts to discuss the implementation of the MAC Protocol had been scheduled, but ultimately had been postponed due to the global COVID19 pandemic.

9. *A representative of Spain* reiterated Spain's strong support for the MAC Protocol and Spain's intention, originally expressed at the Diplomatic Conference, to sign and ratify the Protocol once the European Union had done so. It was explained that internal procedures had been delayed due to the pandemic, however, certain actions had been undertaken, including the preparation of an informal Spanish language version of the text for consideration by the Ministry of Foreign Affairs.

10. *A representative of South Africa* noted that the South African Foreign Minister had written to the Minister of Trade, Industry and Competition recommending that the MAC Protocol be signed and ratified at the earliest opportunity. The representative explained that the Department of Trade, Industry and Competition had agreed to become the responsible Department for the MAC Protocol, which was an important domestic step required for ratification. The representative noted that while South Africa had been preoccupied by its response to the pandemic, its commitment to the MAC Protocol had not diminished. It was further explained that in South Africa's current role as Chair of the African Union, it intended to lobby for the treaty's implementation across Africa once opportunities presented themselves.

11. *An observer from the European Union* explained that the European Commission had begun working on the process for the European Union to sign the MAC Protocol, although it had been delayed by the global pandemic. It was explained that the issue could be discussed under the German Presidency of the European Union between July – December 2020 with adoption by the Council by the end of 2020 or in 2021. It was noted that the Commission had reported on the outcomes from the Diplomatic Conference and there were no reactions from representatives of Member States regarding their willingness to sign. The representative concluded that the Commission would need support from Member States for the European Union to sign the MAC Protocol and it was anticipated that Member States might provide more input once the proposal had been formally tabled at the Council, which might occur in September 2020.

12. *A representative of China* noted that following the Diplomatic Conference, a report was made to the Vice Minister for Legal Affairs in the Ministry of Commerce regarding the MAC Protocol. It was explained that China was working on the ratification of all Protocols to the Cape Town Convention that China had not yet ratified. The Ministry of Commerce was coordinating with Governmental authorities, professional industry groups and legal experts through a series of internal meetings to ensure all relevant stakeholders were involved in the procedure. The representative concluded that while the initial meetings had been postponed due to the global pandemic, it was hoped that China would be able to ratify all Protocols in the near future.

13. *A representative of Germany* thanked the Secretariat for convening the meeting and noted its support for the Commission continuing the implementation of the MAC Protocol despite the challenges created by the global pandemic.

14. *An observer from the MAC Working Group* noted that while the Working Group's capacity had been affected by the global pandemic, the private sector's commitment and support for the MAC Protocol had not been diminished. It was explained that the Working Group had held a meeting in New York in March 2020, which included discussions with the Secretary-General of the Aviation Working Group to advise on how the MAC Working Group could effectively support the implementation of the MAC Protocol. Long-term goals and initiatives for the Working Group had been agreed and a Legal Advisory Panel within the Aviation Working Group was in the process of being established. The MAC Working Group had also continued its promotion of the MAC Protocol through virtual fora, including during a NatLaw/World Bank coordinated implementation of secured transactions instruments conference and through publishing an article in a widely disseminated trade journal. It was emphasised that the MAC Protocol should be promoted as an urgent tool to assist global economic recovery following the pandemic. The representative explained the next steps for the Working Group would be to review the draft Official Commentary and launch national contact groups, starting with Spain.

### **Item No. 3 Discussion and adoption of Commission's Rules of Procedure**

15. *The Chair* introduced the Provisional Rules of Procedure (MACPC/1/Doc. 2). It was explained that the Secretariat had prepared the Provisional Rules based upon the Rules which had been adopted for the Preparatory Commissions held for the Aircraft Protocol, Luxembourg Rail Protocol and Space Protocol. The Chair opened the floor for comments on the Provisional Rules of Procedure.

16. *The Diplomatic Conference Rapporteur* noted that Resolution 1 of the Diplomatic Conference Final Act established that the Preparatory Commission was to be composed of up to twenty representatives of States, rather than States themselves. The Rapporteur suggested that the definition of "Commission Member" be amended to better reflect the language of Resolution 1 of the Diplomatic Conference. *Several representatives* agreed that Resolution 1 contemplated the appointment of representatives rather than States and supported the change to the definition of "Commission Member". A *representative of Germany* noted that while it was correct that the Preparatory Commission was composed of representatives, it was understood that each State had the right to determine who their representatives would be and that representatives could be changed by the State. The *Chair* confirmed that a State invited to send a representative to the Commission had the right to change their representative(s).

17. *The Commission instructed the Secretariat to amend the definition of "Commission Member" to clarify that the Commission was composed of representatives of States rather than States, as consistent with Resolution 1 of the Diplomatic Conference Final Act.*

18. It was queried whether the limitation of the Preparatory Commission membership to 20 representatives in Resolution 1 of the Diplomatic Conference meant that only 20 natural persons representing 20 States could participate as Commission Members. It was suggested that States should be allowed to designate one representative as well as alternate representatives and advisors.

19. *Some representatives* suggested that other rules might need to be reviewed in light of the new definition of "Commission Member", including Rules 16 and 19.

20. *An observer from the European Union* suggested that the definition of "Observer" should be amended to clarify that Regional Economic Integration Organisations could participate as observers

in the Commission. It was explained that the European Commission represented the European Union in the Preparatory Commission and that the European Union had legal capacity under the 2007 Treaty of Lisbon. The *Chair* noted that the rules of procedure needed to adhere to Resolution 1 of the Final Act. *Several representatives* agreed that it would be reasonable to interpret Resolution 1 as allowing Regional Economic Integration Organisations to participate in the Commission as observers.

21. *The Commission agreed that the definition of "Observer" should be amended to include "Regional Economic Integration Organisations".*

22. *The Commission discussed whether Commission sessions should be open to the public under Rule 14. It was noted that Rule 14 was consistent with the rules from the Preparatory Commissions of earlier Protocols to the Cape Town Convention in allowing public attendance, although there had not been significant public interest in earlier Preparatory Commissions. The Commission agreed that sessions should be open to public attendance, although Rule 14 should allow the Commission to retain the right to close certain sessions from public attendance, particularly those sessions considering the appointment of the Registrar. Several representatives queried whether Rule 14 should retain the reference to Rule 15, as it was superfluous.*

23. *The Commission decided to remove the language "to Rule 15 and" from Rule 14.*

24. *Several representatives queried the relationship between the definition of "Observer" and Rule 15 of the Provisional Rules of Procedure. The Secretariat explained that Rule 15 expanded the types of Observers that could attend the Commission to include officers of Assisting Organisations necessary for the conduct of the session, Member States of Assisting Organisations, and other Observers as the Commission may decide. The Commission discussed whether the "shall be open" language in Rule 15 should be retained. Several representatives suggested that Rule 15 was compatible with the definition of "Observer" adopted by the Commission. The Commission decided that Rule 15 did not need to be amended.*

25. *Several representatives raised queries concerning Rule 21. In light of the change to the definition of "Commission Member", the Commission affirmed that while an invited State could nominate more than one delegate to attend a Commission session, it was clear that only one State representative was allowed to vote on Commission matters. To reflect this, the Rapporteur proposed the following sentence be added at the start of Rule 21: "For the purposes of determining the existence of a quorum and an absolute majority vote on any decision, only one representative of each participating State or Regional Economic Integration Organisation shall be counted and shall vote". The Commission agreed that the proposed sentence should be included at the start of Rule 21.*

26. *An observer from Ireland suggested that "and shall vote" should be changed to "or may vote" in the newly proposed sentence, to reflect that representatives were permitted to abstain from voting. The Commission agreed to change "and shall vote" to "or may vote" in the newly inserted first sentence of Rule 21.*

27. *The Commission discussed whether further details should be added to Rule 21 regarding the voting procedure. The Commission agreed that "ballot" in Rule 21 should be replaced by "vote", as "ballot" denoted a narrower type of voting which was typically undertaken in secret and in writing.*

28. *The Commission approved the Provisional Rules of Procedure in MACPC/1/Doc. 2, subject to the agreed upon changes to the definitions of "Commission Member", "Observer", Rule 14, and Rule 21.*

**Item No. 4 Election of the Chair and Vice-Chairs of the Commission**

29. *The Commission agreed to postpone the election of the Chair and Vice-Chairs of the Commission until the first in-person Commission session. The Commission further agreed that the UNIDROIT Secretary-General should continue to act as Provisional Chair under Rule 4 until the Chair and Vice-Chairs could be elected.*

**Item No. 5 Consideration of matters relating to the appointment of a Supervisory Authority**

30. The Chair introduced the item. It was explained that Resolution 2 of the Diplomatic Conference Final Act invited the governing bodies of the International Finance Corporation (IFC) of the World Bank Group to consider accepting the functions of Supervisory Authority upon or after the entry into force of the Protocol, to take the necessary action in this regard, as appropriate, and to inform the Secretary-General of UNIDROIT accordingly. Resolution 2 also established a 6-month time period for the IFC to make a decision in relation to whether to accept the role of Supervisory Authority, after which the Preparatory Commission would begin to consider the appointment of an alternative international organisation or entity as Supervisory Authority.

31. The Chair further explained that the challenges created by the COVID19 pandemic constituted a case of *force majeure*, which was likely to have affected the ordinary decision making processes of the IFC. In light of this situation, it was suggested that the Commission should consider suspending the 6-month period from when the United States, the country of IFC's Seat, declared a state of emergency. This approach would give the IFC an additional 69 days (the number of days remaining between when the state of emergency was declared on 13 March 2020 and when the IFC's decision period ended on 21 May 2020) from the end of the state of the emergency to make a decision.

32. Several representatives noted their support for the IFC undertaking the role of the Supervisory Authority and for providing sufficient time for a decision to be taken in that regard. The Commission agreed that the period for the IFC to have the exclusive right to accept the role of Supervisory Authority should be extended, given the challenges created by the pandemic. However, the Commission also noted that urgent action was needed in relation to the issue of Supervisory Authority ahead of the Commission's second session.

33. *The Commission agreed that the period available to the IFC to accept the role of Supervisory Authority be extended until either 69 days after the end of the state of emergency in the United States, or the start of the Commission's next session, whichever occurred first.*

34. A representative of the United States noted that while the IFC should continue to be the preferred candidate, it would be prudent for the Commission to also start considering other potential candidates, to ensure that the Commission would have contingency plans should the IFC decide not to undertake the role. It was noted that during discussions at the Diplomatic Conference in November 2019, it had been suggested that UNIDROIT and the OECD could be considered as alternative candidates. The representative suggested that the Secretariat begin exploring these alternative candidates while waiting for the IFC to make its decision.

35. The Chair noted that in light of the discussions at the Diplomatic Conference, the Secretariat had undertaken an initial review of the text of the MAC Protocol to identify any issues associated with UNIDROIT performing both the role of treaty Depository and Supervisory Authority of the Registry. It was explained that the initial review identified several provisions that created minor challenges. However, it was the preliminary view of the Secretariat that nothing in the text of the treaty would

make it impossible or inappropriate for UNIDROIT to undertake the role of both Depositary and Supervisory Authority. The Chair suggested the initial analysis undertaken by the Secretariat could be expanded and shared with the Commission in advance of its second session. The Chair also noted that while the OECD did not have a strong international role in relation to secured transactions law, the OECD had undertaken a number of regulatory functions in the international sphere. On this basis, it might be interested in considering the role of Supervisory Authority. *Several representatives* requested that the research undertaken by the Secretariat be shared with the Commission.

36. *A representative of Australia* noted that there could be value in exploring other International Financial Institutions (IFIs) as potential candidates, including the European Bank for Reconstruction and Development (EBRD) and the Asian Development Bank (ADB). The *Chair* welcomed suggestions as to alternative candidates, noting that global organisations would be preferable to regional organisations, given the international nature of the treaty. The *Secretariat* noted that an analysis on other potential candidates had been prepared during the negotiation of the Protocol and could be re-shared with the Commission.

37. *The Commission requested the Secretariat to undertake further research on other potential candidates for the role of Supervisory Authority, including UNIDROIT and the OECD, and submit the research to the Commission for consideration at its next session.*

#### **Item No. 6 Establishment of a Working Group to develop draft Regulations for the International Registry**

38. The Chair introduced the item and explained that the Commission had two action items: (i) consideration of the creation of a Working Group to prepare the draft Regulations for the International Registry; and (ii) discussion of the preliminary draft document prepared by the Secretariat.

##### Establishment of a Regulations Working Group

39. *The Commission established a Working Group to develop draft Regulations for the International Registry (hereafter the "Regulations Working Group"), composed of the following members:*

##### Members:

1. Australia
2. China
3. Germany
4. Japan
5. South Africa
6. Spain
7. United Kingdom
8. United States

##### Observers:

1. MAC Working Group
2. Aviareto
3. Chair of the Diplomatic Conference HS Working Group
4. Co-Chair of the Diplomatic Conference Drafting Committee
5. NatLaw

40. *An observer from Ireland* noted that Ireland needed to consult further as to whether it wanted to participate in the Working Group and reserved its position.

41. The Commission confirmed that the Working Group was not a closed group and that participants in the Commission could register their delegates for the Working Group at a later stage.

#### Consideration of the Preliminary Draft Regulations

42. The *Chair* introduced MACPC/1/Doc. 3 and explained that it had been prepared by the Secretariat based on the Regulations adopted under the Aircraft Protocol and draft Regulations adopted under the Luxembourg Rail Protocol and the Space Protocol. The Chair cautioned that the document had been prepared merely as a starting point for the Commission to begin its discussions on the MAC Protocol Registry Regulations (hereinafter referred to as the "MAC Regulations") and should not be treated as a first draft of the Regulations, which were to be developed by the newly established Regulations Working Group. The Chair invited the Registrar appointed under the Aircraft Protocol (Aviareto) to share its experiences in relation to the development of the Regulations for the International Registry of the Aircraft Protocol (hereinafter referred to as the "Aircraft Regulations").

43. *An observer from Aviareto* explained that a new edition of the Aircraft Registry Regulations was implemented approximately every 18 months. The Aircraft Registry was currently using its 8<sup>th</sup> edition of Regulations, with a 9<sup>th</sup> edition in development. It was explained that the Regulations were usually updated for three reasons: (i) recommendations from the private sector using the Registry; (ii) recommendations from the Registrar itself; or (iii) in response to external requirements, such as the introduction of the European Union's General Data Protection Regulation (GDPR). The observer described the process for updating the Regulations, which involved input from the International Registry Advisory Board (IRAB), advice from the Registrar's lawyers, and then a formal submission to the Supervisory Authority, which relied on a Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) to undertake a thorough review of the proposed changes over a two day meeting. The final step was the approval of the International Civil Aviation Organization (ICAO) Council and publication. It was explained that the current process ensured that any proposed change was reviewed by hundreds of experts before it was adopted. It was noted that the Regulations had been amended to respond to challenges relating to the abuse of unilateral registrations, particularly in relation to the unsubstantiated registration of registrable non-consensual rights and interests which had led to several (between 10 and 15) Irish High Court cases over the preceding years. It was further explained that if the MAC Regulations were to be based on the Aircraft Regulations, it might be useful to consider whether parts of the Regulations could be made more technology neutral.

44. *A representative of Australia* noted that the Aircraft Regulations were a complex document, which reflected the complex nature of aircraft finance and sophistication of parties involved in that industry. It was suggested that the users of the future MAC Registry would often not be as sophisticated and that the design of the MAC Registry and its Regulations should reflect this difference. *A representative of the United States* agreed, noting that the MAC Registry was likely to be utilised by many smaller manufacturers and lessees than those which were using the Aircraft Registry. *A representative of the United Kingdom* noted that the Regulations provided the legal structure for the Registry and therefore needed to be legally robust. It was noted that simplicity was certainly required in terms of the operation of the registry for less sophisticated users, however this did not necessitate the oversimplification of the Regulations, as most users would not need to read the Regulations.

45. *The Diplomatic Conference Rapporteur* suggested that wherever possible, the draft MAC Regulations should follow the model of the Aircraft Regulations, as the Aircraft Regulations were the most comprehensive version of the existing regulations. It was further suggested that the MAC

Regulations should be re-evaluated once the 9<sup>th</sup> edition of the Aircraft Regulations was released in 2021. The Rapporteur noted that one innovation of the Aircraft Regulations which should be retained by the MAC Regulations was the ability to provide certain features without mandatorily guaranteeing their creation, such as the closing room.

46. *An observer from NatLaw* agreed that the Aircraft Regulations were the best starting point for the development of the MAC Regulations. It was queried whether Procedures for the MAC Registry would be developed, as consistent with the Aircraft Registry and whether there was a process for the adoption of such Procedures. The observer agreed that there was value in the MAC Regulations providing for some types of "voluntary" functions, such as block assignments or closing room. Ultimately, whether such features would be developed would depend on commercial necessity and whether users of the MAC Registry would use them. It was suggested that certain types of functions provided in the Aircraft Registry could be repurposed for the MAC Registry. For example, it was noted that the closing room had been of great value in allowing parties to ensure that their interests in a certain object were registered in the correct order of priority. For the MAC Registry, the closing room function could be expanded to allow not only of the ordering of priorities, but also to allow for the registration of interests in multiple assets, which might be of particular value in facilitating the registration of interests in inventory. It was noted that the Rail Registry Regulations provided for "Non-Convention Filings" as another type of voluntary function. The observer explained that the Registrar did not verify whether a registration pertained to a transaction within the scope of the Convention and queried whether providing for Non-Convention Filings in the Regulations was necessary. The observer noted that while many of the legal requirements governing the operation of the MAC Registry had already been established by the Convention and Protocol and therefore could not be changed, other aspects such as technological functions could be considered with more flexibility.

47. *An observer from Aviareto* noted that there was a spectrum of different technologies available in relation to establishing the identity and consent of parties using the Registry, from qualified digital certificates which required face-to-face vetting to electronic signatures. The observer agreed that the Regulations providing that the Registrar "may" undertake certain voluntary functions had been an especially useful mechanism.

48. *The Secretariat* noted that the draft Rail Registry Regulations allowed for Non-Convention Filings as a voluntary mechanism in order to improve the economic viability of the Rail Registry. It was explained that while allowing such registrations did create an additional level of complexity, it was considered to be an economic necessity to ensure the early operation of the Rail Registry.

49. *A representative of Spain* agreed that the Aircraft Regulations provided a useful starting point in developing the MAC Regulations but that they would need to be adapted to suit the MAC industries. It was noted that there was no need to maintain perfect alignment between the MAC Regulations and the existing Regulations. The representative suggested that on issues such as manifesting consent and effecting registrations, balancing flexibility and simplicity with safety and certainty was of great importance. It was further noted that national entry points would be of great importance to certain States.

50. *A representative of Australia* agreed that that the initial draft document prepared by the Secretariat provided an appropriate starting point for the Regulations Working Group. The representative also noted that it was important to consider the market that the MAC Registry would be servicing, which would have a diverse range of actors. It was suggested that the attractiveness of the MAC Protocol would be increased if the Registry was able to integrate with national registries serving as domestic entry points, allowing users to search both domestically and internationally in relation to interests in MAC equipment. The representative added that while the Regulations providing

for voluntary registry functions were not a common tool in domestic registry regimes, there might be value in allowing for such functionality in the MAC Regulations.

51. *An observer from NatLaw* suggested that the Regulations Working Group could take into account work that had already been undertaken in the negotiation of the MAC Protocol, particularly that of the Committee of Governmental Experts Intersessional Working Group on Registration Criteria (IWGRC) in 2017. It was suggested that this research would need to be updated but would provide a useful starting point on a number of issues to be considered by the Regulations Working Group. The observer queried whether consent should be required individually for the registration of each MAC object held as inventory or whether block consents could be registered. In relation to the ability to make Non-Convention Filings that did not require consent, it would open the Register to be cluttered with all kinds of registrations which would have no legal effect under the Convention. The observer concluded that this concern would have to be balanced with any economic utility that Non-Convention Filings would provide.

52. *The Diplomatic Conference Rapporteur* suggested that if the MAC Registry was to allow for Non-Convention Filings, the Registry might need to be organised in a manner to ensure that a search for registrations made against a particular MAC object would not return matches for Non-Convention Filings that had no legal effect. Additionally, users should have the ability to filter out Non-Convention Filings.

53. *An observer from Aviareto* noted that consent and entry points were two large policy issues that the Regulations Working Group would need to consider in detail. The observer explained that the Aircraft Regulations provided for certain measures to prevent the abuse of the Registry, such as requiring users in certain instances to make unilateral statements regarding matters such as under which State's laws their interest in an aircraft object arose, and to upload supporting documentary evidence. Without the provision of documentary evidence, the Registrar was entitled to block the account. In relation to consent, it was suggested that the MAC Registry could provide for a spectrum of consent, which could require higher levels of consent for certain functions. In relation to domestic entry points, it was noted that entry points for the Aircraft Registry had caused problems in certain instances. Authorising entry points under the Aircraft Registry added an additional layer of bureaucracy and in certain circumstances were an impediment to accessing the Registry but were important to some States. The observer noted that for the MAC Registry, domestic entry points could provide a useful and powerful vehicle for facilitating access and usability of the Registry in different Contracting States. It was further noted that standardisation of domestic entry points could be a challenge and suggested that one option could be the creation of a domestic entry portal that would be available to Contracting States. For States like Australia that might wish to integrate an existing domestic registry with the MAC Registry, application programming interface (API) technologies might be required.

54. *A representative of the United States* noted that domestic export credit agencies in different countries might have useful insights in relation to the development of the MAC Regulations and suggested that Commission Members should consider inviting representatives from their domestic export credit agencies to participate in the Regulations Working Group.

55. The *Chair* thanked participants for their initial comments on the preliminary draft Regulations. The Chair then brought the Committee's attention to several specific issues identified in the footnotes of MACPC/1/Doc. 3 that required further discussion.

#### Use of electronic signatures (Section 5.1(a))

56. The *Chair* suggested that the Commission might wish to consider whether the term "electronic signature" in Section 5.1(a) could be changed to a more technologically neutral term.

57. An observer from NatLaw suggested that the Regulations should be as technologically neutral as possible.

58. An observer from Aviareto noted that the term "electronic signature" was relatively generic and that UNCITRAL had adopted a Model Law on Electronic Signatures in 2001. It was suggested that the term "electronic signature" might be technologically neutral enough to warrant its continued use.

59. A representative of Spain agreed that the term "electronic signature" was reasonably technologically neutral, even if electronic signatures were generally associated with specific asymmetric cryptography methods. It was suggested that the Commission could consider using a broader concept, such as a "consent manifesting method" or "consent method", but that generally "electronic signature" would suffice.

60. The Diplomatic Conference HS Working Group Chair suggested that the Regulations could clarify the types of consent that the Registrar would be bound to accept. It was further noted that it was anticipated that the Regulations were likely to be reviewed every 18 months, and that they could be updated to reflect changes in technology as appropriate.

61. A representative of South Africa noted that the Commission should take into account how these different technologies might work in developing countries. It was explained that in many parts of Africa, users might only be able to access the International Registry through a mobile phone rather than a computer.

62. A representative of the United Kingdom noted that section 5.1(a) dealt with the electronic signature of a party making a registration, whereas section 5.1(e) dealt with consent of the named parties to an international interest. It was explained that section 5.1(e) did not describe a particular type of technology required to establish consent.

63. The Diplomatic Conference Rapporteur noted that as a notice-based system, the consent mechanism must be automated, or it would interfere with the basis of the entire system.

#### Registration Criteria (Section 5.1(c))

64. The Chair explained that the three existing Regulations each used different criteria for the identification of equipment for registration purposes. The Chair noted that Article XVII of the MAC Protocol provided "A description of equipment that contains its manufacturer's serial number and such additional information as required to ensure uniqueness is necessary and sufficient to identify the object for the purposes of Article 18(1)(a) of the Convention. The Regulations shall specify the format of the manufacturer's serial number and provide what additional information is required to ensure uniqueness."

65. The Diplomatic Conference HS Working Group Chair noted that Section 5.1(c) would need careful consideration by the Regulations Working Group. It was suggested that the Regulations should clarify that the equipment's serial number (Section 5.1(c)(i)) was the primary identification requirement, whereas other criteria should be considered as additional information. It was important for the MAC Regulations to distinguish between exactly what information was required to identify MAC equipment and what additional information could be voluntarily provided. It was noted that by allowing users in Section 5.1(c)(ii) to provide the name of the manufacturer only where the brand name of the equipment "was unavailable" could create vagueness. It was suggested that in order to avoid making the registration process too cumbersome, the Regulations could provide for the serial number to be the primary registration criteria and then provide for several other additional criteria. It was explained that the additional criteria would only be necessary for the relatively rare

circumstance where two different MAC objects had identical serial numbers. Finally, it was suggested that it might be useful for the Regulations to allow the registrant to voluntarily provide additional information in relation to the asset not specifically linked with its identification, such as its location or its HS code. It was noted that Section 5.19 might allow for the provision of such supplemental information, although the relationship between Sections 5.1(c) and 5.19 was not entirely clear.

66. *The Diplomatic Conference Rapporteur* suggested that Section 5.1(c)(ii) was missing an "or" before "if unavailable". The Rapporteur cautioned that any additional information voluntarily provided should not be able to invalidate a registration. For example, if a user registered that an object was in a particular State at the time of registration, they should not be expected to update the registration every time the asset moved to a new State at the risk of losing their priority.

67. *A representative of China* noted that under the Preliminary Draft Regulations the manufacturer serial number was the criteria for both registration and searches. It was queried whether any global registration systems existed, noting that China did not have any unified industry standards in this regard.

68. *An observer from Natlaw* noted that in 2017 the IWGRC explored the issue of uniform identification systems. It was explained that there had been a degree of international standardisation for serial numbers, through ISO-compliant 27-digit pin numbers, although the use of such serial numbers was not uniform. It was suggested that the 2017 research should be updated in this regard. It was noted that Section 5.1(c) should not be considered as the basis of the actual drafting of the relevant rule, but was useful in setting out different options. The observer further noted that there were many questions that required further consideration, including whether multiple additional criteria were needed, whether the criteria would be ordered in a cascading list, whether they were all mandatory and the exact relationship between Sections 5.1(c) and 5.19.

69. *A representative of Japan* agreed with the preceding interventions and noted that in Japan, the mining and construction equipment tended to have ISO-compliant unique serial numbers whereas agricultural equipment did not. It was suggested that the various industry practices had to be considered in more detail and that the Commission should consider other additional criteria, such as photos of the objects.

#### Closing room facility (Section 5.17)

70. *The Chair* suggested that the Commission may wish to discuss whether a closing room facility would be useful for users of the MAC Registry.

71. *An observer from NatLaw* noted that insofar as the closing room facility was an optional functionality that a Registrar could choose to create and might be of value in the future to registry users, then the section should be retained in the MAC Regulations. It was suggested that a closing room mechanism could assist with the simultaneous registration of interests in multiple objects held as inventory. *A representative of Spain* supported this suggestion.

72. *An observer from Aviareto* noted that in the Aircraft Registry, approximately 75% of registrations were made through the closing room facility and that the percentage had been increasing over time. He explained that the closing room allowed multiple parties, such as the manufacturer, lessor, financier and airline to determine the order in which registrations were filed in the registry, and therefore their priority. The observer agreed that the closing room facility could be useful in the inventory context and for other complex deals. It was explained that it was a useful tool for planning as it generated a report that indicated what a registration would look like once completed. The observer concluded that including the closing room as an optional mechanism would

allow the Registrar to consider whether it warranted development, depending on the needs of the registry users.

73. *A representative of Australia* suggested that the closing room functionality would likely be useful in the MAC Protocol context. However, the representative queried whether it needed to be provided for in the Regulations if it was not intended to be a mandatory function of the MAC Registry.

74. *The Diplomatic Conference Rapporteur* noted that in the Aircraft Protocol context, the closing room allowed the conclusion of registrations involving multiple transactions rather than multiple objects. The Rapporteur suggested that it might not be necessary to provide for the closing room in the regulations as it was only providing for a facility and did not require an underpinning legal framework.

75. *An observer from Aviareto* noted that there had been some debate in the Aircraft Regulations context whether the closing room facility had to be provided for in the regulations or was just related to the Registry's software. The observer noted that there was an appendix to the Aircraft Regulations that described how the closing room feature functioned. It was noted that there was technical liability that arose for the Registrar in relation to the functioning of the closing room and in this regard, it was useful for the closing room facility to be established through the Regulations. There was also value in the Regulations clarifying that a pre-registration through the closing room was not equivalent to an actual registration and had no legal effect.

76. *A representative of Spain* agreed that to the extent that the closing room merely provided a functional technological aspect of the software, it would not need to be provided for in the Regulations. However, to the extent that the closing room dealt with legal issues related to registrar liability and the legal distinction between preregistrations and registrations, it might be better to address it in the Regulations.

#### Notification of registrations to named parties (Section 6.3)

77. *The Chair* noted that as manufacturer serial numbers would not necessarily ensure uniqueness, it would be possible that two or more registrations of interests in different objects with the same serial number could be made in the MAC Registry. Under such circumstances, the Registrar might have difficulty determining which parties to send a notification to under Section 6.3.

78. *A representative of Australia* agreed that under Section 6.3, where separate registrations in different MAC objects with the same serial number existed, there would be a risk of the Registrar sending automated notifications regarding one of the registrations to the parties associated with the other MAC object, creating confusion. It was suggested that one method of addressing this issue would be for the automatic notification to provide additional descriptive information so parties that received the notification could verify whether it related to their MAC object or a different object.

79. *The Secretariat* noted that Section 6.3 might need to be revisited once the registration criteria under Section 5.1(c) had been confirmed.

80. *An observer from NatLaw* queried whether the notification feature under Section 6.3 was a mandatory legal requirement or a service-like feature. It was noted that the type of feature contemplated in Section 6.3 was not common in domestic collateral registries. The observer noted that Section 6.3 appeared to apply to all types of registrations including amendments of registrations.

81. *An observer from Aviareto* noted that the corresponding automatic notification feature in Section 6 of the Aircraft Regulations was a service-like feature. The observer explained that the purpose of the feature was to ensure that parties would not unexpectedly discover existing unilateral

registration(s) of non-consensual interest(s) which they were not aware of when finalising agreements relating to a particular asset. It was noted that in certain circumstances these notifications could create a level of spam, which would be multiplied if there were multiple MAC objects with the same serial number. It was suggested that for the MAC Protocol Registry, it could be an opt-in rather than opt-out feature for Registry users.

82. *Several representatives* noted that the current drafting of Section 6.3 was unclear in its scope and might need to be revised.

83. *A representative of Spain* suggested that it could be a useful service to maintain, although the service's utility needed to be balanced against whether there was any legal effect or liability arising from the notices.

84. *A representative of the United Kingdom* noted that Section 6.4 provided the information that needed to be included in a Section 6.3 notification. The representative noted that the Commission should be cautious in allowing the HS code to be listed by users as an identifying feature, as it was possible that the user could list an incorrect code. *A representative of Australia* agreed that users who were not importing equipment and instead seeking to finance domestically manufactured equipment would be unlikely to have knowledge of the HS code of the MAC equipment they were looking to finance. *The Diplomatic Conference HS Working Group Chair* suggested that the HS code should not be a registration criterion for identification purposes but instead could be data that the user could add voluntarily when registering an asset.

#### Entry points (Section 13)

85. *The Chair* noted that Section 13 implemented Article XVI of the MAC Protocol, which provided for Contracting States to designate entry points to the International Registry. It was explained that Section 13 was largely consistent with Section 12 of the Aircraft Regulations and Space Regulations, in differentiating between "authorising entry points" and "direct entry points".

86. *The Secretariat* explained that Section 13 of the Rail Regulations did not expressly define direct and authorising entry points, although they did refer to the distinction. It was further explained that the Rail Regulations did not provide a connecting factor for the use of entry points, however, they did clarify that a registration effected not in compliance with a domestic entry point would be invalid.

87. *A representative of Australia* noted that there could be benefit in considering the Rail Regulations entry point section as a model for the MAC Regulations due to its simplicity, however this issue would need to be considered in further detail by the Regulations Working Group.

88. *The Diplomatic Conference Rapporteur* suggested that Section 13.7 was superfluous and could be deleted as Article XVI(3) of the MAC Protocol already clarified that a registration could not be invalidated by a failure to use a designated entry point.

89. *A representative of China* queried what obligations and standards would be required by a domestic entry point and whether a connecting factor had been established. *The Secretariat* clarified that the Diplomatic Conference had delegated these issues to the Preparatory Commission.

90. *A representative of Australia* noted that as Article XVI(3) of the Protocol provided that there could be no consequences under the Convention for failing to use an entry point, the connecting factor might not be as important an issue. It was queried whether it was necessary to specify a connecting factor at all. *Several representatives* responded that it was important for the Regulations

to provide a connecting factor for the use of domestic entry points, because there could be domestic administrative sanctions for failing to comply.

91. A representative of Japan noted that the two connecting factor possibilities that had been discussed at the Diplomatic Conference were (i) the location of equipment, or (ii) the location of debtor. The representative expressed a slight preference with location of debtor, on the basis that the location of the debtor was the connecting factor for the application of Article XII of the Protocol. It was suggested that if the location of the equipment was used as the connecting factor, if some Contracting States opted out of the application of the Protocol to certain annexes, it could cause confusion in relation to the entry point.

92. The Diplomatic Conference HS Working Group Chair agreed that the location of the debtor might be the preferable connecting factor for two reasons. First, using the location of the debtor would be more compatible with national registry systems which were likely to be debtor-based and might serve as domestic entry points. Second, as the consequence of a failure to comply with an entry point would be a domestic administrative sanction directed against the registrant or debtor, having the location of the debtor as the connecting factor would ensure that at least the debtor was in the entry point State. A representative of Spain also supported the use of the location of the debtor as the preferable connecting factor. An observer from NatLaw noted that generally it would be the creditor registering their interest in the international registry and the debtor consenting to the registration. The observer suggested that any domestic law sanction arising from a creditor's failure to comply with a national entry point in registering an interest in the MAC Registry should be enforced against the creditor, which might be challenging if the connecting factor was the location of the debtor.

93. The Diplomatic Conference Rapporteur suggested that as national registry systems would generally only apply to assets in that State, the location of the asset might be the preferable connecting factor. An observer from NatLaw noted that most domestic collateral registries considered the location of the collateral at the time of filing as the connecting factor. It was explained that the United States domestic legal framework used the location of the debtor as the connecting factor, although some States also had special rules for certain highly mobile equipment (for example, delivery trucks).

94. The Secretariat noted that in the Aircraft Regulations, the connecting factor for the use of a domestic entry point was the national aircraft registry, which was an asset-based registry rather than a debtor-based registry.

95. The Chair thanked participants for their contributions to the debate and that the outcomes of the discussion would be reflected in the materials prepared for the Regulations Working Group.

#### **Item No. 7 Establishment of a Working Group to draft a request for proposals for the selection of a Registrar**

96. The Chair introduced the item and suggested that the Commission might wish to establish a Working Group to develop a request for proposals for the selection of the MAC Registrar. It was explained that the Secretariat had been preparing research on international best practice for procurement and tender management, taking into account how the processes were undertaken for the selection of Registrars under previous Cape Town Convention Protocols.

97. The Commission established a Working Group to develop a request for proposals for the selection of the MAC Registrar (hereafter the "Registrar Working Group"), composed of the following members:

**Members:**

1. Australia
2. United States

98. A representative of Spain noted that Spain was very interested in the process and might be interested in joining the Working Group at a later stage. An observer from Ireland noted that Ireland needed to consult further as to whether it wanted to participate in the Working Group and reserved its position.

99. The Commission confirmed that the Working Group was not a closed group and that participants in the Commission could register their delegates for the Working Group at a later stage.

**Item No. 8 Time-table and planning of further work**

100. The Chair reaffirmed that the second session of the Commission had been tentatively scheduled for 10 – 11 December 2020 as an in-person meeting at the seat of UNIDROIT in Rome. The Chair noted that scheduling would have to remain flexible as the Institute monitored the progression of the pandemic and that ultimately the scheduling of the second session would be a decision of the Commission, not the Secretariat.

101. Several representatives noted that COVID19 was spreading at different rates around the world and that travel restrictions for some States would likely still be in place in December. A representative of Australia noted that even if participants were able to travel to Rome in December, they would likely be held in quarantine for two weeks on their return to their home States, which would fall over the December holiday period.

102. The Secretariat explained that under Rule 17, in exceptional circumstances participants in the Commission could participate remotely in in-person meetings. The Chair noted that Rule 17 was truly limited only to exceptional circumstances as it was important for the Commission meetings to be held in-person to the greatest extent possible, although travel restrictions due to a global pandemic would likely satisfy the “exceptional circumstances” test.

103. Several representatives noted that the dates of 10 – 11 December 2020 clashed with the scheduled UNCITRAL Working Group V meeting. The Chair suggested that given the subject matter of Working Group V, this scheduling overlap would not be a major issue as there would not be many participants who would be intending to attend both meetings.

104. The Secretariat explained that the Regulations Working Group and Registrar Working Group would both meet before the Commission’s second session. No dates had yet been confirmed, although it was anticipated that the Working Groups would meet in either September or October 2020 and the meetings would likely allow both in-person attendance as well as remote participation.

105. The Commission noted the proposed second session dates of 10 – 11 December 2020.

**Item No. 9 Any other business**

106. No other business was raised under this item.

**Item No. 10 Closing of the Session**

107. *The Chair* thanked all the participants for their attendance and positive contributions to the discussion. It was noted that the first session had demonstrated the international community's continued commitment to the MAC Protocol. The Chair wished all participants health and safety in the coming months.

108. *The Chair closed the first session of the Commission.*

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**ANNEX II****ORDER OF BUSINESS**

1. Opening of the session and welcome by the UNIDROIT Secretary-General
2. Adoption of the Order of Business of the session
3. Adoption of the Commission's Rules of Procedure
4. Election of the Chair and Vice-Chairs of the Commission
5. Consideration of matters relating to the appointment of a Supervisory Authority
6. Establishment of a Working Group to develop draft Regulations for the International Registry for MAC equipment
7. Establishment of a Working Group to draft a request for proposals for the selection of a Registrar
8. Time-table and planning of further work
9. Any other business
10. Closing of the session