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**Item No. 8 on the agenda: International Interests in Mobile Equipment**

**(c) Implementation and status of the Protocol on Matters specific to Mining, Agricultural and Construction Equipment (MAC Protocol)**

(prepared by the Secretariat)

<i>Summary</i>	<i>Update on the implementation of the MAC Protocol to the Cape Town Convention</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of progress</i>
<i>Mandate</i>	<i>Work Programme 2023-2025</i>
<i>Priority level</i>	<i>High</i>
<i>Related document</i>	<a href="#"><u>MACPC/5/Doc. 5</u></a>

**I. INTRODUCTION**

1. The Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (MAC Protocol) was opened for signature in Pretoria, South Africa on 22 November 2019. The MAC Protocol is not yet in force.
2. The purpose of this document is to update the Governing Council on work undertaken since its 101<sup>st</sup> session (Rome, 8-10 June 2022) to implement the MAC Protocol.

**II. STATUS**

3. There are currently three outstanding requirements for the MAC Protocol to enter into force. First, a Supervisory Authority of the International Registry to be established under the MAC Protocol must be appointed. Second, an International Registry itself must be established and become fully operational. Finally, five States must ratify the Protocol. The appointment of a Supervisory Authority is an administrative requirement, whereas the certification that the Registry is fully operational and the five ratifications are formal requirements under Article XXV of the Protocol.
4. The activities required to implement the MAC Protocol are being advanced under the auspices of the MAC Preparatory Commission.

### III. THE PREPARATORY COMMISSION

5. As consistent with the implementation of the other Cape Town Convention Protocols and [Resolution 1 of the MAC Protocol Diplomatic Conference](#), a Preparatory Commission has been established to act as Provisional Supervisory Authority for the MAC Protocol. The UNIDROIT Secretariat has been designated as the Secretariat of the Preparatory Commission pursuant to Resolution 1. The Preparatory Commission operates under the guidance of the Governing Council and General Assembly of UNIDROIT. Customarily, the Preparatory Commission also performs an important role in encouraging States to sign, implement and ratify the Protocol. The Preparatory Commission has 16 Member States<sup>1</sup> and has held five sessions.<sup>2</sup>

6. The Preparatory Commission has three key responsibilities:

- (a) Appointment of a Supervisory Authority,
- (b) Selection of a Registrar to operate the MAC Protocol International Registry, and
- (c) Preparation of the first edition of the International Registry Regulations.

#### A. Appointment of a Supervisory Authority

7. Article 17 of the Cape Town Convention requires that each Protocol provide for a Supervisory Authority. Article XIV of the MAC Protocol provides that the Supervisory Authority shall be the international entity designated pursuant to a resolution of the MAC Protocol Diplomatic Conference. Resolution 2 of the Diplomatic Conference Final Act had invited the governing bodies of the International Financial Corporation (IFC) to consider undertaking the functions of Supervisory Authority upon or after the entry into force of the Protocol. However, in 2020, the IFC informed the MAC Preparatory Commission that it was unable to undertake the role.

8. Over a number of years, the UNIDROIT Secretariat made strenuous efforts to identify an existing international body willing to undertake the role of Supervisory Authority.<sup>3</sup> After consultations with a range of organisations, it appears that there are no existing appropriate organisations willing to undertake the role of Supervisory Authority. As such, there are two possible remaining options:

- (i) Establish a new international entity to undertake the role, with UNIDROIT as its Secretariat, similar to the approach adopted under the Luxembourg Rail Protocol;<sup>4</sup> or
- (ii) Consider whether UNIDROIT could undertake the role of Supervisory Authority.

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<sup>1</sup> Australia, Canada, the Republic of the Congo, the People's Republic of China, France, The Gambia, Germany, the Republic of Ireland, Japan, the Republic of Korea, Nigeria, Paraguay, Spain, South Africa, the United Kingdom and the United States

<sup>2</sup> The first session of the Preparatory Commission took place via videoconference on 21-22 May 2020 and was attended by 38 participants ([MACPC/1/Doc. 9](#)). The second session of the Preparatory Commission took place via videoconference on 10-11 December 2020 and was attended by 33 participants ([MACPC/2/Doc. 6](#)). The third session of the Preparatory Commission took place via videoconference on 3-4 June 2021 and was attended by 32 participants ([MACPC/3/Doc. 6](#)). The fourth session of the Preparatory Commission took place in hybrid format on 17-18 January 2022 and was attended by 41 participants ([MACPC/4/Doc. 5](#)). The fifth session of the Preparatory Commission took place in hybrid format on 22-23 November 2022 and was attended by 40 participants ([MACPC/5/Doc. 5](#)).

<sup>3</sup> See [UNIDROIT 2021 – C.D. \(100\) B.11](#), paras 10-14, [UNIDROIT 2021 – C.D. \(100\) B.12](#), paras 3-5.

<sup>4</sup> Under the Luxembourg Rail Protocol, a new international entity will be established to perform the role of Supervisory Authority, with the Intergovernmental Organisation for International Carriage by Rail (OTIF) acting as the Supervisory Authority Secretariat.

9. At its 100<sup>th</sup> session in 2021, the Governing Council discussed (i) the suitability of UNIDROIT undertaking the role of Supervisory Authority of the International Registry to be established under the MAC Protocol, and, to a limited extent, (ii) how the Supervisory Authority functions could be incorporated into UNIDROIT's governance structure. No consensus was reached on these matters. The Governing Council requested that the Secretariat prepare further detailed information on the specific tasks that would be required from the Governing Council, should UNIDROIT be appointed as Supervisory Authority, and an analysis of a dual system, with a new international entity created to perform the role of Supervisory Authority, with UNIDROIT as its Secretariat.<sup>5</sup>

10. At its 101<sup>st</sup> session (Rome, 8-10 June 2022), the UNIDROIT Governing Council considered a document prepared by the Secretariat that evaluated the relative merits of (i) the suitability of UNIDROIT undertaking the role of Supervisory Authority, and (ii) establishing a separate entity to perform the role of Supervisory Authority. The Governing Council remained unable to reach a consensus.<sup>6</sup> In order to work intersessionally on the matter and to allow the Governing Council to make a decision at its 102<sup>nd</sup> session, the Governing Council decided to establish the Ad Hoc Committee, composed of interested Governing Council Members and public international and treaty law experts, to discuss the unresolved public international law matters. Composed of 11 members, the Ad Hoc Committee met on four occasions between November 2022 and April 2023.

11. The Governing Council will be provided with a separate document addressing these issues for discussion at its 102<sup>nd</sup> session, including the Ad Hoc Committee's findings and recommendations.<sup>7</sup>

## **B. Selection of a Registrar to operate the MAC Protocol International Registry**

12. At the Preparatory Commission's first session, a Working Group was established (the Registrar Working Group) to draft a request for proposals (RFP) for the selection of a Registrar. The RFP was developed by the Registrar Working Group over seven sessions<sup>8</sup> and approved by the Preparatory Commission at its fourth session in January 2022.

13. The RFP was published on 21 March and closed on 1 September 2022. Four bids were submitted in response to the RFP. An Evaluation Committee established by the Preparatory Commission assessed the bids according to the methodology set out in the RFP itself and submitted a report to the Preparatory Commission. The Preparatory Commission considered the Evaluation Committee's report at its fifth session in November 2022. The Preparatory Commission approved the ranking of the four bidders as recommended by the Evaluation Committee and agreed to negotiate in sequence with the bidders in order of their ranking.

14. The Preparatory Commission established a negotiation team to undertake the contract negotiations on its behalf, including individuals with expertise in the technical aspects of building and operating a registry, as well as individuals with expertise in the evaluation of financial matters. The composition of the negotiation team was approved by the Preparatory Commission in February 2022. In January 2023, the Secretariat held an initial, informal negotiation planning meeting with the first-ranked bidder. The negotiation team will commence formal negotiations in the coming weeks.

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<sup>5</sup> See [UNIDROIT 2021 – C.D. \(100\) B.24 – Report](#), paras 160-186.

<sup>6</sup> See [UNIDROIT 2022 – C.D. \(101\) 21 – Report](#), paras 285-310.

<sup>7</sup> See UNIDROIT 2023 – C.D. (102) 17.

<sup>8</sup> The Registrar Working Group met seven times. The first session was on 4 November 2020 ([MACPC/Registrar/W.G./1/Doc. 4](#)), the second session was on 26 February 2021 ([MACPC/Registrar/W.G./2/Doc. 4](#)), the third session was on 7 May 2021 ([MACPC/Registrar/W.G./3/Doc. 4](#)), the fourth session was on 20 May 2021 (no report), the fifth session took place on 16 November 2021 (no report), the sixth session took place on 21 December 2021 (no report) and the seventh session took place on 13 June 2022 (no report).

### **C. Preparation of the first edition of the International Registry Regulations**

15. At the Preparatory Commission's first session, a Working Group was established to prepare a first draft of the International Registry Regulations (the Regulations Working Group). Over four sessions,<sup>9</sup> the Regulations Working Group resolved a number of policy and technical issues relating to the operation of the future MAC International Registry. In particular, the Regulations Working Group established (i) the criteria required to identify a MAC object for the purposes of registering an interest in the International Registry, (ii) the access requirements for users of the International Registry, and (iii) the procedure for debtors to provide their consent for a registration.

16. Following its fourth session, the Regulations Working Group submitted the draft Regulations to the Preparatory Commission. At the Preparatory Commission's third session, the Commission approved the draft Regulations and agreed that the draft Regulations were sufficiently developed for inclusion in the RFP for the selection of a Registrar. The draft Regulations were duly included as an Annex to the RFP when it was published on 21 March 2022.

## **IV. RATIFICATION AND PROMOTION OF THE MAC PROTOCOL**

17. UNIDROIT has been designated as the Depository of the MAC Protocol, pursuant to Article XXXVII(1) of the [treaty](#).

18. As of April 2022, five States (the Republic of the Congo, the Republic of The Gambia, the Republic of Paraguay, the Federal Republic of Nigeria and the United States of America) and one regional economic integration organisation (the European Union) have signed the treaty. The Republic of the Congo, the Republic of The Gambia, the Republic of Paraguay and the Federal Republic of Nigeria signed the Protocol at the Diplomatic Conference on 22 November 2020. The United States of America signed the MAC Protocol on 1 October 2020 at a ceremony held at the seat of UNIDROIT in Rome. The European Union signed the MAC Protocol on 20 September 2022.

### **A. Establishment of the MAC Protocol Ratification Task Force**

19. At its fifth session in November 2022, the Preparatory Commission decided to create a MAC Protocol Ratification Task Force (RTF) to support the implementation of the MAC Protocol. The RTF is an informal group of interested stakeholders that will meet on a regular basis to coordinate strategy and initiatives to promote and implement the MAC Protocol. The RTF is composed of (i) supportive Member States, (ii) supportive intergovernmental and international non-governmental organisations, (iii) the MAC Working Group (representing private sector stakeholders), (iv) the Registrar for the International Registry for MAC Equipment (once appointed), (v) the Supervisory Authority (once appointed), and (vi) the UNIDROIT Secretariat. Participation in the RTF is on a voluntary basis and there are no financial obligations for members. The main objectives of the RTF are:

- To develop different strategies and initiatives for the promotion and implementation of the MAC Protocol;
- To maintain a table tracking the implementation status of the MAC Protocol in different countries;

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<sup>9</sup> The first session was on 14-15 September 2020 ([MACPC/Regulations/W.G./1/Doc. 3](#)), the second session was on 24 November 2020 ([MACPC/Regulations/W.G./2/Doc. 4](#)), the third session was on 19 February 2021 ([MACPC/Regulations/W.G./3/Doc. 3 rev](#)), and the fourth session was on 30 April 2021 ([MACPC/Regulations/W.G./4/Doc. 5](#)).

- To coordinate efforts and resources to promote and implement the MAC Protocol;
- To organise events to promote and implement the MAC Protocol; and
- To develop strategies, documents and marketing materials for the promotion of the MAC Protocol.

20. In January 2023, the Secretariat invited interested stakeholders to join the RTF. The RTF will hold its first meeting in the first half of 2023.

## **B. Promotion of the MAC Protocol**

21. The Secretariat has continued to promote the MAC Protocol at various intergovernmental, regional, and domestic fora in order to encourage signatures, ratifications, and support from governments and industry. In 2022, these activities included:

- Presentation on how the Cape Town Convention and the MAC Protocol could support the Asian Infrastructure and Investment Bank's (AIIB) core work to the AIIB Legal Department (virtual, January 2022);
- Presentation on the MAC Protocol's benefits for the European Union to the European Union Working Party on Civil Law Matters (Brussels, January 2022);
- Presentation of the MAC Protocol at an APEC Workshop on Modernising Secured Transaction Legal Regimes in APEC Economies (Tokyo, May 2022);
- Presentation on the MAC Protocol as a tool for economic development in Africa to a group of African legal experts as part of the UNIDROIT Summer School (Rome, June 2022);
- Discussion of the MAC Protocol at the 11<sup>th</sup> Cape Town Convention Academic Conference (Cambridge, September 2022);
- Discussion regarding coordinating implementation of the MAC Protocol at the 5<sup>th</sup> Secured Transactions Coordination Conference (Rome, October 2022);
- Presentation of the MAC Protocol at the Asia-Pacific Private International Law Summit (Hong Kong, November 2022);
- Presentation on how the Cape Town Convention and the MAC Protocol could support the core work of the Asian Development Bank (ADB) during a Bank-wide conference (Manila, November 2022);
- Bilateral assistance to States working on implementation of the MAC Protocol (Cameroon, India, Indonesia, Malaysia, Mauritius, Kazakhstan, Kenya, Pakistan, Philippines, Spain, Ukraine and Uzbekistan); and
- Quarterly virtual meetings with the MAC Working Group.

## **V. FUTURE STEPS**

22. The Secretariat is supporting the Preparatory Commission and its subgroups in order to facilitate the earliest possible entry into force for the MAC Protocol.

23. The negotiation team will undertake formal negotiations over the coming months, with the intention of having a final contract to submit to the Preparatory Commission for approval at its sixth session in late 2023. It is anticipated that the Registry will then be developed and tested throughout 2024, with the intention of having the Registry online by 2025. It is also anticipated that the

Regulations Working Group will meet in 2023 to update the draft Regulations to take into account discussions between the negotiation team and the first-ranked bidder.

24. The Secretariat will support the work of the RTF in promoting the ratification of the MAC Protocol and continue to directly assist States and regional economic integration organisations in their implementation of the MAC Protocol.

## **VI. ACTION TO BE TAKEN**

25. *The Governing Council is invited to note the progress towards implementation of the MAC Protocol to the Cape Town Convention.*