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Item No. 5 on the agenda: International Interests in Mobile Equipment –
(c) Preparation of other Protocols to the Cape Town Convention, in particular
on matters specific to agricultural, mining and construction equipment

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Update on activities undertaken by the Secretariat.</i>
<i>Action to be taken</i>	<i>See § 11</i>
<i>Mandate</i>	<i>Work Programme 2011-2013</i>
<i>Priority level</i>	<i>Medium</i>
<i>Status</i>	<i>Ongoing activity</i>
<i>Related documents</i>	

INTRODUCTION

1. The *Convention on International Interests in Mobile Equipment* (the Convention) was opened for signature on 16 November 2001. Article 2(3) of the Convention anticipates that the initial 3 protocols would cover aircraft, railway rolling stock and space assets; protocols related to aircraft and to railway rolling stock have been adopted, and a protocol related to space assets is to be considered for adoption at a Diplomatic Conference to be held in Berlin from 27 February to 9 March 2012. Article 51 of the Convention provides that the process to be followed for the development of additional future protocols would involve the creation of working groups.

BACKGROUND

2. At its 90th session the Governing Council discussed future work on a possible fourth protocol on agricultural, construction and mining equipment. The Council decided that the Secretariat should conduct informal consultations in the second half of 2011, possibly in conjunction with the colloquium on private law and agriculture. The objective of the consultations would be to build upon the Institute's previous work (which included a questionnaire of States, and consultations convened in cooperation with the German Bundesministerium der Justiz) by conducting a focused and specialised discussion of the potential issues that would be involved in the development of a fourth protocol.

3. On 10 November 2011 the Secretariat convened a forum on "Possible Benefits of Extending the Cape Town System to Agricultural, Mining and Construction Equipment". The forum, which was part of the UNIDROIT Colloquium "Promoting Investment in Agricultural Production: Private Law Aspects", was chaired by Dr Bollweg (Governing Council Member, Germany).

4. At the forum, the UNIDROIT Secretariat made a presentation giving an overview of the Cape Town Convention, of the work that had been undertaken to date on the possible fourth protocol (including the questionnaire sent to States, and industry consultations), and of the legal, technical and practical issues that would need to be addressed in developing the possible fourth protocol.

5. A representative from Caterpillar Financial SARL, Ms Katrin Frauchiger, made a presentation on industry perspectives. After noting the extensive use of secured financing (finance leasing and mortgages) particularly in relation to construction and mining equipment, she noted a range of issues that affect the cost and availability of financing, and which are routinely considered in the due diligence phase of secured financing deals:

- Whether it is possible to register the security interest;
- Fees charged for registering security interests;
- Local laws may qualifications as to who may register a security interest (eg only local persons/entities);
- Whether creditors security interest could give rise to liability in the event of damage;
- Difficulties in enforcing rights and obtaining remedies (in particular, self-help remedies are very limited outside of North America).

6. Ms Frauchiger also gave examples of the numerous country-by-country differences in relation to regimes for registration of security interests. For example, in relation to finance leasing she noted that there were no comprehensive, mandatory registration regimes for registration of a lessor's interest. In relation to charges/mortgages over equipment, Ms Frauchiger noted that there was a wide variety in approaches, and gave examples of some differences in approaches, including:

- United Kingdom: it is possible for a mortgagor to register a chattels mortgage, but there are documentary requirements (eg the original mortgage must be produced at registration) and the process is restricted to companies;
- Turkey – equipment pledges can be registered at regional chambers of commerce, but the process is burdensome (eg involves personal attendance, notarised documents) and expensive;
- United Arab Emirates – it is only possible to register security interests in "vehicles", and only at road traffic authorities.

7. Finally, Ms Frauchiger indicated support for the development of a harmonised registration system in order to reduce the costs and complexities arising from the existence of numerous national approaches. She noted that such system should enable registrations to prevail over local formalities, should be harmonised with the UNCITRAL legislative guide on secured transactions,

and should enable security interests (or the underlying equipment) to move from one jurisdiction to the next without the need to make a new registration. The system should also enable registered interests to be protected against interests of bone fide third-party purchasers, and should provide a uniform set of remedies enabling fast enforcement actions. It would also be important for the registration processes themselves to be relatively simple and low costs. In relation to the potential fourth protocol, she noted that it could address many existing problems by improving legal certainty, reduce borrowing costs (eg through lower rates of bad debts, capacity to use standard documentation across jurisdictions), and broadening the markets for financed equipment.

8. A question and answer discussion session followed the presentations. Although a number of issues emerged, a central concern expressed by several participants was the need to ensure that any future protocol project was based on sound economic analysis as to the existing barriers to secured financing and the capacity for a future protocol to address those barriers. This would require close examination of the economic value of any improved access to remedies that the protocol might create.

9. In closing the forum, Dr Bollweg noted that whilst the forum had provided valuable industry insights, it would in future be necessary to involve a broader range of industry views, in particular so as to gauge interest in a potential protocol in areas beyond Europe and North America.

10. Following the forum, the Secretariat has been consulting with the Center for the Economic Analysis of Law (Washington D.C.) in relation to an offer by the Center to undertake an economic impact analysis of the possible fourth protocol. This work would be undertaken without cost to the Secretariat. The Secretariat would propose continuing to consult with a view to reaching agreement for the Center to undertake the analysis work. The Secretariat would also propose that it explore appropriate opportunities to continue consulting with relevant industry representatives.

ACTION TO BE TAKEN

11. *The UNIDROIT Secretariat would invite the Governing Council to take note of the Secretariat's proposal to continue consultations with the Center for the Economic Analysis of Law with a view to reaching agreement for the Center to undertake an economic impact analysis of the possible fourth protocol, and to explore appropriate opportunities to continue its industry consultation efforts.*