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**Item No. 5(c) on the agenda: Preparation of a Protocol on Matters specific to agricultural, mining and construction equipment**

(memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Update on the work undertaken towards the preparation of a possible future Protocol on Matters specific to agricultural, mining and construction equipment</i>
<i>Action to be taken</i>	<i>See § 2</i>
<i>Mandate</i>	<i>Work Programme 2006-2008</i>
<i>Priority level</i>	<i>To be determined</i>
<i>Status</i>	<i>Ongoing activity</i>
<i>Related documents</i>	<i>Questionnaire (results reported in C.D. (86) 8 (d), 2007); Draft tentative text (see Appendix 1)</i>

**BACKGROUND**

1. The *Convention on International Interests in Mobile Equipment* (the Convention) provides a process for extending the application of the Convention to objects in categories other than the 3 categories specifically mentioned in the Convention (aircraft objects, railway rolling stock and space assets). At its 87<sup>th</sup> session in April 2008, the Governing Council authorised the distribution to UNIDROIT Member States, for comment, of a draft tentative text for a Protocol relating to agricultural, mining and construction equipment. That draft tentative text (copy attached as Appendix 1) was circulated to UNIDROIT Member States in October 2008, with a request that any comments on the draft possible text be received by 27 February 2009. As of 25 March, comments had been received from 10 States (Australia, Austria, Canada, Colombia, Finland, Germany, Latvia, Portugal, Romania and the United States of America). The comments received have been collated and are attached as Appendix 2.

**ACTION TO BE TAKEN**

2. The UNIDROIT Secretariat would invite the Governing Council to note the results of the consultations on the draft tentative text and to consider the future development of this project.

**APPENDIX 1****PROPOSAL FOR A PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AGRICULTURAL, CONSTRUCTION AND MINING EQUIPMENT**

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING it necessary to implement the *Convention on International Interests in Mobile Equipment* (hereinafter referred to as the *Convention*) as it relates to agricultural, construction and mining equipment, in the light of the purposes set out in the preamble to the Convention,

MINDFUL of the need to adapt the Convention to meet the particular requirements of agricultural, construction and mining equipment and their finance,

HAVE AGREED upon the following provisions relating to agricultural, construction and mining equipment:

**CHAPTER I – SPHERE OF APPLICATION AND GENERAL PROVISIONS****Article I – Defined terms**

1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2. In this Protocol the following terms are employed with the meanings set out below:

(a) “equipment” means any agricultural equipment listed in Annex 1 to this Protocol, any construction equipment listed in Annex 2 to this Protocol, or any mining equipment listed in Annex 3 to this Protocol;<sup>1</sup>

(b) “guarantee contract” means a contract entered into by a person as guarantor;

(c) “guarantor” means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

(d) “insolvency-related event” means:

(i) the commencement of the insolvency proceedings; or

(ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;

(e) “primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor’s main interests is situated, which for this purpose shall be deemed to be the place of the debtor’s statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise.

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<sup>1</sup> The Annexes should be established by experts in the field.

## **Article II – Application of the Convention as regards agricultural, construction and mining equipment**

1. The Convention shall apply in relation to agricultural, construction and mining equipment as provided by the terms of this Protocol.
2. The Convention and this Protocol shall be known as the *Convention on International Interests in Mobile Equipment as applied to Agricultural, Mining and Construction equipment*.

## **Article III – Application of the Convention to sales<sup>2</sup>**

The following provisions of the Convention apply as if references to an agreement creating or providing for an international interest were references to a contract of sale and as if references to an international interest, a prospective international interest, the debtor and the creditor were references to a sale, a prospective sale, the seller and the buyer respectively:

Articles 3 and 4;  
Article 16(1)(a);  
Article 19(4);  
Article 20(1) (as regards registration of a contract of sale or a prospective sale);  
Article 25(2) (as regards a prospective sale); and  
Article 30.

In addition, the general provisions of Article 1, Article 5, Chapters IV to VII, Article 29 (other than Article 29(3) which is replaced by Article XIII), Chapter X, Chapter XII (other than Article 43), Chapter XIII and Chapter XIV (other than Article 60) shall apply to contracts of sale and prospective sales.

## **Article IV – Derogation from application of Protocol**

The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article IX(3) – (4).

## **Article V – Formalities, effects and registration of contracts of sale<sup>3</sup>**

1. For the purposes of this Protocol, a contract of sale is one which:
  - (a) is in writing;
  - (b) relates to equipment of which the seller has power to dispose; and
  - (c) enables the equipment to be identified in conformity with this Protocol.
2. A contract of sale transfers the interest of the seller in the equipment to the buyer according to its terms

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<sup>2</sup> This Article was not included in the Rail Protocol. The need for such an article should be considered.

<sup>3</sup> The decision taken with respect to Article III will affect also Article V.

3. Registration of a contract of sale remains effective indefinitely. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.

#### **Article VI – Representative capacities**

A person may, in relation to agricultural, mining or construction equipment, enter into an agreement or a contract of sale, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention in an agency, trust or representative capacity.

#### **Article VII – Identification of agricultural, mining or construction equipment<sup>4</sup>**

A description of agricultural, mining or construction equipment that satisfies the requirements established in the regulations is necessary and sufficient to identify the equipment for the purposes of Article 7(c) of the Convention and Article V(1)(c) of this Protocol.

#### **Article VIII – Choice of law**

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXVII.

2. The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.

3. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

### **CHAPTER II - DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS**

#### **Article IX – Modification of default remedies provisions**

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter, procure the export and physical transfer of equipment from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

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<sup>4</sup> This Article follows the formulation of the Aircraft Protocol and refers to asset-based financing. The formulation of the Rail Protocol is more suitable for project financing. Which approach is adopted will depend on what form of financing it is intended to cover.

3. Article 8(3) of the Convention shall not apply to agricultural, mining and construction equipment. Any remedy given by the Convention in relation to such equipment shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

4. A chargee giving [X] or more calendar days' prior written notice of a proposed sale or lease to interested persons as provided by Article 8(4) of the Convention shall be deemed to satisfy the requirement of giving the "reasonable prior notice" specified therein. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

#### **Article X – Modification of provisions regarding relief pending final determination**

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII and to the extent stated in such declaration.

2. Relief under Article 13(1) of the Convention shall not be dependent upon the agreement of the debtor.

3. For the purposes of Article 13(1) of the Convention, "speedy" in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

4. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):

"(e) if at any time the debtor and the creditor specifically agree, sale of the equipment and application of proceeds therefrom",

and Article 43(2) applies with the insertion after the words "Article 13(1)(d)" of the words "and (e)".

5. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor's international interest has priority under the provisions of Article 29 of the Convention.

6. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

7. With regard to the remedies in Article IX(1):

(a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the creditor notifies such authorities that the relief specified in Article IX(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

8. Paragraphs 3 and 7 shall not affect any applicable safety laws and regulations.

### Article XI – Remedies on insolvency

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVII(3).

#### *Alternative A*

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 6, give possession of the equipment to the creditor no later than the earlier of:

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the equipment if this Article did not apply.

3. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

4. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the agricultural, mining or construction equipment and maintain it and its value in accordance with the agreement; and
- (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

5. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the agricultural, mining or construction equipment under arrangements designed to preserve the equipment and maintain it and its value.

6. The insolvency administrator or the debtor, as applicable, may retain possession of the equipment where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement and related transaction documents. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

7. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

8. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

9. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

10. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.

11. The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article.

*Alternative B*

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXVII whether it will:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the agricultural, mining or construction equipment, in accordance with the applicable law.

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

5. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the equipment but fails to do so, the court may permit the creditor to take possession of the equipment upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

6. The equipment shall not be sold pending a decision by a court regarding the claim and the international interest.

*Alternative C*

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall within the cure period:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the equipment in accordance with the applicable law.

3. Before the end of the cure period, the insolvency administrator or the debtor, as applicable, may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period and ending no later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the "suspension period"). Any such order shall require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate or by the debtor as they become due and that the insolvency administrator or the debtor, as applicable, perform all other obligations arising during the suspension period.

4. If an application is made to the court under the preceding paragraph, the equipment shall not be sold pending a decision by the court. If the application is not granted within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by

the Contracting State in which the application is made, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve equipment and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the equipment under arrangements designed to preserve and maintain it and its value.

7. Where during the cure period or any suspension period the insolvency administrator or the debtor, as applicable, cures all defaults other than a default constituted by the opening of insolvency proceedings and agrees to perform all future obligations under the agreement and related transaction documents, the insolvency administrator or debtor may retain possession of the equipment and any order made by the court under paragraph 3 shall cease to have effect. A second cure period shall not apply in respect of a default in the performance of such future obligations.

8. Subject to paragraphs 3, 4 and 7, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

9. Subject to paragraphs 3 and 4, no obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.

10. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

11. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in the insolvency proceedings over registered interests.

12. The Convention as modified by Articles IX and XXVI of this Protocol shall apply to the exercise of any remedies under this Article.

13. For the purposes of this Article, the "cure period" shall be the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

## **Article XII – Insolvency assistance**

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII(1).

2. The courts of a Contracting State in which equipment is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.

### **Article XIII – Modification of priority provisions**

1. A buyer of equipment under a registered sale acquires its interest in that equipment free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.
2. A buyer of equipment acquires its interest in that equipment subject to an interest registered at the time of its acquisition.

### **Article XIV – Modification of assignment provisions**

Article 33(1) of the Convention applies as if the following were added immediately after sub-paragraph (b):

“and (c) the debtor has not been given prior notice in writing of an assignment in favour of another person”.

### **Article XV – Debtor provisions**

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the equipment in accordance with the agreement as against:
  - (a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention unless and to the extent that the debtor has otherwise agreed; and
  - (b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention [and Article XIII(1) of this Protocol], but only to the extent, if any, that such holder has agreed.
2. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to agricultural, mining or construction equipment.

## **CHAPTER III - REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AGRICULTURAL, CONSTRUCTION AND MINING EQUIPMENT**

### **Article XVI – The Supervisory Authority and the Registrar**

1. The Supervisory Authority shall be designated at the Diplomatic Conference to Adopt an Agricultural, Mining and Construction Equipment Protocol to the Cape Town Convention.
2. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise.

3. The Supervisory Authority may establish a commission of experts, from among persons nominated by Signatory and Contracting States and having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.

4. The first Registrar shall operate the International Registry for a period of five years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or reappointed at regular five-yearly intervals by the Supervisory Authority.

#### **Article XVII – First regulations**

The first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of this Protocol.

#### **Article XVIII - Designated entry points**

A Contracting State may at any time designate an entity or entities as the entry point or entry points through which there may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or of a right or interest under Article 40 of the Convention in either case arising under laws of another State. Such designation may permit but shall not compel the use of such designated entry point. The various entry points shall be operated at least during working hours in their respective territories.

#### **Article XIX – Additional modifications to Registry provisions**

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by regulations of the Supervisory Authority.

2. For the purposes of Article 25(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than [X] calendar days after the receipt of the demand described in such paragraph.

3. The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by Article 17(2) of the Convention.

4. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.

5. The insurance or financial guarantee referred to in Article 28(4) shall cover all liability of the Registrar under the Convention.

6. Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.

## CHAPTER IV - JURISDICTION

### Article XX – Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to agricultural, mining or construction equipment under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.
2. A waiver under the preceding paragraph must be in writing and contain a description of the equipment as specified in Article VII of this Protocol.

## CHAPTER V - RELATIONSHIP WITH OTHER CONVENTIONS

### Article XXI – Precedence of Protocol<sup>5</sup>

The Convention and this Protocol shall, for Contracting States which are parties to them, in the event of any conflict, take precedence over

[...]

as they relate to agricultural, mining and construction equipment, to the extent that that convention is in force among them and that the terms of that convention are inconsistent with the provisions of the Convention or of this Protocol.

### Article XXII – Relationship with the *UNIDROIT Convention on International Financial Leasing*

The Convention as applied to agricultural, mining and construction equipment shall supersede the *UNIDROIT Convention on International Financial Leasing* in respect of the subject matter of this Protocol, as between States Parties to both Conventions.

## CHAPTER VI - FINAL PROVISIONS

[Once a consensus has evolved, final provisions will be added. The Final Provisions of the Aircraft and Rail Protocols *inter alia* deal with the signature, ratification, acceptance and approval of, or accession to, the Protocols, their entry into force, declarations and reservations, the denunciation of the Protocols, Review Conferences, amendments and related matters and the Depositary and its functions.]

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<sup>5</sup> The need for a provision on the precedence of the Protocol should be carefully considered.

**APPENDIX 2**

**Comments received in response to the tentative draft text of a Protocol relating to  
agricultural, mining and construction equipment**  
(as of 25 March 2009)

**AUSTRALIA**

We have conducted some initial consultations and within Australia we have not detected a high level of interest at this stage. However, this would be expected as our understanding is that the protocol is designed to assist countries that do not have as ready access to commercial finance for mobile equipment of this type.

**AUSTRIA**

The consultations of the national stakeholders lead to the conclusion that this Protocol would be only of limited use and interest for the relevant Austrian industry and banking sector. The costs and efforts for the adoption and implementation of such a Protocol seem to be in no relation to its potential benefits. In comparison to aircraft equipment and railway rolling stock, agricultural, construction and mining equipment is usually stationary and not transferred between different countries.

Austria would therefore not participate in the preparation and adoption of this Protocol.

**CANADA**

The comments set out below have been developed in consideration of the following criteria, among others:

- Does the initiative address a demonstrated need (that is, not simply an identified legal problem or gap, but one that requires a solution)?
- Would the initiative duplicate efforts underway elsewhere?
- Is there a demonstrated interest on the part of a broad range of States or at least a very strong interest on the part of a particular group of States in the initiative?
- What are the resources that would be required?
- How long would it take to complete?
- Would the product have a reasonable chance of adoption in more than a few States?
- Overall, do the benefits outweigh the cost?
- Why should resources be allocated to this initiative over others?

Our consultations on the Protocol indicate that it would seem to offer general benefits. It would provide Canadian and international lenders with greater legal certainty with respect to the applicable rules when doing business abroad. It would also provide Canadians with the ability to exercise their rights in foreign jurisdictions. Stakeholders in the agricultural and mining sectors have expressed interest in the possibilities that the regime envisaged by the Protocol could bring for facilitating future investments in their sectors.

Our consultations have also brought to light a number of concerns, which are outlined below:

- The objects that are the subject of this Protocol do not have the same degree of mobility as those that are the subject of other Protocols under the Convention. Highly mobile assets, such as aircraft, would benefit from an international secured financing regime to a greater degree than objects that are less mobile, such as construction, mining and agricultural equipment. This raises the issue of whether these types of objects cross borders frequently enough to justify the creation of a new international regime. Accordingly, this Protocol may be of greater use in regions where national borders constitute less of a barrier, for example in continental Europe, and where States are in close proximity.
- The current draft of the Protocol presents certain inconsistencies with the domestic secured transactions regimes currently operating in Canada. For example, many of the objects covered by the Protocol (i.e. combines or heavy upgrader machinery) would not be considered mobile goods for the purposes of the conflicts of laws provisions of Canadian personal property security legislation. These inconsistencies could lead to a two-tier, bifurcated system in which secured financings would be covered by both the domestic secured transactions regimes (in respect of assets not covered by the international regime) and an international secured transactions regime that covers the specified assets. This would be contrary to the main purpose of the Protocol to have a single, secured transactions regime.
- Although the benefits of a two-tier, bifurcated system may outweigh the costs in the case of highly mobile equipment, the benefits diminish and the costs increase when dealing with assets that are largely fixed. Some stakeholders have expressed the view that the scope of this Protocol should be more clearly specified (i.e., the nature of the equipment covered). One suggestion was that the thresholds for the equipment should be substantial, even if this would lead to gaps in coverage (i.e., \$100,000 for agricultural equipment to capture large tractors, combines etc., \$200,000 for mining equipment to capture large trucks, shovels etc., and \$500,000 to \$1 million for construction equipment as in most cases this equipment would be sourced from domestic supply).
- The style and language of the draft Protocol are not always consistent with other Protocols under the Convention. For example, the wording of the Preamble in the draft Protocol is different from that of the Aircraft Equipment and Railway Rolling Stock Protocols. There are also substantive differences between the draft Protocol and other Protocols under the Convention. For example, the draft Protocol provides for three types of remedies in insolvency, which is similar to the Railway Rolling Stock Protocol, but not the Aircraft Equipment Protocol. The reasons for these differences are unclear.

Generally, our consultations indicate that there seems to be an interest in Canada for this Protocol, especially from the agriculture and mining sectors upon which the Protocol would potentially have the greatest impact. There are concerns, however, about creating an international registry that may not be cost effective, considering the value and mobility of the objects, and about the inconsistencies that would exist between Canadian personal property security legislation and the international secured transactions regime that would be introduced by the Protocol.

The results of the initial questionnaire were considered inconclusive and although the solicitation of expert studies from each industry was contemplated in the initial stages of the project, there has been no mention of such further research. Accordingly, before deciding whether to move forward with this project, it would be important to have a more developed background study covering a range of issues including, the nature of each industry, the types and value of equipment, the

nature and frequency of financing agreements and the extent to which such equipment does cross borders, all with the aim of demonstrating the need for and feasibility of developing a successful Protocol, in line with the criteria set out above. Thus, although there is some interest in Canada, there is insufficient information for Canada to support developing a protocol at this time. We would, however, support further background work being done.

## **COLOMBIA**

### *About Article IV*

Article IV would enable parties, by agreement in writing, to exclude the application of Article XI (Remedies on insolvency) and, in their relations with each other, to derogate from or vary the effect of any of the provisions of this Protocol except Article IX (2)-(4) (Modification of default remedies). Colombia recalls that it has already made declarations under the Aircraft Protocol which expand the choice of parties (for example, Colombia's declaration under in relation to Article VIII of the Aircraft Protocol which enables the parties to an agreement to agree on the law which is to govern their contractual obligations).<sup>1</sup>

### *About Article VIII*

The Article VIII, which is subject to a declaration, would enable the parties to an agreement to agree on the law which is to govern their contractual rights. As noted above, Colombia has made a declaration under the corresponding article of the Aircraft Protocol.<sup>2</sup>

### *About Article XI*

Article XI of the draft Protocol would regulate the remedies that would be able to be applied in insolvency, and would require a Contracting State to make a declaration choosing between Alternative A, Alternative B, or Alternative C. Colombia notes that in respect of the corresponding Article in the Aircraft Protocol it made a declaration applying Alternative A. This article would modify the Convention's rules, in particular the provisions of Article 8 dealing with remedies of the chargee, and would enable Colombia to choose the appropriate insolvency procedures, having regard to its current domestic insolvency laws and policies (including the framework of Law 1116 of 2006). Colombia notes that Alternative C would enable the creditor to take possession of the object during the cure period but would also enable the debtor to request a suspension of this taking of possession. This is the only alternative that could be effectively applied under Colombian law, and Colombia would therefore choose Alternative C.

### *General commentary*

The draft Protocol under examination is satisfactory, and in particular would permit Colombia to make declarations in order to adapt the insolvency provisions in order to comply with the requirements of Colombian national laws, in particular to maintain consistency between Article XI

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<sup>1</sup> Under the draft Agriculture Protocol it is likely that many of the same declarations would be available, and that Colombia might make similar declarations to those that it made under the Aircraft Protocol: however, Colombia notes that the Alternative A of Article XI of the Aircraft Protocol is applicable not only to the process of reorganisation but also covers the process of judicial liquidation pursuant to Law 1116 of 2006, and to all other types of insolvency processes; Colombia also notes that in the corresponding declaration under the Aircraft Protocol it declared that the waiting period (after which the insolvency administrator would be required to deliver possession of an aircraft object) should be 60 days.

<sup>2</sup> Colombia notes that Article VIII of the draft Agriculture Protocol has the same sense as Article VIII of the Aircraft Protocol.

(Remedies on Insolvency) and Colombian insolvency laws. Also, the draft Protocol does not alter the priority system of the Convention (pursuant to which Colombia made a declaration under the Convention).

### ***FINLAND***

Generally, Finland welcomes the ongoing efforts of UNIDROIT to facilitate efficient financing and acquisition of mobile equipment in international context. Thus, Finland is generally supportive of the work done by UNIDROIT to explore new areas where the results already achieved in the fields of aviation and rail could be expanded.

With respect to agricultural, construction and mining equipment in particular, Finland is, for the present, of the opinion that the question of the desirability of an additional protocol to the 2001 Cape Town Convention warrants further scrutiny. Arguably, such an instrument would be of value, as it would no doubt enhance legal certainty for international financing arrangements for the equipment in question. Based on our preliminary consultations of stakeholders in Finland, the utility of such an additional protocol would seem to be greatest in the mining industry, where there is a need for cross-border financing that would obviously benefit from a global legal regime. Again based on the preliminary response of Finnish stakeholders, however, there seems to be considerably less interest in such a protocol among those representing the interests of agriculture or the construction industry.

### ***GERMANY***

With reference to the Note Verbal of 23 October 2008 prepared by the UNIDROIT Secretariat concerning the preparation of an additional Protocol to the Cape Town Convention on Matters specific to Agricultural, Construction and Mining equipment (UNIDROIT 2009 C.D. (88) 6 (c) Rev.), Germany has the honour to inform the UNIDROIT Secretariat of its strong interest in pursuing the project of the proposed protocol to the 2001 Cape Town Convention on International Interests in Mobile Equipment on agricultural, construction and mining equipment.

Especially, the German agricultural industry has shown considerable interest in the creation of a protocol on agricultural, construction and mining equipment due to the expectation that much better financial facilities would be available. This strong interest is especially involving marketing intermediaries and banks, especially in emerging markets it has turned out difficult to find financially strong partners. Long-term financing at a favourable rate often only can be obtained from abroad. Especially in these cases the question arises by which means credits can be safeguarded. An international interest would create the possibility to make the recoverability of the assets useful in transnational financing and to make financing more independent from the partner's financial power. Furthermore the German manufacturers of construction and mining equipment indicated considerable interest in establishing an international interest according to their devices by an additional Protocol to the Cape Town Convention on Matters specific to Agricultural, Construction and Mining equipment. But because of the actual economic crises they currently do not have any capacities available to support the project in an active manner.

Such an international interest would not only support the larger enterprises which have established themselves in global markets already but also, at least indirectly, smaller ancillary suppliers which usually operate on the domestic market only. Besides, a considerable amount of small and medium-sized firms produce agricultural, construction and mining equipment. The capital cover of those firms is generally lower compared to global players. Therefore the shortfall in payment of

just one partner can arouse much bigger trouble. This prospect alone can lower the incentives of those producers to export their equipment in regions with lower financial power. This fact has also been confirmed by the UNIDROIT 's preliminary investigation into the utility of a fourth Protocol on Agricultural, Constructing and Mining Equipment. The investigation has exposed that especially in developing and newly industrialized countries shortages of such equipment are obvious. Many of these countries do not have any or very little equipment at their disposal as referred to in the fourth protocol. This shows that the need of a reliable international interest concerning agricultural, constructing and mining equipment is exceptionally urgent.

It also has to be stressed that the abolition of financial restraints in the agricultural sector as a consequence will improve the worldwide alimentary situation by a more effective utilisation of agricultural land. A reliable international interest will also encourage owners of such equipment, especially agricultural equipment like combined harvesters, to even let them cross borders. In this way the international interest opens up opportunities to provide such equipment on a wide range what otherwise would not be acceptable for the creditors. Rising food prices and the iniquity of food insecurity in developing countries is a strong request to provide effective agricultural equipment to these countries at reasonable economical conditions. Such realistic development aid will present developing countries a fair option to help themselves by using their own potentials. In the face of such potential the project of an fourth protocol can offer UNIDROIT an opportunity for a productive alliance with the UN Food and Agriculture Organisation to fight hunger and to reach the targets of development set by the 1996 World Food Summit.

Due to the experience and example given by the Aircraft Equipment Protocol and the Railway Protocol and taking into account the preparations already made by the UNIDROIT Secretariat it can be expected that a protocol specific to agricultural, construction and mining equipment will be completed with little effort. A study group called by UNIDROIT could evaluate the statements of the states now and afterwards, investigate the dispositions of the industry. Both could be reflected on at a first meeting of interested states, the UNIDROIT Secretariat and members of the industry later this year.

#### **LATVIA**

The Government of the Republic of Latvia does not have any comments or suggestions to the draft *Protocol to the 2001 Cape Town Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment*.

#### **PORTUGAL**

Having regard to the Note Verbale containing a proposal relating to a Protocol under the Convention, we advise that we do not have any comments or suggestions of a technical nature relative to agricultural equipment.

#### **ROMANIA**

The Ministry of Justice and Citizens Liberties has the honor to transmit the following suggestion: in relation to the proposal of art. XI, the B variant is preferred, because its concise form and because it offers an increased guaranty.

As soon as the Ministry of Justice and Citizens Liberties receives proposals or suggestions from other competent Authorities – to whom the draft Protocol has been transmitted – they will be transmitted.

### ***UNITED STATES OF AMERICA***

It is the view of the United States that there is a global need for a protocol to the Cape Town Convention that will facilitate the financing and acquisition of agricultural, mining and construction equipment. Early indications are that it will be welcomed by developing as well as manufacturing states and will be supported by multilateral and bilateral bodies that engage in facilitating development, capacity building and trade. There are many areas of the world where shortages of such equipment have retarded economic growth and, in the case of agriculture, resulted in smaller and less efficient harvests which in turn has contributed to higher food costs and greater hunger. The draft of the protocol, prepared by the UNIDROIT Secretariat and circulated to States, represents a strong start and provides a firm basis from which to proceed.

The United States suggests that the Council consider establishing a flexible time frame in which initial steps could be taken that would lead to a study group meeting. Following the incorporation of views from States, UNIDROIT could establish by this summer an industry group, as it previously did with Aviation, Rail and Space, and seek comments from that group. One area that the industry group would want to pay particular attention to would be the scope of the equipment that could be covered by the Protocol. As a next step, there could be a meeting including this group, the UNIDROIT Secretariat and interested States this summer, or as soon thereafter as possible to review industry comments. A study group could then be established and hold its first meeting later this year. Consistent with U.S. recommendations as to the working methods of UNIDROIT, the study group should be constituted so as to ensure full geographical representation.

With respect to the provisions in the Secretariat draft, the United States has the following preliminary comments to make:

Regarding Article I (2)(a), we agree with this approach to defining the three types of equipment because there is a need here for separate definition provisions.

With respect to footnote 4 on the 4<sup>th</sup> page, we would note that ultimately, this Protocol may need to incorporate both approaches referenced here.

We note that in Articles IX and XI, the draft omits provisions found in the Rail and Air Protocols. It would be helpful to know the drafter's rationale for these deletions.

In Article XIX (5), we believe that this provision should be modified so that it is the Supervisory Authority that determines the level of liability the insurance or financial guarantee covers.

With respect to Article XXII, the relationship of this protocol to the International Financial Leasing Convention should be re-examined on its own merits. As a related matter, other conventions as well as the recently concluded UNIDROIT model law on leasing should also be examined with respect to their interaction with this protocol.

As a final matter, we would suggest that transitional arrangements should be considered at the early stages of this process rather than near its conclusion, regardless of whether they are grouped with the Final provisions.

In conclusion, we believe that there is substantial support to pursue this project, and we note that it may be the first UNIDROIT project to present a basis for active collaboration with the UN Food and Agriculture Organization. We welcome the early initiation of consultations with industry and interested States.