



EN

GOVERNING COUNCIL
98th session
Rome, 8-10 May 2019

UNIDROIT 2019
C.D. (98) 4
Original: English
April 2019

Item No. 4 on the agenda: International Interests in Mobile Equipment

**b) Draft Protocol to the Cape Town Convention on Matters Specific to Mining
Agricultural and Construction Equipment**

(prepared by the Secretariat)

<i>Summary</i>	<i>Progress report on the MAC Protocol project in advance of the Diplomatic Conference in November 2019</i>
<i>Action to be taken</i>	<i>Note the Secretariat's activities in preparation for the Diplomatic Conference</i>
<i>Mandate</i>	<i>Work Programme 2017-2019</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<i>DCME-MAC - Doc. 3: Draft MAC Protocol</i> <i>MAC Protocol Economic Assessment</i>

INTRODUCTION

1. The purpose of this document is to update members of the Governing Council on the preparation of a 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"), in advance of the Diplomatic Conference to adopt the Protocol which will be held in Pretoria, South Africa from 11 – 22 November 2019.

2. This document provides information regarding the arrangements for the Diplomatic Conference, legal operation, the economic assessment of the MAC Protocol, private sector support and promotional activities.

I. 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, 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, 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.

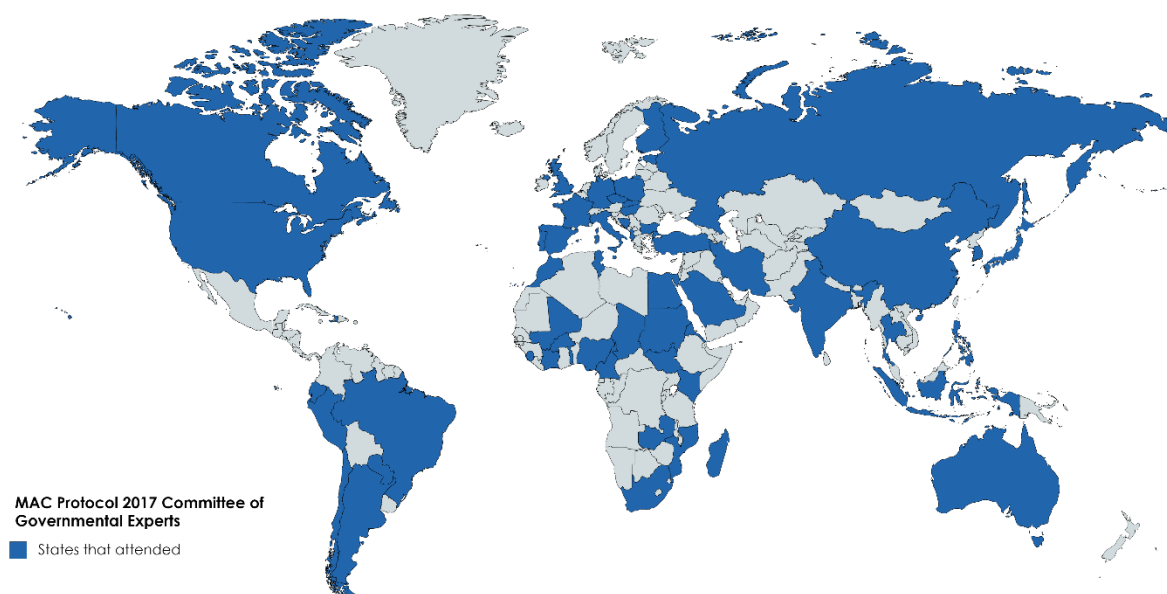
6. At the conclusion of the fourth Study Group meeting on 8 March 2016, the Study Group submitted the preliminary draft Protocol to the Governing Council with a recommendation that a Committee of Governmental Experts be convened. At its 95th session (Rome, 18-20 May 2016), the Governing Council considered 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 for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (the Committee of Governmental Experts).

7. 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. Majority of the text proposed by the Study Group was adopted by the Committee. On most of the challenging issues, there was consensus on many aspects.

8. 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. The sustained high numbers of participating States

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).

at CGE2 reflect the considerable interest the MAC Protocol project has generated in the international community.



9. As consistent with the Committee’s deliberations during its first session, the vast majority of the preliminary draft MAC Protocol was subject to unanimous support and approval. However, the Committee made several substantive changes to the preliminary draft Protocol approved at the first session, especially in relation to the provisions regarding immovable property (Article VII) and registration (Articles XVI and XVII). A new Article XII was inserted to allow Contracting States to opt out of the MAC Protocol’s application to inventory financing, in order to avoid unduly compromising well-functioning inventory financing laws. At the conclusion of the 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.

10. At its 97th session (Rome, 2–4 May 2018), the Governing Council approved the convening of a Diplomatic Conference in 2019 to formally adopt the MAC Protocol.

II. THE DIPLOMATIC CONFERENCE

11. 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. The Diplomatic Conference will be held in Pretoria from 11 – 22 November 2019.

12. In October 2018 a Note Verbale was sent to all United Nations Member States informing them of the dates of the Diplomatic Conference. Invitations to the Diplomatic Conference are to be sent by the South African Government in April along with the draft Agenda, draft Rules of Procedure, participant registration form and model letter of credentials. The Secretariat is working to finalise the analytical documents (explanatory report and legal analysis) for distribution in June 2019, which will allow States four months to provide formal comments on the draft text.

III. LEGAL OPERATION

13. The provisions of the [draft MAC Protocol](#) are overwhelmingly consistent with those in the previous protocols to the Cape Town Convention. This is due to the policy adopted throughout its negotiation of retaining consistency with the existing protocols to the greatest extent possible. Rules

governing the creation, registration and priority of international interests under the MAC Protocol are generally consistent with the previous Protocols, as are the default and insolvency remedies.

14. There are four significant innovations in the MAC Protocol which were required to adapt the Cape Town Convention framework to regulate the financing of mining, agricultural and construction equipment. They are in relation to (i) how the scope of the Protocol in relation to equipment is defined, (ii) the relationship between international interests in MAC equipment and interests arising out of immovable property, (iii) the treatment of inventory and (iv) the amendment articles. The Secretariat is working with international experts to provide additional analysis and drafting options in relation to these issues, which were not fully resolved by the Committee of Governmental Experts. In relation to the amendment article (Article XXXIII), the Secretariat is consulting with Governmental public international law experts to ensure that the drafting proposal made in the Secretariat's legal analysis is consistent with existing treaty law principles.

IV. SCOPE OF THE MAC PROTOCOL

15. The draft MAC Protocol uses the Harmonized Commodity Description and Coding System (HS) to identify the types of mining, agricultural and construction equipment which fall within its scope. The HS is a global nomenclature system developed by the World Customs Organisation (WCO) to achieve uniform classification of commodities and merchandise in international trade. States also use it to monitor controlled goods, calculate and collect internal excise and sales taxes and compile transport statistics. The HS is uniformly utilised by both Governments and the private sector and covers 98% of all international trade.

16. The MAC Protocol utilises the HS to appropriately limit its scope to predominantly high value equipment used primarily in the mining, agriculture and construction industries. The annexes to the draft MAC Protocol provide a list of 6-digit HS codes that cover the types of MAC equipment which fall within its scope (HS System codes for mining equipment are listed in Annex 1, agricultural equipment in Annex 2 and construction equipment in Annex 3). The listing of the HS codes covering equipment from the different sectors (mining, agriculture and construction) in separate annexes will allow Contracting States to apply the MAC Protocol to only one or two of the mining, agricultural or construction categories if they so wish.

17. The draft MAC Protocol annexes list 42 HS codes. In June 2018, on request by the Committee of Governmental Experts, the UNIDROIT Secretariat created a process to allow States to propose additional HS codes for inclusion in the draft MAC Protocol. This was done to allow States a sufficiently long period to consult with their domestic industries in proposing new codes, and to try to avoid States submitting of a large number of new codes immediately before the Diplomatic Conference, which would be challenging to effectively evaluate. A Note Verbale was sent to all United Nations Member States inviting their proposals by 1 December 2018.

18. The Secretariat received submissions from seven countries proposing 70 HS codes, including 42 new HS codes not currently in the draft MAC Protocol Annexes. On consultation with the MAC Working Group and the WCO, the Secretariat has provisionally recommended an additional 14 codes of the 42 codes proposed as appropriate for inclusion in the MAC Protocol annexes. The Secretariat is currently working with the proposing States to conclude the process, the outcomes of which will be provided in the Diplomatic Conference documents to be circulated in June.

V. ECONOMIC ASSESSMENT OF THE MAC PROTOCOL

19. Upon request of the Committee of Governmental Experts, the Secretariat commissioned a group of economists (Warwick and Associates) to undertake an independent ex ante Economic Assessment of the MAC Protocol. The MAC Protocol Economic Assessment was majority funded by

the MAC Working Group. [The final Economic Assessment](#) was presented at the 7th Cape Town Convention Academic Project Conference in September 2018.

20. The expected economic benefits for countries that ratify the Protocol are significant. The assessment estimates that over a ten year period, the MAC Protocol may increase the stock of MAC equipment in developing countries by \$90 billion and is predicted to increase the GDP of developing countries by \$23 billion and by \$7 billion in developed countries, for a total annual impact on GDP for UNIDROIT Member States equivalent to \$30 billion. While the Protocol is expected to benefit manufacturers, financiers and users of MAC equipment, the larger projected impact in developing countries indicates that the largest beneficiaries will be the end-users involved in the mining, agricultural and construction sectors who import the equipment.

VI. PRIVATE SECTOR SUPPORT

21. Throughout the life of the MAC Protocol project, there has been consistent support from the private sector. As consistent with the established practice for the other protocols to the Cape Town Convention, in 2015 leading private stakeholders were invited to form a MAC Protocol Working Group. The MAC Protocol Working Group is responsible for encouraging private sector participation in developing the Protocol, as well as communicating and representing private sector interests during the drafting process. It is an independent body outside the purview of UNIDROIT. The Working Group has been critical in providing data on value, financing and usage of agricultural, construction and mining equipment throughout the negotiation of the MAC Protocol.

22. The Working Group is made up of many of the largest MAC equipment manufacturers and financiers globally. Membership also includes several trade associations, including the Association of Equipment Manufacturers (AEM), which has 917 members in the agriculture and construction industries, the Equipment Leasing and Finance Association (ELFA), which represents over 575 financial service companies, banks and manufacturers, and the Verband Deutscher Maschinen und Anlagenbau (VDMA), which is one of the largest industrial associations in Europe representing 3,100 member companies in the engineering industry. The Working Group is led by Mr Phillip Durham who is a partner in the Structured Finance Group of the law firm Holland and Knight in New York.

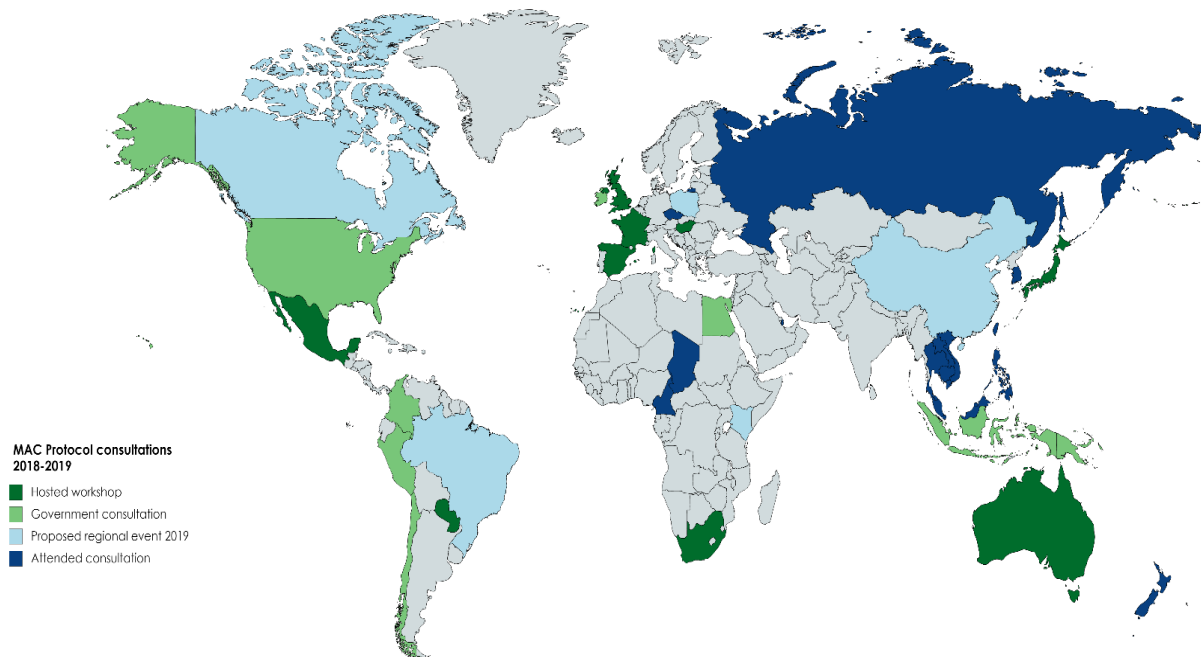
23. The Working Group will continue to play an important role in providing private sector views on the drafting of the Protocol and its promotion. Further information is available on the MAC Working Group's website.²

VII. PROMOTION AND TECHNICAL ASSISTANCE

24. In advance of the Diplomatic Conference, the Secretariat has undertaken 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.

² <https://www.macwg.org/>

25. The Secretariat has undertaken these activities through bilateral, regional and multilateral channels. Utilising existing international fora provides 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), the United Nations Commission on International Trade Law (UNCITRAL), the Visegrad Group, the Arab League, the African Union and the European Union.



26. Over the last 18 months, the Secretariat has consulted approximately 40 States on the MAC Protocol through various channels. The Secretariat has delivered 11 workshops and undertaken nine Governmental meetings in 17 States. The major 2018 event was an international consultation event on the scope of the MAC Protocol, which was convened on 11 September 2018 in partnership with the Harris Manchester College Commercial Law Centre at the University of Oxford. The consultation event brought together 35 Governmental representatives and legal experts from 19 countries.

27. The Secretariat further intends to deliver a number of further regional engagement events in advance of the Diplomatic Conference in Africa, Asia, South America and Eastern Europe. Further information on the Secretariat's promotion events for the MAC Protocol is available at Appendix I.

28. Governing Council members are invited to encourage the respective Governments of their countries of origin to send a delegation to the Diplomatic Conference. Should their Government have a positive view of the MAC Protocol, States are being encouraged to consider signing the Protocol at the Diplomatic Conference, which will hasten the treaty's entry into force.

VIII. ACTION TO BE TAKEN

29. *The Governing Council is invited to note developments in relation to the MAC Protocol, and, if deemed appropriate, to encourage the Governments of their countries of origin to (i) participate actively in the process leading to the Diplomatic Conference, to (ii) attend the Diplomatic Conference with a strong delegation, and (iii) to consider signing the Protocol in Pretoria or shortly thereafter.*

Appendix I

MAC Protocol Promotional Work 2017 – 2019

Workshops

1. Australia (Canberra and Melbourne workshops, September 2018)
2. France (Paris workshop, January 2019)
3. Hungary (Budapest regional workshop, December 2017)
4. Japan (Tokyo workshop, August 2018)
5. Mexico (Mexico City workshop, APEC/IFC March 2018)
6. Paraguay (Asuncion regional workshop June 2018)
7. South Africa (Johannesburg workshop, June 2018)
8. Spain (Madrid workshop, November 2018)
9. United Kingdom (London workshop, March 2018 and Oxford international workshop, September 2018)

Government Consultations

1. Chile (Santiago Government meetings, November 2018 and APEC February 2019)
2. Colombia (Bogota Government meeting, March 2019)
3. Egypt (Cairo Government meeting, December 2017)
4. Indonesia (Jakarta Government meeting, APEC July 2018)
5. Ireland (Government meeting, January 2019)
6. Papua New Guinea (Port Moresby Government meeting, APEC February 2018)
7. Peru (Lima Government meeting, November 2019)
8. United States (Washington Government meeting, World Bank LJD week November 2018)

International workshop (Oxford, 11 September 2018)

1. Australia (Expert)
2. Cambodia (Government)
3. Cameroon (Government)
4. Chad (Government)
5. China (Expert)
6. France (Expert)
7. Germany (Expert)
8. Holy See (Government)
9. Hungary (Government)
10. Italy (Expert)
11. Japan (Expert)
12. Kenya (Government)
13. Korea (Government)
14. Lao (Government)
15. Qatar (Government)
16. South Africa (Government)
17. Spain (Expert)
18. United Kingdom (Government)
19. United States (Expert)

States consulted through APEC Economic Committee

1. United States
2. Australia
3. Brunei Darussalam
4. Canada
5. Chile
6. China
7. Indonesia
8. Japan
9. Malaysia
10. Mexico
11. New Zealand
12. Papua New Guinea
13. Peru
14. The Philippines
15. Russia
16. Singapore
17. Republic of Korea
18. Thailand
19. Viet Nam

Proposed regional consultations 2019

1. Asia (China)
2. Canada
3. East Africa (Kenya)
4. Eastern Europe (Poland, Slovakia)
5. South America (Brazil, Chile)
6. South Africa (South Africa)