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COMMENTS ON THE DRAFT MAC PROTOCOL

(Submitted by the United States of America)

1. The United States of America appreciates the opportunity to comment on the revised draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural, and Construction Equipment (Protocol). Substantial progress occurred since the second session of the Committee of Governmental Experts (CGE) in October 2017, as reflected in the current text authorized for transmission to the Diplomatic Conference by the UNIDROIT Governing Council in May 2018. We also welcome the intersessional efforts by key experts and the Secretariat, as reflected in the legal and explanatory materials prepared by the Secretariat in advance of the November 2019 Diplomatic Conference. At this stage in the negotiation, with very few issues remaining to be resolved, we would like to provide the following general policy comments on several draft articles for consideration by other delegations in advance of the meeting.

Article VII – Association with Immovable Property

2. We support the policies underlying the Secretariat's proposed revisions to Article VII, Alternative A, with respect to immovable-associated equipment. These revisions are reflected in the Secretariat's Legal Analysis (Doc. DCME-MAC – Doc. 5 corr.) at p. 19. The Protocol should apply to equipment associated with immovable property except when physically disconnecting that equipment from the immovable property would render the equipment without any material value. In making this assessment, one would need to take into account the value of the equipment after it is disconnected from the immovable property, plus any costs incurred to disconnect the equipment and to repair the immovable property and the equipment itself. In our view, Alternative A offers the most promise for ensuring the economic benefits of the Convention and the Protocol for immovable-associated equipment.

3. Further refinements to the draft text of Article VII may be useful for achieving its policy goals as well as to simplify and clarify the text. In addition, we suggest that Article VII include a rebuttable presumption that, if the Protocol applies to equipment at the time an international interest is created, the Protocol will continue to apply at a later time. This presumption would place the burden of persuasion that the Protocol has ceased to apply to that equipment (because disconnection would render it without material value) on a challenging party. This approach would provide certainty to the creditor and facilitate the extension of credit secured by equipment associated with immovable property. Without the presumption, a creditor, having already determined that the Protocol applies at the time of creation, would be required to prove once again that the Protocol applies in the event

of a default, which could create an incentive for challenge by competing creditors or an insolvency representative.

Article XII – Provisions Relating to Inventory

4. We support in general the opt-out declaration option for inventory that was proposed by the MAC Working Group and adopted by the second CGE. This option allows these States to retain their domestic regimes when they have robust legal frameworks for financing inventory. For other States that lack such robust regimes, the application of the Convention and Protocol would provide net benefits for inventory financing when compared with the otherwise applicable law.

5. We also welcome in principle the refinements proposed by the Secretariat in the Legal Analysis, which would clarify the inventory-related provisions. See Legal Analysis (Doc. DCME-MAC – Doc. 5 corr.) at pp. 12-17. We believe, however, that some additional revisions to Article XII's inventory-related provisions could be useful, as explained below. To achieve the inventory-related objectives proposed by the CGE, we believe that consideration should be given to whether Article XII should provide for two alternative declarations. If a State does not make either one of these declarations, of course, the Convention and Protocol would apply to inventory in all respects.

First Alternative Declaration – Optional "Takes-Free" Rule

6. The first alternative declaration, which may be useful to consider at the Diplomatic Conference, would make the "takes-free" rule that would allow for buyers, conditional buyers, and lessees of inventory to take free of registered international interests optional rather than mandatory. This alternative reflects the general views of several delegations expressed at the second CGE meeting. This alternative embraces the underlying assumption that some States might wish to adopt the Convention and Protocol for application to inventory financing but also might wish to preserve the rule under their applicable law that protects ordinary-course buyers and lessees with respect to registered international interests. We believe the Secretariat's draft of the "takes-free" rule more precisely defines the role of domestic law other than the Convention and Protocol (the non-Convention law) in the proposed rule, which is a useful clarification. The Secretariat's version, as well as the current version of the draft Protocol, however, imposes a "takes-free" rule without exception. We think it is important to offer a State the option of having the Convention and Protocol apply according to their terms without also being required to adopt a "takes-free" rule. Thus, this approach would allow States this flexibility.

7. We offer this suggestion as a way to address concerns expressed about the mandatory "takes-free" rule. Nevertheless, while we recognize that it may be desirable in principle to permit opting in to a "takes-free" rule under the first alternative, we encourage States that want the Convention and Protocol to apply generally to inventory to consider whether including this optional "takes-free" rule is necessary at all. Despite potential benefits, including this first alternative represents a substantial deviation from earlier Protocols and eliminating it would simplify the Protocol and encourage uniformity in implementation and application.

Second Alternative Declaration – Exclusion of Inventory Interests

8. The second alternative for consideration at the Diplomatic Conference would exclude interests in inventory created by a dealer from the scope of the Protocol, reflecting the view that the legal framework supporting inventory financing in some jurisdictions (including any "takes-free" rule in that jurisdiction) is robust and adequately balances the interests of both financers of MAC equipment and buyers of inventory consisting of MAC equipment. In this case, imposing the Convention and Protocol regime of asset-based registrations in these States would not be justified.

9. We acknowledge, however, that for the second alternative declaration, an important overall policy objective for some States may be to ensure the broadest availability of the Convention's and the Protocol's default remedies and insolvency-related provisions for inventory. As such, States participating in the Diplomatic Conference should consider whether, for a State choosing to opt out of inventory coverage entirely under this second alternative declaration, the remedies and insolvency provisions of the Convention and Protocol should still be preserved for inventory financing. If so, then the second alternative declaration excluding interests created in inventory by a dealer should be modified so as to retain the remedies and insolvency provisions of the Convention and Protocol. In particular, if a State opted for the second alternative as so modified, the registration and priority rules of the Convention and Protocol would not be applied, but the remedies and insolvency provisions would apply. Whether such a modification of the second alternative is feasible and practical, however, will depend on whether suitably clear text could be agreed at the Diplomatic Conference. While we have reservations about whether such text can be developed, we welcome further discussion on this approach.

Articles VIII(5), IX(6), X Alt. A(8), and X Alt. C(9) – Duties Related to the Administrative Authorities

10. During the meetings of the CGE, we expressed our view that the language in the relevant paragraphs referring to the obligations of "administrative authorities" should be deleted to avoid imposing vague and potentially overbroad obligations in the context of this Protocol. Whereas under earlier Protocols, analogous provisions imposed obligations on States that were fairly discrete and well-understood, the current language could be ambiguous as to what types of assistance might be required for the export of MAC equipment and which administrative authorities might be affected. We are aware, however, of concerns that deletion of these obligations, which appear in the Aircraft and Railroad Protocols, could create negative inferences about their scope in those agreements. We also appreciate that the obligations related to "administrative authorities" have been key to the effective operation of Cape Town Convention regime remedies. We therefore appreciate the efforts to date to clarify the interpretation of these obligations so as to confirm that they are meant to extend only to export and physical transfer activities associated with the movement of MAC equipment across borders. See Legal Analysis (Doc. DCME-MAC – Doc. 5 corr.) at pp. 32-34. We remain willing to work to achieve a solution at the Diplomatic Conference that would make the limited scope of these obligations clear so as to minimize or avoid variations in language from the text of previous Protocols.

Articles XXXIII and XXXIV – Provisions Related to Periodic Changes in the Harmonized System Codes

11. We would like to thank the Secretariat, the Drafting Committee, and the intersessional efforts by States and international experts for their efforts to develop a workable amendment process that would distinguish between amendments that change the scope of the Protocol's coverage or the obligations of Contracting States and other changes resulting from the five-year review of the Harmonized System (HS) codes that affect the categories of equipment listed in the Annexes. We support the general framework set out in the Protocol and the Legal Analysis as a way to minimize the need for formal review Conferences to address HS code changes that do not change the scope of the obligations under the Protocol. See Legal Analysis (Doc. DCME-MAC – Doc. 5 corr.) at pp. 38-47. We believe, however, that it is important to retain the ability of States Parties to the Protocol not to be bound by a change to which they do not consent. Thus, while the revised text prepared by the Secretariat provides a balanced approach that will provide a sufficiently nimble mechanism for amending the Annexes while also respecting States' general practices for treaty amendments, we believe that further drafting changes are needed to ensure that States Parties to the Protocol have the flexibility to opt out of a particular change to the HS code to which they object. In Article XXXIV specifically, we believe that States Parties should still have the opportunity to opt out of any changes adopted by the Contracting Parties, to ensure that no State is bound by a modification to which it

does not agree. We also agree that the use of "Contracting States" is appropriate in this Article, to allow changes to the HS codes to be resolved as needed, even if the Protocol has not taken effect. We look forward to further efforts to resolve this issue at the Diplomatic Conference.

Conformity with Prior Protocols

12. To aid in the consistent interpretation of the Cape Town Convention and its related Protocols, as a general matter we support the incorporation of provisions from the first three Protocols when the MAC Protocol seeks to achieve the same outcome. Examples include provisions for developing search criteria (Article XVII) and, as noted above, administrative authorities (Articles VII, IX, and X), so long as it is clear from the context that the terms are to be interpreted the same in all Protocols. We do, however, remain concerned about the use of fees generated from registration to offset costs associated with the general Depositary functions under this Protocol (bracketed language in Article XVII(3)). We prefer to retain the practice followed in the other Protocols on this matter, or revise the provision to clarify that any fees recovered are to defray costs associated with specific duties, such as registration obligations or duties related to the review conference or amendment process under this Protocol, as opposed to general duties of a depositary.