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Item No. 11 on the agenda: International Interests in Mobile Equipment

(b) Implementation of the Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment (MAC Protocol)

(prepared by the Secretariat)

<i>Summary</i>	<i>Report on the Diplomatic Conference and outline of next steps in implementing the MAC Protocol</i>
<i>Action to be taken</i>	<i>Note the outcomes of the Diplomatic Conference and the first meeting of the Preparatory Commission.</i>
<i>Mandate</i>	<i>Work Programme 2020 - 2022</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<u>Diplomatic Conference Final Act</u> <u>MACPC/1/Doc. 9</u>

I. INTRODUCTION

1. The purpose of this document is to update members of the Governing Council on the fourth Protocol to the 2001 Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (the "MAC Protocol"), which was adopted at a Diplomatic Conference in Pretoria, South Africa between 11 – 22 November 2019.

2. This document provides information on the Diplomatic Conference and the first meeting of the Preparatory Commission as well as future steps that the Secretariat will take to implement the MAC Protocol.

II. BACKGROUND

3. The [Convention on International Interests in Mobile Equipment](#) was opened for signature on 16 November 2001. Article 2(3) of the Convention provides that the initial three protocols, adopted respectively in 2001, 2007 and 2012, cover aircraft, railway rolling stock and space assets. Article 51(2) of the Convention specifically contemplates the possibility of adopting additional protocols, which cover other categories of equipment.

4. At its 84th session (Rome, 18-20 April 2005), the UNIDROIT Governing Council decided to include in the 2006–2008 Work Programme of the Institute the preparation of a fourth Protocol to the 2001 Cape Town Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment. Between 2005 and 2013, a range of background research activities were conducted in relation to the project, including a questionnaire distributed to Member States, consultations with private industry and a preliminary economic analysis (for further information on the background of the project, see document [UNIDROIT 2015 – C.D.\(94\) 5\(b\)](#)).

5. At its 93rd session (Rome, 7-10 May 2014) the Governing Council agreed to convene a Study Group entrusted with preparing a first draft of the MAC Protocol prior to its 95th session. Composed of various international experts¹ in secured transactions law, the Study Group met four times (15-17 December 2014, 8-9 April 2015, 19-21 October 2015 and 7-9 March 2016) to consider legal issues associated with the preparation of the MAC Protocol and to prepare a preliminary draft text. In addition to the members of the Study Group, the meetings were attended by observers from various international organisations and academic institutions, including the United Nations Commission on International Trade Law (UNCITRAL), the International Finance Corporation (IFC), the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD), the World Customs Organization (WCO) and the National Law Center for Inter-American Free Trade (NatLaw). Several out-of-session teleconferences were also held to further work on specific issues relating to the Protocol.

6. At the conclusion of the fourth Study Group meeting on 8 March 2016, the Study Group submitted the preliminary draft Protocol to the Governing Council with a recommendation that a Committee of Governmental Experts be convened. At its 95th session (Rome, 18-20 May 2016), the Governing Council considered the draft text produced by the Study Group, and decided that it was sufficiently developed to warrant the convening of a Committee of Governmental Experts to prepare a draft Protocol. The first session of the UNIDROIT Committee of Governmental Experts (CGE1) was held at the FAO Headquarters in Rome, from 20 to 24 March 2017. The session was attended by 126 representatives from 48 Governments (30 UNIDROIT member States and 18 non-member States), six regional and intergovernmental organisations and four international non-governmental organisations. The second session of the Committee of Governmental Experts (CGE2) was held at the FAO headquarters in Rome from 2-6 October 2017. 126 representatives from 51 Governments, six regional and intergovernmental organisations and three international non-governmental organisations registered to attend the meeting.

7. At the conclusion of the second session, the Committee decided that the majority of the open legal issues had been resolved and recommended to the UNIDROIT Governing Council that a Diplomatic Conference be convened. At its 97th session (Rome, 2–4 May 2018), the Governing Council approved the convening of a Diplomatic Conference to formally adopt the MAC Protocol.

¹ Mr Michel DESCHAMPS, Partner, McCarthy Tetrault (Canada); Professor Charles MOONEY, University of Pennsylvania (United States of America); Professor Jean-François RIFFARD, Université de Clermont-Ferrand (France); Professor Teresa RODRÍGUEZ DE LAS HERAS BALLELL, Universidad Carlos III de Madrid (Spain) and Professor Benjamin VON BODUNGEN, Counsel at Bird & Bird LLP (Germany).

III. PREPARATIONS FOR THE DIPLOMATIC CONFERENCE

8. In advance of the Diplomatic Conference, the Secretariat undertook an extensive promotion and consultation campaign. The objectives of this campaign were to (i) inform States about the legal operation and predicted economic benefits of the MAC Protocol; (ii) encourage States to attend the MAC Protocol Diplomatic Conference and consider signing the instrument; and (iii) receive feedback on the draft provisions and open legal issues.

9. The Secretariat has undertaken these activities through bilateral, regional and multilateral channels. Utilising existing international fora provide the Secretariat with efficient and cost-effective opportunities to engage large groups of diverse States. In this regard, the Secretariat has sought to work with relevant international and regional organisations to promote the MAC Protocol, including the World Bank Group (International Finance Corporation), the Asia Pacific Economic Cooperation (APEC), UNCITRAL, the Visegrad Group, the Arab League, the African Union and the European Union.

10. In 2018 and 2019 UNIDROIT delivered 32 bilateral, regional and international consultation events on the MAC Protocol. Five major events in 2019 were (i) the Latin American regional workshop in Brazil in August, (ii) the international workshop for embassies in the United Kingdom in September, (iii) the European regional workshop for EU Member States in Brussels in October, (iv) the briefing for embassies in Italy in October and (v) the African regional workshop in Kenya in October. Further information on these consultation events is available in the UNIDROIT Annual Reports for 2018 and 2019 and Annexe I of this document.

11. To assist States in their consideration of the treaty, in July 2019 the Secretariat released several documents containing 314 pages of analysis and information on the operation and scope of the MAC Protocol. Six States and the MAC Working Group also submitted comments on the draft text.²

12. With a view to progressing legal issues in the draft text requiring further consideration, UNIDROIT also organised two informal expert meetings in Paris (31 January 2019) and Oxford (9 September 2019).

13. Finally, UNIDROIT launched a dedicated website for the MAC Protocol Diplomatic Conference: <https://macprotocol.info/>.

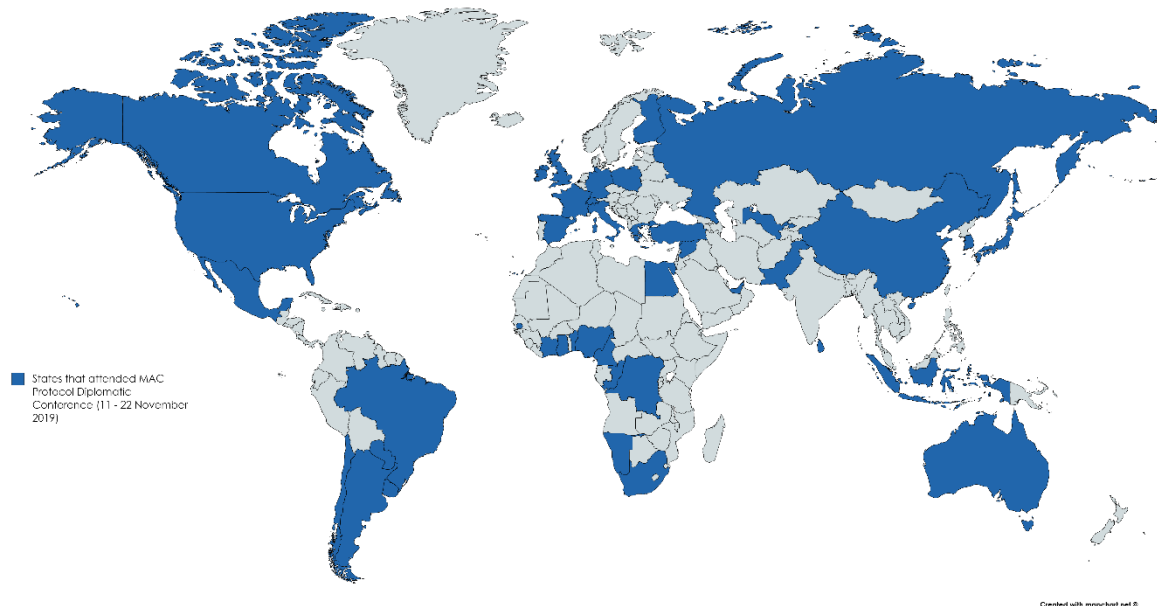
IV. THE DIPLOMATIC CONFERENCE

14. Following discussions with a number of interested Member States, in September 2018 the Secretariat accepted an offer from the Government of South Africa to host the Diplomatic Conference.

15. Between 11 – 22 November 2019, over 150 delegates from 42 States, 1 regional economic integration organisation, 3 intergovernmental organisations, 4 international non-governmental organisations, and 1 technical adviser participated in the Diplomatic Conference.

² All Diplomatic Conference documents are available at: <https://macprotocol.info/diplomatic-conference/>

States that attended the MAC Protocol Diplomatic Conference



16. The Conference elected Ms Sandea de Wet (South Africa) as President of the Conference, Mr Dominique D’Allaire (Canada) as the Chair of the Commission of the Whole and Sir Roy Goode (United Kingdom) as Rapporteur.³

17. The Diplomatic Conference was a great success. Delegations negotiated the final text of the treaty in an open, positive and collaborative spirit and were able to conclude an instrument that was supported by all participating States. Negotiating States enthusiastically participated in the subgroups created by the Diplomatic Conference, including the Credentials Committee (5 States), Drafting Committee (10 States), Final Clauses Committee (17 States) and a Working Group established to evaluate the Harmonized System (HS) codes listed in the MAC Protocol Annexes (12 States).

18. While the vast majority of the draft Protocol was adopted without amendment by the Diplomatic Conference,⁴ there were several provisions that were the subject of intense negotiations over the two weeks. Several substantive changes were made to the draft Protocol by the Diplomatic Conference, in order to resolve open issues and improve the text:

- (a) Article VII - The priority of an international interest in MAC equipment over interests arising from the association of the equipment with immovable property under Alternative A was limited to circumstances where the equipment was “severable” from the immovable property. Equipment is severable where “its estimated value after physical disconnection of the equipment from the immovable property would be greater than the estimated cost of the disconnection and of any restoration of the immovable property.”

³ Further information on the officers elected at the Diplomatic Conference is contained in the Final Act, available at: <https://macprotocol.info/wp-content/uploads/2019/11/FINAL-ACT-22-November-2019-complet.pdf>.

⁴ The changes made to the draft MAC Protocol by the Diplomatic Conference are tracked in the Drafting Committee’s Report of 20 November 2019, available at: <https://macprotocol.info/wp-content/uploads/2020/01/DCME-MAC-%E2%80%9334-corr.-Report-by-the-Drafting-Committee.pdf>.

- (b) Article VIII – Contracting States have the right to opt-out of their relevant administrative authorities expeditiously co-operating and assisting a creditor export equipment.
- (c) Article X – Insolvency Remedies Alternatives B and C were removed from the draft Protocol, allowing Contracting States to choose only between Alternative A (considered to be a more “creditor-friendly” insolvency remedy) and their national insolvency law.
- (d) Article XII – Contracting States have the right to opt-out of the Protocol’s application to equipment held as inventory by dealers, where the dealer is located in the Contracting State making the declaration.
- (e) Article XIX – A new article was included in the MAC Protocol in order to improve deficiencies in Article 25 of the Cape Town Convention regarding the circumstances in which a registration can be discharged from the international registry.
- (f) Articles XXXV and XXXVI – Two new articles were included in the MAC Protocol, establishing procedures in order to (i) update the MAC Protocol Annexes to reflect periodic revisions to the Harmonized Commodity and Coding System (the “adjustment” procedure under Article XXXV) and (ii) for Contracting States to propose other changes to the HS codes listed in the Annexes (the “modification” procedure under Article XXXVI).
- (g) Annexes 1, 2 and 3 – The number of Harmonized System codes (“HS codes”) listed in the MAC Protocol Annexes was increased from 42 to 56, with 25 HS codes listed in Annex 1 (mining equipment), 36 HS codes in Annex 2 (agricultural equipment) and 35 HS codes in Annex 3 (construction equipment). The changes made to the Annexes were based on proposals submitted by negotiating States between 2018 and 2019.

19. Four States (the Republic of Congo, the Republic of Gambia, the Republic of Paraguay and the Federal Republic of Nigeria) signed the treaty on adoption. During the signing ceremony on 22 November, an additional 20 States expressed their support for the treaty and many declared their intention to initiate domestic processes to sign the instrument. In appreciation of the Republic of South Africa hosting the Diplomatic Conference, the MAC Protocol will also be known as the “Pretoria Protocol”.⁵

20. As consistent with the Final Act of the Diplomatic Conference, in the 90 days following the Diplomatic Conference the UNIDROIT Secretariat undertook a verification process of the treaty text to ensure the English and French versions were in linguistic concordance. Following the verification process, the Secretariat identified additional minor errors in the text of the Protocol. The errors identified in the English version concerned Article VII and Article XIX and the errors identified in the French version concerned Article XIX, Article XXXV and Article XXXVI. The errors identified in Articles VII, XXXV and XXXVI related only to a lack of linguistic concordance between the English and French versions of the treaty, whereas the error in Article XIX related to an omission by the Drafting Committee at the Diplomatic Conference. On identification of the errors, the Secretariat consulted with the Co-Chairs of the Drafting Committee, the Rapporteur as well as the Chair of the Commission of the Whole and the President of the Conference. The deficiencies were unanimously recognised and there was agreement the changes required to correct Article XIX went beyond linguistic discrepancies as a matter of public international law. On 29 April 2020, the Secretariat opened an error correction process under Article 79 of the Vienna Convention on the Law of Treaties. Having received no objection from Signatory States, the corrections were approved and the finalised text was

⁵ Paragraph 7, Resolution 5 (Annex VI) of the Final Act, available <https://macprotocol.info/wp-content/uploads/2019/11/FINAL-ACT-22-November-2019-complet.pdf>.

communicated to all States that attended the Diplomatic Conference via Note Verbale on 29 July 2020.

V. THE PREPARATORY COMMISSION

21. As consistent with the implementation of the other Cape Town Convention Protocols and Resolution 1 of the Diplomatic Conference Final Act, a Preparatory Commission has been established to act as Provisional Supervisory Authority until the Protocol enters into force. The Preparatory Commission operates under the guidance of the Governing Council and General Assembly of UNIDROIT.

22. The Preparatory Commission has three key responsibilities:

- (a) Selection of a Registrar to operate the MAC Protocol International Registry
- (b) Work towards the establishment of a Supervisory Authority
- (c) Prepare the first edition of the International Registry Regulations

23. Customarily, the Preparatory Commission also plays an important role in encouraging States to sign, implement and ratify the Protocol.

24. The first session of the Preparatory 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,⁶ one observing State, one observing Regional Economic Integration Organisation, three observing organisations, and *ex officio* observers from the Diplomatic Conference. A report of the first session is available in [Doc MACPC/1/Doc. 9](#).

25. At its first session, the Preparatory Commission negotiated and adopted the Rules of Procedure and considered several issues associated with the future operation of the International Registry. The Commission also established a Working Group to draft a request for proposals for the selection of a Registrar (the Registrar Working Group), as well as a Working Group to develop draft Regulations for the International Registry (the Regulations Working Group). Finally, the Commission extended the period available to the International Finance Corporation (IFC) to accept the role of Supervisory Authority.

VI. FUTURE STEPS

26. The Secretariat is supporting the Preparatory Commission and its Working Groups in order to facilitate the earliest possible entry into force for the MAC Protocol. The first meeting of the Regulations Working Group is scheduled for 14-15 September 2020 and the first meeting of the Registrar Working Group is scheduled for 1 October 2020. The second session of the Preparatory Commission will be scheduled in December 2020.

27. Article XXV of the Protocol provides that the treaty shall enter into force after five States have ratified the Protocol and the International Registry has become fully operational. The Secretariat is assisting several States that are currently working towards implementation of the Protocol.

⁶ Australia, China, Germany, Japan, Spain, South Africa, the United Kingdom and the United States.

VII. ACTION TO BE TAKEN

28. *The Governing Council is invited to note the adoption of the MAC Protocol, and, if deemed appropriate, to encourage the Governments of their countries of origin to consider signing and ratifying the Protocol.*

ANNEXE I**MAC Protocol Consultations 2018 – 2019****Bilateral Consultations**

1. Papua New Guinea (Port Moresby, APEC February 2018)
2. Mexico (Mexico City, March 2018)
3. United Kingdom (London, March 2018)
4. South Africa (Johannesburg, June 2018 and Pretoria, September 2019)
5. Indonesia (Jakarta, APEC July 2018)
6. Japan (Tokyo, August 2018)
7. Australia (Canberra and Melbourne, September 2018)
8. Chile (Santiago, November 2018, February 2019 and June 2019)
9. Spain (Madrid, November 2018 and May 2019)
10. Peru (Lima, November 2018)
11. United States (Washington DC, November 2018)
12. Ireland (Dublin, January 2019)
13. France (Paris, January 2019)
14. Colombia (Bogota, March 2019)
15. Canada (Montreal, April 2019)
16. Brazil (Brasilia, July 2019)
17. China (Beijing, July 2019)
18. Mauritius (September 2019)

Regional Consultations

1. Asia-Pacific and Latin America (Mexico City, APEC/IFC March 2018)
2. Latin America (Asuncion, Paraguay, June 2018)
3. Latin America (Sao Paulo, Brazil, August 2019, 8 States)
4. Asia-Pacific (Puerto Varas, Chile, APEC Economic Committee, August 2019, 21 APEC Members)
5. Europe (Brussels, Belgium, European Union workshop, October 2019, 27 EU Member States)
6. Africa (Nairobi, Kenya, October 2019)

International Consultations

1. UN Member States (Oxford, United Kingdom, September 2018, 19 States)
2. UN Member States (London, United Kingdom, September 2019, 18 States)
3. UN Member States (Rome, Italy, October 2019, 34 States)