



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**

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**SUMMARY REPORT**  
**OF THE FOURTH SESSION**  
**(Hybrid session, 17-18 January 2022)**

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1. The fourth session of the Preparatory Commission for the establishment of the International Registry for Mining Agricultural and Construction (MAC) equipment pursuant to the MAC Protocol (the Commission) took place between 17 and 18 January 2022. The session was held as a hybrid event allowing for both in-person and videoconference participation. The Commission was attended by 41 participants from 11 Member States of the Commission, one observing State, one observing Regional Economic Integration Organisation, one observing organisation, *ex officio* observers from the Diplomatic Conference and members of the UNIDROIT Secretariat (the List of Participants is available in Annex I).

#### **Item No. 1 Opening of the session and welcome by the UNIDROIT Secretary-General**

2. *The Chair* welcomed participants to the fourth session. It was explained that due to the ongoing restrictions on travel caused by the global COVID-19 pandemic, the Commission's fourth session was held in a hybrid format and that the majority of representatives were participating via videoconference. It was noted that simultaneous interpretation for the meeting was available in both English and French.

3. The *UNIDROIT Secretary-General* thanked all representatives for participating in the Commission and expressed hope that the fifth session would be an in-person meeting in Rome. It was noted that substantial intersessional work had been undertaken by the Registrar Working Group in further developing the Request for Proposals (RFP) for the selection of a Registrar and a guidance document regarding the establishment and operation of the Evaluation Committee (EC). It was further noted that progress had also been made regarding the appointment of the Supervisory Authority of the future MAC Registry and in relation to the European Union signing the MAC Protocol.

4. Having verified that representatives of at least eight States were in attendance and quorum had therefore been constituted under Rule 21 of the Rules of Procedure, *the Chair* declared the session open.

#### **Item No. 2 Adoption of the annotated draft order of business of the session and statements from delegations regarding adoption of the MAC Protocol**

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

6. *The Chair* invited participants to update the Commission on their activities to implement the MAC Protocol.

7. *The Secretary-General* noted that the Republic of Ireland had formally become the 16<sup>th</sup> member of the MAC Protocol Preparatory Commission. It was explained that Ireland had initially been invited to attend the Preparatory Commission as an observing State, however, given Ireland's significant contributions to the work of the Preparatory Commission, UNIDROIT had invited Ireland to become a full member of the Preparatory Commission in August 2021, which they duly accepted in September. The Secretary-General congratulated Ireland on their appointment as a full member of the Preparatory Commission and thanked Ireland's representatives for their contributions to the Commission's work.

8. *An observer from the European Union (EU)* noted that the European Commission's proposal for the EU to sign the MAC Protocol had been adopted on 3 December 2021. It was explained that the matter was now being considered by the Council Working Party on Civil Law matters. The Council Working Party had an initial discussion regarding the EU signing the MAC Protocol on 21 December and would have a more substantive discussion at its next meeting on 27 January 2022. It was noted

that current French Presidency was very supportive of the EU signing the MAC Protocol and that the European Commission had not encountered any opposition to the proposal.

9. *The Secretary-General* noted that in 2021 the Secretariat had sent Notes Verbale to the Embassies of all UNIDROIT-European Union Member States notifying them of the EU MAC Protocol signature process and asking for their support. It was reported that four ambassadors had positively responded and confirmed that their States would actively support the signature process.

10. *A representative of Ireland* asked what the anticipated timeline was for the EU to both sign and then approve the MAC Protocol, noting that EU Member States had to wait for the EU to approve the Protocol before individual Member States could ratify it.

11. *An observer from the European Union (EU)* noted that while it was impossible to provide a specific timeline, if the signature proposal received strong support at the Council Working Party on Civil Law, there would be a case to propose that the approval process be expedited. It was noted that there were technical and procedural steps that needed to be completed between signature and approval. She concluded that the signature process had the additional benefit of having provided translations of the MAC Protocol into all EU languages, which could be found in the annexes to the European Commission proposal.

12. The Preparatory Commission noted the implementation update provided by the European Commission.

### **Item No. 3 Consideration of matters relating to the appointment of a Supervisory Authority**

13. *The Chair* invited the Secretary-General to provide an update on matters related to the appointment of a Supervisory Authority.

14. *The Secretary-General* introduced the item, with reference to paragraphs 3 – 10 of the Annotated Agenda (MACPC/4/Doc. 1). It was recalled that at its third session, the PC had invited UNIDROIT to initiate its internal procedures to determine whether the Institute was willing to accept the role of Supervisory Authority.

15. The Secretary-General provided an update regarding the UNIDROIT Governing Council's consideration of the matter at its 100<sup>th</sup> session in September 2021. He explained that the matter was one of the most prolonged and engaged discussions of the entire Governing Council session. In advance of the Governing Council meeting, the Secretariat had provided Governing Council members with a detailed document addressing (i) UNIDROIT's suitability for the role of Supervisory Authority, (ii) how UNIDROIT's governance structures would undertake the Supervisory Authority's functions and (iii) whether UNIDROIT's Statute would need to be amended for it be appointed Supervisory Authority. It was noted that at the outset of the discussion, both the Secretary-General and the UNIDROIT President had expressed the view that UNIDROIT was well positioned to undertake the role of Supervisory Authority as the candidate of last resort and that UNIDROIT would not need to amend its Statute to accept the role.

16. The Secretary-General explained that the Governing Council was unable to agree whether UNIDROIT was suitable to undertake the role of Supervisory Authority. It was further noted that discussions had not moved past the initial matter of whether UNIDROIT would be a suitable candidate for the role. As a result, the other two matters (preferred governance structures and whether the Statute would need to be amended) had not been comprehensively discussed. It was noted that three Governing Council Members had spoken in favour of UNIDROIT undertaking the role, four Governing Council Members had expressed concerns regarding UNIDROIT undertaking the role and

three other Governing Council Members had suggested that they were not yet in a position to express a firm view. It was further explained that the Governing Council generally approved matters on the basis of consensus and that it was clear that there had been no consensus on the matter at its [100<sup>th</sup> session](#).

17. The Secretary-General explained that there were two main concerns raised by the Governing Council. First, it was noted that some Governing Council Members expressed unease that UNIDROIT and its organs may not have the technical competency and expertise to fulfil the role of Supervisory Authority. It was noted that there appeared to be some confusion regarding what was expected of the Supervisory Authority, as several members expressed concern that UNIDROIT's Governing Council and General Assembly did not have specific expertise in overseeing secured transactions registries. It was suggested that these concerns reflected a misunderstanding regarding the role of the Supervisory Authority, as the technical work would be largely undertaken by a Commission of Experts advising the Supervisory Authority, as with the case of the International Civil Aviation Organization (ICAO), which also did not have such experience, but had accepted and successfully undertaken the role of Supervisory Authority of the Aircraft Protocol International Registry. To address the Governing Council's concerns, the Secretary-General confirmed that the Secretariat would provide further explanation and analysis on the role expected of the Governing Council and the General Assembly in the context of the decision-making process of the Supervisory Authority in its next document for the Governing Council. Second, the Secretary-General explained that some Governing Council Members did not consider UNIDROIT to be the option of last resort until the advantages and disadvantages of establishing a new international entity to undertake the role were properly assessed. It was noted that this solution had been adopted under the Luxembourg Rail Protocol and was an important precedent for some members. To address this issue, the Secretariat confirmed that it would prepare a detailed analysis on the Luxembourg Rail Protocol's process to submit to the Governing Council in advance of its 101<sup>st</sup> session in May/June 2022.

18. Finally, the Secretary-General reaffirmed that UNIDROIT could not accept an appointment as Supervisory Authority without a guarantee of financial support from interested States and the private sector, which would be required to support the Supervisory Authority's operation in advance of the MAC Protocol's entry into force. It was noted that should UNIDROIT undertake the role, it had forecasted that it would cost 118,000 euro annually to perform the role of Supervisory Authority until the MAC Protocol entered into force. It was explained that this sum was considerably lower than the amount requested by ICAO when it became the Supervisory Authority of the Aircraft Protocol Registry. It was noted that UNIDROIT would be unable to accept the role without funding being confirmed and suggested that participating States should work individually with the Secretariat on this matter. The Secretary-General concluded by explaining that there should be adequate time for UNIDROIT to complete its internal procedures to accept the role of Supervisory Authority in 2023, should that be the will of its governing bodies.

19. *The Chair* opened the floor for interventions.

20. *A representative of the United Kingdom* queried whether there were any developments regarding other potential candidates. *The Secretariat* explained that all organisations approached as potential candidates in 2020 and 2021 were either unwilling or unable to undertake the role. The Secretariat noted that the only organisation that had not given a definitive answer was the United Nations Conference on Trade and Development (UNCTAD). It was further noted that UNCTAD had not been particularly responsive on the issue and had not been able to provide even a preliminary indication of whether it would be interested in discussing its suitability to undertake the role. The Secretariat concluded that UNCTAD's lack of interest in the role indicated that it was not a viable candidate.

21. *A representative of the United States* expressed support for UNIDROIT continuing its internal processes to consider whether it could accept the Supervisory Authority role.

22. *The Secretariat* noted that, should the Preparatory Commission invite UNIDROIT to continue its consideration of whether it could accept the role of Supervisory Authority, the Secretariat would contact interested States in relation to whether they would be in a position to make a future voluntary contribution to finance the Supervisory Authority's operation. The Secretariat explained that one of the concerns raised at the Governing Council meeting had been that States would not provide financing to support the operation of a Supervisory Authority and that the process should therefore be slowed down. The Secretariat concluded that any offers of financial support made to support the Supervisory Authority's future operation made before the Governing Council's 101<sup>st</sup> session in May/June 2022 would address the Governing Council's concerns regarding financing and might improve the prospect of the Governing Council agreeing to UNIDROIT undertaking the role.

23. *The Preparatory Commission* noted that the *International Fund for Agricultural Development (IFAD)* and the *United Nations Conference on Trade and Development (UNCTAD)* were no longer candidates to undertake the role of Supervisory Authority.

24. *The Preparatory Commission* invited UNIDROIT to continue its internal procedures to determine whether the Institute was willing to accept the role of Supervisory Authority and report back to Preparatory Commission at its 5<sup>th</sup> session.

25. *The Preparatory Commission* requested that the Secretariat contact Preparatory Commission members and encourage them to provide the funding necessary for a Supervisory Authority to be appointed and for it perform its functions until the MAC Protocol entered into force.

#### **Item No. 4 Updates on the activities of the Working Group to develop draft regulations for the International Registry for MAC equipment**

26. *The Chair* invited the Chair of the Regulations Working Group to provide an update on the development of the draft regulations for the MAC Registry.

27. *The Chair of the Regulations Working Group* reminded the Commission that at its third session it had approved the draft regulations and deemed them sufficiently developed for inclusion as an annex to the RFP. It was explained that while there were some unresolved issues in the draft regulations, it had been decided that there was no need to convene an additional meeting of the Regulations Working Group until a Registrar had been contracted to design the registry.

28. The Chair of the Regulations Working Group noted that during its fourth session, Germany had made a scrutiny reservation in relation to regulation 5.18, which provided rules regarding the circumstances in which the Registry itself could amend a registration in accordance with a court order. It was explained that Germany had withdrawn its scrutiny reservation during the intersessional period and that there was no further need to amend regulation 5.18.

29. *The Preparatory Commission* noted the Chair of the Regulations Working Group's report.

#### **Item No. 5 Updates on the activities of the Working Group to draft a request for proposals for the selection of a Registrar**

30. Before discussing Item 5, *the Chair* requested that any participant representing a non-State observer institution that might have an intention to submit a tender or be involved with the submission of a tender to leave the meeting. The Chair then requested that the Chair of the Registrar Working Group update the Commission on the preparation of the draft RFP.

31. *The Chair of the Registrar Working Group* recalled that the Preparatory Commission, at its Third Session, had expressed its appreciation and general approval of the RFP, but had requested the Registrar Working Group to conduct some additional work, particularly regarding the evaluation criteria and methodology for the procurement process. The Preparatory Commission had also requested that the RFP be reviewed by an additional set of experts nominated by Preparatory Commission Member States. In this regard, the Registrar Working Group had met twice intersessionally to complete the work that had been requested on the RFP. The Registrar Working Group also developed a Guidance Document (see MACPC/4/Doc. 3) for the Evaluation Committee, which would be appointed to evaluate the proposals received in response to the RFP. The Chair of the Registrar Working Group expressed particular appreciation for the support offered by experts from Australia, Ireland, USA, Japan, and Ghana, as well as from ICAO, in this process.

### **Content of the RFP**

32. The Chair of the Registrar Working Group drew the Commission's attention to MACPC/4/Doc. 2 (Draft RFP). It was noted that between Paragraph 1 and Paragraph 100, only a limited number of linguistic changes had been made intersessionally. The Chair welcomed comments on these Paragraphs.

33. *A representative of Australia* raised a query with regard to the 5-year term noted in Paragraph 10 of the RFP. This referred to the appointment of the Registrar for a period of 5-years, but was unclear as to when the 5-year period would start (at the signing of the contract, or at the entry into force of the MAC Protocol). It was noted that this 5-year period was also referenced in other parts (including Paragraph 173) of the RFP. The representative suggested that it would be preferable for the 5-year period to begin at the entry into force of the MAC Protocol, as this would allow sufficient time for the Registrar to recover its investment in the MAC Registry.

34. *The Secretariat* clarified that the original intention had been for the period of 5-years to start from the point of signature of the contract. This was designed to allow flexibility for both parties. *A representative of Spain* agreed, noting that the contract not only related to the operation of the Registry, but also its design and implementation. It was queried whether the 24-month period for the Supervisory Authority to review the reappointment of the Registrar should be reconsidered.

35. *The Secretariat* noted that this 5-year period was mentioned in Article XIV (5) of the MAC Protocol, and in Resolution 1 of the Diplomatic Conference of the MAC Diplomatic Conference. The Secretariat noted that it would seek specific feedback on this matter from Sir Roy Goode, who was the Rapporteur of the Diplomatic Conference and the author of the Official Commentary, and revert back to the Preparatory Commission accordingly on how to align the RFP with the MAC Protocol. It was noted that one possibility could be to structure a contract in two parts with (i) an initial build and implementation phase of the registry and (ii) a formal 5-year appointment of the Registrar at the point of entry into force of the MAC Protocol.

36. On the second day of the Preparatory Commission's session, the Secretariat presented MACPC/4/Doc. 4, which proposed additional changes to Paragraphs 10, 173, and 151.

37. With regard to the new drafting for Paragraph 173, *the Secretariat* explained that in order to reach consistency with the MAC Protocol and the Resolution 1 of the MAC Protocol Diplomatic Conference, the contract between the Registrar and the Supervisory Authority would be structured in a manner that covered an initial period during which the Registrar would build and implement the registry, and a second period starting on the date of entry into force of the MAC Protocol when the Registrar would formally be 'appointed' to operate the Registry for 5 years.

38. *The representative of the United Kingdom* queried what would happen during the period where the design and implementation of the registry was complete, but the MAC Protocol had not entered into force. *Other representatives* clarified that during this period, the registry would be on 'hold'. It was noted that the contract would impose several other obligations on the Registrar, such as promoting the MAC Protocol and the registry, which would all continue to exist in this 'holding' period.

39. *The representative of Spain* queried if a timeframe was necessary for the design and implementation of the registry, given that the contract would impose several different obligations in any case. It was clarified by the *Chair of the Registrar Working Group and the Secretariat* that such a timeframe was a useful tool to measure the performance of the registrar. Additionally, the timeframe stipulated in the RFP was based on market research and input from registrars regarding the minimum amount of time that building such a registry would require. As such, it would not impose a significant burden on a registrar. It was further noted that it was not realistically possible to build a well-functioning registry in a significantly shorter period, should the MAC Protocol receive the ratifications necessary for entry into force faster than anticipated.

40. *The representative of the United Kingdom* noted that items such as ancillary services could also be provided by the registrar before entry into force of the MAC Protocol. It was queried whether, in the case the MAC Protocol did not enter into force for a long time after the implementation of the registry, the registrar had any obligation to maintain the registry and keep it up to date.

41. *The updated drafts of Paragraphs 10 and 173, as found in MACPC/4/Doc. 4 were approved by the Preparatory Commission.*

42. The Chair of the Regulations Working Group requested that before finalisation of the RFP, all references to the Draft Regulations should be verified. The Preparatory Commission agreed and asked the Secretariat to review all references to the Draft Regulations in the RFP.

43. With regard to Part 3 and Part 4 of the RFP, no objections were raised and the Preparatory Commission approved the drafting.

44. *The Rapporteur* noted that requiring both performance guarantees and insurance would add extra costs. *The Secretariat* clarified that performance guarantees were non-mandatory, whereas insurance was mandatory. This was designed to give the Supervisory Authority some flexibility in this regard. It was added that the contracts matrix made available to the bidders would allow them to note anything which would increase their costs.

45. *The Chair of the Registrar Working Group*, with support from the *Secretariat*, noted that Part 5 of the RFP contained most of the substantive changes. Additional specificity had been introduced into the process of submitting a bid, by means of requiring bidders to complete 9 standardised forms.

46. The overall evaluation process had also been divided up into four phases, the first of which was a pass/fail test based on forms designed to determine the eligibility of bidders to participate, the second related to an evaluation of the technical proposal of the bidders, the third related to an oral evaluation, and the fourth related to the evaluation of the financial proposals of the bidders. *The Chair of the Preparatory Commission* welcomed comments on Part 5 of the RFP in a section-by-section manner, giving the floor to the Chair of the Registrar Working Group to explain each section accordingly.

47. With regard to Paragraphs 138 and 139, it was noted that while clarifications (under Paragraph 138) would be discussed and released by the Registrar Working Group, should an addendum to the RFP become necessary (Paragraph 139), this decision would need to be made by



the Preparatory Commission. *A representative of the United Kingdom* noted that the language of Paragraph 139 needed to be improved to clarify that the Preparatory Commission would have the power to cancel the entire RFP process.

48. It was noted that Paragraph 147 was designed to allow a broad range of bidders to participate, rather than limiting the potential bidders to those that had specific experience in setting up international registries. *The Chair of the Registrar Working Group* noted that further clarity could be provided in order not to restrict entities from bidding should they not have customer references related to registries the bidder had designed in the past. *Representatives of Ireland and Spain* agreed with this proposition. It was noted that alternative drafting to address this issue would be provided later in the meeting.

49. With regard to Phase II on the Technical Proposal Evaluation, *the Chair of the Registrar Working Group* informed the Preparatory Commission of the two different (stratified and unstratified) evaluation methodologies which would be used, depending upon the number of bids received. It was noted that specific details regarding these methodologies were presently only available in the Evaluation Committee Guidance Document, and that the Preparatory Commission was invited to comment on whether the RFP itself should also clearly specify these methodologies. It was noted that the decision of the Preparatory Commission on this matter would determine how many sheets from Form 4 would be shared with the bidders.

50. *The Secretariat* explained that international best practice allowed for both approaches, whereby some organisations clearly outlined the evaluation methodologies in the RFP, whereas others did not. It was noted that where the methodologies were clearly outlined, there was greater risk that the bidders would try to manipulate them to attain a higher score, especially considering that this step of the process was already based on a self-evaluation mechanism. *A representative from the United States* recommended that details of the evaluation methodology should be specified in the RFP, even if the language used was different from that found in the Evaluation Committee Guidance Document. It was noted that the Evaluation Committee's discretion in selecting the methodology should also be reflected in the RFP.

51. *The Secretariat* detailed the stratified and unstratified methodologies to the Preparatory Commission, noting that the stratified methodology would produce results which grouped most bidders that met a certain threshold of compliance to the technical requirements, and allotted them similar scores, whereas the unstratified approach would allot very specific scores to individual bidders based on their level of compliance. As such, the stratified approach would be used in the case where the total number of bids was low (12 or less), and the unstratified approach would be used where the total number of bids was high (more than 12).

52. *A representative of Ireland* noted that in the unstratified scorecard, the scoring was not detailed enough, and could be improved by adding additional decimal points. *It was agreed that one additional decimal point should be included.*

53. Several participants agreed that a shorter/summarised version of the evaluation methodologies should be included in the RFP, including criterion for selecting the methodology to be used. Such an approach would give flexibility to the Evaluation Committee, and also reduce the risk of protest by bidders. It was noted that the Secretariat would provide drafting to facilitate this later in during the meeting. It was also agreed that Form 4 would only display Sheet 1 for the bidders as the detailed tables and methodologies for the calculation of the scores was not being shared with the bidders.

54. *A representative of the United Kingdom* noted that the RFP should provide that the Evaluation Committee would examine all the self-assessments submitted by the bidders and that it would be in

a position to adjust the scores as appropriate. *This was agreed and it was noted that the Secretariat would provide the requisite drafting later in the meeting.*

55. On the second day of the Preparatory Commission's session, the Secretariat presented updated drafting as part of MACPC/4/Doc. 4 with regard to Paragraphs 151 and 152. *This was approved by the Preparatory Commission.*

56. With regard to oral presentations, it was noted that all bidders would be asked the same questions. The questions would be determined once all the bids had been received. It was also noted that the technical scores would not be re-evaluated after the oral presentations.

57. With regard to the evaluation of the financial proposals, *the Chair of the Registrar Working Group* noted that the Group had determined not to recommend making any distinction between the build and operation costs.

58. *The Chair of the Registrar Working Group* and the *Secretariat* explained the debriefing process which had now been included in the RFP in order to avoid protests and conflicts after the selection of the preferred bidder. The debriefing process followed best practices used by the United Nations. It was noted that a dispute settlement mechanism was deemed not to be necessary, and not within the resources of UNIDROIT or the Preparatory Commission.

59. With regard to Paragraph 176(c), it was noted that a new optional deadline for submitting notices of intent to submit a bid had been included. This could serve as a helpful indication to the Preparatory Commission as to whether the deadline for final submission of the bids should be extended.

60. With regard to Paragraph 178, *a representative of Ireland* noted that further clarity should be provided in the reference to the members of the Preparatory Commission. *This was agreed and would be reflected accordingly.*

### **RFP Annexes**

61. No objections were raised with regard to Annex 1, Annex 2, Annex 3, Annex 4, Annex 5, and Annex 6 of the RFP. It was noted that Annex 3 now included references to Part 2 of the RFP, ensuring that both were fully aligned. It was further added that Annex 3 was the basis of the Form 4 on technical requirements.

62. *A representative of Australia* noted that additional clarity should be added to Item F1 3.1 of Annex 3 with regard to languages. It should be stated that this was only with regard to the website of the registry, and not the content of the registration(s). *This was agreed.*

### **RFP Forms**

63. With regard to Form 1 on identification of the bidder, *a representative of Spain* queried if the RFP should specify the type of documentation which a bidder would need to include in order to indicate whether the State in which it was located supported its bid. *The Chair of the Registrar Working Group* suggested that it would preferable to leave this open ended, as it was in the bidder's best interest to include as strong a letter as appropriate.

64. *The Secretary-General* queried if the nationality of the bidder, with regard to the strength of the legal system and respect for the rule of law within that country, should be considered as a factor when determining the suitability of a bidder for the role of the registrar. *The Chair of the Registrar Working Group* queried if this should be part of the eligibility criteria, or should it be reflected in the evaluation process in some other manner. *The Secretariat* suggested that one possible way of addressing this matter would be to award 5 additional points to a bidder from a Contracting State of the Cape Town Convention, or a State deemed, by some internationally approved methodology, to have an adequate level of adherence to the rule of law.

65. While it was acknowledged by some participants that the ability for a court to enforce against the Registrar might be affected by whether a particular country had adopted the treaty, *several participants* noted that in the case of the MAC Registry, the relevant treaty would be the MAC Protocol, and that limiting the bidders to those based in MAC Protocol contracting States would not be a viable option. Additionally, the question of adherence to the rule of law in a particular country had no connection to whether that country was party to the Cape Town Convention.

66. It was queried as to what would be the criteria to determine the nationality of the bidder. *Several participants* suggested that Article 44(1) of the Cape Town Convention provided an appropriate test to determine the nationality of the bidder, based on domestic court jurisdiction: "The courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar."

67. *A representative of Australia and a representative of the United Kingdom* emphasised the importance of a sophisticated legal system being present wherever the registry was to be located, noting that Article XIX (5) of the MAC Protocol gave the court the ability to order the Registrar to discharge a particular registration upon specific requirements being met.

68. *A representative of South Africa* emphasised the importance of trust in the national court system in the location where the registry would be located. It was added that assessing the rule of law was a politically sensitive and subjective matter. It was suggested that the Commission should refrain from adopting an approach that could be subjective or politically sensitive. It was noted that one way to address this issue could be to ask bidders to indicate how their host jurisdiction would ensure trust and confidence concerning the enforcement of the rule of law for matters related to the MAC Protocol registry. It was noted that while ratification of the MAC Protocol would help in this regard, it was not a fundamental issue.

69. *The Chair of the Registrar Working Group* summarised that there was not significant support for restricting the RFP, or awarding extra points to a particular registrar, from a Cape Town Convention contracting State, or a Member State of UNIDROIT. It was noted that one mechanism to assess the rule of law could be to request bidders to submit an expert opinion on the rule of law in their jurisdiction as part of their bid. This would allow the Evaluation Committee to make a judgement on the matter accordingly. It was noted that including the matter in the RFP was a difficult and sensitive issue.

70. *The Secretary-General* reiterated the importance of the registry being based in a jurisdiction which embodied legal confidence and a high level of assurance to the international community that the courts would enforce the applicable legal framework in an adequate and expedient manner concerning matters of application of the Convention involving the registry. It was noted that while additional points should not be given, a points deduction could be considered for countries where there was a very clear rule of law issue.

71. *A representative of Australia* suggested that this matter could be resolved by including an additional question in Form 2, requesting bidders to confirm the State in which the registrar would have its centre of administration. This would allow the Evaluation Committee to determine the court

which would have jurisdiction over the Registry. Additionally, more language could be added to Paragraph 147 to allow the Evaluation Committee to exclude bidders located in jurisdictions that would not provide sufficient legal certainty in resolving disputes involving the Registry. *A representative of the United Kingdom* noted that should language be added to Paragraph 147, an additional question should also be added to Form 2 to request the requisite information from bidders. This solution would require the Evaluation Committee to make a decision on this matter at an early stage in the evaluation process, rather than towards the end. *A representative of Spain* agreed with this proposition, and noted that global indices in this regard could be considered.

72. *The Secretariat* noted that the World Justice Project maintained a Rule of Law Index that could be considered as a benchmark in this regard.

73. *The Chair of the Registrar Working Group* expressed support for a two-fold test under which an index could first be considered, and thereafter the bidder would be invited to submit evidence with regard to the rule of law in their jurisdiction.

74. *A representative of South Africa* expressed support for this solution and noted that specific factors such as legal certainty, independence of the judiciary, and other similar objective factors were preferable to a general consideration of the rule of law, which was often measured using many different factors.

75. *The Chair of the Preparatory Commission* requested the Secretariat to propose some language addressing this matter to include in the RFP later in the session.

76. On the second day of the Preparatory Commission's session, *the Chair of the Preparatory Commission* invited the Secretariat to present an updated draft of Paragraph 147 of the RFP, as well as a new question in Form 2 to address the issue of the importance of the rule of law in the centre of main administration of the Registrar. *The Secretariat* noted the proposed drafting was designed to focus on issues of access to justice regarding civil litigation, while avoiding political sensitivities. The proposed drafting requested bidders to submit references to support their claims. It was added that the new question in Form 2 would be supplemented by additional guidance in the Evaluation Committee Guidance Document which would refer the Evaluation Committee to items such as the Civil Justice Index of the World Justice Project's report. However, the Civil Justice Index would only be considered by the Evaluation Committee as a non-binding source of information.

77. With regard to the updated drafting of Paragraph 147, *a representative of Australia* noted that while the original text was referring to the bidder, the new text inserted was primarily referring to the centre of main administration of the registrar, which might be different from the bidder. As such, it was recommended that the two sentences be separated. It was also noted that the civil justice issue was relevant on its own, and should be in a separate sentence. As such, it was recommended that the sentences should be separated. *This was supported by other members of the Preparatory Commission and approved.*

78. *The Chair of the Registrar Working Group* recommended replacing the references to centre of administration of the 'Registry' to centre of administration of the 'Registrar', in order to be consistent with the Cape Town Convention.

79. *A representative of the United Kingdom* suggested that Form 2 should also require bidders to expressly indicate their centre of administration. *This was supported and approved.*

80. *A representative of the United States of America* noted the political sensitivity around the term 'showing stability'. It was clarified that this term referred to financial stability of the bidder and would be amended to clarify the matter.

81. *A representative of South Africa* queried if specific reference should be made to the provisions of the Cape Town Convention under which a court might be asked to adjudicate on matters related to the registry. *The Chair of the Registrar Working Group* suggested that this might not be necessary. *A representative of Spain* agreed with the Chair of the Registrar Working Group, but noted that it would be helpful to indicate to bidders why civil justice was an important factor (because the centre of administration would have jurisdiction over the registrar and its courts would have power to issue orders to direct the registrar to act in a particular way). *This was supported by the Preparatory Commission, and it was noted that it would be included in a footnote to the new question.*

82. *The Preparatory Commission approved the drafting, subject to the changes proposed above.*

83. The Preparatory Commission raised no objections to Form 2 and approved the text, noting that additional questions with regard to the rule of law issue would be further discussed later in the meeting.

84. *The Preparatory Commission raised no objections to Form 3 and approved the text.*

85. With regard to Form 4, it was noted that the Preparatory Commission had already discussed the matter and that only Sheet 1 would be shared with the bidders. It was noted that this was to ensure that bidders did not inflate their scores, which would be possible should the scoring tables also be shared with them. Additionally, it was reiterated that the self-assessments in Form 4 would be assessed and adjusted by the Evaluation Committee to the extent necessary.

86. *The Chair of the Registrar Working Group* queried whether the RFP needed to define the terms 'Compliant', 'Partially Compliant', and 'Not Compliant'.

87. *A representative of Australia* suggested that the term 'Compliant' could be replaced with 'Fully Compliant', which would make the terms self-explanatory. *Other representatives supported this proposition.*

88. *The Secretariat* noted the challenges associated with providing specific definitions in this regard, as introducing such definitions risked causing additional confusion.

89. *A representative of Australia* suggested that bidders could be required to provide additional information in cases where they had indicated partial compliance to a particular item. *The Secretariat* noted that Form 4 allowed bidders to submit additional notes regarding their indicated level of compliance. It was queried as to whether this section needed to always be filled in by the bidders.

90. The Preparatory Commission deliberated whether documentation should be requested from bidders regarding every self-assessment item in Form 4. *It was agreed that this would not be necessary. It was also agreed that bidders would only be required to provide an explanation in column H of the spreadsheet in circumstances where they had indicated partial compliance to a particular item. In other cases, giving additional information would be purely optional.*

91. *The Preparatory Commission raised no objections to Forms 5, 6, 7, 8, and 9, and approved them.*

### **Evaluation Committee Guidance Document**

92. *The Chair* invited the Chair of the Registrar Working Group to introduce MACPC/4/Doc. 3, which was a Guidance Document for the Evaluation Committee, and opened the floor for comments.

93. With regard to Part III of the document, and in particular with regard to the publication of clarifications to the RFP, *the representative of Spain, as well as others*, noted inconsistencies between the deadlines listed in Paragraph 11, and those listed in the RFP. *It was agreed that the deadline to request clarifications would be set to 15 April 2022 (2 months from publication), and the publication of clarifications to 15 May 2022 (3 months from publication).*

94. *A representative of Australia* sought clarity on whether the publication of clarifications would be a continuous process, or would all clarifications be published together. It was noted that both approaches were common in procurement best practices. *The Secretariat* noted that the process established for publishing clarifications required the Secretariat to collect all requests for clarifications from the prospective bidders, prepare a draft response, share it with the Registrar Working Group for comments and approval, and thereafter publish them together on the UNIDROIT website. *This process was supported by the Preparatory Commission.*

95. With regard to Part IV of the document, it was queried by *a representative of Australia* as to whether the Evaluation Committee should be given the discretion to determine whether the stratified or unstratified scorecard be used to determine the technical scores, rather than using the fixed number of 12 bids to determine which scorecard would be used. *A representative of Spain* supported this approach, whereas the *Chair of the Registrar Working Group* advised against the approach, as providing too much discretion to the Evaluation Committee would make the process less objective and was not aligned with procurement best practices.

96. *A representative of Australia* queried why 12 bids was the number determined to decide which scorecard was used. It was clarified by the *Chair of the Registrar Working Group* that this was recommended as a sufficiently high number to warrant the use of the unstratified scorecard. It was explained that if less than 12 bids were received, a bracketed approach to scoring the technical compliance to the RFP's requirements would be manageable for the Evaluation Committee.

97. The Preparatory Commission did not agree to making any changes to this section and approved the drafting accordingly.

98. With regard to Part V, *the Chair of the Registrar Working Group* queried whether the Preparatory Commission should have the capacity to approve/adjust the ranking provided in the report submitted to it by the Evaluation Committee. *Several members of the Commission* noted that the Evaluation Committee would make a recommendation to the Preparatory Commission, and that while it was very likely that the Commission would accept this, it would retain the power to disagree with the Evaluation Committee's recommendation without this being expressly mentioned in the Guidance Document.

99. *It was agreed that the Evaluation Committee Guidance document should remain silent on the question of whether the Preparatory Commission could disagree with the ranking provided by the Evaluation Committee. However, it was further agreed that Commission members were invited to provide additional suggestions on the matter prior to the publication of the RFP. It was also reiterated that the Preparatory Commission could invite the members of the Evaluation Committee to present their findings in making their recommendation.*

100. *The Preparatory Commission approved Annex 1 of MACPC/4/Doc. 3. The Preparatory Commission also approved MACPC/4/Doc. 4, subject to a non-substantive review by the Secretariat.*

101. *The Preparatory Commission approved the draft RFP for publication, subject to the changes approved at the session, and a final non-substantive review by the Secretariat.*

102. *The Preparatory Commission approved the creation of an Evaluation Committee to evaluate the bids received and directed the Secretariat to commence the necessary preparations.*

**Item No. 6 Timetable and planning of further work**

103. *The Secretariat* informed the Commission of its proposed timeline for future work. The Secretariat explained that it would put its best effort to adhere to the timelines established in the RFP and Evaluation Committee Guidance Document, which would require the RFP to be published on 15 February. The Secretariat noted that the dates for the Commission's fifth session could not be fully confirmed until the RFP was published and would likely be scheduled in late September or early October.

104. *The Secretary-General* requested that the Commission grant the Secretariat some flexibility in relation to (i) the specific date that the RFP would be published and (ii) the dates for the Commission's fifth session. It was explained that while the Secretariat would do its best to publish the RFP on 15 February and hold the Commission's fifth session in September, it might be necessary to slightly delay both due to a variety of unforeseeable factors.

105. *A representative of the United States* thanked the Secretariat for the preparation of the detailed and streamlined RFP process timeline. It was suggested that it would be useful for the Secretariat to provide an integrated timeline at a future session which also incorporated the other matters within the Supervisory Authority's purview, including (i) the appointment of a Supervisory Authority and (ii) progress towards States ratifying the implementing the Protocol. It was noted that an integrated timeline and approach would assist in ensuring that the MAC Protocol would enter into force as soon as possible. The representative concluded by calling on all Preparatory Commission members to consider encouraging their governments to adopt the MAC Protocol.

106. *The Secretary-General* confirmed that the Secretariat would endeavour to keep the Commission informed of events related to the implementation of the MAC Protocol, including the EU signature process. It was noted that in advance of the Commission's fifth session a detailed report would be provided regarding the Governing Council's Supervisory Authority discussion. It was noted that the Secretariat was working individually with States in relation to signatures and ratifications.

107. *The Commission requested that the Secretariat propose a date for the Commission's fifth session once the Request for Proposals had been published.*

**Item No. 7 Any other business**

108. *The Chair* opened the floor for any other business.

109. *The Secretary-General* noted that during the RFP process it was possible that issues might arise that would require the Preparatory Commission's consideration but would be relatively simple or straightforward to resolve. Under such circumstances, the *Secretary-General* suggested that it would be useful for the Commission to have a process by which they could adopt decisions by way of a written procedure without the need to convene a formal meeting. It was explained that such an approach was consistent with the approach used by the UNIDROIT Governing Council and the Luxembourg Rail Protocol Preparatory Commission. The Secretary-General explained that the Commission members would retain the right to request that a Commission meeting be convened to discuss a specific issue raised via written procedure. It was suggested that this approach would grant the Secretariat the necessary flexibility to ensure that the RFP process would be completed as efficiently as possible. The Secretary-General concluded that the Secretariat would be willing to provide the Commission with a formal document outlining the proposed written acceptance procedure which could then be considered and approved by the Commission intersessionally.

110. *A representative of Ireland* noted that Ireland would be agreeable in principle to the proposed approach but would need to see the specific details. The representative cautioned that it would be

important to provide Preparatory Commission members sufficient time to make decisions by correspondence.

111. *The Preparatory Commission requested that the Secretariat provide it with a proposal to establish a process under which the Commission could make certain decisions via a written procedure without convening a formal meeting. The Commission agreed that, should the Commission support the proposal, the proposal could be approved via correspondence without the need to convene a meeting.*

112. *The Secretary-General expressed thanks to the experts from the United States, Australia, Ireland and Japan who dedicated large amounts of time to developing the RFP and the Evaluation Committee Guidance Document. He further thanked the Chair of the Registrar Working Group Dr Ole Boger for his excellent leadership and tireless work. Finally, he thanked Mr Hamza Hameed for his extraordinary work supporting the work of the Registrar Working Group and developing the RFP and Evaluation Committee Guidance Document.*

113. *The Chair thanked the Secretariat for providing the documentation for the meeting and thanked the interpreters for interpreting such a technical meeting.*

#### **Item No. 8 Closing of the session**

114. *The Chair thanked all the participants for their attendance and positive contributions to the discussion.*

115. *The Chair closed the fourth session of the Commission.*



**ANNEX I****LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS****REPRESENTATIVES / REPRÉSENTANTS****STATES / ÉTATS****AUSTRALIA / AUSTRALIE**

Mr Dipen MITRA  
Director  
Australian Financial Security Authority

Mr Bruce WHITTAKER  
Senior Fellow  
University of Melbourne

**CHINA (People's Republic of) /  
CHINE (République populaire de)**

Ms YANG Yuan  
Deputy General Manager  
Administrative Affairs Department  
Credit Reference Center of the People's Bank of  
China

Ms JIA Haina  
Deputy General Manager  
Movable Financing Registration Department  
Credit Reference Center of the People's Bank of  
China

Ms WANG Yanjie  
Legal Manager  
Movables Interest Registry Co.  
Ltd, Credit Reference Center

**GERMANY / ALLEMAGNE**

Mr Vincent WÄCHTER  
Legal Officer  
Federal Ministry of Justice and Consumer Protection

**IRELAND / IRLANDE**

Ms Karen CULLEN  
Head of International Financial Services  
Department of Finance

Mr Cathal KELLY  
International Finance Services Section  
Department of Finance

Ms Róisín MAGEE  
Solicitor  
Legal Services Division  
Department of Agriculture

JAPAN / JAPON	Ms HARA Megumi Professor of Law Gakushuin University
PARAGUAY	Amb. Ines Martinez VALINOTTI Directora General de la Asesoría Jurídica de Derecho Internacional Ministerio de Relaciones Exteriores  Ms Lilian ROJAS Tercera Secretaria
REPUBLIC OF THE CONGO / <i>RÉPUBLIQUE DU CONGO</i>	M. Pierre OBA Ministre d'État Ministre des industries minières et de la géologie Président du Groupe MAC-Congo Brazzaville  M. Droms EBITA-GAMA Directeur des affaires juridiques au Ministère des affaires étrangères, de la francophonie et des congolais de l'étranger Brazzaville  M. Romely Trésor Divin APENANGA Directeur des Organisations Internationales et Affaires Spéciales Ministère des Affaires Étrangères, de la Francophonie et des Congolais de l'Étranger  M. Grégoire KANDZA Conseiller économique Ambassade du Congo en Italie Rome
SOUTH AFRICA / <i>AFRIQUE DU SUD</i>	Adv André R SMIT State Law Adviser (International Law) Office of the Chief State Law Adviser (International Law) Department of International Relations and Cooperation
SPAIN / <i>ESPAGNE</i>	Ms Teresa RODRÍGUEZ DE LAS HERAS BALLELL Associate Professor in Commercial Law Departamento de Derecho Privado Universidad Carlos III de Madrid
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND / <i>ROYAUME-UNI DE GRANDE BRETAGNE ET D'IRLANDE DU NORD</i>	Ms Louise Joan GULLIFER Rouse Ball Professor of English Law University of Cambridge

UNITED STATES OF AMERICA /  
*ÉTATS-UNIS D'AMÉRIQUE*

Ms Ifeanyichukwu EGBUNIWE  
Senior Counsel for Trade Finance, Insurance, and  
Small Business  
Export-Import Bank of the United States

Mr Henry GABRIEL  
Professor of Law  
Elon University

Ms Karin KIZER  
Attorney-Advisor for Private International Law  
Office of the Legal Advisor  
U.S. Department of State

Mr Pat SWEENEY  
Supervisor, Machinery Team  
International Trade Administration  
U.S. Department of Commerce

Ms Carly SWEET  
Special Assistant  
Office of the Procurement Executive  
U.S. Department of State

Ms Katherine VULTAGGIO  
Senior Contracting Officer and Advisor  
Office of the Procurement Executive  
U.S. Department of State

Ms Alexandra WILSON  
Attorney-Adviser  
Office of the Legal Adviser for Buildings and  
Acquisitions  
U.S. Department of State

**OBSERVERS / OBSERVATEURS**

**STATES / ÉTATS**

MAURITIUS / *MAURICE*

Mr Yvan Caril JEAN LOUIS  
Acting Assistant Solicitor General  
Attorney General's Office

**REGIONAL ECONOMIC INTEGRATION ORGANISATION / ORGANISATION RÉGIONALE  
D'INTEGRATION ÉCONOMIQUE**

EUROPEAN UNION / *UNION EUROPÉENNE*

Ms Patrizia DE LUCA  
Team Leader External Relations and International  
Cooperation

**INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS / ORGANISATIONS  
INTERNATIONALES NON-GOUVERNEMENTALES**

KOZOLCHYK NATIONAL LAW CENTER  
(NatLaw)

Mr Marek DUBOVEC  
Executive Director

**EX OFFICIO OBSERVERS / OBSERVATEURS EX OFFICIO**

RAPPORTEUR

Sir Roy GOODE  
Emeritus Professor of Law  
University of Oxford

CHAIRPERSON CREDENTIALS COMMITTEE /  
*PRÉSIDENT DU COMITÉ DE VÉRIFICATION  
DES POUVOIRS*

M. Koffi Rodrigue N'GUESSAN  
Directeur Général  
Développement rural et de la maîtrise de l'eau dans  
le domaine agricole  
Ministère de l'agriculture et du développement rural

CO-CHAIRPERSON OF THE FINAL CLAUSES  
COMMITTEE / *CO-PRÉSIDENT DU COMITÉ  
DES DISPOSITIONS FINALES*

Reverend Mark Winton SMITH (Chair)  
Deputy Director, Corporate, Insolvency and Easter  
– Corporate and Insolvency Law Team  
BEIS Legal Advisers, Government Legal Department

CHAIRPERSON OF THE HS CODES WORKING  
GROUP / *PRÉSIDENT DU GROUPE DE  
TRAVAIL DES CODES SH*

Mr Ole BÖGER  
Judge  
Hanseatic Court of Appeal in Bremen

AVIARETO

Mr Rob COWAN  
Managing Director

Ms Natalia MURPHY  
Product Manager

Mr Mark RONAN  
Product Specialist

**SECRETARIAT / SECRÉTARIAT**

INTERNATIONAL INSTITUTE FOR THE  
UNIFICATION OF PRIVATE LAW /

*INSTITUT POUR L'UNIFICATION DU DROIT  
PRIVÉ*

Mr Ignacio TIRADO  
Secretary-General

Ms Anna VENEZIANO  
Deputy Secretary-General

Mr William BRYDIE-WATSON  
Senior Legal Officer

Mr Hamza HAMEED  
Legal Consultant

Ms Liu CONGHUI  
Legal Intern

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

1. Opening of the session and welcome by the UNIDROIT Secretary-General
2. Adoption of the annotated draft order of business of the session and statements from delegations regarding adoption of the MAC Protocol
3. Consideration of matters relating to the appointment of a Supervisory Authority
4. Updates on the activities of the Working Group to develop draft regulations for the International Registry for MAC equipment
5. Updates on the activities of the Working Group to draft a request for proposals for the selection of a Registrar
6. Timetable and planning of further work
7. Any other business
8. Closing of the session