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PROTOCOL**

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RESEARCH ON POTENTIAL CANDIDATES FOR SUPERVISORY AUTHORITY

1. At its first meeting, the MAC Preparatory Commission requested the Secretariat to undertake further research on potential candidates for the role of Supervisory Authority in addition to the IFC/WBG, including UNIDROIT and the OECD, and submit the research to the Commission for consideration at its next session. This document is an update of the research which was previously presented on this issue at the Diplomatic Conference for the Adoption of the MAC Protocol as part of Appendix VII of DCME-MAC – Doc. 5 corr. – Appendices.
2. This paper presents a detailed list of organisations that could theoretically perform the role of Supervisory Authority of the MAC Protocol. To present the most extensive list of candidates possible, the paper has considered organisations with connections to international commercial trade, development and the agricultural, construction and mining sectors. It does not consider regional organisations as the suitability of a regional organisation serving as Supervisory Authority for a global instrument is not considered recommendable at this stage.
3. This paper divides the list of potential candidates into two sections:
 - I. International Public Entities
 - A. The International Finance Corporation/World Bank Group (IFC)
 - B. Organisation for Economic Co-operation and Development (OECD)
 - C. The International Institute for the Unification of Private Law (Unidroit)
 - D. The World Customs Organization (WCO)
 - E. Asian Infrastructure Investment Bank (AIIB)
 - F. United Nations Conference on Trade and Development (UNCTAD)
 - II. Single sector international Public Entities
 - A. International Fund for Agricultural Development (IFAD)
 - B. Food and Agriculture Organization (FAO)
 - C. The World Farmers Organization (WFO)
 - D. World Mining Congress (WMC)

4. The purpose of including an extensive list is to provide the Preparatory Commission with a wider range of options. However, several of the listed organisations present certain characteristics which are not optimal for an institution performing the role of Supervisory Authority for several reasons, and, mainly, entities listed in section I. have expertise related to only one of the categories of equipment that the MAC Protocol will apply to. As such, this paper suggests that section II. entities might not be viable options for the role of Supervisory Authority.

I. INTERNATIONAL PUBLIC ENTITIES

A. The International Finance Corporation/World Bank (IFC)¹

5. The IFC, a member of the World Bank Group, is the largest global development institution focused exclusively on the private sector in developing countries. The IFC provides financing and advice to private sector clients in different industries, with a focus on infrastructure, manufacturing, agribusiness, services and financial markets. Its products and services include the provision of loans, equity investments, trade and supply chain finance, syndications, treasury client solutions, blended finance, venture capital, advice and asset management.

6. The IFC has a longstanding engagement with the MAC Protocol project. The possibility of the International Finance Corporation (IFC) being the Supervisory Authority was first raised during Study Group negotiations. At the third Study Group meeting, the representative of the IFC noted that the Supervisory Authority issue would be discussed internally at the IFC, to determine whether it was feasible for the IFC to perform such a role. In January 2016, the UNIDROIT Secretariat provided additional information to the IFC in relation to the nature of the Supervisory Authority role to assist with their discussions. At the fourth Study Group meeting the representative of the IFC noted that the IFC was exploring the possibility of the IFC acting as the Supervisory Authority to the Protocol. He mentioned a number of considerations, namely whether such a role would fall within the sphere of activity of the IFC and its articles of agreement, given that the IFC's exclusive focus was on investment in the private sector. However, he noted that parts of the IFC's mandate was to promote the development of the private sector, which could possibly be read to allow for a slightly broader range of activities. He also noted that from a practical perspective, if the IFC was to perform the role of Supervisory Authority, actions would have to be taken to avoid possible conflicts of interest, as the IFC would be both a user of the International Registry and its Supervisory Authority.

7. Resolution 2 of the MAC Protocol Diplomatic Conference officially invited "the governing bodies of the IFC to accept 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".

8. The UNIDROIT Secretariat has continued to liaise with IFC regarding this issue. Resolution 2 of the Diplomatic Conference also noted that should there be no positive response from the IFC following the expiry of a 6-month period after the adoption of the MAC Protocol, the Preparatory Commission would consider the appointment of another international organisation for this role. This six-month period was originally due to expire on 22 May 2020. However, due to the COVID-19 pandemic, the Preparatory Commission at its first session extended the period until 17 February 2021.

¹ See http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home.

B. Organisation for Economic Co-operation and Development (OECD)

9. The basic purpose of the OECD is to foster international cooperation to achieve sustainable economic growth and encourage peaceful relations between peoples by enhancing general well-being. Article 1 of the OECD Convention provides that it shall promote policies designed:

- a. to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- b. to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- c. to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

10. In pursuance of these objectives, the organisation has developed, over the past 55 years, 450 international standards in the form of conventions, recommendations, decisions and declarations, with more than 250 legal instruments in force. The OECD has 37 Member countries from North and South America to Europe and Asia-Pacific, representing 80% of world trade and investment. Its total budget for 2020 amounted to 386 million Euros.²

11. The OECD structure consists of a Council composed of all its member countries and the European Commission. Agreement on the acts of the OECD must in principle be reached by mutual agreement between all member countries. In addition, there are more than 300 Substantive Committees and subsidiary bodies (expert and working groups) which propose solutions to problems, analyse data and review the policies of its members in specific areas such as education, finance, trade and environment. Around 40,000 people from member countries and partners take part in their discussion and review meetings annually. A Secretary-General is appointed by the Council for a term of five years to carry out the work of the OECD. The Secretariat of the OECD includes a number of Directorates which report to the Secretary-General and coordinate with the Committees.³

12. The goal of improving access to finance internationally championed by the Cape Town Convention and the MAC Protocol align well with the OECD's mission of improving economic efficiency and general welfare around the world. Several synergies exist between the strategic direction of the OECD and the type of development promoted by the MAC Protocol. Moreover, the OECD's vast network of experts would be in a good position to advise the OECD if it took the role of Supervisory Authority.

13. The OECD's Regulatory Policy Committee may be a viable candidate to examine the suitability of the OECD's role as Supervisory Authority of the MAC Protocol. This Committee is central to the OECD's effort to improve the efficiency and quality of international rulemaking and coordinates with the Regulatory Policy Division of the Secretariat based on the following mandate:

- a. to promote strategic, evidence-based and innovative public policy outcomes by identifying, developing, and disseminating a global vision for regulatory policy and governance;
- b. to support efforts across the whole of government and within its branches to design and deliver effective, efficient and equitable regulatory frameworks;

² See <https://www.oecd.org/about/budget/>

³ See <https://www.oecd.org/about/>

- c. to strengthen public governance through regulatory policy leading to high quality, fit-for-purpose laws and regulations that ensure transparency, legitimacy, accountability and respect for the rule of law.⁴

14. However, while actively involved in investment, financing, and trade from a macro-economic perspective, the OECD does not have a specific background with regard to secured transactions. Although the OECD's Working Party on SMEs and Entrepreneurship has examined finance options for SMEs, including, *inter alia*, asset-based lending, it does not have any bodies whose field of study concentrates on security interests in equipment and has conducted little work on finance in the mining and construction sectors.

15. The OECD Trade and Agriculture Directorate is already familiar with the Cape Town Convention. Specifically, it conceived the 'OECD discount' contained in the Aircraft Sector Understanding on Export Credits for Civil Aircraft, which provides for a reduction of up to 10 percent of the minimum premium rate granted by governmental export credit agencies to aircraft operators.⁵ The OECD has not particularly been engaged in the development of the MAC Protocol.

C. The International Institute for the Unification of Private Law (UNIDROIT)

16. Established in 1926 as an auxiliary organ of the League of Nations, UNIDROIT comprises 63 member States which cover over 73% of the world population and over 90% of global nominal GDP.⁶ Its purpose is to develop methods for modernising, harmonising and co-ordinating international private and commercial law and to formulate uniform law instruments, principles and rules. Its work facilitates trade, contributes to international sustainable development, promotes education, advances international cooperation and exchange, and closes cultural gaps.⁷

17. The governing organs of UNIDROIT are the Governing Council and the General Assembly. The Governing Council, composed of 25 members elected by the General Assembly, determines the means of achieving the statutory objectives of the Institute and supervises the work of the Secretariat for the implementation of the Work Programme. The General Assembly is UNIDROIT's supreme decision-making body: it votes on the Institute's annual budget, approves its Work Programme every three years and appoints, for a five-year term, the members of the Governing Council. It is composed of one representative of the Government of each Member State. The Secretariat, composed of a team of international civil servants and support staff, serves as the executive body of Institute.

18. As the organisation responsible for developing the Cape Town Convention and all its Protocols, UNIDROIT has the highest level of knowledge and expertise concerning the functioning and operation of the MAC Protocol. The Institute is also well positioned to constitute expert bodies which would provide advice to the Supervisory Authority.

19. UNIDROIT serves as the Depositary of the Cape Town Convention and all its Protocols. The Cape Town Convention and its Protocols have been drafted assuming that the Depositary and Supervisory Authority are separate entities. As such, the Depositary is required to consult with the Supervisory Authority, provide it with instruments of ratification, and fulfil other related tasks. It is the Secretariat's view that nothing in the text of the Cape Town Convention or the MAC Protocol

⁴ See <https://www.oecd.org/gov/regulatory-policy/regulatory-policy-committee.htm>

⁵ See <http://www.oecd.org/trade/topics/export-credits/arrangement-and-sector-understandings/aircraft-specific-rules/>

⁶ Based on 2019 Data

⁷ See <https://www.unidroit.org/about-unidroit/overview>

would make it inappropriate for UNIDROIT to undertake the role of both Depositary and Supervisory Authority.

20. The following articles of the MAC Protocol contemplate interactions between the Supervisory Authority and Depositary:

Article XXV (1)(b)	the date of the deposit by the Supervisory Authority with the Depositary of a certificate confirming that the International Registry is fully operational.
Article XXXIV	(1) The Depositary , in consultation with the Supervisory Authority , shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system. (2) At the request of not less than twenty-five per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the Depositary , in consultation with the Supervisory Authority
Article XXXV (1)	Upon the acceptance of a Harmonized System revision, the Depositary shall consult the World Customs Organization and Supervisory Authority in relation to any Harmonized System codes listed in the Annexes that might be affected by the revision.
Article XXXVII (2)	The Depositary shall: (c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available and assist in the performance of any related duties to ensure the proper operation of the Registry; (d) inform the Supervisory Authority and the Registrar of any pending processes under Article XXXV or Article XXXVI and of the outcomes of any such processes;

21. While the Depositary is to "consult", "inform" or provide the Supervisory Authority with copies of relevant documents, as noted in the provisions above, this would not be impossible should UNIDROIT perform both roles. The tasks of the Supervisory Authority which have a material content (consultation) would be performed with the involvement of the Commission of Experts, a body created pursuant to Resolution 2 of the Diplomatic Conference to assist the Supervisory Authority in the discharge of its functions, and integrated by up to 15 members having the necessary qualifications and experience, appointed from among those nominated by the Signatory and Contracting States to the Protocol. In other words, the Depositary would in fact be consulting a body of experts nominated by States, and separate and fully independent from UNIDROIT's Secretariat and governing bodies. Any concerns arising from this situation could be tackled by ensuring the Statute and Rules of Procedure of the Supervisory Authority include sufficient participation of this independent body of experts in the decisions of the Supervisory Authority. Moreover, if UNIDROIT was to perform the role of Supervisory Authority, the decisions concerning some of the core functions of

the Supervisory Authority (eg, the update of the Statute and Rules of Procedure of the Supervisory Authority itself, or the update of the regulations of the International Registry) would not only be adopted in consultation with the said Commission of Experts, but would be also subject to the approval of the Institute's General Assembly, a body of States which would then have the last word on those matters.

22. Importantly, the Supervisory Authority sets the fees for the International Registry, from which UNIDROIT will benefit as Depositary, **only** insofar as recovery of costs under Article XVIII(2)(b) is concerned. This does not create a conflict of interest as the funds recoverable by the Depositary can only cover the reasonable costs of the Depositary for performing certain functions. In other words, the criterion to determine the fees is regulated by law, and thus, in the absence of discretion, any potential conflict disappears. Moreover, as Article XVIII(2)(b) is a cost recovery mechanism, even if the Supervisory Authority increased the fees for using the Registry, the Depositary's costs would remain the same (therefore, the Depositary could not exploit its role as Supervisory Authority to somehow increase the costs it generates as Depositary). The Supervisory Authority would have to set the fees to cover the Registry costs, Supervisory Authority costs, and the Depositary costs, regardless of who is performing the role.

23. All Protocols to the Cape Town Convention already contemplate the Supervisory Authority setting the fees for the Registries and recover the costs of performing the role of Supervisory Authority from the registry fees. This is the case for ICAO, which both sets the fees for the Aircraft Registry, and recovers its Supervisory Authority costs annually from those fees. This is clearly analogous to a situation where the Supervisory Authority would set the fees and recover some of those fees due to it also performing the role of Depositary. As noted above, and in addition, should the Institute become the Supervisory Authority, its decisions would be adopted in consultation with a Commission of Experts nominated by states as well as, ultimately, under the oversight of a body of States, which would suffice to solve any possible conflict of interest.

D. The World Customs Organization (WCO)⁸

24. The World Customs Organization, established in 1952 as the Customs Co-operation Council (CCC) is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations. The WCO represents 182 Customs administrations across the globe that collectively process approximately 98% of world trade. The WCO provides leadership, guidance and support to Customs administrations to secure and facilitate legitimate trade, realize revenues, protect society and build capacity.

25. The WCO maintains the HS and would have unrivalled expertise in managing changes to the HS and assessing how they may affect the Annexes to the MAC Protocol. It will be moreover involved in the proceedings established by the Protocol for any adjustments to the Harmonized System codes in the Annexes following a Harmonized System revision. However, the WCO does not have any expertise in secured transactions or international electronic registries, and has not expressed an interest in performing the function.

E. Asian Infrastructure Investment Bank (AIIB)⁹

26. The AIIB is a multilateral development bank, founded in 2016, to address Asia's infrastructure needs. Headquartered in Beijing, China, AIIB provides sovereign and non-sovereign financing for sustainable projects in, among others, rural infrastructure and agricultural development,

⁸ See <http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx>.

⁹ See <https://www.aiib.org/en/about-aiib/index.html>.

urban development, as well as energy and power.¹⁰ According to its Articles of Agreement, the AIIB will “provide or facilitate financing to any member, or any agency, instrumentality or political subdivision thereof, or any entity or enterprise operating in the territory of a member, as well as to international or regional agencies or entities concerned with economic development of the Asia region.”¹¹

27. The AIIB has not been closely engaged with the development of the MAC Protocol.

F. United Nations Conference on Trade and Development (UNCTAD)¹²

28. UNCTAD is a United Nations agency established in 1964. It provides analysis, consensus-building, and technical assistance to developing countries. UNCTAD developed the highly successful Generalised System of Preferences (GSP) under which developed countries accord tariff concessions to exports from developing countries. UNCTAD works to:

- Diversify economies to make them less dependent on commodities
- Limit their exposure to financial volatility and debt
- Attract investment and make it more development friendly
- Increase access to digital technologies
- Promote entrepreneurship and innovation
- Help local firms move up value chains
- Speed up the flow of goods across borders
- Protect consumers from abuse
- Curb regulations that stifle competition
- Adapt to climate change and use natural resources more effectively

29. The role of Supervisory Authority does not neatly fit within the scope of UNCTAD’s mandate and activities. However, given its status as a UN agency, it could possibly function as such. The UNIDROIT Secretariat has not engaged with UNCTAD and it is unknown whether UNCTAD would have an interest in performing this role.

II. SINGLE SECTOR INTERNATIONAL PUBLIC ENTITIES

A. International Fund for Agricultural Development (IFAD)¹³

30. IFAD is an international financial institution and a specialized agency of the United Nations established in 1977. Since its establishment, IFAD “has focused exclusively on rural poverty reduction, working with poor rural populations in developing countries to eliminate poverty, hunger and malnutrition; raise their productivity and incomes; and improve the quality of their lives.” IFAD operates in 120 countries and territories around the world. It provides loans to member states and grants “to institutions and organizations in support of activities to strengthen the technical and institutional capacities linked to agricultural and rural development.” “IFAD works in partnership with others – borrowing-country governments, poor rural people and their organizations, and other donor agencies. Its focus on local development has given it a role in bridging the gap between multilateral and bilateral donors on the one side, and civil society represented by NGOs and community-based organizations (CBOs) on the other.” The nine areas supported by IFAD’s work are:

¹⁰ See <https://www.aiib.org/en/about-aiib/who-we-are/our-work/index.html>.

¹¹ See <https://www.aiib.org/en/about-aiib/who-we-are/financing-operations/index.html>.

¹² See <http://unctad.org/en/Pages/aboutus.aspx>.

¹³ See <https://www.ifad.org/what/overview>.

- agricultural development
- financial services
- rural infrastructure
- livestock
- fisheries
- capacity-and institution-building
- storage/food-processing/marketing
- research/extension/training
- small and medium scale enterprise development

31. IFAD's sole focus on agriculture does not make it a suitable candidate for the Supervisory Authority.

B. Food and Agriculture Organization (FAO)¹⁴

32. The FAO is a specialized agency of the United Nations, established in 1945. Its main goals are "the eradication of hunger, food insecurity and malnutrition; the elimination of poverty and the driving forward of economic and social progress for all; and, the sustainable management and utilization of natural resources, including land, water, air, climate and genetic resources for the benefit of present and future generations."¹⁵ Its strategic objectives include the elimination of hunger and food insecurity, making agriculture more productive, reducing rural poverty, enabling inclusive and efficient agricultural and food systems, and increasing the resilience of livelihoods to threats and crises.¹⁶ FAO also works to strengthen political will and share policy expertise with member countries "in devising agricultural policy, supporting planning, drafting effective legislation, and creating national strategies to achieve rural development and hunger alleviation goals."¹⁷

33. FAO's sole focus on agriculture does not make it a suitable candidate for the Supervisory Authority.

C. The World Farmers Organization (WFO)¹⁸

34. The WFO is an organization that works to bring together farmers' organizations and agricultural cooperatives around the world with the objective of developing policies that support farmers' causes in developed and developing countries. It represents small and large scale farmers. "By advocating on behalf of farmers and representing their interests in international policy forums, WFO supports farmers in better managing extreme price volatility, leveraging market opportunities, and timely access to market information."¹⁹ "WFO's work covers all agriculture related thematic areas including forestry, aquaculture and fisheries, environment, trade, extension, research and education. WFO encourages farmers' involvement in sustainable rural development, the protection of the environment and facing other emerging challenges, such as climate change, generational renewal, and gender equality."²⁰ To achieve its goals, WFO:

¹⁴ See <http://www.fao.org/home/en/>.

¹⁵ See <http://www.fao.org/about/en/>.

¹⁶ *Id.*

¹⁷ See <http://www.fao.org/about/how-we-work/en/>.

¹⁸ See <http://www.wfo-oma.org/>.

¹⁹ *Id.*

²⁰ *Id.*

- “Represent its members in governmental, non-governmental and inter-governmental venues, with a view to encouraging the world’s farming community to establish and develop contacts, relations and partnerships.
- Promote and advocate on behalf of farmers, encouraging the creation of adequate agricultural policies.
- Encourage partnerships among its members, as well as with international organisations, executing agreements, protocols and conventions with other bodies and third parties in general.
- Conduct and promote research, in-depth analysis and studies, as well as support and organise conferences, meetings and seminars on topics and arguments of interest to the Organisation.”²¹

35. WFO’s sole focus on agriculture does not make it a suitable candidate for the Supervisory Authority.

D. World Mining Congress (WMC)²²

36. The World Mining Congress established in 1958 after the first International Mining Congress, is a Poland-based international organization affiliated with the United Nations. The Preamble to the Statutes of the WMC stipulates that the objective of the WMC is to promote and support scientific and technical co-operation, for national and international progress in the fields of mining of solid minerals and the development of natural mineral resources.²³

37. WMC’s sole focus on mining would not make it suitable for the Supervisory Authority.

²¹ *Id.*

²² See <http://www.wmc.org.pl/?q=node/1>.

²³ See <http://www.wmc.org.pl/?q=node/3>.