

SECURED FINANCING FOR MOBILE EQUIPMENT

The Proposed Protocol on Mining, Agricultural and Construction Equipment

March 5, 2014

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THE PROPOSED PROTOCOL ON MINING, AGRICULTURAL AND CONSTRUCTION
EQUIPMENT**

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INTRODUCTION

For quite some time, the International Institute for the Unification of Private Law (hereinafter “UNIDROIT”) has been exploring the possibility of adopting a fourth Protocol to the Convention on International Interests in Mobile Equipment (hereinafter the “Cape Town Convention” or the “Convention”). Thus far, three Protocols have been adopted: i) the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (hereinafter the “Aircraft Protocol”),¹ ii) the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (hereinafter the “Railway Assets Protocol”),² and iii) the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (hereinafter the “Space Assets Protocol”).³ The fourth Protocol, in its initial draft form, covers mining, agricultural and construction equipment (hereinafter the “MAC Protocol”).

This Report introduces the Cape Town Convention, its Protocols and the results achieved thus far. The aviation industry has drawn significant economic benefits from the Cape Town regime that pertains to the financing of aircraft objects. These economic benefits

¹ UNIDROIT *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (Nov. 16 2001), available at <http://www.unidroit.org/instruments/security-interests/aircraft-protocol> (last accessed Feb. 20, 2014) [hereinafter Aircraft Protocol].

² UNCITRAL, *Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock* (Feb. 23, 2007), available at <http://www.unidroit.org/english/conventions/mobile-equipment/railprotocol.pdf> (last accessed Feb. 20, 2014) [hereinafter Luxembourg Protocol].

³ UNIDROIT, *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets* (Mar. 9, 2012), available at <http://www.unidroit.org/instruments/security-interests/space-protocol> (last accessed Feb. 20, 2014).

relate primarily to the reduced cost of credit. The Report also looks at the operations of the International Registry established under the Aircraft Protocol.

After describing the Cape Town system in broad terms, the Report proceeds with an examination of the history, reasons and economic needs for the MAC Protocol. The MAC equipment, as the other types of equipment covered by the three Protocols, has unique features that might affect the final wording of the rules included in the relevant Protocol.

The Report also addresses some of the criticism of the proposal to adopt the MAC Protocol, including the absence of evidence of the cross-border use, uncertainty of scope, unreliable identification of equipment in registrations, etc. The last Section examines interactions of the MAC Protocol with domestic secured transactions regimes.

As with the drafting of the three previous Protocols, support from the industry players, whether manufacturers, dealers or end-users, will be key. There is already sufficient evidence of how beneficial the MAC Protocol could be to manufacturers and dealers. They and their representative associations have been the most vocal with their support for the project. End-users' support, particularly the farmers', will be critical in moving the project forward. Despite the sufficient support, there remain a number of issues that will need to be resolved before the MAC Protocol becomes a reality and starts delivering on its promise of economic benefits.

I. THE CAPE TOWN CONVENTION

The following Section provides some background on the drafting of the Cape Town Convention, the methodology and the main drivers of the project. The second Section describes the key economic benefits and identifies the players who have benefitted from the Cape Town system as a whole.

A. HISTORY

The project began in 1988 when the government of Canada presented the original proposal for the treaty at the UNIDROIT Governing Council. A study group then began to work on a draft Convention in 1993.⁴ The Cape Town Convention and the Aircraft Protocol were opened for signature November 16, 2001 at a diplomatic conference in Cape Town, South Africa. The large number of signatures to the two instruments signified the countries' acknowledgment of the excellent work done by drafting groups under the auspices of UNIDROIT.

One of the main reasons for the adoption of the Cape Town Convention was to recognize and enforce property interests in aircraft objects on an international basis, irrespective of the location of the object. Prior to its adoption, a great deal of uncertainty existed with respect to the effectiveness of such interests. Many lenders experienced difficulties in getting their security rights recognized and enforced in foreign jurisdictions, but more so

⁴ Charles W. Mooney Jr., *The Cape Town Convention: A New Era for Aircraft Financing*, 18 SUM. AIR & SPACE L. 4 (2003).

in civil-law jurisdictions as opposed to those of the common-law origin.⁵ Another area which posed an obstacle to efficient cross-border financing of highly-mobile objects was the lack of uniformity across various countries' conflict of laws rules.⁶ The Cape Town Convention displaces domestic laws and binds all parties involved in the financing of objects covered by the Protocols to the same set of rules.⁷

The involvement of the industry groups in the formulation of the Cape Town Convention, and particularly the Aircraft Protocol, was unprecedented for an international convention of this kind.⁸ However, it was precisely this involvement and support of the industry groups that facilitated the Convention's adoption and has thus far yielded positive economic results. The relevant industry groups have played a critical role in the formulation of all Protocols to the Cape Town Convention.

B. ECONOMIC BENEFITS AND IMPORTANCE

The main purpose for the adoption of the Cape Town Convention, as set out in its Preamble, was to facilitate and streamline the financing of the acquisition and use of high-value mobile equipment that is of an international nature and to promote such equipment's availability. In other words, the Convention seeks to provide lenders greater

⁵ B. Patrick Honnebier, *The Convention of Cape Town on International Interests in Mobile Equipment: The Solution of Specific European Property Law Problems*, 3 EUR. REV. OF PRIVATE L. 77, 382 (2002).

⁶ B. Patrick Honnebier & J. Michael Milo, *The Convention of Cape Town: The Creation of International Interests in Mobile Equipment*, 1 EUR. REV. OF PRIVATE L.3, 6 (2004).

⁷ Roy Goode, *The International Interest as an Autonomous Property Interest*, 1 EUR. REV. OF PRIVATE L. 18, 20 (2004) [hereinafter Goode, *International Interest*].

⁸ Sandeep Gopalan, *Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment*, 9 L. & BUS. REV. OF THE AMERICAS 255, 268 (2003). The Aviation Working Group, formed by Airbus and Boeing, even prepared the initial draft of the Aircraft Protocol. M.J. Stanford & D.A. Porras, *The Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, 43 No. 2 U.C.C. L.J. Art. 4 (2011).

confidence in their decisions to extend credit, enhance the credit rating of equipment receivables, and reduce the borrowing costs to the advantage of all interested parties.⁹ For this purpose, the Convention in its Preamble recognizes the advantages of asset-based financing and leasing and provides a clear framework to govern these types of transactions.

Access to reasonably-priced finance for the types of equipment covered by the existing Protocols is critical because the industries are highly capital-intensive and dependent on external financing.¹⁰ Boeing and Airbus project sales of their aircrafts in the range of US\$3-4 trillion in the next 20 years for which the buyers will require significant financing assistance.¹¹ The Cape Town system eliminates or minimizes many of the risks associated with the financing of high-value and highly-mobile equipment. For instance, a significant factor that impacts the cost of credit is the inability of the creditor to enforce the debtor's obligations in a timely, efficient and low-cost fashion. Protracted court proceedings present a serious impediment to secured financing, in general, and to aircraft financing, in particular.¹² This and other issues have been successfully addressed in the Cape Town Convention and the related Protocols, and have already delivered significant results in the form of reduced cost of finance.

⁹ Roy Goode, *The Cape Town Convention on International Interests in Mobile Equipment: A driving Force For International Asset-Based Financing*, 1 UNIF. L. REV. 3, 4 (2002), available at <http://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/information/overview.pdf> (last accessed Feb. 20, 2014) [hereinafter Goode, *Cape Town Convention*].

¹⁰ Iwan Davies, *The New Lex Mercatoria: International Interests in Mobile Equipment*, 52 INT'L & COMP. L. Q. 151 (2003).

¹¹ Deutsche Bank, *Cape Town Treaty: Economic Assessment and Benefits*, Cape Town Treaty Seminar, Bangkok, Thailand 1 (Apr. 27, 2012), available at <http://whoswholegal.com/news/features/article/31036/the-cape-town-convention-capital-markets-air-canadas-first-eetc-offering/> (last accessed Feb. 24, 2014) [hereinafter Deutsche Bank].

¹² Jeffrey Wool, *The Case for a Commercial Orientation to the Proposed UNIDROIT Convention as Applied to Aircraft Equipment*, 31 L. & POL. INT'L BUS. 79, 93 (1999).

The Organisation for Economic Cooperation and Development (OECD) issued the Aircraft Sector Understanding (ASU) on September 1, 2011, which allows export credit agencies to charge lower premiums on the financing provided to the end-users located in the countries that have ratified the Cape Town Convention.¹³ This fee reduction is often cited as one of the primary economic benefit that influences states to ratify the Convention and the Aircraft Protocol.¹⁴ The savings could amount to US\$2.5 million per aircraft on the purchase of the new Airbus A380.¹⁵

In the process of assessing the benefits of the United Kingdom's ratification of the Cape Town Convention and the Aircraft Protocol, the U.K. Department for Business Innovation & Skills (BIS) conducted an industry-wide study on the benefits of ratification.¹⁶ In a response to the request for information from the BIS, the Aviation Working Group, a non-profit entity representing major stakeholders from the aviation industry, estimated that "UK based airlines are expected to save between 534 million

¹³ Organization for Economic Co-operation and Development, *Sector Understanding on Export Credits for Civil Aircraft*, TAD/ASU(2011)1 (Sept. 1, 2011), available at <http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=tad/asu%282011%291&doclanguage=en> (last accessed Feb. 24, 2014) [hereinafter Legal Advisory Panel on the Aviation Working Group].

¹⁴ See Commonwealth of Australia, Explanatory Memoranda, *International Interests in Mobile Equipment (Cape Town Convention) Bill 2013*, available at http://www.austlii.edu.au/au/legis/cth/bill_em/iiimetc2013682/memo_0.html (last accessed Feb. 24, 2014).

¹⁵ Statements by Anthony Albanese MP, Second Reading Speech – International Interests in Mobile Equipment (Cape Town Convention) Bill 2013 (May 29, 2013), available at <http://anthonyalbanese.com.au/second-reading-speech-international-interests-in-mobile-equipment-cape-town-convention-bill-2013> (last accessed Feb. 24, 2014).

¹⁶ DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, CALL FOR EVIDENCE: SUMMARY OF RESPONSES, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT 8 (Feb. 2010), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262207/bis-11-539-call-summary-of-responses-mobile-aircraft-equipment.pdf (last accessed Feb. 24, 2014).

pounds and 2.7 billion pounds (best estimate 1.195 billion pounds) in funding costs on the estimated 98 billion pounds of financing relating to aircraft deliveries over the next 20 years.”¹⁷ While these savings remain just projections, a number of concrete examples of reduced financing costs have already been documented.

For instance, as a result of Canada’s ratification of the Cape Town Convention and the Aircraft Protocol in early 2013, Air Canada was able to finance the acquisition of new Boeing 777 and 787 aircrafts at a historically low cost.¹⁸ Air Canada financed the purchase with the proceeds from the sale of bonds, known as enhanced equipment trust certificates (EETC), which were assigned a high credit rating. The Canadian government’s efforts leading to the eventual ratification of the Convention greatly influenced the three credit agencies that gave the bonds high ratings.¹⁹

Most recently, Malawi ratified the Cape Town Convention and the Aircraft Protocol largely to secure Ethiopian Airlines’ investment in its domestic carrier – Air Malawi. The Convention and the Aircraft Protocol will enter into force in Malawi on May 1, 2014.²⁰

Access to financing through the issuance of bonds is an alternative to the conventional bank finance in the form of asset-based loans. Such alternative sources are expected to play an increasingly important role in the future, particularly in light of the new banking

¹⁷ *Id.* The United Kingdom has yet to ratify the Cape Town Convention and the Aircraft Protocol.

¹⁸ Donald G. Gray & Auriol Marasco, Blake Cassels & Graydon LLP, *The Cape Town Convention and Capital Markets: Air Canada’s First EETC Offering*, WHO’S WHO LEGAL (Nov. 2013), available at <http://whoswholegal.com/news/features/article/31036/the-cape-town-convention-capital-markets-air-canadas-first-eetc-offering/> (last accessed Feb. 24, 2014).

¹⁹ *Id.*

²⁰ See *Cape Town Convention and Aircraft Protocol – Accession by the Republic of Malawi*, UNCITRAL NEWS AND EVENTS, <http://www.unidroit.org/news> (last accessed Feb. 27, 2014).

regulations such as the Basel III Rules.²¹ A similar trend leading to the replacement of some bank credit with alternative sources has also been detected in space assets finance.²²

C. SCOPE

The Cape Town Convention has a two-tiered structure, that is, the Convention itself, which is not equipment specific, and Protocols that govern each specific category of equipment. Thus far, three Protocols have been adopted: i) the Aircraft Protocol, ii) Railway Assets Protocol, and iii) the Space Assets Protocol. Currently, only the Aircraft Protocol has attained the sufficient number of ratifications (54 Contracting States) and has taken effect.²³ The Convention and the Protocols must be read and interpreted together as a single instrument. However, pursuant to Article 6 of the Convention the applicable Protocol prevails in the event of inconsistencies with the Convention. The individual Protocols and the subject-matter they cover will be discussed further in the following Section. The following sub-Sections examine some of the key elements and features of the Cape Town Convention.

1. International interest

The Convention provides for the creation of a right that secures the obligation owed to the creditor, known as an international interest that must be recognized in all Contracting

²¹ Deutsche Bank, at 6.

²² MJ Stanford, *The Availability of a New Form of Financing for Commercial Space Activities: The Extension of the Cape Town Convention to Space Assets*, CAPE TOWN CONVENTION J. 109, 119 (2012).

²³ The list of contracting states can be found at: *Status – Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, UNCITRAL, <http://www.unidroit.org/status-2001capetown-aircraft> (last accessed Feb. 21, 2014).

States. International interests may originate under three different types of transactions and may be created by i) the chargor under a security agreement, ii) a conditional buyer under a title reservation agreement, or iii) a lessee under a leasing agreement. According to Article 7 of the Convention, the agreement under which an international interest is created must comply with the following requirements, otherwise it is not validly constituted as an international interest: i) the agreement must be in writing, ii) it must relate to an object of which the chargor, conditional seller or lessor (creditor) has power to dispose, iii) it must enable the object to be identified in conformity with the respective Protocol, and iv) in case of a security agreement, it must enable the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

The international interest is a new right that is not derived from any domestic law.²⁴ It is irrelevant whether or not it has a formal or functional counterpart in a domestic law.²⁵ However, characterization of an international interest as an interest created under a security agreement, a title reservation or lease agreement will depend on the application of the rules of the forum where the issue arose.²⁶ Accordingly, if an international interest originated in a transaction covered by the law of the United States that law will determine whether the international interests will be characterized as a security interest or an ownership right of the lessor/conditional seller.

²⁴ Honnebier, at 387.

²⁵ Goode, *International Interest*, at 24.

²⁶ Ronald C.C. Cuming, *Overview of the Convention on International Interest in Mobile Equipment*, 2011, 35 U.C.C. L.J. 73, 76 (2002) [hereinafter Cuming, *Overview*].

The Convention regulates and protects five types of interest in objects covered thereunder: i) international interests, ii) prospective international interests, iii) national interests, iv) non-consensual interests arising under domestic law and given priority without registration, and v) registrable non-consensual rights and interests arising under domestic law.²⁷ Since the international interest was already described above, the following paragraphs briefly summarize the application of the Convention to the remaining four types of interests and rights.

Prospective international interests are interests intended to be created over existing and identifiable equipment as international interests in the future, upon the occurrence of a stated event, which may include the debtor's acquisition of an interest in the object, whether or not the occurrence of the event is certain.²⁸ Prospective international interests may be registered in the International Registry; however, they remain ineffective until they mature into international interests. A creditor may register a notice of a prospective international interest while the loan negotiations are on-going in order to secure the priority for its international interest that will arise when the loan transaction is eventually concluded. Once they become effective, international interests rank, for priority purposes, as of the time of the registration as prospective international interests.²⁹

According to Article 1(r) of the Convention, national interests are interests held by a creditor in an object that arose in an internal transaction to which the Convention does

²⁷ Roy Goode, *Cape Town Convention*, at 2.

²⁸ UNCITRAL, *Convention on International Interests in Mobile Equipment* [The Cape Town Convention] art. 1(y) (2001), available at <http://www.unidroit.org/instruments/security-interests/cape-town-convention> (last accessed Mar. 4, 2014) [hereinafter Cape Town Convention].

²⁹ *Id.* art. 19(4).

not apply. In an internal transaction, both parties and the collateral are located in the same state. Contracting States may, at the time of ratification, acceptance, approval, or accession to a Protocol, declare that the Convention will not apply to a transaction that is an internal transaction in relation to that state with regards to all types of equipment or some of them.³⁰

Non-consensual rights or interests arising under national law and given priority without registration are interests that will be given priority under national law over registered international interests or their equivalent, even if such non-consensual rights or interests are not registered in the International Registry. For instance, these rights and interests typically protect mechanics when the aircraft owner refuses to pay for the services performed by the mechanic. Under Article 39 of the Convention, each Contracting State may make a declaration specifying these non-consensual rights or interests.³¹

Registrable non-consensual rights or interests are interests that arise under the national laws of a Contracting States and can be registered in the International Registry. For purposes of the Convention, these rights and interests are treated as international interests. An example of this type of interest is a decision rendered by a court of a Contracting State that affects equipment of the category to which the Convention applies.

³⁰ *Id.* art. 50.

³¹ See further JOHN PRITCHARD & DAVID LLOYD, ANALYSIS OF NON-CONSENSUAL RIGHTS AND INTERESTS UNDER ARTICLE 39 OF THE CAPE TOWN CONVENTION, available at http://denning.law.ox.ac.uk/news/events_files/Analysis_of_Non-Consensual_Rights_and_Interests_under_Article_39_of_the_Cape_Town_Convention_Pritchard_&_Lloyd.pdf (last accessed Feb. 27, 2014).

Contracting States may make a declaration under Article 40 of the Convention specifying which non-consensual rights or interests may be registered in the International Registry.

Finally, the Cape Town Convention also applies to assignments which are defined in Article 1(b) as contracts by which, whether by way of security or otherwise, confer on the assignees associated rights with or without transferring the related international interests. Assignments relating to international interests are registrable under the Convention.³² Because the Convention adopts the position of most major legal systems by which a security interest is considered as accessory to the obligation secured, an assignment of associated rights transfers to the assignee the related international interest and all of the interests and priorities of the assignor under the Convention, unless the parties to the transaction agree otherwise.³³ Assignments of associated rights that do not transfer the related international interests are outside the scope of the Convention. According to Article 32(1) of the Convention, the formal requirements that assignments must meet in order to become effective are: i) the assignment must be in writing, ii) it must enable the associated rights to be identified under the contract from which they arise, and iii) in the case of an assignment by way of security, it must enable the obligations secured by the assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum sum secured.

The Convention thus creates a comprehensive and clear legal framework enabling creditors and other third parties to take informed decisions when contemplating to lend

³² Legal Advisory Panel on the Aviation Working Group, at 24.

³³ *Id.*

against, buy or lease an object that may be potentially encumbered by an international interest.

2. International registries

The system for registration of international interests, assignments and the other interests (discussed in the preceding sub-Section) in the International Registry is central to the Cape Town Convention. The Convention anticipates that separate registries will be established under the individual Protocols.³⁴ The main functions of these registries are to give notice of the creation or potential creation of international interests to third parties and to enable the creditor to preserve its priority against subsequently registered interests, as well as against un-registered interests and the debtor's insolvency administrator.³⁵ Thus far, only the registry under the Aircraft Protocol has been established and is fully operational. As a result, the remainder of this Report focuses on that registry and all references to the International Registry are to the one established under the Aircraft Protocol.

Article 17(2)(i) of the Convention provides the legal grounds for the establishment of a notice-based electronic registration system, as opposed to a document registration system. In a notice-filing system, only information sufficient to alert a potential creditor or buyer of the asset described in the notice must be provided in a registration form.³⁶ The third

³⁴ See further John Atwood, *The Cape Town Convention: The New Dublin International Registration System in Practice*, 43 U.C.C. L.J. art. 2 (2011).

³⁵ *Id.*

³⁶ Alejandro Álvarez de la Campa, *Making Security Interests Public: Registration Mechanisms in 35 Jurisdictions* 7, WORLD BANK, available at

party is then expected to engage in due diligence to determine the details of a transaction relating to the registered interest outside the International Registry. The registration system is completely automated, meaning that there is no human intervention in the International Registry's process of verifying registration forms, effectuating the registration, processing search requests or issuing certificates.³⁷ The results and operations of the International Registry are examined further in Section III below.

3. Priorities

An international interest combines two critical features on which the presence of secured financing of any kind is conditioned: i) priority and ii) remedy. This and the following sub-Section briefly summarize the two features. The fundamental rule of the Cape Town Convention is that registered international interests have priority over any subsequently registered interests and over unregistered interests.³⁸ Accordingly, the first-in-time, first-in-right rule determines conflicts between two international interests according to the date and time assigned to the registrations by the International Registry.

It is noteworthy that the priority of the first-registered international interest applies even if the first-registered international interest was acquired or registered with actual knowledge of other interests.³⁹ Thus, this priority rule may deviate from some of the domestic recording regimes with which users are familiar with, such as those for the

<http://www.ifc.org/wps/wcm/connect/fbef87804c2ab1dda285eaf12db12449/Registry+survey+report.pdf?MOD=AJPERES> (last accessed Feb. 20, 2014).

³⁷ Rob Cowan & Donal Gallagher, *The International Registry for Aircraft Equipment – The First Seven Years, What We Have Learned*, 45 U.C.C. L.J. ART 1 (2014).

³⁸ Cape Town Convention, art. 29(1).

³⁹ *Id.* art. 29(2).

recording of mortgages that require the mortgagee to register its interest first but also to do so without any knowledge of a competing claim. The Cape Town Convention affords some level of flexibility to the creditors to vary their respective priorities by an agreement.⁴⁰ Subordination that results from a modification of the priority between the parties may also be registered in the International Registry.

4. Remedies

Article 11 of the Convention allows debtors and creditors to agree on the events that would constitute a default or otherwise give rise to rights and remedies provided by the Convention. Typically, failure to make a payment under the loan would constitute a sufficient ground to declare the debtor in default. Some other “non-monetary” breaches of the debtor, such as the lapse in insurance or damage to equipment, would also commonly constitute grounds for default. Upon default, the creditor would be able to resort to remedies leading to the satisfaction of the secured obligation. Absent of an agreement between the parties as to the events and actions that constitute default, Article 11(2) of the Convention provides a default rule according to which default occurs when the creditor is substantially deprived of what it is entitled to under the agreement. The Convention allows the Protocols to expand on and modify the remedies set forth in the Convention.

Even though the Convention encourages enforceability of contracts and party autonomy with respect to the debtor and creditor rights,⁴¹ it also provides creditors with an array of

⁴⁰ *Id.* art. 29(5).

⁴¹ *Id.* arts. 11 and 12.

default remedies.⁴² The application of the relevant remedies depends on the characterization of the international interest as either a security interest of the chargee or an ownership interest of the lessor/conditional seller. Both categories of creditors may enforce the available remedies without having to obtain a court order. However, Contracting States whose laws and public policy do not recognize self-help enforcement may submit a declaration stating that all remedies could be enforced only with leave of a court.⁴³

The application of domestic law remedies is not entirely supplanted by the remedies set forth in the Cape Town Convention and its Protocols. Nevertheless, the application of the Cape Town system remedies is mandatory for enforcement of an international interest.⁴⁴

In addition to the conventional remedies in case of a default, Article 13 of the Convention sets forth some protections for international interests allowing the creditor to seek a relief pending final determination of its claim. When seeking provisional relief, the creditor must provide adequate evidence of i) default of the debtor and ii) the debtor's consent to the availability of such relief. This type of pre-judgment relief may not correspond to the

⁴² Pursuant to Article 12, "any additional remedies permitted by the applicable law... may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15." *Id.*

⁴³ *See also* Honnebier, at 390. On the concern of the constitutionality of the Cape Town Convention remedies in Argentina *see* Rogelio N. Maciel, *The Cape Town Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment: An Argentine Perspective*, 29 AIR & SPACE L. 219, 224 (2004) and in Brazil *see* Terena Penteadou Rodrigues, *International Regulation of Interests in Aircraft: The Brazilian Reality and the UNIDROIT Proposal*, 65 J. AIR L. & COM. 279, 287 (2000).

⁴⁴ Sandeep Gopalan, *Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment*, 9 L. & BUS. REV. OF THE AMERICAS 255, 266 (2003).

types of remedies commonly available under domestic laws.⁴⁵ If the creditor succeeds in persuading the court that it is entitled to a provisional relief, its chances of obtaining a final court order are very high.

5. Insolvency

One of the critical achievements of the Cape Town system was to provide adequate protections for international interests in the debtor's insolvency. The starting point is Article 30 which requires recognition of an international interest by the insolvency administrator handling the debtor's insolvency proceedings. Accordingly, the insolvency administrator may not challenge the effectiveness of the international interest on the grounds that the creditor has not satisfied all the requirements applicable to a comparable interest under the domestic law. This fundamental rule is supplemented by the Protocols which regulate the actual enforcement of remedies while the insolvency proceedings are pending.

The Aircraft and Space Assets Protocols provide two alternative approaches to the rights of creditors while the Railway Assets Protocol incorporates three different approaches that Contracting States may choose from. These alternatives protect the international interest but may suspend the enforcement of the creditor's rights.⁴⁶

⁴⁵ Gilles Cuniberti, *Advance Relief under the Cape Town Convention*, 2012 CAPE TOWN CONVENTION J. 79 (2012).

⁴⁶ On the substance and effect of these insolvency alternatives see Kristin van Zwieten, *The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives*, 2012 CAPE TOWN CONVENTION J. 53 (2012).

II. CAPE TOWN CONVENTION PROTOCOLS

The Cape Town Convention was drafted and designed to operate with Protocols.⁴⁷ Article 49 of the Convention is truly innovative in respect to how a convention may enter into force in that it suspended its entry into force until at least one of the Protocols has entered into force.⁴⁸ In order for the Convention to enter into force with regards to a specific category of equipment, three requirements must be fulfilled: i) states must deposit three instruments either of ratification, acceptance, approval or accession at UNIDROIT, ii) a time period of three months must elapse from the day the third instrument is deposited and iii) the conditions for a Protocol to take effect must be satisfied.⁴⁹ The Protocols were given controlling powers over the Convention itself in respect to the particular types of equipment covered therein.⁵⁰ The Convention is not equipment-specific and “will in principle apply to any category of object to which it relates.”⁵¹

The Convention became effective with respect to aircraft equipment after the terms of Article XXVIII(1) of the Aircraft Protocol were satisfied on March 1 of 2006. This date was three months after the eight instruments of ratification, acceptance, approval or

⁴⁷ In fact, the Cape Town Convention is unable to operate on its own without the relevant Protocol(s). B. Patrick Honnebier & J. Michael Milo, *The Convention of Cape Town: The Creation of International Interests in Mobile Equipment*, 1 EUR. REV. OF PRIVATE L. 3, 6 (2004).
⁴⁸ See further Lorne S. Clark, *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines*, 69 J. AIR L. & COM. 3, 6 (2004).
⁴⁹ Cape Town Convention, art. 49(1).
⁵⁰ Iwan Davies, *The New Lex Mercatoria: International Interests in Mobile Equipment*, 52 INT'L & COMP. L.Q. 151 (2003).
⁵¹ Roy Goode, *International Interest*, at 20.

accession to the Aircraft Protocol were deposited.⁵² The Aircraft Protocol remains the only one thus far to have entered into force.⁵³ The Protocols are as flexible as the Convention in that they allow Contracting States to submit declarations with respect to the applicability of certain provisions within the Contracting States' territory. In addition, the Protocols promote the principles of party autonomy and freedom of contract.

A. AIRCRAFT

As of February 28, 2014, 54 countries are Contracting States to the Aircraft Protocol, including Brazil, Canada, Chile, Mexico, Panama, and the United States.⁵⁴ The Aircraft Protocol covers specific aircraft objects that are not used in military, customs or police services. Article I(2)(c) of the Aircraft Protocol defines aircraft objects to include airframes, aircraft engines, and helicopters.

Airframes are defined in the Aircraft Protocol as “airframes of the type certified by the competent aviation authority to transport at least 8 persons including crew or goods in excess of 2750 kilograms, together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines).”⁵⁵ Aircraft engines are defined as “engines that are powered by jet propulsion or turbine or piston technology and, in the case of jet propulsion engines, they have at least 1750lb of thrust and, in the

⁵² The Legal Advisory Panel of the Aviation Working Group, *Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol 6* (Rev. Nov. 2012), available at <http://www.awg.aero/assets/docs/Practitioner-Guide-November-2012.pdf> (last accessed Feb. 20, 2014).

⁵³ See *Status – Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, UNIDROIT, <http://www.unidroit.org/status-2001capetown-aircraft> (last accessed Feb. 26, 2014).

⁵⁴ *Id.*

⁵⁵ Aircraft Protocol, art. I(2)(e).

case of turbine-powered or piston-powered engines have at least 550 rated take-off shaft horsepower.”⁵⁶ Finally, helicopters are defined as “heavier-than-air-machines supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes and which are of the type certified by the competent aviation authority to transport at least 5 persons including crew or goods in excess of 450 kilograms.”⁵⁷ The term helicopter also covers all accessories, parts and equipment.⁵⁸

The Aircraft Protocol broadens the scope of application set forth by Article 3(1) of the Convention. According to Article IV(1) of the Aircraft Protocol, the Convention not only applies when debtors are situated in a Contracting State at the time of the conclusion of an agreement creating an international interest, but also when helicopters and airframes pertaining to aircrafts are registered in the aircraft registry of a Contracting State.

According to Article VII(c) of the Aircraft Protocol, an aircraft object must be uniquely identified by a manufacturer’s serial number, the name of the manufacturer and its model in order to effectively constitute an international interest. Additionally, pursuant to the regulations issued by the Supervising Authority, the International Civil Aviation Organization (ICAO) of the International Registry, the same identification elements must be provided when registering an international interest in the International Registry.⁵⁹

⁵⁶ *Id.* art. I(2)(b).

⁵⁷ *Id.* art. I(2)(l).

⁵⁸ *Id.*

⁵⁹ See International Civil Aviation Organization [ICAO], *Regulations and Procedures for the International Registry* §5.4, Doc. 9864 (5th ed., 2013) available at http://www.icao.int/publications/Documents/9864_5ed.pdf (last accessed Feb. 7, 2014) [hereinafter ICAO, *Regulations*]. The Regulations and Procedures are published by the International Civil Aviation Organization (ICAO). Additional registration requirements include: the identity and electronic signature of the registering person and the identity of the named parties.

The Aircraft Protocol provides a set of default remedies that supplement those included in Chapter III of the Convention. Among them is the remedy of de-registration of the aircraft object from the aircraft registry of the Contracting State and the object's removal from the territory in which it is situated.⁶⁰

B. RAILWAY

The Railway Assets Protocol was adopted in February of 2007, and applies exclusively to railway rolling stock. In order for the Protocol to enter into force, Article XXIII requires four ratifications, acceptances, approvals or accessions, as well as the Secretariat's deposit of a certificate confirming that the International Registry is fully operational. As of February of 2014, only one country has ratified the Protocol.⁶¹

Railway rolling stock is defined by Article I(2)(e) of the Railway Assets Protocol as “vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.” As opposed to the Aircraft Protocol that provides uniform identification criteria for aircraft objects both for the constitution of an international interest and for its registration, the Railway Assets Protocol governs the identification criteria for constitution and registration of international interests in railway rolling stock differently. Unlike in the

⁶⁰ See Aircraft Protocol, art. 9(1).

⁶¹ See *Status – Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock*, UNIDROIT, <http://www.unidroit.org/status-2007luxembourg-rail> (last accessed Feb. 26, 2014).

aviation industry, not all railway rolling stock subject to the Protocol is uniquely identifiable by a permanent designation.⁶²

Article V of the Railway Assets Protocol provides that an agreement by which an international interest is constituted must identify the railway rolling stock by one of the following four criteria: i) a description of the railway stock by item, ii) a description of the railway stock by type, iii) a statement that the agreement covers all present and future railway rolling stock, or iv) a statement that the agreement covers all present and future railway rolling stock except for specified items or types. For registration purposes of international interests in railway rolling stock, the Protocol states that a system must be implemented by the Supervising Authority for the allocation of identification numbers by the Registrar, enabling the unique identification of items of railway rolling stock.⁶³

Similar to the Aircraft Protocol, Chapter II of the Railway Assets Protocol provides for remedies in addition to those included in the Convention. For instance, a creditor may, when the debtor has previously agreed, procure the export and physical transfer of railway rolling stock from the territory in which it is situated.⁶⁴

⁶² Howard Rosen, *The Luxembourg Rail Protocol – Extending Cape Town Benefits to the Rail Industry*, UNIF. L. REV. 612 (2012), available at <http://www.unidroit.org/english/publications/review/articles/2012-4-rosen-e.pdf> (last accessed Feb. 26, 2014).

⁶³ Luxembourg Protocol, art. XIV(1). *See also* Rosen, at 613.

⁶⁴ Luxembourg Protocol, art. VII(1).

As global trade grows, railroads will be relied upon to transport increasing volumes of goods.⁶⁵ This is true not only within Europe but also for the cross-border movement of rail cars between the three countries of the North American Free Trade Agreement (NAFTA), Latin America and Africa.⁶⁶ Accordingly, this Protocol is not only of interest to the European Union (EU) Member States where trains and other railway objects frequently cross borders, as argued by some observers.⁶⁷

In Latin America, rail transportation has been historically heavily regulated by governments, even though more recently the industry has opened up to private investments. This changed in policy occurred largely because governments were unable to continue to invest in rail infrastructure and thus, with no other options, were forced to privatize some of it.⁶⁸

Countries in North America may become interested in the Railway Protocol in light of the significant increase in shipments of crude oil from 4,700 carloads in 2006 to 400,000 in 2013.⁶⁹ The Mexican government introduced a railroad bill in early 2014 to open up the industry to competition in cross-border rail transportation between the United States

⁶⁵ This is despite the decline in freight carried by rail since the 1970s that was caused by underfunding. Howard Rosen, *The Regimen of the Railway Rolling Stock Protocol*, 1 EUR. REV. OF PRIVATE L. 26, 29 (2004).

⁶⁶ On the need of African nations to improve their infrastructures and acquire new rolling stock *see id.* at 30. For the long list of rail infrastructure projects in Central and Latin America *see* Rafael Castillo-Triana, *The Relevance of the Luxembourg Protocol for Central and South America*, 12 UNIF. L. REV. 461, 463-4 (2007).

⁶⁷ *See*, for instance, Honnebier, at 384.

⁶⁸ John M. Wilson, *Mobile Equipment Financing in Latin America: Application of the OAS Model Law, the Cape Town Convention and the Luxembourg Rail Protocol*, 12 UNIF. L. REV. 473, 477-8 (2007).

⁶⁹ Commonly, North American railroads own engines and track but not the tank cars, 99% of which is owned by leasing companies. Current generation tanks cost between USD\$120,000 and 175,000. Laura Stevens, *BNSF Railway to Buy New Tank Cars to Transport Crude Oil*, WALL STREET JOURNAL (Feb. 21, 2014).

and Mexico. Currently, this transportation channel is controlled by two railroads: the Mexican unit of Kansas City Southern and Ferromex.⁷⁰ These two companies acquired a governmental concession to operate cross-border rail traffic for 30 years.⁷¹ The bill, if enacted, will open up access to cross-border rail transportation to new railroad companies.

C. SPACE ASSETS

The Space Assets Protocol, adopted in March of 2012, has the highest threshold of ratifications to enter into force as compared to the other Protocols. According to Article XXXVIII(1)(a), it must be ratified by at least ten countries. As of February of 2014, no country has ratified it.⁷²

The Space Assets Protocol applies to space assets defined in Article I(2)(k) as “any man-made uniquely identifiable asset in space or designed to be launched into space, and comprising (i) a spacecraft, such as a satellite, space station, space module, space capsule, space vehicle or reusable launch vehicle..., (ii) a payload (whether telecommunications, navigation, observation, scientific or otherwise) in respect of which a separate registration may be effected in accordance with the regulations, or (iii) a part of a spacecraft or payload such as a transponder, in respect of which a separate registration may be effected in accordance with the regulation...” The Space Assets Protocol applies

⁷⁰ Juan Montes, *Railroads Fight Mexican Bill*, WALL STREET JOURNAL (Feb. 20, 2014).

⁷¹ *Id.*

⁷² *See Status – Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, <http://www.unidroit.org/status-2012-space> (last accessed Feb. 26, 2014). Similar to the Railway Assets Protocol, under Article XXXVIII(1)(b), its entry into force is also subject to the deposit by the Supervising Authority of a certificate confirming that the International Registry is fully operational.

not only to those assets that have already been launched into space, but also to security agreements covering objects designated to be launched into space that have reached a point of manufacture that they can be identified within the definition of space asset.

Because of the similarity between nature of the assets covered by the Aircraft Protocol and the Space Assets Protocol, there might an issue as to which Protocol should apply. Article III(3) of the Space Assets Protocol explicitly provides that it does not apply to assets falling under the “aircraft objects” definition included in the Aircraft Protocol. Furthermore, in order to facilitate the distinction between space assets and aircraft objects, Article III(3) of the Space Assets Protocol focuses on the purpose of the specific asset. For instance, if the asset is primarily designed to be used in space, the Space Assets Protocol applies even if such an object is not in space.

With regards to the identification of assets for the purpose of constituting an international interest, Article VII(1) of the Space Assets Protocol follows the Luxemburg Protocol’s generic approach; it requires the space asset to be described by item, type, by a statement that the agreement covers all present and future space assets or by a statement that the agreement covers all present and future space assets except for specified items or types. With respect to the description for registration purposes of an international interest in space assets in the International Registry, Article XXX of the Space Assets Protocol provides that the criteria for identification provided by the regulations issued by the Supervising Authority shall be followed.

The Space Assets Protocol provides for limitations on the creditors' exercise of default remedies. Among these limitations is the public service limitation, which, according to Article XXVII(3), confines the ability of a creditor holding an international interest in a space asset that is subject to a public service notice to exercise any of the remedies provided by Chapter III of the Convention, as well as Chapter II of the Protocol on Space Assets, if the enforcement of such remedies would make the space asset unavailable for the provision of the relevant public service. Financing of space assets may be sensitive due to certain assets' importance to national security and other public interests.⁷³

One of the issues extensively discussed during the negotiations related to the enforcement of remedies was in respect to a space object that is attached to another object. The concern raised highlighted the potential impairment of the ownership rights to an object that is not subject to enforcement but it is connected to one against which remedies are being enforced. Ultimately, the working group decided to leave this matter to inter-creditor agreements which are already commonly utilized in practice.⁷⁴ In addition, in the context of enforcing remedies, the creditor is more interested in acquiring constructive control, as opposed to actual possession of the object, in order to gain access to the economic value of the object, rather than any re-sale value after the object has been repossessed.⁷⁵

⁷³ Zhao Yun, *Revisiting Selected Issues in the Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets*, J. OF AIR L. AND COMM. 805, 807 (2011).

⁷⁴ Mark J. Sundahl, *The Space Assets Protocol One Year Later: An Update and Reassessment*, 26 AIR & SPACE L. 1, 5 (2013).

⁷⁵ See Stanford & Porras.

At the time of the drafting of the Protocol, only a handful of states had any kind of domestic space legislation. The U.S. law could be applied to the financing of objects in the outer space, but it has many gaps.⁷⁶

Financing of satellites not only involves the acquisition of equipment, but also incidental costs such as launching and insurance.⁷⁷ Unlike the equipment covered by the other two Protocols, creditors financing space assets are looking primarily at the revenue generated by their collateral as the primary source of repaying the loan.⁷⁸ The definition of debtor's rights in Article I(2) of the Space Assets Protocol has been broadened beyond the definitions in the other two Protocols to expressly include "rights to payment or other performance due or to become due to a debtor with respect to a space asset."⁷⁹

III. IMPLEMENTATION OF THE PROTOCOLS AND THE INTERNATIONAL REGISTRY

All three Protocols provide for the establishment of an international registry. Only the international registry under the Aircraft Protocol has been established, and the other two are expected to be set up in the near future as the Protocols enter into force. Consequently, this Section examines the establishment, administration, operations and results of the International Registry for notices of international interests relating to aircraft objects.

⁷⁶ Paul B. Larsen, *Future Protocol on Security Interests in Space Assets*, 67 J. AIR L. & COM. 1071, 1073 (2002).

⁷⁷ Olivier M. Ribbelink, *The Protocol on Matters Specific to Space Assets*, 1 EUR. REV. OF PRIVATE L. 37, 38 (2004).

⁷⁸ See Stanford & Porras.

⁷⁹ See Zhao Yun, *Revisiting Selected Issues in the Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets*, J. OF AIR L. & COMM. 805, 815 (2011).

The ICAO selected Aviareto Ltd. to establish the International Registry in a public bidding process.⁸⁰ Aviareto Ltd, a company based in Dublin, Ireland, is a joint venture between SITA (80%),⁸¹ a specialist in air transport communications and information technology solutions, and the Irish Government (20%).⁸² It began designing the registry system pursuant to a contract with ICAO signed on November 23, 2004.⁸³ The International Registry became operational March 1, 2006.⁸⁴

The International Registry is operated on a non-profit basis and uses the fees for registrations and other services to cover the cost of its operation. Since its launch in March 2006 through September 2013, the International Registry processed 432,000 registrations and 500,000 searches.⁸⁵ It is accessible only by electronic means 24 hours a day.

In addition to the significant number of registrations and searches, the success of the International Registry may be measured by the cost of its insurance coverage necessary to cover the risks of its operations. In 2006, USD\$1 million of insurance coverage for the International Registry cost USD\$16,000, but in 2010 it dropped to around USD\$4,000.⁸⁶

⁸⁰ Rob Cowan & Donal Gallagher, *The International Registry for Aircraft Equipment – The First Seven Years, What We Have Learned*, 45 U.C.C. L.J. art. 1 (2014).

⁸¹ See *SITA – Specialists in Air Transport Communications and IT Solutions*, SITA, <http://www.airport-technology.com/contractors/traffic/sita/> (last accessed Feb. 19, 2014).

⁸² See Atwood, art. 2. Aviareto also expressed an interest in functioning as the registrar for the future international registry under the Space Assets Protocol. See also Stanford & Porras, art. 4.

⁸³ ELMAR MARIA GIEMULLA & LUDWIG WEBER, INTERNATIONAL AND EU AVIATION LAW: SELECTED ISSUES 208 (2011).

⁸⁴ *Id.* at 209.

⁸⁵ Rob Cowan & Donal Gallagher, *The International Registry for Aircraft Equipment – The First Seven Years, What We Have Learned*, 45 U.C.C. L.J. art. 1 (2014).

⁸⁶ See Atwood.

The reduction in the costs of insurance resulted in the increase in the amount of the Registry's insurance coverage from USD\$35 million to USD\$70 million.⁸⁷

The operation of the International Registry is regulated by the Cape Town Convention, the Aircraft Protocol and the Regulations and Procedures for the International Registry (hereinafter the "Regulations").⁸⁸ The International Registry operates differently than domestic registries for aircraft objects, which are largely transactional-registration systems that record actual documents creating or conveying rights such as under sale and security agreements.⁸⁹ The International Registry is a notice-filing system in which mere notices of possible existence of an international interest are registered. Registration in the International Registry does not require the submission of the actual sale, security or lease agreement and may be done in anticipation of concluding an agreement, in which case the registration relates to a prospective international interest.

The International Registry places the responsibility for the accuracy and legality of the information squarely on creditors and persons who register on the creditors' behalf. This set-up reduces the risk of Registry errors and, thus, its liability. The registrar's role is administrative or mechanical in nature and limited to verifying that all the required information has been provided by the user and that the fees have been paid. The registrar cannot provide legal advice, such as whether the international interest is fully effective, whether the creditor has priority, etc.

⁸⁷ *Id.*

⁸⁸ *See ICAO, Regulations.*

⁸⁹ Mooney, at 5.

Full services of the International Registry, including the ability to submit registration forms, are available only to authorized users. Guests may perform only limited functions such as a search the Registry's database. Section 4 of the Regulations sets out the requirements for accessing the International Registry for the purpose of effecting registrations. Users cannot submit registration forms to the International Registry unless they have first been authorized by the Registrar. During the approval process, the Registrar must verify the identity of the applicant and establish whether the administrator is entitled to act on behalf of the entity.⁹⁰

The International Registry does not replace domestic aircraft registries established under the Chicago Convention.⁹¹ Those registries continue to operate and register various transactions, such as sales and other conveyances of aircraft objects. However, a registration in such registries does not protect the creditor's interest internationally.

There is no coordination among domestic registries with respect to providing access to the International Registry. Under Article 18 of the Cape Town Convention, each Contracting State may designate an entity as the exclusive conduit through which registration forms to the International Registry must be submitted.⁹² If the country has designated an exclusive point of entry, pursuant to Section 12.6 of the Regulations, a

⁹⁰ See Atwood, art. 2.

⁹¹ See the U.S. Federal Administration Aviation Registry at: *Aircraft Registry*, FEDERAL AVIATION ADMINISTRATION, http://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/ (last accessed Feb. 19, 2014).

⁹² "The Contracting State making a designation may specify the requirements to be satisfied before the data are transmitted to the Registry." ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT, OFFICIAL COMMENTARY 34 (3rd ed. 2013) [hereinafter GOODE, OFFICIAL COMMENTARY].

registration may not be effected other than through this entry point.⁹³ Users must thus follow the procedures for accessing the International Registry that may be established differently by each country.⁹⁴

IV. THE PROTOCOL ON MINING, AGRICULTURAL AND CONSTRUCTION EQUIPMENT

A. HISTORY

The UNIDROIT General Assembly, at its 72nd session, held on December 5, 2013, adopted its work programme for the triennial period of 2014-2016 that enumerates a number of legislative activities, and under the heading of “secured transactions” it lists “Preparation of other Protocols to the Cape Town Convention.”⁹⁵ The list has three items, including the Protocol on Matters Specific to Agricultural, Construction and Mining Equipment (the “MAC Protocol”).⁹⁶

At the request of a number of member states during the preparation of the three previous Protocols, the Governing Council added the MAC Protocol to its agenda in 2006.⁹⁷ In 2007, input from member as well as non-member states was solicited leading to the preparation of an initial draft of the MAC Protocol in 2008. This draft was again

⁹³ Ronald C.C. Cuming, *The International Registry for Interests in Aircraft: An Overview of its Structure*, UNIF. L. REV. 18, 34 (2006) [hereinafter Cuming, *International Registry*].

⁹⁴ Cuming, *Overview*, at 80.

⁹⁵ See UNIDROIT Work Programme for the Triennial Period 2014-2016, UNIDROIT, <http://www.unidroit.org/about-unidroit/work-programme> (last accessed Feb. 13, 2014).

⁹⁶ *Id.*

⁹⁷ LENA PETERS, INTERNATIONAL INSTITUTE FOR UNIFICATION OF PRIVATE LAW 46 (2011).

circulated for comments with the Council requesting the Secretariat, in 2009, to refine the scope for the future Protocol.⁹⁸

Since the initiation of this project in 2006, the MAC Protocol has attracted significant attention particularly from the industry representatives and end-users of equipment. This attention increased after the completion of the Space Assets Protocol in 2012. The majority of support letters and comments have come from the industry players such as manufacturers and dealers of equipment. Nonetheless, the input from the end-users (*e.g.* farmers) will be critical to the success of the entire project. A number of end-users' representative bodies, such as the World Farmers' Organisation (WFO), will be consulted in the upcoming months.⁹⁹

B. PROJECTED ECONOMIC BENEFITS

The traditional argument for an international instrument that facilitates secured transactions is its positive impact on the cost of credit. As mentioned above, the Aircraft Protocol has already reduced the cost of financing for manufacturers, dealers, lessors as well as end-users. When the scope of an international instrument covers the types of assets that are used in critical sectors of the economy that employ large segments of the population, the benefits will go beyond the stimulation of economic growth. For instance, when the cost of credit for agricultural machinery is reduced, farmers may be

⁹⁸

Id.

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WFO is holding its General Assembly meeting in Buenos Aires, Argentina, March 25-29, 2014. During the meeting, it will consider the work of UNIDROIT in the area of contract farming. The program is available at: *WFO General Assembly 2014, Buenos Aires*, WORLD FARMERS' ORGANIZATION, <http://www.wfo-oma.org/component/k2/wfo-general-assembly-2014-buenos-aires-argentina.html> (last accessed Feb. 14, 2014).

able to acquire new and more items, allowing them to increase the food production, leading to lower prices and positively impacting the hunger problem. However, many developing countries lack adequate infrastructure that prevents, for instance, producers, growers and manufacturers to market their products better and more effectively, as a result of which they are unable to increase production and/or sell for an adequate price.

1. Factors affecting economic impact

Estimating or measuring the potential economic impact of the MAC Protocol is affected by a number of direct (*e.g.*, the number of ratifications) and indirect (*e.g.*, the availability of tax credits) factors. For instance, U.S. farmers and businesses that utilize heavy equipment were allowed to deduct up to USD\$500,000 from their taxable income if they spend up to USD\$2 million a year on acquisition of new equipment.¹⁰⁰ These tax benefits have undoubtedly contributed to the growth in sales of Deere's equipment.¹⁰¹

Another example of an indirect factor is the existence of a secondary market that would allow original lenders to sell their rights to payment, whether in the forms of accounts receivable or chattel paper, *i.e.*, an obligation of the buyer of equipment to pay the purchase price which is secured with the acquired equipment. The presence of a liquid securitization market in which receivables are bundled and sold off in the form of securities may also have an impact on the cost of credit under the MAC Protocol, which will not go as far as reforming domestic laws that govern the sales of receivables and securitizations.

¹⁰⁰ Bob Tita, *Deere Earnings Grow on Boost in Equipment Sales*, WALL STREET JOURNAL (Feb. 12, 2014).

¹⁰¹ *Id.*

The economic impact of selling and using new farming equipment such as combines and tractors also depends on farmers' incomes, prices of commodities and projected revenues. When the crop yields or incomes are expected to decrease, the farmers might not be interested in acquiring new machinery, irrespective of favorable credit terms offered by lenders.¹⁰² In addition, while agricultural production of particular commodities may be lower during some seasons the demand for other equipment covered by the MAC Protocol, such as construction machinery, may increase.¹⁰³ The industries that utilize MAC equipment are cyclical and their incomes may vary season to season.

The estimates of economic benefits also depend on the scope of the MAC Protocol and the deficiencies in domestic secured transactions laws. Countries that have efficient secured transactions laws already provide adequate protections to creditors, but that is not the case in a significant majority of developing countries.¹⁰⁴ The MAC Protocol would benefit primarily these countries in providing an alternative to their outdated legal regime for the financing of equipment. It could even entice these countries to overhaul their general secured transactions systems having realized the economic benefits derived from the ratification of the MAC Protocol.

¹⁰² The United States Department of Agriculture projected significant decrease in revenue for U.S. farmers from corn and soybeans, of USD\$ 11 and USD\$6 billion, respectively. Jesse Newman, *USDA Projects U.S. Net Farm Income to Decline %27 in 2014*, WALL STREET JOURNAL (Feb. 12, 2014).

¹⁰³ John Deere expects sales of construction machinery to increase by 10% from 2013. Bob Tita, *Deere Earnings Grow on Boost in Equipment Sales*, WALL STREET JOURNAL (Feb. 12, 2014). Caterpillar also expects the sales of its construction machinery to increase by 5% in 2014. James R. Hagerty, *Caterpillar Expects Sales Will Stabilize*, WALL STREET JOURNAL (Jan. 28, 2014).

¹⁰⁴ See THE WORLD BANK, DOING BUSINESS, GETTING CREDIT RANKINGS (2013), available at <http://www.doingbusiness.org/rankings> (last accessed Feb. 28, 2014).

Given the variety of factors that affect sales and financing of equipment, the projection for economic benefits may significantly vary. For instance, one study prepared by the Center for the Economic Analysis of Law (CEAL) estimated that the MAC Protocol would facilitate using USD\$2 trillion in equipment as collateral for loans, and that sales of new equipment would increase by USD\$600 billion in the next five to seven years.¹⁰⁵ However, CEAL qualified its projections by the uncertainty as to how many countries will become parties to the MAC Protocol.¹⁰⁶

The MAC Protocol may result not only in economic growth in the general terms measured by an increase in the overall gross domestic product (GDP), but also address a number of social issues such as food security, modern infrastructure and job growth. For instance, many rural farmers are unable to market their produce in neighborhood markets and are relegated to selling locally for a low price. This situation changed for some Indian farmers when a road which usually took three hours to travel by foot was paved by bulldozers, and now the asphalt road allows the farmers to reach the same destination within 25 minutes by car. As a result, the farmers have better access to seeds, fertilizers and potential buyers for their products.¹⁰⁷

¹⁰⁵ CENTER FOR THE ECONOMIC ANALYSIS OF LAW [CEAL], EXTENDING UNIDROIT'S CAPE TOWN CONVENTION TO MINING, AGRICULTURAL AND CONSTRUCTION EQUIPMENT: ECONOMIC ISSUES 1 (2013), available at <http://www.unidroit.org/english/governments/councildocuments/2013session/cd92-05b-e.pdf> (last accessed Feb. 14, 2014) [hereinafter CEAL].

¹⁰⁶ *Id.*

¹⁰⁷ Kartik Goyal, *India's Farmers Benefits from Better Roads*, BLOOMBERG BUSINESSWEEK (Jan. 16, 2014), available at <http://www.businessweek.com/articles/2014-01-16/indias-farmers-benefit-from-better-roads-which-may-help-singh> (last accessed Feb. 25, 2014).

2. Impact on manufacturers, dealers and end-users

MAC equipment plays an important role in the overall global economy with billions of UD dollars in annual sales. For instance, Caterpillar forecasted sales of its equipment as USD\$56 billion in 2014.¹⁰⁸ Sales numbers of this magnitude and further increases may be crippled without an international legal framework that adequately and efficiently protects the rights of lenders. The following paragraphs illustrate some of these benefits as highlighted in a number of studies, letters and statements made by influential industry associations and end-users.

The U.S. President's Export Council, in its letter dated March 12, 2013, sought the support of the U.S. President and the Administration in the preparation of the MAC Protocol.¹⁰⁹ The letter highlighted the fact that many manufacturers do not have any captive finance companies that would finance wholesale and retail sales of their equipment overseas.¹¹⁰ The benefits from this new framework should accrue primarily to small and medium-sized enterprises (SMEs) involved in exports of equipment.¹¹¹ In addition to highlighting the economic benefits, the letter also stressed the potential positive impact of the MAC Protocol on global food security.¹¹²

In a joint letter submitted to the UNIDROIT Secretary General, the Equipment Leasing and Finance Association, American Rental Association, Associated Equipment

¹⁰⁸ James R. Hagerty, *Caterpillar Expects Sales Will Stabilize*, WALL STREET JOURNAL (Jan. 28, 2014).

¹⁰⁹ The letter is available at: The President's Export Council, *Letter to the President of the United States of America* (Mar. 12, 2013), available at http://trade.gov/pec/docs/PEC_Letter10_UNIDROIT_031213.pdf (last accessed Feb. 13, 2014).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

Distributors, Association of Equipment Manufacturers, and North American Equipment Dealers Association also highlighted the economic benefits of the future MAC Protocol, including a reduction in the cost of financing, but also pointed to the potential growth in jobs resulting from increased manufacturing, sales and utilization of MAC equipment.¹¹³ The joint letter also emphasized that employment growth as well as technological innovation, to some degree, depends on reliable export financing and access to capital markets.¹¹⁴

Numerous other letters have been sent to the UNIDROIT Secretariat urging completion of the MAC Protocol project. The Los Angeles County Business Federation (BizFed) that represents over 250,000 businesses from the mining, agricultural and construction sector highlighted the importance of the MAC Protocol as a tool that could facilitate integration of businesses into supply chains.¹¹⁵ BizFed indicated in its letter that a future MAC Protocol could lead to an increase in sales of MAC equipment by about USD\$600 billion over the next few years.¹¹⁶ Finally, BizFed highlighted the potential positive impact on social and economic initiatives including food security and infrastructure building.¹¹⁷

¹¹³ The letter is available at: AEM et. al., *Letter to Jose Angelo Estrella Faria, Secretary-General to UNIDROIT* (Apr. 2, 2013), available at <http://www.elfaonline.org/advocacy/fed/PDFs/CapeTownLetterUNIDROIT.pdf> (last accessed Feb. 13, 2014).

¹¹⁴ *Id.*

¹¹⁵ The letter is available at: *Act Now: Support New Protocol For Key Export*, BIZFED (Mar. 29, 2013), <http://www.bizfed.org/action-alerts/act-now-support-new-protocol-key-export-sectors> (last accessed Feb. 13, 2014).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Increased investment in MAC equipment is needed in all developing countries. Most economies that rely on agricultural production as the main contributor to growth are plagued by low rates of mechanization that reduces efficiency and output. For instance, in 2010 the International Food and Policy Research Institute published its “Policy Note No. 22,” which found that in the late 1990s, only 8% of farmland in West Africa was cultivated with a tractor, a level significantly lower than in other regions.¹¹⁸ The report, specifically focusing on Nigeria, concluded that the low level of agricultural mechanization is caused primarily by a lack of i) access of credit, ii) manufacturing and repair services, iii) necessary infrastructure, and iv) legal and regulatory capacity to protect the rights of the owners of the machinery.¹¹⁹ The Report found that Nigerian farmers had limited access to mechanized agricultural tools such as tractors.¹²⁰

Mechanization of agricultural production has also been a growing trend elsewhere. For instance, in India, the number of tractors grew from 9,500 in 1970 to 2.6 million in 2000, while the number of draught animals decreased from 82.6 to 60.3 million, demonstrating “a significant increase and shift in the sources of farm power in India.”¹²¹ One of the

¹¹⁸ Hiroyuki Takeshima and Sheu Salau, *Policy Note No. 22: Agricultural Mechanization and the Smallholder Farmers in Nigeria*, INT’L FOOD POLICY RESEARCH INSTITUTE NIGERIA STRATEGY SUPPORT PROGRAM 1 (2010), available at http://www.ifpri.org/sites/default/files/publications/nsspnp22_0.pdf (last accessed Feb. 25, 2014).

¹¹⁹ *Id.*, at 4.

¹²⁰ *Id.* at 1. The report explains:

For smallholder farmers, modern tools – even if renter or shared among users – are too costly. Many farmers prepare their farms at the same time of the year, thereby raising rental fees for tools such as tractors. Sharing tools with other farmers often brings in risks of mismanagement and breakdown. Smallholder farmers are particularly averse to these types of risks...Consequently, very few Nigerian farmers own, share, or rent modern agricultural machinery.

Id. at 3.

¹²¹ Gajendra Sing, *Agricultural Mechanization in India*, in 20 MECHANIZATION FOR RURAL DEVELOPMENT, A REVIEW OF PATTERNS AND PROGRESS FROM AROUND THE WORLD 107 (Josef

primary reasons for this increase in mechanization was the creation of credit facilities to allow farmers to purchase equipment.¹²² During the “Green Revolution” in the 1970s, banks began to open branches in rural areas, and thus were able to start providing credit to the farming population.¹²³

Access to credit has accelerated sales of agricultural machinery in many countries. For instance, a 2009 study found that “70 percent of the agricultural machinery sales in Brazil could be explained by the availability of credit.”¹²⁴ The Programme for the Modernization of the Fleet of Agricultural Tractors, Implements and Harvesters, launched in 2000, established a “rural credit scheme designed to finance the renovation of the agricultural machinery fleet.”¹²⁵ As a result, in 2009 almost 45,000 wheeled tractors were sold in Brazil.¹²⁶ Efforts like this have helped Brazil transform from a net importer to a net exporter of farming machinery.¹²⁷

Similarly, the countries in Central Asia lack access to adequate sources of financing which prevent their farmers from acquiring agricultural machinery and thus making their production more efficient.¹²⁸

¹²² Kienzle et. al. ed., 2013), available at <http://www.fao.org/docrep/018/i3259e/i3259e.pdf> (last accessed Feb. 26, 2014).

¹²³ *Id.* at 106.

¹²⁴ *Id.* at 107.

¹²⁵ Francisco de Assis de Carvalho Pinto et. al., *The Development of Farm Mechanization in Brazil*, in 20 MECHANIZATION FOR RURAL DEVELOPMENT, A REVIEW OF PATTERNS AND PROGRESS FROM AROUND THE WORLD 158 (Josef Kienzle et. al. ed., 2013).

¹²⁶ *Id.* at 155.

¹²⁷ *Id.* at 156.

¹²⁸ *Id.* at 157.

¹²⁸ Lawrence Clarke, *Agricultural Mechanization in Countries in Transition in Eastern Europe and Central Asia*, in 20 MECHANIZATION FOR RURAL DEVELOPMENT, A REVIEW OF PATTERNS AND PROGRESS FROM AROUND THE WORLD 179 (Josef Kienzle et. al. ed., 2013).

V. SCOPE OF THE MAC PROTOCOL

The Cape Town Convention expressly provides for adoption of Protocols thereto with respect to the following categories of assets identified in Article 2(3): i) airframes, aircraft engines and helicopters; ii) railway rolling stock; and iii) space assets. As explained above, all three relevant Protocols have already been adopted by UNIDROIT. Article 51(1) of the Cape Town Convention includes the grounds for adoption of future protocols to cover other categories of assets, provided the Depositary considers such extension of the regime feasible. This Article thus authorizes adoption of one or more future protocols with respect to high-value mobile categories of equipment that are uniquely identifiable. This authorization focuses on three aspects of equipment to be potentially covered by a future protocol: i) high-value, ii) mobility and iii) unique identification. The remaining paragraphs in Article 51 set forth the procedures required to prepare a draft of a future protocol, its negotiation, collecting of input and convening of a diplomatic conference.

The following sub-Sections examine the criteria that affect the scope of the future MAC Protocol. The criteria of high value, economic significance and mobility have guided the drafting of the previous three Protocols. These are all important factors that should be taken into account in consideration of the scope. The proposals on the identification of assets to be covered by the MAC Protocol, such as by Harmonized Tariff Schedule (HTS) codes included in annexes and examined in the subsequent sub-Sections, are the tools to implement the decisions with respect to the scope. The HTS codes provide a

useful guidance on the application of some of the approaches to the scope of the MAC Protocol, particularly regarding the value and mobility of equipment.

A. HIGH VALUE

The Preamble to the Cape Town Convention highlights some of the characteristics of assets the financing of which it seeks to facilitate: “Aware of the need to acquire and use mobile equipment of high value or particular economic significance...” High value and economic significance are important features that a category of assets should possess for consideration under a future protocol. The high-value feature is relative to particular types of assets, and none of the Protocols have included a minimum monetary threshold indicating the market price of an asset for it to fall under the scope of the Cape Town regime.

Some minimal value threshold requirements should not be included in the MAC Protocol. Nonetheless, there are arguments on both sides as to whether to include a value criterion in the definition of scope. The main argument against would seem to be the mandate of the Cape Town Convention itself, as set forth in its preamble, which is to facilitate financing of economically significant assets. Undoubtedly, the value of some MAC equipment, primarily those involved in agricultural production will be significantly lower than the value of aircraft and space objects. However, this can be also said of some railway assets. Nonetheless, the economic significance of a combine with a value in the hundreds of thousands of U.S. dollars may be equal to, if not even higher, an aircraft.

It is important to solicit input from the end-users of MAC equipment as to what items are economically significant to them and with respect to which items they have been experiencing difficulties in gaining access to financing. Mr. Rob Napier who is the vice-president of the International Farm Management Association, based in London, the United Kingdom, stated that:

“I consider that appropriate cross border protocols for the movement of agricultural machinery are potentially important. Agricultural machinery is expensive and often only used seasonally so any attempts to achieve more year round use can help reduce costs and improve the efficiency of agricultural production. As more free trade agreements are made it should become easier to move machinery between countries.”¹²⁹

The main argument supporting a value criterion is to exclude low-cost farming and construction equipment. The argument against the extension of the MAC Protocol to those kinds of items of equipment is that it might unduly interfere with the operations of the local secured transactions law or even create an obstacle to the reform and modernization of that law. This concern may be ameliorated by a careful selection of the categories of equipment to be covered by the MAC Protocol. For instance, using the HTS codes that have gained support thus far as the criteria to determine the Protocol’s scope could clearly exclude items of equipment that do not cross borders and have a low market value. It might not be economical for the MAC Protocol to cover low-value agricultural tools that are used only locally.

¹²⁹ Email exchange with NLCIFT staff, February 3, 2014, (on file with NLCIFT).

B. MOBILITY

The assets covered by the previous three Protocols are highly mobile in that they may and do in fact cross borders on a daily basis. A concern has been raised with respect to the mobility of MAC equipment.

Sir Roy Goode in his Official Commentary on the Cape Town Convention notes that “the ingredients of mobility and internationality are not expressly prescribed by the Convention but are considered inherent in the nature of the equipment.”¹³⁰ Despite the inherently mobile nature of the equipment covered by the Cape Town Convention, it has been estimated that about 50% of the aircraft covered by the Aircraft Protocol do not engage in any cross-border movement, and the ratio of railway assets covered by the Railway Assets Protocol is even lower.¹³¹

The Cape Town Convention does not prescribe any specific requirements of mobility that an asset must meet in order to fall under the scope of the Convention and one of its Protocols.¹³² Accordingly, the Convention does not require that an asset must move across the borders daily, weekly or monthly for a future protocol to be developed.

MAC equipment does move across the borders although not with such high velocity as, for instance, aircrafts. The frequency of movement also varies depending on the type of MAC equipment and the business activity in which it is utilized. The following

¹³⁰ GOODE, OFFICIAL COMMENTARY, at 48 and 397.

¹³¹ CEAL, at 22.

¹³² GOODE, OFFICIAL COMMENTARY, at 266.

paragraphs illustrate the movement of some typical MAC equipment in actual transactions.¹³³

1. Mobility under Sales

The CEAL study found that MAC equipment moves across the borders in a number of contexts, but primarily when i) it is sold and exported by the manufacturer to a foreign buyer or dealer and ii) when it is sold to a foreign buyer in a foreclosure sale.¹³⁴ The NLCIFT interviews confirmed this practice, and discovered, for instance, that Bigge Crane and Rigging Co., a California-based company, sells 100-120 cranes, worth between USD\$250,000 to USD\$5 million to foreign buyers annually.¹³⁵ Another example is Titan Machinery's, a CASE dealership based in Arizona, which on a recent occasion sold ten agricultural machines to a customer in Mexico on a rent-to-own basis.¹³⁶

Despite the sales occurring on a cross-border basis, a significant majority of them, based on the NLCIFT interviews, are executed on a cash basis whereby the buyer pays the purchase price in full either before shipment or as a condition of delivery. One of the exceptions where credit sales are quite common is between Canada and the United States. The occurrence of such sales and their frequency could be attributed to the mature and

¹³³ All information in the following paragraphs is based on NLCIFT interviews completed with those in the industry and taken between January and February 2014. All interview notes are on file with the NLCIFT.

¹³⁴ CEAL, at 21-23.

¹³⁵ Interview completed by NLCIFT staff (on file with NLCIFT).

¹³⁶ *Id.*

efficient secured transactions frameworks of both countries that adequately protect the interests of secured creditors, irrespective of the location of the collateral.

2. Mobility in Use

The CEAL study concluded that any reliable data on the cross-border use of equipment is difficult to unearth and did not include an actual example of cross-border use of MAC equipment.¹³⁷ The following paragraphs will illustrate some actual cross-border uses of MAC equipment.

Several decades ago, the service of custom harvesting developed in the agricultural sector of the United States. Custom harvesting involves the hire of a combine or similar equipment to harvest the farmer's crop at a fee. This service allows the farmer to reduce its business costs by not having to purchase a combine, and it is utilized particularly by smaller-size farmers.¹³⁸ Custom harvesters that own such equipment at times provide their services internationally.

For instance, in one such documented instance of cross-border custom harvesting the crop of some ranchers in the U.S. state of Montana was harvested by a Canadian forage harvester. Canadian custom harvesters frequently took a three-day trip to travel to farms in Nebraska. An Alberta (Canada) based custom harvester began his season in June and July in Montana where he chopped alfalfa and barley. In August, he brought his

¹³⁷ CEAL, at 21.

¹³⁸ See Joel Parcell, *Owning a Combine versus Custom Harvesting*, available at <http://agebb.missouri.edu/mgt/mgtnews/00-12/combine.pdf> (last accessed Feb. 10, 2014).

equipment to Alberta to harvest cereal crops and in September took it back to Montana to chop corn.¹³⁹

Some cross-border uses of agricultural equipment also occur south of the U.S. border. These transactions involve primarily true (operating) leases of agricultural equipment to Mexican farmers. As a guarantee of timely satisfaction of all lease obligations, the lessee is required to procure a stand-by letter of credit on which a lessor may draw in the case of default.¹⁴⁰ A number of Mexican agricultural producers move equipment between their farms in Mexicali (Mexico) and California (the United States). The export-import regulations allow the farmers to relocate the equipment without paying export-import duties.

Construction equipment also moves internationally other than when it is sold. For instance, Martifer Group is a multinational company based in Portugal that completes large scale projects in the metallic construction and renewable energy sectors. The company builds structures made of steel, stainless steel, aluminum, and glass facades and also produces components for wind energy, fuel and gas. Martifer projects have included the construction of hotels and residential buildings, airports, shopping centers, sports complexes, etc. It has been estimated by Martifer that 95% of construction equipment is financed through the use of leases and bank loans.¹⁴¹ These loans are repaid from the cash-flow generated by the use of the equipment on construction projects.

¹³⁹ John Dietz, *Border Crossing*, HAY & FORAGE GROWER (May 1, 2003).

¹⁴⁰ Interview completed by NLCIFT staff (on file with NLCIFT).

¹⁴¹ Email between NLCIFT staff and Slovakian proxy holder for Martimer (on file with NLCIFT).

One of the types of construction equipment the company owns is a large crane that it has utilized for a number of projects.¹⁴² The crane weighs over 500 tones and originally cost over 20 million Euros. There are only about 15 cranes of this kind in all of Europe. The crane was initially purchased in Portugal and used by the company to lift wind turbines on a two-year project. Currently, the crane is being used on a number of projects in Brazil, moving between various construction sites. Depending on the size of the project, the crane may be used on a site for a couple of weeks or as many as three years before being moved elsewhere.

In addition to the crane, the company frequently moves support towers transnationally. Martifer Group used support towers to construct a soccer stadium in Gdansk for the European Championship in 2012. After the stadium was built, the towers were then relocated to Saudi Arabia to construct a different soccer stadium.

A number of European-based intermediaries, such as Ramirent and Felbermayer, specialize in renting or temporarily leasing primarily construction equipment. Felbermayer leases cranes, working platforms and lift trucks throughout Europe. Its rental agreements are governed by Austrian law and subject to the jurisdiction of Austrian courts.¹⁴³ Ramirent specializes in leasing light and heavy machinery, power supplies, scaffolding, lifts and tower cranes and provides planning services to aid customers in determining what they need to rent for a given job and then provides both

¹⁴²

Id.

¹⁴³

Felbermayer's General Terms and Conditions are available at: *General Terms and Conditions of Felbermayr Transport-und Hebetchnik GmbH & Co KG, FELBERMAYR, available at <http://www.felbermayr.cc/index.php?id=155>* (last accessed Feb. 10, 2014).

on-site and business support while the customer retains the equipment. These intermediaries retain the responsibility for maintenance of the equipment and also provide transportation of the equipment to and from the site. For instance, one of their high-tonnage cranes was recently used on a construction site in Latvia where a contractor was building a power plant. Martimer also sometimes rents equipment from these intermediaries on a short-term basis, such as for two months when needed on a specific project.

3. Economic and Legal Significance

The economic significance approach to establishing the scope of the MAC Protocol was already discussed above. This sub-Section focuses primarily on the legal significance of MAC financing, and particularly the obstacles to accessing low-cost credit. Many countries in the world are yet to reform their secured transactions laws to reduce the cost of credit and facilitate its flow to businesses and consumers alike. Such outdated laws increase the costs in a myriad of ways, including the requirement to notarize the signatures of parties to a security agreement, payment of stamp duties on execution of a security agreement or promissory note, high registration fees, unclear priority rules that subordinate the interest of secured creditors to hidden liens, cumbersome and lengthy enforcement mechanisms that result in a significant reduction in the collateral value after default, etc.

Many, if not all of these costs, will be ultimately passed on to the borrower. At times, the cost may be inflated to such a level that prevents the borrower from acquiring an asset

because of insufficient cash-flow to service the debt. The MAC Protocol would significantly reduce the cost of credit by streamlining many of the requirements imposed by domestic secured transactions laws. However, it should be highlighted that it will do so only with respect to the categories of assets falling under its scope, and its ratification should in no way be understood as a sufficient cure for a deficient domestic secured transactions regime whose scope extends beyond the defined categories of assets.

4. Identification of Assets to be Covered by the MAC Protocol

The previous three Protocols have taken different approaches to the identification of assets falling under their respective scope. Article I of the Aircraft Protocol includes definitions of “aircraft engine,” “airframes,” and “helicopters.” All three definitions refer to specific technical requirements, such as aircraft engines having at least 1750 lb of thrust, airframes certified to transport at least either persons including crew and helicopters certified to transport goods in excess of 450 kilograms. Article I(2) of the Space Assets Protocol includes a definition of “space asset” and also sets out the types of equipment that fall under the definition, including a spacecraft, a payload, and their parts. In contrast, the definition of “railway rolling stock” in Article I(2) of the Railway Assets Protocol neither refers to any technical requirements that an asset must meet nor defines sub-sets of the types of equipment falling under its scope.

The current draft of the MAC Protocol takes a different approach, and in the definition of “equipment” it defers to Annexes. Defining the scope by a reference to annexes seems to be an appropriate approach, particularly in light of the proposal that qualified equipment

be identified by an HTS code. It would not be economical for the MAC Protocol itself to set out all applicable HTS codes either in the definition of MAC equipment or elsewhere in a separate article.

The current draft contemplates three separate Annexes for the three individual types of MAC equipment. Several questions have been raised in connection with the three separate Annexes. First, from the creditor's perspective, it may not matter much under which category of the MAC equipment the asset falls, since the rules will be the same for all three categories. Second, there might be situations where an asset has been included in a particular Annex, such as under the category of mining (Annex 3) but a person wants to lease it, for instance, for some construction. A number of MAC equipment may be used for multiple purposes, such as to drill tunnels in a mine and later to drill tunnels to build a metro. Under Article I(2) of the draft MAC Protocol, the lender may examine Annex 2 assuming that the equipment belongs to the construction category but would not find the HTS code for this particular equipment listed thereunder. This could leave a mistaken impression that the asset is not covered with the risk that the international interest will not be perfected.

Assets of the kind described in the preceding paragraph, may have to be listed under more than one category. Alternatively, the three separate annexes for the individual categories of MAC equipment could be merged into a single annex. This approach could ease the burden on the lender to have to properly classify the equipment, determine its use and consult the correct Annex. Separate annexes would be justifiable if, for instance,

different rules of the MAC Protocol applied to different categories of equipment, which presently is not the case.

Thus far the most economic approach, discussed by the experts, to identifying assets that might be covered by the MAC Protocol is through the use of HTS codes. Currently experts have identified a preliminary list of codes relating to MAC equipment that will be discussed by larger groups of stakeholders for consideration. The list of HTS codes includes the following items (summarized):

- Rock drilling or earth boring tools
- Spark-ignition reciprocating or rotary internal combustion piston engines and parts
- Compression-ignition internal combustion piston engines and parts
- Other engines and motors – Hydraulic, Pneumatic, Others, Parts
- Pumps for liquids whether or not fitted with measuring device (concrete pumps) and parts
- Fans that exceed 125 W output
- Dryers for agricultural products
- Centrifuges – cream separators
- Cranes, mobile lifting frames, straddle carriers, works trucks fitted with crane and other machinery
- Self-propelled bulldozers, angledozers, graders, levelers, scrapers, shovels, excavators, shovel loaders, tamping machines, and road rollers
- Other moving, grading, etc. extracting and boring machinery for earth, minerals, or ores, pile drivers, snow ploughs, etc. and parts
- Agricultural, horticultural machinery for soil prep or cultivation
- Harvesting machinery, mowers, machines for eggs, fruit other produce (except grain and seed)
- Milking and dairy machines and parts
- Other agriculture, horticulture, forestry, poultry or bee keeping machinery
- Tools for working in the pneumatic motor
- Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores, minerals, mineral fuels, ceramic paste, cements, plaster, etc.
- Machines and mechanical appliances having individual function not specified or included elsewhere – for public works, passenger boarding bridges, and other
- Transmission shafts and cranks
- Tractors other than pedestrian controlled or road tractors for semi-trailers
- Motor vehicles for the transport of goods

- off-highway dumpsters and Compression-ignition internal combustion piston engines (diesel or semi-diesel) gvw exceeding 20 tonnes
- Crane lorries
- Chassis fitted with engines, bodies (including cabs) and limited parts and accessories for motor vehicles listed above

Once finalized, the list of HTS codes attached as an Annex to the MAC Protocol should be regularly updated so as to keep it current.

In considering the use of HTS codes in relation to the MAC Protocol, a background is useful. The nomenclature for the existing HTS codes has been developed by the World Customs Organization (WCO).¹⁴⁴ The nomenclature includes approximately 5,000 commodity groups and each of these groups are identified by a six digit code. The system is currently used as a basis for custom tariffs and the collection of international trade statistics by more than 200 countries and is governed by the International Convention on the Harmonized Commodity Description and Coding System.¹⁴⁵

The WCO periodically updates (every five to six years) the nomenclature in light of developments in technology and changes in trade patterns. The update process is managed through the Harmonized System Committee.¹⁴⁶ Decisions concerning the interpretation and application of the HTS, such as classification decisions and

¹⁴⁴ World Custom's Organization, *What is the Harmonized System (HS)?*, available at <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> (last accessed Feb. 3, 2014).

¹⁴⁵ *Id.*

¹⁴⁶ World Custom's Organization, *Amending the HS*, available at http://www.wcoomd.org/en/topics/nomenclature/overview/~/_link.aspx?id=CBC09AC340C246C3A350187C86282B95&z=z, (last accessed Feb. 3, 2014).

amendments to the Explanatory Notes or to the Compendium of Classification Opinions, become effective two months after the approval by the Committee.¹⁴⁷

As such, the HTS codes should not be used as the main indexing criterion to identify assets in the International Registry. In other words, registration forms should not be organized in the registry record and made available to searchers by the HTS codes because searches would most likely retrieve multiple results. Another indexing/searching criterion such as the serial number of the asset should be selected to assure retrieval of only those registrations that relate to that particular asset.

VI. ISSUES SPECIFIC TO MAC EQUIPMENT

UNIDROIT has prepared three Protocols to the Cape Town Convention, all of which to some extent follow the same structure; they are divided into Chapters that govern individual aspects of transactions relating to the particular type of equipment. However, in some respects, the three Protocols address issues differently, particularly because of the nature of the asset. For instance, the Aircraft and Space Assets Protocols apply to sales of assets covered thereunder, but the Railway Assets Protocol does not extend its application to sales. Other aspects treated differently include the description of equipment in an agreement, insolvency remedies, public service exception, etc.

¹⁴⁷ For a full explanation of the HTS Amendment Process see Annex I to this Report. Annex I is taken directly from the World Customs Organization Website. World Custom's Organization, *Amending the HS*, available at http://www.wcoomd.org/en/topics/nomenclature/overview/~/_link.aspx?id=CBC09AC340C246C3A350187C86282B95&z=z, (last accessed Feb. 3, 2014).

At its 87th session in April 2008, the UNIDROIT Governing Council authorized for distribution a draft MAC Protocol in order to solicit input from member states.¹⁴⁸ The draft was based primarily on the Railway Assets Protocol with some modifications to account for the different nature of the MAC equipment. Ten states provided comments on the draft.¹⁴⁹ The following sub-Sections examine some of the issues specific to the MAC equipment which could provide the grounds for regulation different from the other three Protocols.

A. ACCESSIONS

Most types of equipment, including aircrafts and locomotives, have very valuable components that may be replaced, bought, exchanged and affixed to it. These components are known as accessions, and typically include engines.¹⁵⁰ MAC equipment also comes with engines that may have to be replaced, although it is unlikely that the

¹⁴⁸ UNIDROIT Governing Council, *Item No. 5(c) on the Agenda: Preparation of a Protocol on Matters Specific to Agricultural, Mining and Construction Equipment*, at 1, C.D. (88) 3(c) (Mar. 2009), available at <http://www.unidroit.org/english/governments/councildocuments/2009session/cd88-03c-e.pdf> (last accessed Feb. 7, 2014).

¹⁴⁹ *Id.*, Appendix 2 contains the comments.

¹⁵⁰ See U.C.C. § 9-102(a)(1) that defines accession as “goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.” See also arts. 886 & 920 of the Mexican Federal Civil Code [*Código Civil Federal*], available at: Código Civil Federal [CC] [Federal Civil Code], Diario Oficial de la Federación, 31 de Agosto de 1928 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/2.pdf> (last accessed Feb. 20, 2014) [hereinafter Mexican Federal Civil Code]. Art. 886 provides: “Ownership of goods grants a right over anything that they produce, or what is attached or incorporated naturally or artificially to them. This right is known as accession.” [Artículo 886.- *La propiedad de los bienes da derecho a todo lo que ellos producen, o se les une o incorpora natural o artificialmente. Este derecho se llama de accesión.*] Art. 920 provides: “When goods that are affixed can be separated without detriment and subsist independently, their respective owners may request the separation.” [Artículo 920.- *Cuando las cosas unidas puedan separarse sin detrimento y subsistir independientemente, los dueños respectivos pueden exigir la separación.*] See also United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions* 7, available at http://www.uncitral.org/pdf/english/texts/security-1g/e/09-82670_Ebook-Guide_09-04-10English.pdf (last accessed Feb. 20, 2014) [hereinafter *UNCITRAL Legislative Guide*]. Attachment to a movable asset means a tangible asset that is physically attached to another tangible asset but has not lost its separate identity.

practice of sharing engines that has developed in the airline industry also exist or will ever develop in the MAC industry. Accordingly, there does not appear to be a practical need for allowing the financing of engines separately from the MAC equipment.

Other valuable accessions to the MAC equipment include tires. For instance, Titan International is one of the major suppliers of large tires and wheels for MAC equipment.¹⁵¹ Titan controls 75% of the market for North American off-the-road farm wheels and 40% of the market for on-the-road tires, and has dealer locations in Canada, Mexico and the United States.¹⁵² Titan Europe provides similar sale and dealer services and has locations in Europe, Asia, Australia, South America and Africa.¹⁵³ Titan sells to individual owners of large equipment through local independent dealers and also sells to large equipment manufactures like John Deere, Case New Holland, Kubota, and AGCO. Tires are sold under both the Titan brand and the Goodyear Farm brand, acquired by Titan in 2011. Such tires are worth in the range of USD\$30,000 to 60,000, per tire.¹⁵⁴

On average, tires on agricultural equipment must be replaced after 5,000 – 10,000 hours, depending on the characteristics of the soil and the weather in which the agricultural equipment such as a tractor is used.¹⁵⁵ For tires used on mining equipment, Michelin

¹⁵¹ David Englander, *Titan International: Big Wheels on a Roll*, Barron's, January 11, 2014, available at <http://online.barrons.com/article/SB50001424053111904246304579304660499812216.html>, (last accessed Feb. 3, 2014).

¹⁵² Christopher C. Williams, *Nice Wheels, Lovely Ride*, Barron's, June 7, 2012, available at <http://online.barrons.com/article/SB50001424053111903431804577502723838972542.html>, (last accessed Feb. 3, 2014).

¹⁵³ Titan International, *Titan Europe*, available at <http://www.titan-intl.com/titan-europe>, (last accessed Feb. 4, 2013).

¹⁵⁴ Englander, *supra* n. 151. See also Telephone interview with Jorge Grimaldi, Owner, Multillantas Grimaldi S.A. de C.V. (Feb. 4, 2014).

¹⁵⁵ *Id.*

tires in the mine of Cananea, Sonora, Mexico (one of the largest copper mines in the world) last on average 10,000 – 11,000 hours. The longevity of tires in mining also depends on the terrain, and the same Michelin tires in the mine of Nacozari, Sonora, Mexico last only 5,000 – 6,000 hours.¹⁵⁶

Dealers of tires access financing either from manufacturers or commercial banks secured with the inventory of their tires. They don't typically provide acquisition financing to the buyers of MAC equipment who pay in cash that is then remitted to the lender to pay down the inventory loan.

Article 29(7)(a) of the Cape Town Convention does not affect the rights of persons with an interest in an accession prior to its installation.¹⁵⁷ The rights of those persons that were created or arose under the applicable domestic law are not extinguished or otherwise negatively affected upon installation unless under the domestic law the ownership of those assets passes to the owner of the principal asset.¹⁵⁸ Article 29(7)(b) allows the creation of a right or an interest in an accession after it has been removed from the principal part. This provision might not be of significance for the users of MAC equipment, particularly when it comes to tires which are removed only after they have been worn out and have no value after such removal.

¹⁵⁶

¹⁵⁷

Id.
Art. 29 does not apply to aircraft engines which are regulated in art. XIV(3) of the Aircraft Protocol. Under the Protocol, aircraft engines are not treated as accessions but as separate objects to which the person retains ownership rights even if they have been affixed to an aircraft frame.

¹⁵⁸

GOODE, OFFICIAL COMMENTARY, at 338.

B. FIXTURES

Unlike the other three types of equipment covered by the previous Protocols, the nature of some MAC equipment may require its physical affixation to real property. For instance, a crane may have to be stabilized by being cemented down to the ground. The equipment thus connected to the real property may be considered a fixture under the domestic law.¹⁵⁹ If it is a fixture, an interest therein may be created or arise under the real property law, including by a mortgage. Some issues may arise when MAC equipment gets affixed to real property subject to a mortgage, whether pre-existing or created and recorded while the equipment remains a fixture.

In that case, the international interest might conflict and compete for priority against an interest in the real property effective under the domestic law. The Cape Town regime does not address any issues that arise in connection with fixtures, thus the domestic law would seem to be applicable. Application of the domestic law could result in a number of issues for the holder of an international interest such as i) the potential need to satisfy the requirements of the local law for its international interest to remain effective against the mortgagee, ii) assuring priority for the international interest, and iii) enforcement in case of the grantor's default. Extension of the MAC Protocol to assets that may become fixtures could potentially derail the project due to the complexity of the rules that will

¹⁵⁹ See Mexican Federal Civil Code art. 750, which provides the definition of real property and governs the situations when movable goods are considered real property (*bien inmueble*) depending on the manner of their affixation. Art. 751 of the Mexican Federal Civil Code provides that, whenever a movable good that was considered as real property under art. 750 is separated from the real estate property, it will re-acquire the character of movable goods. See also *UNCITRAL Legislative Guide*, at 7. It defines attachment to immovable property as “a tangible asset that is so physically attached to immovable property that, despite the fact that it has not lost its separate identity, it is treated as immovable property under the law of the State where the immovable property is located.”

need to be drafted as well as the acceptability of the rules by contracting states in light of the potential need to modify their real property laws.

An alternative solution would be for the MAC Protocol to specify that all assets covered under it shall not be considered fixtures irrespective of the nature of their affixation to real property. This proposal could raise a concern with respect to those types of equipment which are intended to be affixed to real property and remain affixed for a long period of time or even permanently. The Cape Town system applies to assets which are highly-mobile, so MAC equipment is not expected to remain affixed in a single location permanently.

An additional alternative would be for the MAC Protocol to dis-apply local laws with respect to fixtures only if the intention of the parties is not for the equipment to remain affixed in the same location permanently. Contracting states could also be allowed to specify in a declaration that MAC equipment will be considered a fixture if it is sufficiently affixed to real property so as to give rise to an interest under the local real property law and for at least a period of time as indicated in the declaration.

Finally, the MAC Protocol could confer super-priority on international interests relating to fixtures if they have been properly registered in the international registry. As a protection to the mortgagee or other person with an interest in the real property, the holder of an international interest may be required to notify these persons. All of these alternatives require further consideration.

C. INVENTORY

Similarly to the other three Protocols, the MAC Protocol is not expressly limited to the financing of assets held as equipment. Assets that potentially fall under the scope of the MAC Protocol are typically sold by dealers and leased by other intermediaries. For instance, AMECO is an authorized dealer of the following brands: CASE, JCB, TEDEX, CLARK, LINDE, NATIONAL, GROVE, and PALFINGER doing business in Hermosillo, Sonora, Mexico.¹⁶⁰ It sells primarily mining and construction machinery with the average price for the former around USD\$1 million and the latter USD\$100,000. AMECO has inventory financing in place to acquire MAC equipment, and works with financial lessors that provide financing to AMECO's customers. Other dealers such as John Deere – Hermosillo, Sonora, Mexico operate with unsecured financing provided by finance arms of manufacturers (*e.g.*, John Deere Financial).¹⁶¹ This is largely because of the long-standing relationship between the parties, financial viability of the dealer and mutual trust.

Many dealers like AMECO have some financing in place, whether directly from the manufacturer, the manufacturer's finance arm or a commercial bank. Similarly, intermediaries hold a stock of equipment that they rent to users. These leasing companies may also need financing to purchase new equipment. Both the dealers that sell and the intermediaries that rent MAC equipment hold it as inventory. An additional example of MAC equipment being held as inventory is during the manufacturing process. Many secured transactions laws define inventory to include raw materials and work in the

¹⁶⁰ Telephone interview Luis Hardy, General Manager, AMECO (Nov. 20, 2013).

¹⁶¹ *Id.*

process.¹⁶² Unfinished MAC equipment held by the manufacturer would also constitute inventory against which the manufacturer may seek secured financing.

It should be noted that inventory of these dealers is not typically on display in a showroom like vehicles in a car dealership. For instance, TRACSA which is an authorized CAT Dealer, located in Guadalajara, Jalisco, Mexico sells special mining machinery that must be ordered from Caterpillar and imported from the United States after the customer agrees to purchase it. Extension of the MAC Protocol to the financing of inventory requires further consideration, including the protection of buyers in due course, trade-ins of used MAC equipment that are exchanged for new equipment and become part of the dealer's inventory, etc.

D. POOLS OF ASSETS AS COLLATERAL

A number of dealers interviewed by the NLCIFT indicated that when they provided purchase-money financing to customers allowing them to finance new MAC equipment, they also take a security interest in some other assets of the customer, primarily other used equipment that belongs to the customer. For instance, Caterpillar Crédito, Mexico, provides financing to its customers in the form of a financial lease under which the customer acquires new equipment but the lender also takes a security interest over some other assets of the customer as additional collateral.¹⁶³ Under the financial lease component, the lender issues an invoice in its own name indicating that it remains the

¹⁶² *UNCITRAL Legislative Guide* defines inventory as “tangible assets held for sale or lease in the ordinary course of a person’s business, as well as raw and semi-processed materials (work-in-process).”

¹⁶³ Telephone interview with Karina Cabazos, Sales and Financing Manger, Caterpillar Crédito S.A. de C.V. SOFOM E.N.R. (Nov. 21, 2013).

owner of the equipment. Furthermore, the lender retains the invoice until the financing has been paid in full. Without the invoice, the customer is unable to sell the equipment.

The additional collateral is typically some other machinery of the customer, and a notice of the security interest is registered at the *Registro Único de Garantías Mobiliarias* (RUG).¹⁶⁴ It is the practice of a number of lenders interviewed by the NLCIFT to describe such additional collateral in registration forms very specifically, including by i) a serial number, ii) the year of manufacture, and iii) number of the financial lease agreement.¹⁶⁵ Accordingly, the financing package may include new MAC equipment and some other assets of the debtor that may or may not be MAC equipment.

Such transactions would not seem to raise any issues as some of the components of the package would fall under the Protocol, and the requirements set forth therein for the effectiveness of the international interest may have to be satisfied. For the remainder of the collateral package, the requirements of the local secured transactions law may have to be complied with.

¹⁶⁴ See *El Registro Único de Garantías Mobiliarias (Video Tutorial)*, SECRETARÍA DE ECONOMÍA, <http://www.rug.gob.mx/Rug/home/inicio.do> (last accessed Feb. 20, 2014). See also art. 32 of the Mexican Code of Commerce [*Código de Comercio*] that provides for the registration of various types of security interests, available at: Código de Comercio [CCo.] [Commercial Code] Diario Oficial de la Federación, 13 de Diciembre de 1889 (Mex.), available <http://www.diputados.gob.mx/LeyesBiblio/pdf/3.pdf> (last accessed Feb. 20, 2014).

¹⁶⁵ Many registrations also identify a guarantor of the financing even though such registration has no legal effect on the enforceability of the guarantee.

E. IDENTIFICATION OF MAC EQUIPMENT IN A REGISTRATION

For an international interest to become effective between the parties as well as against third parties, both the agreement creating an interest and a registration form must sufficiently describe the asset taken as collateral. Traditionally, the requirements of secured transactions laws are a bit more flexible with respect to descriptions in financing statements (registration forms) as opposed to security agreements.¹⁶⁶ The three Protocols to the Cape Town Convention require specific asset-by-asset description in a registration form. Such detailed description is necessary for the registry system to index the registration in its database. All registrations are also retrievable in a search by the specific description which is a unique number, such as a serial number assigned to an asset by the manufacturer.

Generic descriptions would not allow such asset-based indexing and searching, and would necessitate establishment of a debtor-based registry. The idea of a debtor-based registry under the MAC Protocol has been considered but for a variety of reasons did not find sufficient support. The remainder of this sub-Section thus considers specific descriptions of MAC equipment and asset-based indexing of registrations.

Article 18 of the Cape Town Convention defers to the individual Protocols and regulations issued thereunder to set forth rules for the identification of assets in a registration. Section 5.4(c) of the Regulations prescribes the following requirements for identification of an aircraft object in a registration: i) type of aircraft object, ii)

¹⁶⁶ Compare U.C.C. 9-108 that provides for a sufficient description of collateral in a security agreement with U.C.C. 9-504 that provides for indication of collateral in a financing statement.

manufacturer's name, iii) manufacturer's generic model designation, and iv) manufacturer's serial number assigned to the aircraft object.¹⁶⁷ With the exception of the type of aircraft object, the other three items of information that identify the asset are also searchable criteria that a third party may enter to search the International Registry against.¹⁶⁸ Unique identification of aircraft objects does not seem to pose any difficulties, as manufacturers routinely assign serial numbers and model designations. This might not always be the case with respect to all types of MAC equipment.

The other two Protocols to the Cape Town Convention have not entered into force so registries are yet to be established and regulations published. Implementation of an international registry under the Railway Assets Protocol and adoption of regulations is one of the priorities for UNIDROIT in its current triennium of 2014-2016.¹⁶⁹ However, some of the discussions leading to implementation could provide useful guidance as regards identification of MAC equipment in a registration because a number of railway assets are not readily and uniquely identifiable by serial numbers as aircraft objects.

The Rail Working Group (RWG) has prepared a number of documents assessing the merits of various approaches to unique identification of rail equipment in a

¹⁶⁷ Regulation 5(4)(d) imposes additional description requirements with respect to an airframe and helicopter which are the current or intended State of Registry for nationality purposes and the current or intended aircraft nationality and registration marks assigned pursuant to the Chicago Convention. These items must be provided only if known to the registering party.

¹⁶⁸ Aircraft Protocol art. XX(1) and ICAO, *Regulations*, ¶7.1.

¹⁶⁹ UNIDROIT Governing Council, *Item No. 5 of the Agenda: International Interests in Mobile Equipment, (a) Implementation and Status of the Luxembourg Rail Protocol and of the Space Assets Protocol 3*, C.D. (92) 5 (a) (Apr. 2013), available at <http://www.unidroit.org/english/governments/councildocuments/2013session/cd92-05a-e.pdf> (last accessed Feb. 7, 2014).

registration.¹⁷⁰ RWG has devised the Unique Rail Vehicle Identification System (URVIS) that identifies railway assets uniquely and permanently, irrespective of the number of sales, location and modifications made to the asset.¹⁷¹ URVIS identifiers differ from the running and operating numbers that may also identify railway assets.¹⁷² Such specific identification was necessary because items of rolling stock, and particularly wagons were not uniquely identifiable.¹⁷³

RWG will retain the responsibility for maintaining and updating the URVIS standards. However, it will be the duty of manufacturers to assign URVIS designation and a code number to new railway rolling stock. These markings must remain permanent and may not be recycled even though the particular asset has been decommissioned or destroyed.¹⁷⁴ With respect to the assets that have already been manufactured, their owners or secured creditors may apply for an URVIS designation.

URVIS numbers will be made available by the Registrar to manufacturers, owners and secured creditors. The numbers will be issued in a standardized format of nineteen digits. The permanent marking assigned to a rail asset shall thus include the designation URVIS and the nineteen-digit code.¹⁷⁵

¹⁷⁰ RWG, *Allocation and Marking of Permanent Numbers of Rolling Stock*, Working Paper 240210, available at http://www.railworkinggroup.org/r0184_240210%20RWG.pdf (last accessed Feb. 7, 2014).

¹⁷¹ *Id.* at 5.

¹⁷² The URVIS designation will not be applicable to “...rolling stock used or to be used solely for personal purposes, used on heritage railways or used on railways with a gauge of less than 500mm...but may comply with it on a voluntary basis.” *Id.*

¹⁷³ Rosen, at 33.

¹⁷⁴ RWG, *Allocation and Marking of Permanent Numbers of Rolling Stock*, at 6.

¹⁷⁵ *Id.* at 7.

Since the scope of the MAC Protocol is yet to be determined, it remains unclear whether an URVIS-like system will be necessary. The discussions thus far have indicated that some MAC equipment may not be readily identifiable by serial numbers and similar unique designations. Nonetheless, industry representatives noted that most MAC equipment is identifiable by a seventeen-digit serial number.¹⁷⁶ The first three to four digits of the serial number sequence relate to a particular type of equipment. Even though it seems that a significant majority of MAC equipment is already uniquely identifiable, consideration might be given to developing an URVIS-like system for MAC equipment. As a starting point for discussion, the HTS codes could become a part of the unique number supplemented with a unique designator for individual assets.

F. OTHER ISSUES NEEDING FURTHER CONSIDERATION

One of the issues that interested stakeholders should consider is the public service exception. Many assets covered by the Cape Town regime serve not only important economic functions but are also part of the social fabric.¹⁷⁷ For this reason, the enforcement of creditors' remedies may have to be temporarily suspended until completion of a public project or similarly important service. While the creditor may temporarily lose access to the collateral, it may want to be compensated by the government.

¹⁷⁶ INTERNATIONAL LAW INSTITUTE, REPORT, ISSUES DIALOGUE, INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT, PREPARATION OF A PROTOCOL ON AGRICULTURAL, MINING AND CONSTRUCTION EQUIPMENT 4 (2013). (on file with NLCIFT).

¹⁷⁷ Benjamin B. von Bodungen & Konrad Schott, *The Public Service Exemption under the Luxembourg Rail Protocol: a German Perspective*, UNIF. L. REV. 573, 574 (2007).

In any case, the public service exception applies only with the respect to the asset itself and not any income it continues to generate. For instance, the creditor will still be able to collect income generated by a satellite because it will not interfere with the satellite's performance of a public service.¹⁷⁸ Furthermore, under Article XXVII(4) of the Space Assets Protocol the stay on enforcement of remedies may not exceed six months.¹⁷⁹

The Space and Railway Assets Protocols incorporate such an exception while the Aircraft Protocol does not.¹⁸⁰ Under the two Protocols, the exception does not apply automatically, but Contracting States may submit a declaration to that effect. Whether or not a similar exception is necessary to be included in the MAC Protocol is a matter that may deserve further consideration but the discussions thus far indicate that it might not be necessary.

Issues such as the one under the Railway Assets Protocol that seeks to protect the uninterrupted provision of passenger service are unlikely to arise under the MAC Protocol.¹⁸¹ Furthermore, many countries have constitutional provisions that require the government to provide rail transportation services and limit the rights of creditors, in general.¹⁸² Finally, the significant number of ratifications and the success of the Aircraft Protocol have proven that absence of a public exception in the MAC Protocol could be

¹⁷⁸ Sundahl, at 7.

¹⁷⁹ In addition, the debtor must agree to the registration of a public service exception which the creditor may prevent by conditioning the secured loan on the exception not being registered. *Id.*

¹⁸⁰ See Luxembourg Protocol, art. XXV.

¹⁸¹ The public sector exception may also have some relevance in the freight sector with respect to trains that may carry hazardous, nuclear and similarly dangerous materials. Bodungen & Schott, at 579.

¹⁸² Howard Rosen, *Public Service and the Cape Town Convention*, 2013 Cape Town Convention J. 131, 143 (2013), available at <http://www.railworkinggroup.org/r0431.pdf> (last accessed Feb. 17, 2014).

acceptable to governments.¹⁸³ The withdrawal of MAC equipment may not be that essential and may be viewed more as an inconvenience, similarly to the withdrawal of an aircraft transporting passengers and freight.¹⁸⁴

Another issue that deserves attention is access to the international registry.¹⁸⁵ As noted above, countries are allowed to designate exclusive entry points through which registrations may be submitted to the international registry. For instance, the Federal Aviation Administration (FAA) is such an entry point for the U.S. registrants. Designating an entity as the exclusive entry point makes sense if an appropriate domestic entity with expertise in the registration of interests and rights to the relevant assets has already been established and operates efficiently. For most MAC equipment types, there are no domestic registries that could be designated as the sole entry points to the international registry. For access to the MAC international registry, Article XIX(2) of the Aircraft Protocol and Section 12.2 of the Regulations may be a model to follow. These rules preclude mandatory use of an entry points for registrations that relate to registrable interests in aircraft engines.¹⁸⁶ An access system with multiple or open entry points to the MAC international registry may be considered as an alternative to the controlled exclusive-type of access.

¹⁸³ *Id.*, at 144. Furthermore, Rosen argued that “the solution taken by the Space Assets Protocol of simply using a cooling-off period but otherwise leaving creditor rights unrestricted would not have been acceptable to the rail industry or many states.” *Id.* at 139.

¹⁸⁴ *Id.* at 133.

¹⁸⁵ Cuming, *International Registry*, at 34.

¹⁸⁶ *Id.*

Consideration may also be given to the registration procedure which requires the consent of all parties to every registration. Accordingly, a secured creditor is unable to register a notice of an international interest unless the international registry has received consent of the grantor. The future MAC international registry may adopt the Cape Town Convention Article 40 procedures for the registration of all consensual and non-consensual rights. Article 40 allows holders of registrable non-consensual rights and interests to effectuate registrations without the other person's consent. This registration procedure is already the norm in many domestic secured transactions systems.

VII. INTERACTION OF THE MAC PROTOCOL WITH SECURED TRANSACTIONS REGIMES

The assets covered by the three other Protocols are typically excluded from general domestic secured transactions regimes because countries have adopted special laws governing various issues related to sales of such assets and their use in secured transactions. The exclusions fall into two categories: i) assets are excluded for all purposes and ii) they are excluded only from the perfection requirements.

A. TYPES OF EXCLUSIONS AND SPECIAL LAWS

The laws that belong to the first category model their exclusion on the basis of Recommendation 4 of the UNCITRAL Legislative Guide on Secured Transactions, which provides that “the law should not apply to: (a) aircraft, railway rolling stock, space objects and ships, as well as other categories of mobile equipment in so far as such asset is covered by a national law or an international agreement...” Colombian secured

transactions law follows this model in Article 4 that excludes from its scope aircrafts, aircraft engines, helicopters, railway equipment, space objects, and other equipment covered by Law 1676 of 2013.¹⁸⁷

An example of the second category of laws is the U.S. Uniform Commercial Code (U.C.C.) Article 9. Section 9-311(a)(1) provides that “...the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to: (1) a statute, regulation, or treaty...” Secured creditors may perfect their security interests only by compliance with the requirements of these statutes, regulations and treaties, and a filing of a financing statement in the general registry of security interests, *i.e.*, the U.C.C. filing system is ineffective. Under this approach, secured creditors must satisfy the requirements of attachment, determine their priorities and enforce their rights in the case of default under U.C.C. Article 9.

Both of these exclusions apply only with respect to clearly defined types of assets. For instance, one must satisfy the requirements of the U.S. FAA regime and register a document relating to an interest in the FAA Registry only when the aircraft meets specified technical requirements (*e.g.*, an airline passenger plane). Smaller aircrafts that

¹⁸⁷ Ley No. 1676 de 2013, Por la Cual se Promueve el Acceso al Crédito y se Dictan Normas Sobre Garantías Mobiliarias [Law No. 1676 of 2013] art. 4 (20 de Agosto de 2013), *available at* <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/2013/LEY%201676%20DEL%2020%20DE%20AGOSTO%20DE%202013.pdf> (last accessed Feb. 20, 2014). It states (in Spanish):

Artículo 4°. Limitaciones al ámbito de aplicación. Las garantías de las que trata esta ley podrán constituirse sobre cualquier bien mueble, salvo aquellos cuya venta, permuta, arrendamiento o pignoración o utilización como garantía mobiliaria esté prohibida por ley imperativa o de orden público. Se exceptuarán de lo dispuesto en esta ley las garantías mobiliarias otorgadas sobre: 1. Bienes muebles tales como las aeronaves, motores de aeronaves, helicópteros, equipo ferroviario, los elementos espaciales y otras categorías de equipo móvil reguladas por la Ley 967 de 2005.

do not satisfy the FAA requirements are not covered by this regime and a mortgage or a notice of a security interest must be registered elsewhere. Similarly, the Colombian laws that define aircraft are covered by special legislation, and absent the satisfaction of the technical requirements set forth in that legislation, an aircraft will be subject to the secured transactions law. The same analysis may be applied to the other types of assets covered by the Cape Town regime.

The MAC Protocol is expected to operate similarly and complement domestic secured transactions laws. It will clearly define the types of equipment that it covers, thus excluding the other types that will remain covered by domestic laws.

Some countries have adopted laws which specifically focus on the use of agricultural and similar equipment as collateral. Under these laws, registries have been established to record security devices, and these registries are separate from the general secured transactions registries. In Argentina, all pledges in agricultural and construction machinery must be registered at the National Registry of Vehicle Ownership (*Registro Nacional de la Propiedad del Automotor*).¹⁸⁸ The law governing this registry is not the general pledge law.¹⁸⁹ The National Registry of Vehicle Ownership is divided into

¹⁸⁸ *Regimen Jurídico del Automotor*, Decreto No. 1.114/97 [Legal Framework of Vehicles, Decree No. 1.114/97], available at http://www.dnrpa.gov.ar/portal_dnrpa/regimen_juridico/informacion/rja.pdf (last accessed Feb. 6, 2014).

¹⁸⁹ *See Ley de Prenda con Registro*, Decreto-Ley No. 15.348/46 [Registered Pledge Law Decree-Law No. 15.348/46], available at http://www.dnrpa.gov.ar/portal_dnrpa/regimen_juridico/informacion/decprenda.pdf (last accessed Feb. 6, 2014).

branches with general jurisdiction (*Registros Seccionales*)¹⁹⁰ as well as branches that have exclusive jurisdiction over certain types of equipment, such as over Agricultural, Industrial and Road Construction Machinery and Loans Secured by a Pledge (*Registros Seccionales de la Propiedad Automotor con competencia exclusiva sobre Maquinaria Agrícola, Vial o Industrial y de Créditos Prendarios*).¹⁹¹ The pledge contract covering agricultural, industrial and road construction machinery must be registered in this specialized registry.¹⁹²

Some U.S. states have adopted similar laws that subject the perfection of a security interest in agricultural machinery to a special law. For instance, in Kansas, a security interest in a farm tractor may not be perfected by filing of a financing statement but rather by notation on a certificate of title.¹⁹³ Accordingly, the perfection is not subject to U.C.C. Article 9, but it is effectuated in the manner also applicable to vehicles.

For countries like Argentina, the MAC Protocol may affect the operation of special pledge laws and registries. Such interaction may operate similarly to the one that exists for aircraft objects where domestic aircraft registries function as access points to the International Registry.

¹⁹⁰ *Resolución 12/97* [Decision 12/97], available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/40000-44999/44409/norma.htm> (last accessed Jan. 6, 2014). See also Ciudad de Rafaela, *Consulta de Registros Seccionales – Titularidad*, available at <http://www.rafaela.gov.ar/Archivos/Patentamiento/RegTodoPais.htm> (last accessed Feb. 7, 2014).

¹⁹¹ *Artículo 5 de la Resolución 1089/2006* [Article 5 of Decision 1089/2006], available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/115000-119999/117985/norma.htm> (last accessed Feb. 6, 2014).

¹⁹² *Artículo 1 de la Resolución 948/97* [Article 1 of Decision 948/97], available at <http://www.infoleg.gov.ar/infolegInternet/anexos/45000-49999/46096/norma.htm> (last accessed Feb. 6, 2014).

¹⁹³ Aaron K. Johnstun & Stephen J. Ware, *Farm Tractors in Kansas: How to Perfect a Security Interest*, 57 KAN. L. REV. 409, 413 (2009).

Yet, there is a third category of laws that may interact with the MAC Protocol. Ecuador is representative of this category. Article 576 of the Ecuadorian Code of Commerce (*Código de Comercio*) (hereinafter “Commerce Code”) distinguishes two classes of pledges: industrial and agricultural, and provides for specialized rules for each type of pledge.¹⁹⁴ Article 578 of the Commerce Code states that the agricultural pledge can be constituted over “agricultural machinery.”¹⁹⁵ Similarly, Article 579 of the Commerce Code provides that the industrial pledge can be constituted over “industrial machinery.”¹⁹⁶ The industrial and agricultural pledge contracts must be in writing and will only take effect against third parties after they have been adequately registered.¹⁹⁷ Both Articles of the Commerce Code apply to all types of agricultural and industrial machinery, irrespective of the asset’s value, technical specifications or mobility. Accordingly, they cover pledges over the types of assets that could potentially fall under the scope of the MAC Protocol.

According to Article 581 of the Commerce Code, there is a specialized registry for each type of pledge: i) agricultural pledge contracts must be registered in the Agricultural Pledge Registry (*Registro de Prenda Agrícola*), and ii) industrial pledge contracts must be registered in the Industrial Pledge Registry (*Registro de Prenda Industrial*). These two registries are administered by the Mercantile Registry,¹⁹⁸ in which, according to

¹⁹⁴ *Código de Comercio* [Commerce Code] (1960) (Ecuador), available at <http://www.scpm.gob.ec/wp-content/uploads/2013/03/C%C3%B3digo-de-Comercio.pdf> (last accessed Feb. 7, 2014) [hereinafter Ecuador Commercial Code].

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Telephone Interview Andres Velasquez, Legal Department of the Ecuadorean Mercantile Registry. See also Ecuador Commercial Code, art. 29. See also Web page of the Mercantile Registry located

Article 17 of the National System of Public Data Registry (*Ley del Sistema Nacional de Registro de Datos Públicos*), the legal acts (*actos jurídicos*) affecting real estate and movable goods must be recorded.¹⁹⁹

Exclusions from the general secured transactions laws may also have the unfortunate effect that the law does not have a specific financing device for an asset.²⁰⁰ Alternatively, the only available financing tool may be the traditional concept of pledge, which requires dispossession of the debtor. As a result, the market players may be forced to resort to alternative financing devices, such as trusts, which the law might not recognize or its enforcement might be complicated.²⁰¹ In these countries, the MAC Protocol would be filling a significant gap in fostering predictability and certainty to creditors.

B. INTERACTIONS IN TERMS OF PRIORITY OF COMPETING INTERESTS

The second level of interaction between the Cape Town regime and domestic secured transactions laws relates to priorities. Under the other three Protocols, a domestic interest may co-exist with an international interest. For instance, an airline acquires a new Boeing plane with financing provided by a bank. When the formal requirements for the creation of an international interest prescribed by the Cape Town Convention are satisfied, including the execution of an agreement that sufficiently describes the aircraft,

in Quito, Ecuador, available at: REGISRO MERCANTIL QUITO, <http://www.registromercantil.gob.ec/quito.html> (last accessed Feb. 7, 2014).
¹⁹⁹ *Ley del Sistema Nacional de Registro de Datos Públicos* [National System of Public Data Registry], available at <http://faolex.fao.org/docs/pdf/ecu123907.pdf> (last accessed Feb. 7, 2014).
²⁰⁰ This was the case in Belgium with respect to aircraft objects. Vincent Sagaert, *The UNIDROIT Convention on International Interests in Mobile Equipment: a Belgian Perspective*, 1 EUR. REV. OF PRIVATE L. 75, 76-77 (2004).
²⁰¹ *Id.* at 77.

an international interest is created. Such a security agreement will, in most cases, be sufficient to create a national interest under the domestic secured transactions law.²⁰² The secured party may then perfect its domestic security interest by registering in the national registry. Such registration will render the security interest effective against third parties, even though its priority is vulnerable vis-à-vis claimants that perfect their international interest by registration in the International Registry.²⁰³ As a result, the creditor may be holding two concurrent interests in the same object with protections provided by two different legal regimes.

A situation may also arise where one creditor holds a fully effective international interest and another creditor only holds a national interest. The priority rules of the Cape Town Convention resolve the conflict in favor of the holder of the international interest. Nonetheless, it is advisable for the creditor to take the necessary steps to effectuate a local registration because the Cape Town regime does not entitle the creditor to claim the general proceeds of the equipment.²⁰⁴ Accordingly, if the equipment is sold and generates accounts receivable, the registration in the International Registry may not give priority to the creditor.

Domestic secured transactions regimes should interact similarly with the MAC Protocol and result in registration in both the applicable national registry as well as in the international registry. Similar to the other three Protocols, failure of the creditor to

²⁰² GOODE, OFFICIAL COMMENTARY, at 56.

²⁰³ *Id.*

²⁰⁴ Cape Town Convention art. 1(w) defines proceeds as “money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition.” Goode, *International Interest*, at 23.

satisfy the applicable domestic secured transactions law requirements will not render the international interest invalid or subordinate to some other claims.

C. EXCLUSION OF INTERNAL TRANSACTIONS

Article 50 of the Cape Town Convention allows Contracting States to submit a declaration excluding the application of the Convention to an internal transaction.²⁰⁵

Internal transaction is defined in Article 1(n) of the Cape Town Convention as “a transaction...where the center of the main interests of all parties to such transaction is situated, and the relevant object located...in the same Contracting State...and where the interest created by the transaction has been registered in a national registry...” Such declarations may be made with respect to all objects covered by a particular Protocol or with respect to a category of objects.

The effect of Article 50 is limited in a number of ways, including the continued application of some of the Convention enforcement rules to national interests, but primarily in its priority rules. Accordingly, even if an interest satisfies the requirements of an internal transaction, and the creditor has perfected its domestic interest under the local law, another creditor may still obtain priority by registering a notice of its interest in the International Registry. Contracting States thus may not rely on this Article to protect the priority of interests created in internal transactions.

²⁰⁵ *Id.* at 145.

B. INTERACTIONS WITH THE RECEIVABLES CONVENTION

The Cape Town Convention as a whole has a limited impact on the operation of the United Nations Convention on the Assignment of Receivables in International Trade (Receivables Convention).²⁰⁶ The former overrides the latter with respect to the coverage of the assignment of associated rights related to international interests.²⁰⁷ The latter would govern the receivables which are the proceeds arising out of a sale or lease of Cape Town equipment. This possible interaction remains hypothetical since the Receivables Convention has not yet entered into force.

D. ALTERNATIVE PROPOSALS

Some experts have suggested that UNIDROIT should contemplate the establishment of a debtor-based registry that would index all registration forms according to the name or other identifier of the debtor. This would be a departure from the other three Protocols and would raise a number of issues such as: i) how to define the unique identifier for debtors, ii) the authorization to describe the assets generically in a registration, iii) the difficulty for third parties to protect themselves if they were buying assets from someone who had bought it from the original debtor but subject to a security interest, etc.

This dramatic departure from the Cape Town Convention registration system would also require modifications to the actual registration procedures. According to Article 20 of the Convention, any registration, including an amendment, requires consent of both

²⁰⁶ The text of the Receivables Convention is available at: UNCITRAL, *United Nations Convention on the Assignment of Receivables in International Trade* (2001), available at http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html (last accessed Feb. 28, 2014).

²⁰⁷ Goode, *Cape Town Convention*, at 14. See also Clark, at 7.

parties.²⁰⁸ This procedure could become a significant problem in a debtor-based system where an amendment, such as the one which reflects a change in the debtor's name, may be made only with the debtor's consent. Failure to obtain the debtor's consent may jeopardize the third-party effectiveness of the international interest.

Finally, rules protecting acquisition financing devices against pre-existing international interests covering "all equipment" or otherwise generically describing collateral in registrations would be needed. Presently, the requirement to identify objects specifically in registrations eliminates the possibility to acquire perfected international interests in "after-acquired" equipment of the grantor.

The second alternative proposal would establish an international registry that would not be limited to the MAC Protocol equipment, but instead made available to contracting states to use as the registry for their own domestic secured transactions laws. Countries would thus be able to designate this international registry as their own and provide creditors and debtors access to it. Again, this proposal would require significant modifications to the registration regime under the Cape Town Convention, including the authorization of the debtor to sue an international registrar in a local court to compel a discharge of a registration that the debtor is entitled to. Article 44(1) of the Cape Town

²⁰⁸

See further Cuming, *International Registry*, at 32, who noted that:

Without the requisite consent, data that in every other respect comply with the Convention, Protocol and Regulations transmitted to and accepted by the Registry cannot give rise to a registration. However, while provision for obtaining consent (to be given in electronic form) is made in the Regulations and Procedures, the Registrar is not under a duty to ensure that consent has in fact been given by the appropriate person. Consequently, it is possible that what appears from a search of the Registry to be a registration has no legal significance...

Id.

Convention provides that the courts of the location in which the Registrar has its center of administration have exclusive jurisdiction to issue orders that are binding on the Registrar.²⁰⁹

FINAL REMARKS

The Cape Town Convention has already become one of the most successful international private law instruments, judged not only by the number of Contracting States but primarily by the actual economic results it has delivered. The Convention with the Aircraft Protocol significantly reduced the cost of financing for aircraft objects. The other two Protocols hold a similar promise for space assets and railway rolling stock. However, these two Protocols have not yet entered into force and, thus, international registries have not been established.

The proposed MAC Protocol has been on the UNIDROIT agenda for a number of years, and is finally getting some traction. The progress has been slow due a number of factors, such as the yet undefined scope of the Protocol, the types of assets it should apply to, the questions about their mobility, value and identification, etc. A concern has also been raised about the interaction of the future MAC Protocol with domestic secured transactions regimes. All of these issues have been addressed in the Report.

Some of the concerns, such as the economic benefits, should be settled, as the MAC Protocol would undoubtedly reduce the cost of financing of MAC equipment. Sufficient support for the Protocol already exists on the side of manufacturers and dealers. It is

²⁰⁹ Local courts have the jurisdiction to issue orders binding on the registrant, such as to discharge a registration or pay damages. However, such an order may not be adequate if the person refuses to discharge a registration.

expected that the view of end-users, particularly farmers, will also be favorable. This should end the discussion as to whether sufficient support from all relevant stakeholders exists.

A number of issues still need to be resolved; some of which are substantive while others are rather technical. For instance, the scope of the instrument has yet to be defined, which is one of the most important issues. On the bright side, a strong proposal to refer to HTS codes was put forward and has already found support. The second most pressing issue is the identification of MAC equipment in security agreements and registrations. Fortunately, the previous three Protocols already provide helpful guidance upon which the MAC Protocol drafters should build.

The technical issues relate primarily to the operations of the international registry. Should it allow access similar to the International Registry under the Aircraft Protocol, which is rather controlled and conditional on consent of the interested parties, or should it be more open (*e.g.*, providing direct access without having to obtain an authorization to register from a domestically-appointed entity) and not require the debtor's consent other than its authorization to register? Several proposals are on the table that would modify the functions of this registry from those envisaged in the Cape Town Convention. These and a number of other issues flagged in the Report should and will be given due consideration.