IMPLEMENTATION OF THE OAS MODEL LAW IN LATIN AMERICA: CURRENT STATUS

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To Ronald C.C. Cuming and Harry C. Sigman, good friends and masters of the law and best practices on notices of security interests; with my appreciation for the many lessons they have taught me and members of the NLCIFT's staff.

The purpose of this article is to report on the progress of the adoption of the Organization of American States' Model Inter-American Law on Secured Transactions (OAS Model Law)[1] in Central and South America and the Caribbean. Because some Caribbean and South American countries have expressed an interest in joining their neighbors who have adopted the OAS Model Law, I will provide readers in these countries and interested readers elsewhere an account of why their neighbors adopted this law, including a short discussion of its Roman, civil, and Anglo-American law roots. It is also important to report on why some adoptions, such as those in Honduras, already have so far succeeded in attaining some of their legislative goals while others have had to undergo drastic revisions shortly after their enactment and are still awaiting the attainment of their goals. Finally, I believe that the reader will profit from knowing why, despite the multiplicity of legal sources used in drafting the OAS Model Law, its guiding principles, rules, and concepts can bring about secured credit or asset-based lending in the Americas and how to make sure that the implementation of this law can truly succeed.

I. THE COMPATIBILITY OF THE OAS MODEL LAW WITH CIVIL AND COMMON LAW SYSTEMS

The compatibility of the OAS Model Law with civil and common law systems was made possible by legal institutions that the civil and the common law

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1. ORG. OF AM. STATES (OAS), MODEL INTER-AM. LAW ON SECURED TRANSACTIONS (2002), http://www.oas.org/dil/cidip-vi-securedtransactions_eng.htm [hereinafter OAS MODEL LAW].

systems have in common as a result of their common Roman law ancestry. One of the Roman law institutions inherited by Anglo-American and Latin American legal systems alike enabled secured debtors and creditors to enjoy possessory rights in the same things and at the same time. For instance, a debtor's property right in a movable thing coexisted with a creditor's possessory right on the same thing, whether this right was granted through a pledge (*pignus*) or through a fiduciary sale (*fiducia cum creditore*).[2] This was also true for immovable property, but the concept of coexisting rights in the same "personal" or movable property proved particularly useful in Anglo-American jurisdictions. Moreover, the flexibility provided by allowing simultaneous possessory rights in the same movable thing or things to various secured creditors and debtors has proved essential in the increasingly speedy transnational trade and trade financing characteristics of the twentieth and twenty-first centuries, as well as in the economic development of nations, big and small.

Consider, for example, the following rights that could be claimed as ownership or possessory rights typical of a transnational sale of traveling and quickly disposable business assets.

> *S*, a German manufacturer of widgets, decides to sell them to *B* on the following basis: 80% of their price will be paid by an irrevocable documentary letter of credit issued by a Spanish bank with branch offices throughout Europe and the United States (*IB*), and the remaining 20% to be paid in the future and which will be secured by a retention of title (or ownership) agreement that reserves title to the widgets with *S* until *B* pays such 20%. In order to secure *IB*'s reimbursement for the issuance of the letter of credit, *IB* requires, in an agreement concluded prior to the shipment of the goods, for *S* to endorse in favor of *IB* the negotiable bill of lading issued by *OC*, the ocean carrier of the widgets. This endorsement was the result of a security agreement (at times referred to as a letter of hypothecation[3]) entered into between *IB* and *B*. As an endorsee of the bill of lading, *IB* acquired the right to the possession of the goods shipped once the vessel arrived at its destination, regardless of *S*'s and *B*'s title or ownership claims to the goods and subject only to *OC*'s possessory right to retain the goods

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2. *See* W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 620 (3d ed. 1963) (describing a transaction in which the debtor "sold" the collateral to the creditor with the latter's obligation to resell the collateral to the debtor upon the debtor's compliance with the underlying obligation).

3. Such an agreement is still referred to in some countries as a "letter of hypothecation" and in others as a mere security. *See, e.g.*, *Financiamiento de la Vivienda y la Construcción* [Housing Finance and Construction], Law No. 24.441, arts. 35–49, Jan. 9, 1995, B.O. 28061 (Arg.).

> until their freight was paid. Shortly before the arrival of the widgets and counting on their easy marketability, *F*, a Canadian bank with offices in the United States, extends a line of credit to *B* and takes as collateral B's inventory that will include the widgets sold by *S* to *B* as well as *B*'s accounts receivable from the sale of such widgets. The goods arrive in the United States, and when *IB* tenders the bill of lading to *OC*, the latter advises *IB* that neither *S* nor *B* has paid for the freight due on the shipment, and *OC* will retain possession of the widgets until its freight charges are paid. *IB* pays the freight, obtains the widgets from *OC*, and asks a jobber (*J*) to sell them as quickly as possible to any interested commercial or consumer buyer. The widgets are sold to a cooperative, each of whose members purchases a certain amount of widgets and receives a paid invoice, which states that the purchaser has title to the purchased widgets free of a security interest.

The preceding is but a slight variant of an actual transaction on which I was asked to render an expert opinion a number of years ago. Please ask yourselves: Who is the true owner of the widgets? The German seller who still has not collected the 20% of the purchase price of the widgets? The buyer who entered into a sale agreement, which, under the laws of some of the involved jurisdictions, is a consensual agreement that confers title to the buyer from the moment *S* and *B* agreed on the subject matter and price involved in the contract? *IB*, who was the lawful holder of a negotiable (endorsed) bill of lading that entitled him to claim the widgets from the carrier? The end-purchaser of the widgets?

It should be clear by now that the rights of the above parties to the widgets originally purchased by *B* and resold by *IB* cannot be determined by asking the question: Who is their owner? Or by trying to reconstruct the history of the various conveyances and liens created in different places and governed by different, and often conflicting, laws. After all, the concept of a chain of title belongs with immovable property and is governed by a law that Anglo-American lawyers still refer to as the law of real property. Yet widgets, letters of credit, letters of hypothecation, and negotiable bills of lading do not belong in a transactional world where Blackacre remains immobile for generations while its inhabitants come and go. In other words, what matters for the determination of rights in the example above is not the chain of title to the widgets. As stated by the French Civil Code of 1804, in a moment of remarkable insight: "In matters of movables, possession is equivalent to a title";[4] and as stated by the heading of

4. CODE CIVIL [C. CIV.] art. 2279 (Fr.).

Section 9-202 of the Uniform Commercial Code (UCC): "Title to Collateral Immaterial."[5]

On the other hand, if the rights to the possession of these goods could be reduced to their common denominator, and if adequate public notice could be provided to creditors and purchasers of the widgets, at least at the time and place of the financing and distribution of those widgets, a modicum of legal predictability could be injected into a chaotic national and multinational legal landscape. Adequate public notice of the acquisition of rights in the widgets and their market value could "perfect" the secured creditor's rights (meaning provide public notice of their existence) and make these rights effective against third parties; accordingly, other creditors or purchasers could know who has prior rights in the widgets and the proceeds of their sale or exchange. This combination of substantive, procedural, and registry laws should bring about the desirable predictability to this confusing landscape. Substantive law should answer, among other questions, what a security interest is, who the parties to it are, what collateral is, when a security interest is created, when it is perfected, what the scope of perfection is, who has priority, and when and how the security interest can be realized. Procedural law should provide the remedies in case of debtor default and make remedies available to an unpaid creditor as well as to an aggrieved borrower or third party. Registry law should determine what authorization is necessary for the creditor to submit a registration; what has to be filed, where, how, and by whom; how to amend or cancel a filing; and what are the responsibilities of filers and registry officials, among others.

II. ANGLO-SAXON LAW: GREAT BRITAIN AND THE UNITED STATES

A. Great Britain

As described by Professor Roy Goode, the process of adjusting the mortgage and the pledge to the needs of an increasingly commercialized society started during the sixteenth century. Prior to that time, mortgages required that the debtor transfer title to the land and often also its possession to the mortgagee/secured creditor. This practice was so generalized that many courts presumed that, when a mortgagee allowed the debtor/mortgagor to remain in possession of the land, the purpose of this allowance was to defraud other creditors; thus, a badge of fraud hovered over mortgages in which the debtor was allowed to remain in possession.[6]

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5. U.C.C. § 9-202 (2002).

6. *See* ROY GOODE, COMMERCIAL LAW 585 (3d ed. 2004). Interestingly, such practice continued in the United States until the beginning of the twentieth century. *See* 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 26 (1965) (stating that, unless the creditor received possession of the collateral, there would be a judicial

With the increased commercialization of England, starting in the sixteenth century, many English mortgages no longer required the transfer of title to, or possession by, the creditor.[7] Behind the new practice was a commercial rationale. By allowing the mortgage debtor to retain title to and possession of his property, he could generate revenues with which to repay more easily his mortgage debts, among others. During the eighteenth century, this practice was extended to chattel mortgages and pledges of movable property, especially when used as commercial assets. In retrospect, it was possible to refer to commercial loans secured by commercial assets such as the debtor's inventory, equipment, accounts receivable, and others as "self-liquidating."[8] By self-liquidating, I mean a loan that allows the debtor to retain possession and use of the collateral, which facilitates repayment with the proceeds derived from the transformation, sale, pledge, or exchange of that collateral.[9]

This productive feature of the debtor's possession was of immediate benefit not only to small and medium-sized merchants but also to farmers, artisans, and professionals. In the case of commercial debtors, the fact that their goods generally had a determinable market value enabled a form of loan known as a "line of credit." It was distinguishable from the late nineteenth century European commercial loan known as an "opening of credit" agreement (*apertura di credito*, *apertura de crédito*, or *ouverture de crédit*). In the latter, funds were made available to the borrower up to a certain amount for a fixed period of time. In the line-of-credit loan, the amount lent was subject to fluctuation depending upon the ratio between the market value of the collateral (as business assets such as inventory, equipment, accounts receivable, and proceeds) and the amount lent. The greater the value of the collateral and profitable proceeds generated from its sale or exchange, the larger the amount of the loan and also, and most importantly, the lower the rate of interest charged to the line-of-credit debtor.

Professor Goode points out that the only mortgage that allowed the debtor to remain in possession of the land with the power to cultivate it in nascent England was the so-called "Jewish loan."[10] It was authorized toward the end of the twelfth century during the reign of Richard I (the Lionheart) and had to be recorded in England's first land registry.[11] This was an important step in the development of security interests in personal property because their perfection, in most instances, also required their filing in a public registry. The public notice provided by this filing in due course became an essential component of the security interest in personal property and in asset-based lending. Another

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presumption that the deferred payment sale or term loan was either fraudulent or had the purpose of defrauding creditors or good faith buyers).

7. *Id.*

8. Boris Kozolchyk & Dale Beck Furnish, *The OAS Model Law on Secured Transactions: A Comparative Analysis*, 12 SW. J.L. & TRADE AM. 235, 243–44 (2006).

9. *Id.*

10. GOODE, *supra* note 6, at 585.

11. *Id.*

important datum on the development of the law of English security interests is found in one of England's first international commercial law textbooks. Leone Levi's *International Commercial Law*, published in 1863, describes the protean figure of a commercial factor and distinguishes him from a commercial broker:[12]

> Factors are general agents, acting for others, with limited or general authority. A factor differs from a broker. The broker is not trusted with the possession of the goods, nor ought he to sell in his own name; but the factor, from its being usual for him to make advances upon the goods, *has a special property in as well as a general lien upon them*, and may sell in his own name.

This description of the factor and his collateral failed to include the by-then increasing use of collateral in the form of intangible property, such as accounts receivable, bills of exchange, promissory notes, bills of lading, and warehouse receipts. A possible reason for Levy's failure to include this collateral is that factoring in England and elsewhere often became part of other forms of commercial secured lending. Thus, the types of secured loans and lenders who relied on them in nineteenth century England were quite varied. As my former NLCIFT colleague John Wilson (presently with the OAS legal staff) and I described:

> The merchants who participated in shaping the 18th and 19th century English commercial secured loans included: (1) goldsmiths, who lent on the collateral of jewelry which most often remained in their possession until they were repaid; (2) general or unspecialized bankers, who lent to merchants and often took as security a non-possessory pledge of their borrowers' inventory known as the "floating charge"; (3) "merchant bankers," who lent on the security of documents of title such as bills of lading and warehouse receipts and on the security of the goods and proceeds that resulted from selling the documents or the goods; and (4) the "factors," who lent on the strength of commercial and consumer accounts receivable either in the form of invoices or bills of exchange and promissory notes.[13]

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12. *See* LEONE LEVI, INTERNATIONAL COMMERCIAL LAW 143 (London, Stevens & Haynes, 1863) (emphasis added).

13. Boris Kozolchyk & John M. Wilson, *The Organization of American States: The New Model Inter-American Law on Secured Transactions*, 7 UNIF. L. REV. 69, 72 (2002).

B. The United States

The use of secured transactions involving personal property and commercial assets without requiring the debtor's dispossession started in the United States at the turn of the nineteenth century, as it gradually transformed from an agricultural society to a commercial and industrial one. It took the United States very little time to exceed the volume and variety of English asset-based lending. Installment sales to consumers were being secured by chattel mortgages and conditional sales or sales where title had been retained by the unpaid seller. The first chattel mortgage laws were enacted by very active northeastern industrial commercial states beginning in the 1820s.[14] As with Richard I's "Jewish" mortgages, one of the principal features of the U.S. chattel mortgages was that the rights of the chattel mortgagees were effective against third parties once recorded in public registries. Thus, Section 230 of the Chattel Mortgage Act of New York[15] reflected the need to overcome the badge of fraud that accompanied this law, and stated:

> Every mortgage or conveyance intended to operate as a mortgage of goods or chattels . . . which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void against creditors of the mortgagor and purchasers of the mortgaged property unless the mortgage or a true copy thereof is filed as directed in this article.[16]

As pointed out by Professor Grant Gilmore, one of the great figures of American commercial and secured transactions law in the twentieth century, conceptually the seller in a conditional sale or sale with retention of title had a superior right to the chattel mortgagee because, at least in theory, the seller was the owner of the goods sold until the buyer fully paid for them.[17] In contrast, the chattel mortgagee was the holder of a security interest, which authorized him to repossess the goods subject to it but not as an owner. This distinction caused the judicial perception of superiority of the rights of the conditional seller and was the reason some states attempted to grant the chattel mortgagee a rather imprecise title to the goods mortgaged.

Not surprisingly, U.S. lenders preferred to rely on the conditional sale for two of their most important credit transactions: the purchase of industrial equipment (at one end of the credit spectrum) and of consumer goods (at the

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14. *See* GILMORE, *supra* note 6, at 124–25. *See generally* George Lee Flint Jr. & Marie Juliet Alfaro, *Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World*, 30 WM. MITCHELL L. REV. 1403 (2004).
15. *See* N.Y. LIEN LAW § 230 (repealed).
16. GILMORE, *supra* note 6, at 26.
17. *Id.*

other). Apparently, secured transactions lawyers had concluded that conditional sales were also immune to the reach of after-acquired collateral clauses of chattel mortgages. In addition, conditional sales did not have to be recorded, and the goods sold and unpaid were more easily recovered by their "owner" than by a secured creditor. A similar rationale caused the widespread use of financial leases in which the lender could use the ownership mantle.

On the other hand, factoring as a means to finance manufacturers, wholesalers, and retailers grew in importance. Each of these market players relied on different collateral, although they often combined them, such as inventory followed by accounts receivable and proceeds. Similarly, the growth in the import and export transactions through the Great Lakes created new types of security interests, such as those of holders of trust receipts. When signing this receipt, the importer of goods whose payment was financed by a bank's issuance of an irrevocable commercial letter of credit agreed to act as a fiduciary agent of the bank for the sale or exchange of these goods and to apply the proceeds of such a sale or exchange to the repayment of the amount owed to the bank as reimbursement for the issuance of the letter of credit. As such a fiduciary agent or trustee, the importer became the endorsee of the negotiable ocean bill of lading that covered the shipment of the goods that was originally issued in the name of the issuing bank or endorsed to its order. An important feature of this trust receipt was that it granted its holder (the bank that issued the import letter of credit) the right to collect from the proceeds generated by the sales or exchanges of the imported goods. This was true regardless of the corporeal or incorporeal nature of these proceeds. As long as they could be traced to the original goods, it did not matter whether the proceeds had become part of the debtor's bank accounts, inventory, equipment, or other types of goods. The seminal concepts of attributable or derived goods (*bienes atribuibles o derivados* for the Anglo-American term "proceeds") used by the OAS Model Law owe their inspiration to the above-described trust receipt practice. I might add that this concept was first and insightfully studied in the Spanish-speaking world by Professor Jaume Tarabal of the University of Barcelona in his article on proceeds written in part while a visiting scholar at the NLCIFT.[18]

At the end of the Second World War, the diversity and often inconsistency of these security devices across the laws of forty-odd states threatened the legal certainty of secured lending. It was for this reason that they were unified and made part of the unitary concept of a security interest by Article 9 of the UCC. The best Spanish translation for a security interest is that of a *derecho posesorio preferencial* because a security interest is not based on ownership, as made clear by the heading of Section 9-202;[19] title or ownership rights in the collateral are immaterial for Article 9 purposes. Thus, it is a

18. Jaume Tarabal Bosch, *El concepto de proceeds en el Artículo 9 UCC*, INDRET, No. 1/2010, *available at* http://www.indret.com/pdf/717_es.pdf.

19. *See* U.C.C. § 9-202 (2002) ("Title to Collateral Immaterial").

possessory right that, depending upon the priority rules of the law of secured transactions, is superior or preferential to others. By means of this conceptual common denominator, all the previously existing rights in rem (whether those of a purported owner such as that by the conditional seller or financial lessor or of a lien holder such as the chattel mortgagee) became one and the same and were subject to the same rules for their creation or "constitution" (attachment), public notice (perfection), priority, and enforcement. The original version of Article 9 began to be enacted by some states in 1952 and is now in force with some variants in the fifty states. Its importance can be measured by reports such as that of the Financial Association of California for the year 2002, in which it appears that 26.1% of the short-term debt of commercial enterprises was secured by Article 9 and, of these enterprises, 71% belonged to small and medium-sized entrepreneurs with annual sales of no more than $50 million.[20]

III. GERMAN LAW

The flexibility provided by the enjoyment of simultaneous or coexistent possessory rights in the same collateral by secured creditors increased commercial credit not only in common law countries but also in the law of continental countries such as Germany, which, as England had done, adjusted Roman legal institutions to the requirements of asset-based lending. The Roman legal institutions selected by German judges after observing market practices was the previously mentioned *fiducia cum creditore*, and its adaptation was the *sicherungs übereignung*. It should be recalled that in the *fiducia*, the debtor sold the collateral to the unpaid creditor for the latter to hold until he was repaid, at which point he had the fiduciary obligation to return it to the debtor.

The *sicherungs übereignung* was not a legislative product, but was created by German courts, which started enforcing it by the end of the nineteenth century; shortly thereafter, it was adopted with slight variations in Holland and Scotland.[21] In Germany, it has remained a judicial creature, while in Slovakia and other countries, it was enacted by the legislature.[22] This legal institution allows the coexistence of fiduciary and legal title in the same collateral, thereby enabling the productive possession of the debtor. On the other hand, as a security interest, it is not perfected by the public notice of a filing; thus it remains as a secret lien

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20. *See* Ted S. Eastman, *Asset Based Line of Credit for Importers*, TRADEPORT EXPORT FINANCE ONLINE (2005), http://tefo.com/products/asset-based-line-of-credit-for-importers.php.

21. *See* EVA-MARIA KIENINGER, SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW 11 (2004). Interestingly, Scotland adopted *fiducia cum creditore* for immovable property but rejected it for movables. *See* George L. Gretton, *Reception Without Integration? Floating Charges and Mixed Systems*, 78 TUL. L. REV. 307, 311 (2003).

22. *See* OBČIANSKEHO ZÁKONNÍKA [CIVIL CODE] § 553 (Slovk.).

for many third parties in the commercial and financial marketplace. In this respect, it is much less conducive to certainty than the OAS Model Law, which, as will be discussed shortly, does require a filing of the security for it to be effective vis-à-vis third parties.

In addition, the fact that the certainty of this security interest depends upon title to the collateral gives the creditor, even in his fiduciary capacity, more rights than he really needs because all that the law of secured transactions requires is a quick determination of who has a preferential or prior right to the immediate possession of the collateral, not a battle among actual or potential historical title-holders. As if this feature were not harmful enough, the fact that the creditor is granted a right of ownership in the collateral prevents the debtor from obtaining a subsequent loan even if the value of the collateral is such that it can support other security interests. The reason for this impediment must be found in the absolute nature of ownership rights, in contrast with the relative and coexistent nature of possessory rights. The difficulty of using a fiduciary ownership as the base right for an asset-based security interest is pointed out, with his customary clarity and precision, by Professor Ulrich Drobnig, one of the most respected contemporary German jurists:

> Ownership as the most comprehensive property right is dysfunctional for security purposes. It gives more rights to the secured creditor than are needed for the purpose of security. The countervailing interests of other persons, especially those of other creditors of the debtor, are so strong that the effects of the secured creditor's right of ownership must be limited. This can be more easily and has been more widely achieved for the use of ownership to secure loan money than for a seller's claim to secure the purchase price (and related claims).[23]

IV. ROMAN LAW IN THE OAS MODEL LAW

Roman law did not know of rights derived from retentions of title, negotiable ocean bills of lading, documentary letters of credit, or factoring, but did know about possessory rights, public notice, and their basic elements. If Rudolf von Jhering was right, "the strong arm" of the Roman legionnaire had quite a bit to do with it, and his planting of his flag in conquered land including valuable personal property was the legitimating force behind acquisitions sub hasta.[24] In addition, Roman law discerned which of the possessory rights were preferential or prevailed over other possessory and non-possessory rights.[25] The common

23. Ulrich Drobnig, *Secured Credit in International Insolvency Proceedings*, 33 TEX. INT'L L. J. 53, 60 (1998).

24. *See* RUDOLF VON JHERING, L'ESPRIT DU DROIT ROMAIN 111–19 (3d ed. 1969).

25. Kozolchyk & Furnish, *supra* note 8, 246–48.

denominator of possessory rights in Roman law did not require the possessor's intent to possess as an owner (*animus dominii* or *rem sibi habendi*).[26] As von Jhering showed, it was enough for the possessor to have the intent to be a legitimate holder (*animus possidendi* or *possidentis*).[27] This explained why non-owners or possessors who did not intend to be owners, such as bailees, carriers, and others, were protected in their possession by remedies or actions (*actiones*) both in rem and in personam.[28] In in rem actions, the plaintiff asserted his right in certain things possessed by the defendant, and in in personam actions, the plaintiff sued for the satisfaction of defendant's contractual or delictual liability.[29]

By their nature, rights in rem were more easily enforceable because they entitled the plaintiff to claim the thing, and this meant that the thing, by itself, could be pursued and repossessed regardless of who was its present possessor. Roman law also knew of rights and actions ad rem, which as Justice Story put it: "is not the right in the thing itself, but only against the person who has contracted to deliver it . . . a mere imperfect or inchoate right."[30] In addition, when these rights were in things owned by others, such as in life estates (*ususfructus*) or easements (*servitudes*), they were referred to in Roman law as *iura in re aliena* (rights in the things of others) and were pursuable by highly flexible possessory remedies, some of which were known as *interdicta*.[31] However, as pointed out by illustrious commercial law historian Levin Goldschmidt, Romans were not merchants. Romans predominantly used this type of right in relation to agriculture; in contrast, coexisting rights in movable and immovable property were particularly useful during England's sixteenth century commercialization (which eventually included immovable property and rights to such property). Later, England—in sharp contrast with Rome—grew into a country of financiers and producers of assets with high circulation and distribution (both domestic and international), and not a country of merely shopkeepers, as derogatorily put by Napoleon ("*une nation de boutiquiers"*).

The common law system that produced Article 9 of the UCC relied on the concept of "rights in the collateral" and its many flexible possessory remedies to enable multiple possessory rights to coexist in the same collateral, as did the Roman law of *iura in re aliena*.[32] This normative commonality provided the conceptual bridge between UCC Article 9 and the OAS Model Law. Thus, the OAS Model Law's preferential possessory right and the UCC's Article 9 security interest can be created *in* things (in rem) or *to* things (ad rem) and, as with the

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26. *Id.* at 247–48.
27. *Id.* at 248 n.38 and accompanying text.
28. *Id*. at 247–48.
29. ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 346 (1953).
30. *Jus ad Rem Definition*, LAW DICTIONARY, http://www.law-dictionary.org/JUS+AD+REM.asp?q=JUS+AD+REM (last visited Dec. 31, 2011).
31. Kozolchyk & Furnish, *supra* note 8, at 247.
32. *See* BORIS KOZOLCHYK, THE LAW OF COMMERCIAL CONTRACTS IN A COMPARATIVE AND ECONOMIC DEVELOPMENT PERSPECTIVE (forthcoming fall 2012).

Roman *iura in re aliena*, neither requires that the secured debtor or the creditor be the owner of the collateral. The term "things" in this context includes both tangible and intangible property. As long as the secured debtor has possessory rights in or to the collateral, he can convey them to his secured creditor and create a security interest in it.

In addition, the OAS Model Law and UCC Article 9 give the secured creditor the protection of summary judicial remedies, such as the Roman *interdicta*, and of extrajudicial, contractually based self-help remedies, such as those derived from the Roman *pacta* (agreements) or conveyances.[33] One such agreement was the Roman *pactum commissorium*.[34] This agreement, which is still illegal in many Latin American civil codes (especially those enacted during the nineteenth century under the influence of the French Civil Code of 1804), was not only legal, but also very popular for many centuries in both republican and imperial Rome.[35] Its illegality stemmed from a decree issued by Emperor Constantine during the fourth century in an attempt to stamp out usury, which was defined by Canonic law as the charge of any amount of interest, however miniscule, for the loan of principal.[36] While this definition remained in force in European countries such as France and Spain for many centuries, others, such as Germany, Holland, and Great Britain, adopted variants of Henry VIII's definition of usury, which regarded as usurious only a rate that exceeded that normally charged in the marketplace.[37]

The extrajudicial remedies of the OAS Model Law were largely inspired by a Roman fiduciary conveyance of collateral that Roman debtors used to make to their creditors, the *constitutum possessorium*, in which the debtor conveyed to the creditor fiduciary rights in the things pledged as security for the loan.[38] If the debtor defaulted in his payment obligation, the creditor, as the fiduciary appointed in the security agreement, could repossess and sell the collateral publicly or privately and retain the amount owed while returning the surplus, if any, to the debtor.[39] Some of the countries that have adopted this model require that the security agreement name a trusted third party, such as a notary public or public broker, to act as the fiduciary of the modern day versions of the *constitutum possessorium*, such as Honduras's *mandato irrevocable* (irrevocable power of attorney).[40]

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33. BERGER, *supra* note 29, at 614.
34. Kozolchyk & Furnish, *supra* note 8, at 256 n.76 and accompanying text.
35. *See* KOZOLCHYK, supra note 32, ch. IV.
36. Kozolchyk & Furnish, *supra* note 8, at 256–57.
37. *See* KOZOLCHYK, *supra* note 32, ch. XXVIII.
38. BERGER, supra note 29, at 411.
39. *Id*. at 614.
40. Ley de Garantías Mobiliarias [Law on Secured Transactions], Decreto No. 182-2009, tit. VII, ch. 1, 28 de enero del 2010, DIARIO OFICIAL [D.O.] [hereinafter Honduras LGM].

The judicial remedies of the OAS Model Law were mostly inspired by the Roman law of summary judicial remedies (*interdicta*). These remedies, which included repossession and private or public foreclosure, had to be decreed by courts at the end of summary hearings. It therefore made sense to adjust Latin America to contemporary secured lending law and practice, not only for the sake of compatibility with Article 9 of the UCC—which continues to be the most exhaustive version of secured transactions law anywhere—but also to attain the desirable uniformity of substantive, procedural, and registry law in the Americas.[41]

The UCC's "security interest" has its counterpart in the OAS Model Law's *derecho de posesión preferente o preferencial.*[42] Both of these legal institutions make it possible for secured debtors to remain in possession or control of the corporeal or incorporeal, tangible or intangible, future or present things pledged by them to their secured creditors. I should add that the UCC concept of "Control"[43] was designed to effectuate possessory rights over intangible or incorporeal goods, such as a bank depositor's claim over money he deposited with his bank, which he and his bank can agree will be "controlled" (meaning "drawn upon") by a designated secured creditor.[44] The secured creditor's security interest as well as his *derecho de posesión preferencial* make it possible for these secured creditors to allow their secured debtors or trusted third parties to remain in possession of the securing goods or assets. This makes it possible for these debtors to manufacture, transform, sell, exchange, or re-pledge these goods and earn "proceeds" (*bienes atribuibles o derivados*) from such acts. In case the secured debtor defaults, he will be protected by a combination of public notice procedural, possessory, and foreclosure remedies that allow him to repay himself from the proceeds of the collateral.

What then was the common denominator in the OAS Model Law of the various claims to the widgets in the above sample transaction? The unpaid seller in the retention of title agreement, the unpaid bank that issued the letter of credit and secured its loan with a negotiable document of title, the factor who financed the acquisition of the widgets and secured it with *B*'s inventory and accounts

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41. The process of identifying conceptual and institutional compatibility and possible uniformity in the Americas was first discussed in 1992 with a group of distinguished Mexican notaries and scholars. Among them were the then president of Mexico's Notarial Association, Lic. Adrian Iturbide, and the Notarial Association's board members, Lic. Miguel Alessio and Lic. Javier Arce Gargollo.

42. OAS MODEL LAW art. 2.

43, *See, e.g.*, U.C.C. § 9-104 (2002) (stating in relevant part: "A secured party has control of a deposit account if: (1) the secured party is the bank with which the deposit account is maintained; (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor . . . .").

44. OAS MODEL LAW art. 8.

receivable, and the purchaser of the widgets all have possessory rights in the widgets, and some also have rights to the proceeds from their sale. With the exception of the purchaser, all the other holders of possessory rights must file the appropriate notice in the appropriate registry in order to perfect their rights. Purchasers who qualify for the status of buyers in the ordinary course of business need not worry about filing; their bona fide possession in the ordinary course of business protects their acquisition.

Creditors who filed their notices (e.g., a UCC 1 Financing Statement) of security interests in the appropriate registry have preferential rights over those who did not, with the exception of those creditors who were secured by their possession of the collateral.[45] Depending upon their time of filing and the nature of their loans (especially in the case of the so called "purchase money" loans),[46] these creditors' rights will be preferential over those who filed later based upon the Roman maxim *prior tempore potior iure* (first in time, first in right).[47]

V. ARTICLE 9 OF THE UCC IN THE OAS MODEL LAW

UCC Article 9 contributed key concepts, principles, and rules to the OAS Model Law. Among these were the concepts that set forth the stages in the life of a security interest: attachment (*creación o constitución*), perfection (*perfección*) through public notice or possession, and priority (*prelación*). Another legal institution contributed by Article 9 of the UCC was "notice filing," akin to "adjective" or "non-constitutive" filings in some land registries in civil law countries that also claim a Roman law ancestry.[48] The UCC rules on attachment, perfection, and priority have the benefit of the most extensive secured transactions case law available anywhere. Case law plus the practical (some would say casuistic) bent of some of the drafters of UCC Article 9 allow its rules to include the broadest range of factual situations possible, often in a seemingly endless enumeration of qualifications of qualifications and exceptions to exceptions.[49] Yet, when the drafting is as casuistic as is the latest revision of UCC Article 9, its rules wind up being extremely narrow, and the narrower a rule is, the greater the likelihood that it will be deemed inapplicable by the judge or arbiter to the equally narrow facts before him or her. In other words, casuistry invites judicial distinctions, more casuistry, and, contrary to the drafters' expectations, greater uncertainty.

The OAS Model Law tried to prevent the problems of casuistry, especially for the vast number of the uninitiated in the Latin American law of secured transactions, by resorting to broad definitions, often phrased as

45. U.C.C. § 9-322(a) (2002).
46. OAS MODEL LAW art. 51.
47. BERGER, *supra* note 29, at 651.
48. U.C.C. § 9-322).
49. *See* U.C.C. § 9-330 (2002).

principles.[50] One illustration of this approach is found in the enumeration of the things that can be collateral in Article 2.[51] After an illustrative list of things that could be collateral came the principle that anything could be collateral as long as it was "susceptible to pecuniary valuation at the time of the creation [of the security interest] or thereafter . . . ."[52] This principle has some obvious implications for a system that requires an open number of things or movable property that can be used as collateral; their number is open (*numerus apertus*). As long as lenders are willing to lend and borrowers are willing to borrow using a new and presumably monetarily valuable business asset as collateral, it is acceptable collateral.[53] An implication of this principle that is not so obvious surfaces when such a law is used to allow microenterprises to borrow using their assets as collateral. Contrary to the increasingly widespread practice among "high interest" lenders to microbusinesses of relying on household items as collateral (which, while devoid of monetary or market value, are needed for family sustenance), the OAS Model Law does require that the pledged assets have monetary or market value.[54]

Finally, because the users of the OAS Model Law lack transactional experience, its drafting had to be "didactic."[55] This is the reason it illustrates, step by step, how its rules on attachment, perfection, and priority apply to each of the types of collateral that are most likely to be used in Latin American countries.

VI. HYBRID (ROMAN AND COMMON LAW) LEGAL INSTITUTIONS IN THE OAS MODEL LAW: PROCEEDS

The concept of proceeds that became part of the OAS Model Law has only a very distant antecedent in the Roman law concept of "fruits" (also referred to as "issues" or as natural "increases" to things in dispute).[56] It came from

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50. OAS MODEL LAW art. 3 (defining terms). *See also NLCIFT 12 Principles of Secured Transactions Law in the Americas*, NLCIFT (2006), http://www.natlaw.com/bci9.pdf [hereinafter *NLCIFT 12 Principles*].

51. OAS MODEL LAW art. 2.

52. *Id*.

53. *See* Boris Kozolchyk, *Secured Lending and Its Poverty Reduction Effect*, 42 TEX. INT'L L.J. 727, 733 (2007).

54. OAS MODEL LAW art. 2.

55. Kozolchyk & Furnish, *supra* note 8, at 276.

56. For examples of Roman juristic discussions on rights to the fruits of usufructs, at times referred to as "issues" or "increases," see Faculty of Law and Administration, University of Warsaw, *Iura In Re Aliena Real Rights* (Jan. 13, 2011), http://en.wpia.uw.edu.pl/files/Urbanik/romanlaw2010/1_13%20real%20rights.pdf?short, which quotes, among others, the following juristic opinion on usufructs: "The question was raised in ancient times whether the issue of a female slave belonged to the usufructuary? The opinion of Brutus prevailed, namely, that the usufructuary had no right to it, as one human being cannot be considered as the product of another; and for this reason the

disputes between holders of *iura in re aliena*, such as usufructuaries (or holders of life estates) and their landlords or holders of easements (servitudes).[57] Their most common issue was: Who was entitled to keep, bequeath, or pledge things such as the offspring of cattle or of female slaves?[58] However, there is more to proceeds than their physical or natural provenance. Under UCC Article 9 and the OAS Model Law, proceeds encompass as much collateral as the secured creditor is allowed to "trace," i.e., find and appropriate things attributable to or derived from the sale, lease, exchange, or any type of disposition of the original collateral.[59]

Although legal historians may find roots of the Anglo-American remedies of equitable tracing in the Roman *praetor*'s equitable powers, the law that enables the tracing and recovery of proceeds for commercial lending purposes was largely the result of the judicial enforcement of nineteenth century "trust receipts" issued by U.S. bankers.[60] These trust receipts attested to the entrustment of imported goods to their importer by banks that financed their import by issuing the letter of credit payable to the exporter of these goods. If the goods, such as the above widgets, arrived at the importer's place of business, and he could not immediately repay the issuing bank but his imports were sufficiently marketable, the issuing bank often allowed him to take possession of the goods, sell them, and repay the bank. To secure this entrustment and sale, the entrusting bank retained a security interest in the goods it released to its customer. This security interest entitled the entrusting bank to trace or pursue the amounts owed to it as proceeds (monetary or other) as generated by the importer's sale of goods.

Accordingly, the OAS Model Law adopted an all-encompassing concept of proceeds that is much more inclusive than the Roman law concept of "issues" or "fruits."[61] The OAS concept of attributable movable property includes not only the traditional Roman law "fruits," but also the money paid by the sale of the offspring or its equivalent in negotiable instruments, investment securities, insurance policies, bank deposits, or in goods or things that substituted the grapes or offspring as part of a debtor's business assets.[62] The requirement is merely that the latter could be traced to the sale or exchange of the original collateral. It is the same notion of proceeds that Article 9 of the UCC inherited from late nineteenth century U.S. bankers who relied on trust receipt financing.[63] As will be discussed

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usufructuary cannot be entitled to a usufruct in the same . . . (1) Sabinus and Cassius are of the opinion that the increase of cattle belongs to the usufructuary. (2) It is evident that the person to whom the usufruct of a flock or herd is bequeathed, must make up any loss out the increase, that is to say, replace those which have died . . . ."

57. *Id.*

58. *Id.*

59. *See* U.C.C. § 9-102(64) (2011); *see also* OAS MODEL LAW art. 3, ¶ VI.

60. *See* BORIS KOZOLCHYK, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS: A COMPARATIVE STUDY OF CONTEMPORARY COMMERCIAL TRANSACTIONS 155–69 (1966).

61. *See* OAS MODEL LAW art. 3, ¶ VI.

62. *Id.*

63. U.C.C. §§ 9-102(a)(64), 9-315.

shortly, once the president of the Chilean Factoring Association understood the implication of proceeds as collateral, he was willing to consider non-recourse financing for micro- and small businesses.

VII. THE UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

Many of the provisions of the United Nations Convention on the Assignment of Receivables in International Trade (UNCR)[64] became part of the OAS Model Law.[65] As noted by Spiros V. Bazinas of the United Nations Commission on International Trade Law (UNCITRAL): "The main objective of the Convention is to promote the availability of capital and credit at more affordable rates across national borders."[66] The industry that makes that capital available by purchasing outright or relying on accounts receivable as collateral is known as "factoring."[67] As will be shown shortly, factoring contributes much to a nation's financial health by providing immediate liquidity to manufacturers, wholesalers, and retailers who are willing to "sell" or "assign" their accounts to the factor in exchange for a discounted amount of the face value.

However, the concept of the sale and purchase of an account, which many factors use, is unclear. Factoring can be done with or without recourse to the borrower/assignor. If the financing is with recourse (often referred to in Spanish as *con la responsabilidad del cedente*), the factor will attempt to collect from the account debtor, and if the latter fails to pay, the factor will ask his borrower/assignor to repay him the amount he advanced plus interest.[68] Clearly, such a form of financing does not fit the notion of a final sale by the seller/secured debtor to the factor/secured lender. If, however, the financing is done on a non-recourse basis (*sin la responsabilidad del cedente*), the factor assumes the risk of

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64. U.N. COMM'N ON INT'L TRADE LAW, U.N. CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, U.N. Sales No. E.04.V.14 (2004), *available at* http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf [hereinafter UNCR].

65. *See* OAS MODEL LAW arts. 13–20. For a fine summary of the UNCR, see Spiros V. Bazinas, *United Nations Convention on International Trade Law (UNCITRAL): Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade*, 11 TUL. J. INT'L & COMP. L. 275 (2003). The drafting group profited from the participation of the Canadian delegation and especially of Professor Mary Catherine Walsh, who had been one of Canada's delegates to UNCITRAL during the drafting of this convention.

66. *Id.* at 2.

67. *See* GILMORE, *supra* note 6, at 128–29.

68. Marek Dubovec, *A Guide to a Successful Adoption and Implementation of the Organization of American States Model Law on Secured Transactions and Registry Regulations in Honduras – The National Law Center Experience*, 43 No. 4 UCC L.J. 825 (2011).

collection from the account debtor, and the assignor will keep the money advanced by the factor, as would be the case in many a sale. Obviously, non-recourse financing is more convenient to borrowers, especially small or microbusinesses, even if the discount or interest rate paid for such financing is higher than that for recourse financing. By disposing of the risk of collection of some or all of their accounts, micro- and small businesses can use the money received from their factors or secured lenders to acquire more business assets and thereby increase their volume of collateral and capacity to borrow.

In essence, factoring is a form of secured lending, and its collateral often includes not only the accounts but also the merchant's inventory, proceeds attributable to the accounts, and sales of inventory reflected in these accounts.[69] Thus, if a normative system of secured lending aspires to treat all secured creditors as equals, factors and their security interests must be part of it. From a factor's standpoint, to be regarded as a buyer-owner of the account, as contrasted with a mere secured creditor, has some legal benefits, especially in jurisdictions that allow owners of accounts to be unaffected by the insolvency or bankruptcy of the assignor.[70] Factors or bankers who could qualify as owners of the account could collect them and avoid being one of many creditors fighting for the assets of the insolvent or bankrupt debtor. The UNCR clarified some of the ambiguity surrounding the status of the "buyer" of accounts receivable.[71] In addition, it modernized the rules on the transfer of accounts receivable, which in many civil law countries are still governed by obsolete rules on assignment of rights or credits (*cession de la créance* or *cesión de créditos*) found mostly in nineteenth century civil codes.[72] Most of these codes give the account debtor a virtual veto power on the assignment of the account.[73] Others ignore the issues of priority between the assignee of the account and other creditors of the account debtor, and, as noted in the preceding section, none grants the assignee the right to pursue or trace the proceeds of the account. As noted in the preceding section, the power to trace proceeds is very helpful to factoring because it increases significantly the pool of collateral available to the factor and enables the factor to offer non-recourse financing to more debtors.

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69. *Id.*

70. *Id.*

71. *See* UNCR, *supra* note 64, at 29, ¶ 8 (discussing "assignor" and "assignee" in the Explanatory Note by the UNCITRAL secretariat).

72. *See, e.g.*, CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] arts. 1434–84 (1871) (Arg.).

73. *See, e.g.*, Ley General de Títulos y Operaciones de Crédito [LGTOC] [General Law for Securities and Credit Operations], *as amended*, arts. 288 et seq., Diario Oficial de la Federación [DO], 20 de Agosto de 2008 (Mex.).

VIII. THE PREPARATORY WORK OF THE OAS MODEL LAW: BEST PRACTICES AND PRINCIPLES

Another reason for the acceptability of the OAS Model Law in Latin America was the preparatory work done on best practices and principles of secured transactions law by the NLCIFT and a panel of Latin American commercial law experts.[74] The participants made sure that the commercial practices incorporated in this law were not only cost effective, but also fair to all the participants in the secured lending transactions including lenders, borrowers, and third parties such as bona fide purchasers, unsecured creditors, and their legal representatives in bankruptcy or insolvency proceedings. Once these practices were deemed acceptable, the twelve principles that inspired them were drafted and used as guides for the first working draft of the OAS Model Law.[75]

One NLCIFT principle that emerged from the best secured transactions practices was self-liquidation. This principle and practice enables the secured debtor to repay his or her debt from the proceeds of the sale or exchange of goods acquired, and subsequently manufactured and sold, or just sold, with the proceeds of this secured loan.[76] This principle also reflects the practice in which a debtor is able to secure a line-of-credit loan that enables him to remain in possession of his business assets and, by selling or exchanging them, render them liquid (i.e. cash). Unlike the traditional "pawn shop" loan, which immobilizes the collateral and fixes the amount lent to a percentage of the original market value of the pledged thing, the line of credit allows the mobilization of the collateral and allows the amount of the line of credit (or secured loan) to increase if the amount of the secured debtor's sales and profitability increases. Another principle requires that in order to affect the rights of third parties such as other secured creditors or of unsecured creditors and their legal representatives or trustees in insolvency or bankruptcy proceedings or of bona fide purchasers of the collateral, public notice of the existence of the preferential possessory right must be provided quickly, accessibly, accurately, and inexpensively.[77]

IX. ADOPTIONS OF THE OAS MODEL LAW

A. Peru

Peru was the first country to adopt the OAS Model Law in 2006,[78] but it did so in a partial and deficient manner. The law ignored the NLCIFT Principle

74. Kozolchyk & Furnish, *supra* note 8, at 263.
75. *See NLCIFT 12 Principles*, *supra* note 50.
76. *Id.* princ. 10.
77 *Id.* princs. 6, 7.
78 Ley de la Garantía Mobiliaria, Law No. 28677, 1 de marzo. de 2006, GACETA OFICIAL (Peru).

that requires the "abstraction," or independence, of the possessory rights perfected by filing notice of the security interest in the public registry.[79] These possessory rights are independent from the rights or equities present or inferred from the underlying loan and security agreement(s). Instead of independence, the Peruvian law fostered dependence upon the underlying transactions' defenses and equities. Simply put, the filed notice of a security interest was subordinated to the rights and duties, and terms and conditions of the separately executed loan and security agreements as well as installment sales or financial leases.[80] It forced the registrars of the loans or security agreements to scrutinize them to determine if the secured creditor who filed the notice of the security interest was legally entitled to do so, including the forever troublesome rights derived from powers of attorney or from the highly detailed terms and conditions of the underlying agreements. This problem alone (and there were many others) rendered the notice filing system envisaged by the OAS Model Law and the NLCIFT 12 Principles inoperative and highly uncertain in Peru; needless to say, asset-based lending in Peru did not prosper.[81]

Fortunately, approximately one year ago, an able group of Peruvian inter-governmental officials and their legal adviser undertook the revision of their law of secured transactions and in due course contacted the NLCIFT for drafting assistance. The resulting final draft of a revised law contains many significant improvements, including a veritable notice filing system independent from its underlying agreements.[82] If enacted by the Peruvian Congress, it will substantially replicate the OAS Model Law and faithful versions enacted in Guatemala[83] and Honduras.[84] If Peru also enacts regulations under the Model Inter-American Law on Secured Transactions (OAS Model Regulations)[85] and designs a registry consistent with it and with the Honduran registry model, it will enjoy a highly effective system of secured lending.

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79. *See NLCIFT 12 Principles*, *supra* note 50, princ. 5.

80. *Id.*

81. *See* Boris Kozolchyk, *Modernization of Commercial Law: International Uniformity and Economic Development*, 34 BROOK. J. INT'L L. 709, 726 (2009) [hereinafter Kozolchyk, *Modernization*]; Boris Kozolchyk, *Modernización del Derecho Mercantil: Uniformidad Internacional y Desarrollo Económico*, 24 FORO DE DERECHO MERCANTIL 19, 42 (2009).

82. Peruvian Draft Law on Secured Transactions, 2010 (on file with author).

83. *See* Ley de Garantía Mobiliaria, Decree 51-2007, 16 de noviembre de 2007, DIARIO OFICIAL (Guat.) [hereinafter Guatemala LGM].

84. Honduras LGM art. 2.

85. OAS Model Registry Regulations Under the Model Inter-American Law on Secured Transactions (2009), http://www.oas.org/dil/cidip-vii_doc_3-09_rev3_model_regulations.pdf [hereinafter OAS Model Regulations] (adopted Oct. 9, 2009, by the Seventh Inter-American Specialized Conference on Private International Law [CIDIP-VII]).

B. Mexico

Mexico adopted significant portions of the OAS Model Law, in 2000 and 2003.[86] Ironically, and despite the fact that this law had been in significant measure inspired by a draft law prepared jointly by the Mexican Ministry of Commerce and Industry (SECOFI) and the NLCIFT, Mexico's adoption of the OAS Model Law was also partial and deficient.[87] Among other deficiencies, Mexico's version of the OAS Model Law ignored the NLCIFT Principle of the transparency of public notice.[88] This principle warns against secret liens, surely the worst enemies of a functional secured transactions law.[89] By allowing a large number of liens on personal property collateral to remain unrecorded or be recorded in several registries without proper cross-filing or information on their perfection and priority, the Mexican secured transactions law remained dysfunctional and highly uncertain.[90]

Another NLCIFT Principle ignored by two successive attempts to improve the original draft of a secured transactions law in Mexico is that of a unitary security interest.[91] A functional and reliable system of priorities requires that perfected security interests be prioritized in accordance with the Roman law principle of "first to file, first to acquire priority,"[92] although both the UCC and the OAS Model Law carve out exceptions for possessory and for purchase money security interests.[93] In order to prioritize these perfected security interests, all must belong to the same genus. For, if what is truly a secured loan is allowed to masquerade, for example, as a sale or as a lease, the basic fairness of treating equals as equals will be subverted, and with secrecy, predictability will disappear. This means that while the secured creditor may wish to call his security interest a conditional sale (or a retention of title or a financial lease with a symbolic option to purchase the leased thing, or an agrarian or an industrial or commercial pledge, for public notice purposes), all these security interests will be the same and acquire their priority on an equal, uniform basis. Mexico's secured transactions

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86. Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito . . . [Decree Reforming, Amending, or Derogating Various Provisions of the General Law on Negotiable Instruments and Credit Transactions . . .] DO, 12 de Junio de 2003 (Mex.); Decreto por el que se reforman, adicionan y derogan diversas disposiciones . . . del Código de Comercio . . . [Decree Reforming, Amending, or Derogating Various Provisions of . . . the Commercial Code . . .], DO, 23 de Mayo de 2000 (Mex.).

87. Kozolchyk & Furnish, *supra* note 8, at 279–81.

88. *NLCIFT 12 Principles*, *supra* note 50, princ. 5.

89. *Id*.

90. Kozolchyk & Furnish, *supra* note 8, at 280–84.

91. *NLCIFT 12 Principles*, *supra* note 50, princ. 6.

92. *See* Dubovec, *supra* note 68, at 2.

93. *See* U.C.C. §§ 9-311, 9-324; *see also* OAS MODEL LAW arts. 8, 49.

law has yet to adopt the "omnibus" or unitary clause that would bring about fairness and transparency as other Latin American jurisdictions have done.[94]

On the other hand, Mexico has created an excellent electronic registry that, unlike Peru's, implements the NLCIFT Principle of an abstract notice filing system.[95] As is the case with the Honduran registry, the Mexican registry is guided by a set of state-of-the-art regulations promulgated by the OAS in sessions presided by Lic. Rodrigo Labardini of the Mexican Ministry of Foreign Affairs.[96] One of the first hopeful signs that Mexico's secret liens may well be on their way out was the recent addition of financial leases (one of its most significant secret liens) as a security interest subject to recording in registry regulations.[97] The NLCIFT has reason to believe that the Mexican government is interested in drafting a revision that will make Mexico's secured transactions fully consistent with the OAS Model Law.[98] A symposium on this subject took place on June 2, 2011, in Mexico City, at which time a group of distinguished Mexican judges and magistrates; representatives from Mexico's Ministries of Commerce, Treasury and Foreign Affairs; registry officials; bankers; lawyers; public and commercial notaries; and staff and members of the Commercial Financial Association (an international umbrella organization for banks engaged in secured lending around the world) and the NLCIFT met to commence discussions on a final revision of Mexico's secured transactions law and related enforcement procedures.[99] These discussions continued in September 2011 with the visit of some of the above-mentioned representatives to the NLCIFT. During the meetings at NLCIFT from September 13 to 17, 2011, the Mexican delegation comprising Lic. Jan Boker, the highly capable Director General of National Commercial Regulation for Mexico's Ministry of Economy and officer in charge of Mexico's Single Registry of Security Interests in Personal Property (*Registro Único de Garantías Mobiliarias*, or RUG), and Lic. Isis Natalia Isunza Ramirez, Director of the Under Secretariat of Competitiveness and Business Regulation, gave every assurance of early completion of the task of revising Mexico's secured transactions law. Given the importance of Mexico as a source of not only national but also regional credit, all of the visit participants felt optimistic about what is about to take place in our southern neighbor.

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94. *See* Guatemala LGM art. 3; Honduras LGM art. 2.

95. *See NLCIFT 12 Principles*, *supra* note 50, princ. 5

96. Reglamento del Registro Público de Comercio, DO, 24 de Octubre de 2003 [hereinafter Mexican Registry Regulations]; *see also* OAS Model Regulations.

97. Mexican Registry Regulations art. 32.

98. *See Secured Transactions Reform in Mexico: A Round Table Discussion*, NOVEDADES (NLCIFT, Tucson, Ariz.), July 2011, at 2, *available at* http://www.natlaw.com/novedad/novedades-pdf/jul11.pdf.

99. *Id.*

C. Guatemala

Guatemala was the first Latin American country to adopt a law of secured transactions faithful to both the OAS Model Law and the NLCIFT 12 Principles.[100] I was an adviser to the Guatemalan drafting committee of government and private lawyers, regulators, and banking officials. Because of lack of funds, the Roadmap study that the NLCIFT usually performs[101] was composed of a set of interviews that I conducted with the bankers, borrowers, attorneys, judges, and public officials likely to be in charge of administering banking laws.[102] As a result of these interviews, the drafters' attention focused on the needs of the agricultural, commercial, and banking sectors.[103] This led to an adjustment of the OAS Model Law to peculiarly Guatemalan legal institutions and to the addition of detailed rules on the perfection and priority of security interests in paper and electronic documents of title used in connection with the transportation and storage of agricultural products.[104]

Interviews with prominent legal practitioners provided insight into the likely problems of enforcing the newly designed security interests. For example, I asked a practitioner who was widely known for his ability to stop or suspend court actions (at times indefinitely): "Looking at this law, what would you do to impede its attachment or foreclosure procedures?" His reply was immediate: "In Guatemala, it is very easy to obtain a judgment lien as part of the so-called summary or executive procedure; I would obtain such a lien and with it attach the same collateral that a secured creditor was about to sell publicly or privately." In the subsequently enacted Guatemalan law, judgment liens have no effect upon perfected security interests unless the liens were filed prior to the filing of the security interest.[105] Unfortunately, the Guatemalan registry is still dysfunctional despite the fact that its features are prescribed in considerable detail in the substantive law.[106] An effort to design its new software is now under way, and hopefully it will succeed. Guatemala will then join Honduras as an effective participant in Central America's secured credit region.

100. *See* Guatemala LGM.
101. Dubovec, *supra* note 68, at 4.
102. Kozolchyk, *Modernization*, *supra* note 81, at 735–36.
103. *Id*. at 739–41.
104. *See* Guatemala LGM art. 57(a)(1).
105. *See id.* art. 6(b).
106. *See generally id.* tit. IV.

D. Honduras

With a population of roughly 8 million, Honduras is the second-poorest country in Central America.[107] For most of its existence, it has depended upon the exports of bananas, coffee, and lumber. (The last now runs far behind the other two). In recent times, Honduras has diversified its export base to include finished and semi-finished products from its assembly industries (*maquilas*) such as apparel and automobile wire harnessing. It has also begun to diversify and increase its agricultural and fisheries exports (e.g., lobster). The present administration inherited an economy where nearly 60% of the population lived (and most still live) in poverty.[108] The sectoral composition of Honduras's GDP for 2010 indicates that 60.8% of it is attributable to services, 26.9% to industry (mostly by *maquilas* or assembly types of plants), and 12.4% to agriculture.[109] And since 98% of Honduran entrepreneurs are microentrepreneurs,[110] their migration to the status of small businesses would be made easier by giving them access to commercial credit at reasonable rates of interest.

Honduras's secured transactions law, its registry, and its regulations[111] have become a model for the developing world. On October 19–20, 2010, I attended a meeting at the World Bank's FinNet 2010 held in Washington, D.C. on Access to Finance 2.0—Financial Inclusion for Development, International Finance Corporation of the World Bank Group Annual Conference, "Registry of Security Interests for Honduras."[112] During this meeting, the World Bank's IFC showcased model registries of two countries: Honduras and the People's Republic of China. As Dr. Dubovec indicates, the Honduran registry is a product of state-of-the-art substantive law and regulations, and is the most faithful to the OAS Model Law, its Model Regulations, and to the NLCIFT 12 Principles.[113] It is also a product of a thorough Roadmap study, which identified actual and potential

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107. *The World Factbook*, CIA, at Honduras, https://www.cia.gov/library/publications/the-world-factbook/geos/ho.html (last updated Nov. 29, 2011).

108. *Id.*

109. *Id.*

110. Carlos Guaipatín, *Observatorio MIPYME: Compilación Estadística para 12 Países de la Región*, INFORME DE TRABAJO, BANCO INTERAMERICANO DE DESARROLLO 22 (April 2003), http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=381255 (citing Consultoría Interdisciplinaria en Desarrollo, *Estudio de Micro y Pequeña Empresa No Agrícola en Honduras* (2000); Liliana Guerrero, *Diagnóstico de la Micro, Pequeña y Mediana Empresa en Honduras*, COMISIÓN NACIONAL DE LA MICRO PEQUEÑA Y MEDIANA EMPRESA (2001)).

111. Reglamento del Registro de Garantías Mobiliarias [Registry Regulations for Secured Transactions], Acuerdo No. 2074-2010, 21 de diciembre del 2010, 14 de marzo de 2011, DO (Hond.) [hereinafter Honduran Registry Regulations].

112. *See 2010 FinNet Annual Meeting* agenda, IFC, http://www.ifc.org/ifcext/gfm.nsf/Content/2010-FinNet-Annual-Meeting.

113. Marek Dubovec, *UCC Article 9 Registration System for Latin America*, 28 ARIZ. J. INT'L & COMP. L. 117, 142 (2011).

secured lenders, borrowers, and their favorite collateral; the accounting information that secured lenders would find reliable, especially for micro- and small businesses; the data that representative lenders would like to have access to as attachments to the filed financing statements; and so on.[114] Last but not least, it is the product of a dedicated group of Honduran public and private officials.[115]

The Roadmap study identified, among other things, the economic importance of vehicles for poor farmers and their self-liquidating value as collateral.[116] Often these farmers have to sell their crops farm-side to usurious buyers/lenders barely at cost, but the same crops are being sold at four or five times higher prices barely fifty kilometers away in a regional market.[117] The difference between the farm-side and the market prices is the poor farmer's inability to buy or rent a truck to transport his crops. A secured transactions law that ensures that crops are deemed a collateral independent of the land in which hey grow will go a long way toward financing that poor farmer's acquisition or rental of trucks.

The Roadmap also identified the pawn shop-like features of the municipal licenses obtained by usurious lenders to allow their secured borrowers

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114. *See* NLCIFT Roadmap Study for the Implementation of the Honduran Secured Transactions Law (Dec. 2007 & Mar. 2008) (unpublished reports) (on file with author) [hereinafter Honduran Roadmap]; *see also* Kozolchyk, *Modernization*, *supra* note 81, at 742–45.

115. I must express publicly my appreciation for the excellent work done by Lic. Octavio Sánchez Barrientos, presently head of Honduras's Cabinet of Ministers and formerly a Research Fellow at NLCIFT. While at NLCIFT, Lic. Sánchez was the liaison between NLCIFT and the Millennium Challenge Account (MCA)-Honduras of the Millennium Challenge Corporation as well as with Honduran legislators, judges, and Chamber of Commerce officials, especially, then-President Amilcar Bulnes. At MCA-Honduras, Lic. Marco Bográn became an effective champion of the secured transactions project and, together with Martín Ochoa, helped shepherd the secured transactions law through the Honduran Congress. We owe also our gratitude to the staff of the Tegucigalpa Chamber of Commerce and Industry (CCIT) and Secured Transactions Registry, ably led by Aline Flores, to Ing. Rafael Medina, CCIT General Manager, and to Maria Lydia Solano, President of the Honduran Bankers' of Association. I would also like to thank the NLCIFT team: Dr. Marek Dubovec, project coordinator on secured transactions, Lic. Cristina Castañeda, sub-coordinator on secured transactions, and Thomas Ose from Ose Micro Solutions, Inc., who designed the registry software. I would also like to express my appreciation to Boris Rosen, CPA (presently at Morrison, Brown, Argiz & Farra, LLC), for his very helpful analysis of accounting practices in Honduras and drafting of accounting documentation, which, in the manner revised by NLCIFT staff member Lic. Castañeda, has gained a foothold in Honduran lending to micro- and small business enterprises; we are all very grateful to Mr. Rosen for his generous contribution of time and financial support to the NLCIFT.

116. *See* Honduran Roadmap, *supra* note 114, at 29–31.

117. *Id*. at 27–28.

to operate market stalls in Honduran cities as the lenders' sub-licensees.[118] The usurers as a rule lend paltry sums each week to their sub-licensees, who are then enabled to buy only a minimal amount of wares.[119] Yet, these borrowers/sub-licensees pay interest rates that exceed 20% a month.[120] If the stall operators failed to repay principal and interest, they would cease to be sub-licensees and would be evicted by their lender licensees.[121] Contrast such an immobilizing loan with line-of-credit financing, which is part of the Honduran law.[122] Now, the same stall operator can receive loans from banks or cooperatives at an affordable rate of interest that can be secured by his inventory, accounts, and proceeds. And, as a line-of-credit loan, the amount lent by the bank increases in proportion to the operators' sales, proceeds, and profits, and is not limited to a percentage of the original value of the initial collateral.

Finally, the Roadmap also included a review of banking regulatory policies and a discussion with regulators on their implementation policies for the new law. One of the purposes of these efforts was to prevent the imposition of unrealistically high and disabling reserve requirements upon secured loans, thereby regulating them as if they were unsecured. As is still the case in many a country that adopts a sound secured transactions law but does not review these regulations, "what the law giveth, the banking regulation will taketh away." For example, the secured transactions law may contain a comprehensive and open-ended listing of collateral, as required by the OAS Model Law, only to encounter a banking regulation that limits the collateral subject to unrealistic reserve requirements to the traditional real estate mortgage and pledge with the debtor's dispossession.

Recently, the NLCIFT received a report on less than five months of operations by the Honduran registry.[123] At first sight, one statistic was disquieting: of 1,345 filings, 1,325 involved vehicles as collateral. This proportion seemed to echo a familiar pattern in other Latin American registries in which the purchase on credit of automobiles by consumers was almost the exclusive security interest filed. After looking into the matter more deeply, we found a much more promising picture, as is apparent in the following statistics:

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118. NLCIFT Report on Socialization of the Secured Transactions Law and Ongoing Research 12–19 (June 2008) (unpublished report) (on file with author) [hereinafter NLCIFT Ongoing Research]; *see also* Boris Kozolchyk & Cristina Castañeda, *Invigorating Micro and Small Businesses Through Secured Commercial Credit in Latin America: The Need for Legal and Institutional Reform*, 28 ARIZ. J. INT'L & COMP. L. 43 (2011), *to be reprinted in* LATIN AMERICAN COMPANY LAW FROM A COMPARATIVE AND ECONOMIC DEVELOPMENT PERSPECTIVE (Boris Kozolchyk & Francisco Reyes eds., Carolina Academic Press, forthcoming 2012).

119. NLCIFT Ongoing Research, *supra* note 118, at 12–19.

120. *Id.* at 14.

121. *Id.* at 19.

122. Honduras LGM art. 2.

123. E-mail from Lic. Nelson del Cid, Registro de Garantías Mobiliarias de Honduras, to author (June 21, 2011, 12:56 MST) (on file with author).

1,689 filings had taken place from January 31 to July 14, 2011.[124] By October 2011, the number of filings had increased to 2,538, including 5 amendments, 102 assignments to other creditors, 21 terminations, and 10 extrajudicial enforcements. Despite the fact that the Honduran marketplace is considerably smaller than that of Guatemala, this five-and-a-half-month volume of filings was almost three times the number of filings in Guatemala during eight months of operation.[125] And based upon the actual description of the collateral in the actual filings, 18.48% of the collateral described in the filings involved commercial assets and thus commercial loans. A large number of vehicles described in the filings are commercial such as buses, microbuses, coasters, trucks, tractors, etc.

Not only were these assets used as collateral for commercial loans, but their variety was most encouraging. They ranged from commercial vehicles to agricultural, professional (e.g., medical and dental), and industrial equipment; from retail and wholesale inventories and accounts receivable to "floating" (after acquired) inventory; and from software licenses to the largely unknown category of contract rights. The sectors that benefited from secured loans were professional services, construction, commercial retail, agriculture, industrial production, and transportation (freight and passenger, for national and foreign tourists).

Honduran Registry Operations Statistics January 31 to July 14, 2011[126]

Total number of all filings of security interests	1689	100%
Initial filings	1622	96.03%
Other filings (including amendments, assignments, enforcements, and terminations)	67	3.96%
Filings on business assets other than vehicles. This category includes inventory, accounts receivable, equipment, and software licenses.	84	4.97%

124. Honduran Registry Statistics, Jan. 31-July 14, 2011 (unpublished report) (on file with author) [hereinafter Honduran Statistics].

125. *See Registro de Garantías Mobiliarias*: *Boletín Informativo* (July 2, 2009), http://www.rgm.gob.gt/documentos/boletin_julio_2009.pdf.

126. Honduran Statistics, *supra* note 124.

Total registrations on vehicles (commercial and consumer)	1605	95.03%
Initial filings (vehicles)	1553	91.94%
Assignment (vehicles)	47	2.78%
Commercial vehicles		
Commercial vehicles including passenger buses, coaster buses (tourism), and microbuses	137	8.11%
Vehicles used in construction and agricultural businesses		
Work trucks (*Camiones*)	15	0.89%
Tractors (*Tractores*)	11	0.65%
Bulldozers	6	0.36%
Truck Heads	4	0.24%
Leveling bulldozer	4	0.24%
Drag Truck	3	0.18%
Cement truck	1	0.06%

There are many factors to consider when reading these statistics, including: a) The Honduran law and registry regulations, following modern international standards including the UCC Article 9, the OAS Model Law and the *UNCITRAL Legislative Guide on Secured Transactions*,[127] do not require that the nature of the collateral be specified, and it is not discernible from a number of filings if the collateral vehicle (pickup or other smaller trucks) is for business or personal purposes. One can assume that a large percentage of pickup trucks are used for business purposes; b) Honduras did not have a registry for the filing of security interests in vehicles, so it is only natural that lenders will use the transparency and priority that the RGM provides them and will use the RGM for such purpose. This is an enormous step forward in transparency and publicity of security interests in vehicles—regardless of their purpose; and c) The registry has only been in operations for approximately six months; more filings and variety of filings should be expected.

127. UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V12 (2007), *available at* http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf.

What do all these statistics tell us?

- Despite the very short period of time since the inauguration of the registry, banks in Honduras (one of Latin America's poorest countries)[128] are lending to borrowers small and large;
- Lenders are willing to secure their loans with many types of collateral unavailable as such prior to the enactment of the Honduran law;
- Judging from the number of extrajudicial enforcement registration forms filed (10), this procedure is functioning well;
- The willingness of many lenders to lend is no longer a hope; it is now apparent for all potential lenders to verify from the public record. This should encourage many others to follow suit. The certainty of these surety interests is reflected in the relatively high number of assignments to other creditors (102);
- On the "to do" side of the ledger, loans for agriculture, cattle, and fisheries are not as apparent as they should be and must be encouraged. These loans can be secured by filings on inventory and accounts receivable, and endorsements of documents of title (including, prominently, warehouse receipts and transportation documents);
- Some microlending secured by inventory and equipment is discernible but must be encouraged, especially when secured by accounts receivable; and
- A larger volume of loans to the agricultural, cattle ranching, and fishery sectors as well as to microenterprises will be encouraged by workshops with borrowers, lenders, lawyers, and registry officials.

The total number of filings showing loans secured with vehicles that are not for consumer or personal use, but for commercial business or agricultural business purposes is 13.51%. It includes 10.73% of initial filings and 2.78% of assignments of previous initial filings on vehicles.

Therefore, the total commercial/agricultural/business type of collateral (vehicles and non-vehicle collateral) indicated in the collateral description field of the filing adds up to 18.48%. This number is potentially even higher because a number of passenger cars (e.g., sedans and small trucks) that are typically bought for consumer purposes could in fact be used as taxis, as equipment for transportation of officers and employees as well as for transportation of smaller quantities of agricultural commodities to the marketplace.

With these facts in mind, I will now comment on some of the legal and economic implications of illustrative descriptions of collateral in filings at the

128. *See World Factbook*, *supra* note 107, at Honduras.

Honduran registry.[129] The following are examples of some business assets frequently used as collateral in Honduras.

1. Accounts Receivable (*Cuentas por Cobrar*)

One of the filings in the collateral descriptions found in the Honduran Statistics describes the collateral as "fluctuating [amounts of] accounts receivable that the customers owe to the company . . . starting at the present date and into the future in an amount not to exceed $250,000."[130] Another one describes it as follows: "Accounts receivable for a total amount of no less than one million *lempiras* [approximately US$50,000]."[131]

Accounts receivable could not be used as collateral in Honduras prior to the enactment of the Honduran law.[132] Banking lawyers whom I interviewed during the enactment of this law described pre-existing practices on accounts receivable financing in Honduras as dependent upon the obligations assumed by the account debtors (i.e., persons that owe money to the secured debtor) in negotiable instruments such as promissory notes and drafts or post-dated checks.[133] Default in paying these instruments would trigger criminal proceedings against the issuers or endorsers.[134] These practices presupposed that the account debtors and the endorsers of their instruments would be willing to sign instruments whose non-payment could land them in jail for having obtained money, goods, or services under false pretenses or for having swindled (*estafa*) their creditors. Not too many account debtors were willing to sign such instruments, especially post-dated checks. In addition, as was the case elsewhere in Central America,[135] during several decades of the twentieth century, the debtors' prison for defaulting borrowers (*apremio corporal*) was highly unpopular with the courts to the point that the Supreme Court of Costa Rica finally declared this remedy unconstitutional.[136] Thus, in practice, many if not most of such

129. *See* Honduran Statistics, *supra* note 124 (describing collateral filed at the Honduran registry).

130. *Id.*

131. *Id.*

132. The alternative to accounts receivable financing, i.e., factoring, was available in Honduras prior to the Honduran law.

133. Honduran Roadmap, *supra* note 114, at 50.

134. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 240 et seq. (1984) (Hond.).

135. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE GUATEMALA art. 17 (Guat.); *Constitución Política de la República de Guatemala:Aplicada en Fallos de la Corte de Constitucionalidad* [*Failures Applied to the Constitutional Court*], TRIBUNAL SUPREMO ELECTORAL, Aug. 2002, at 24–25, http://www.tse.org.gt/descargas/Constitucion_ Politica_de_la_Republica_de_Guatemala .pdf.

136. *See* Boris Kozolchyk, *Toward a Theory of Law in Economic Development, the Costa Rican USAID-ROCAP Law Reform Project*, 1971 LAW & SOC. ORDER 681, 731 (1971); *see also* Kozolchyk & Furnish, *supra* note 8, at 259.

claims based on defaulted negotiable instruments remained unenforced, contributing to the widespread perception of high risk and to the higher cost of commercial credit. Having observed the negative effects upon the commercial credit market that the debtors' prison had in Central America during the 1960s, I became convinced that the practice was one of the two worst enemies of asset-based lending in that region and possibly in other Latin American countries. The other: secured creditors who retained or reserved ownership in collateral and either acquired a "fiduciary property" or claimed to be financial lessor, but in fact were creating secret (unfiled) security interests.

In contrast to the pre-existing absence of financing secured with accounts receivable, the above descriptions evidence the Honduran lenders' willingness to extend "fluctuating" and "open-ended" lines of credit in all their varieties ("no less than one million lempiras").

This is a very auspicious beginning for collateral that, in conjunction with inventory and equipment financing, could be of considerable importance to microbusinesses, as shown in a recent writing by Ms. Castañeda and myself.[137] Yet, to facilitate reliance on accounts receivable financing by microborrowers, lenders will need to be satisfied that the statement of income flowing from the performance of services or sales of their wares is accurate and reflects a steady and reliable enough clientele (i.e., account debtors) to merit loans or lines of credit. This will require that microentrepreneurs learn how to use simple but reliable accounting records that will support the basic data communicated to prospective lenders in their equally simple but accurate loan applications. It will also require a higher degree of specialization of the lenders to microbusinesses.

2. Inventory

The collateral descriptions in the Honduran Statistics refer to various types of inventory. I have selected three as representative of the wide variety of merchandise and security interests therein: 1) "Inventory of general merchandise as found in store . . . inventory that as of [date] and for an amount of 6,846,797.24 Lempiras is found in the premises of the business . . . [the debtor is] obligated to maintain the same aggregate value of inventory as well as the same type of individual goods";[138] 2) "Merchandise stored in the warehouse";[139] 3) "Inventory of merchandise valued in the amount of US$4,000,000.00, appraised at cost value and stored in a warehouse owned by the debtor . . . and located in [a particular place]."[140]

While example 2 is simple enough to reflect a loan to a small or perhaps even to a microenterprise, example 1 is the product of a complex line-of-credit

137. *See generally* Kozolchyk & Castañeda, *supra* note 118.
138. *See* Honduran Statistics, *supra* note 124.
139. *Id.*
140. *Id.*

agreement in which the secured debtor agrees to maintain a certain ratio of value of the inventory as collateral to the amount of the loan. Example 3 in turn resembles a field warehousing arrangement in which the inventory/collateral is located in property of the secured debtor and presumably monitored by a field warehouseman. It is good to know that Honduran banks are willing to extend loans using such a broad spectrum of inventory/collateral and that, in the case of large business loans, they provide a borrowing base that is consistent with safe and sound banking practices. Such a borrowing base should enable lenders or regulators to ascertain whether the loan-collateral ratio is observed. It is also good to know that lenders and their lawyers feel sufficiently protected by a generic description of the collateral, referred to simply as inventory or as merchandise, or even redundantly as inventory of merchandise, as done in the previous examples. All these descriptions should reassure those Latin American jurisdictions whose versions of the OAS Model Law mistakenly required a detailed, item-by-item enumeration of all the goods that comprised an inventory, thereby contributing to the dysfunction of their registries and to the unnecessary enrichment of the scriveners/notary publics.[141] These requirements for detailed descriptions also significantly increase the cost of credit.

3. General Intangibles, Investment Securities, Financial Leases, and Contract Rights

The Honduran Statistics also contain a description of a general intangible type of collateral as a "non-exclusive and perpetual license to use software." As presently defined by UCC Section 9-102 (42)[142] and Comment (75),[143] the term "general intangible" includes computer software programs and, implicitly, the license or right to use such a program. Open-ended definitions of collateral in the Honduran law, which in effect say that "anything with market value" can be collateral[144] enable the use of software licenses. I would be surprised if a security interest on the license to use a computer program could be filed in registries of personal property security interests in countries other than Honduras.

The Honduran Statistics also contain a filing of a "certificate of corporate shares of stock owned by company."[145] Investment securities, and especially corporate stock certificates, have long been used as possessory collateral in Mexico, and Central and South America. The Honduran Law made it possible for the secured debtor to remain in possession of the certificate while the security interest of his creditor was filed in the Honduran registry.[146] It is encouraging to

141. *See, e.g.*, Law No. 20190, art. 3(3), Junio 5, 2007, DIARIO OFICIAL [D.O.] (Chile).
142. U.C.C. § 9-102 (42).
143. *Id.* § 9-102(75).
144. Honduras LGM arts. 2, 3(9).
145. *See* Honduran Statistics, *supra* note 124.
146. Honduras LGM art. 3(8).

see that the Honduran registry's notice mechanism is trusted enough not to require a transfer of possession of the stock to the secured creditor.

Finally, the Honduran Statistics also contain a very significant filing, a security interest in the form of a financial lease used as collateral to "guarantee" the fulfillment of a sale of valuable equipment. The filing of a financial lease as a security interest describes it tersely as "a lease with an option to purchase [the leased object]."[147] Much opposition to the inclusion of financial leases in the list of security interests arose during the first drafting sessions of the OAS Model Law, during the adoption of the Mexican version of this law, and during the adoption of the Guatemalan and Honduran laws. The objections were caused by a combination of factors. One was the adherence to a legal taxonomy that inflexibly characterized the financial lessor as an owner of the leased object and who therefore had no need to file as a secured creditor because, legally speaking, "he was much more than that." This was one of the reasons, incidentally, for the wording of Article 2 of the OAS Model Law which restated the heading of UCC Section 9-202, "Title to the Collateral Immaterial."[148] Another objection to the need to file financial leases had a deceitful motivation: to prevent the existence of a public record that would alert tax collectors to the large volume of financial leasing that failed to pay applicable transfer or income taxes. This filing reflects a definite change of attitude. Instead of adhering to the old practice that relied on the putative ownership of the alleged lessor in the leased asset, the Honduran lender decided to adhere to the Honduran law,[149] even though it causes a degree of transparency that was not always appealing to pre-law lenders.

Another previously unseen collateral in Latin American jurisdictions is that of the secured debtor's contractual rights, or rights to the performance of contracts entered into by that debtor and third parties. Only the rights of the beneficiaries of letters of credit or of independent bank or insurance company guarantees, or their lawful transferees or assignees, were occasionally relied upon as collateral in Latin America.[150] Please note that the above-mentioned filing pertains to a contractual performance promised not by a bank or insurance company, but by an ordinary businessperson. And please also notice that the traditional characterization of this promise in French- and Spanish-influenced civil code jurisdictions is of an obligation to *do* something.[151] The fact that a security interest in a contractual right to do something was deemed acceptable by a Honduran lender and by his lawyer shows that the secured creditors in question are willing to trust the legal certainty that this law and the registry provide in that heretofore unusual type of collateral. This filing should also serve as a warning to Honduran courts of the need for their firm enforcement of such a contractual right if contested.

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147. Honduran Statistics, *supra* note 124.
148. U.C.C. § 9-202; *see also* OAS MODEL LAW art. 2, ¶ 1.
149. Honduras LGM arts. 2, 7.
150. Kozolchyk & Furnish, *supra* note 8, at 270.
151. KOZOLCHYK, *supra* note 32, ch. VIII.

4. Agricultural Sector Collateral: Equipment (Mostly for the Production of Coffee and Grains)

While a wide assortment of equipment appears used as collateral, a large amount of it is devoted to agricultural endeavors and, particularly, in the production and warehousing of coffee and grain. For example, equipment listed in the Honduran Statistics helps to classify, pulverize, dry, pack, and store coffee beans and rice, and also to weigh grains.

The description of this collateral, while somewhat detailed, does not specify serial numbers. This reflects the filers' uneasiness with generic descriptions such as "equipment for the production or storage of coffee" and their search for a method of identification of their collateral that fits somewhere between highly detailed and purely generic descriptions.[152] Incidentally, many such descriptions are not uncommon in the United States and Canada.[153]

In addition to the above-listed typical agricultural production equipment, numerous filings of security interests in vehicles have been made, but their descriptions were generic enough so that they could be used either for agricultural or construction purposes. Among these are trucks (*camiones*) (15 filings), tractors (*tractores*) (11 filings), and bulldozers (6 filings).[154]

Notably absent from the agricultural sector filings, however, were loans secured by crops (*cosechas*) and seed and fertilizer (*abono y fertilizantes*). Loans of this kind are particularly important for small farmers, who under pre-existing law and practice could be considered credit-worthy only if they mortgaged their title to the land underlying the crops. By requiring only that the secured debtor have possessory rights in his collateral, the OAS Model Law[155] and its Honduran version[156] separated rights to the land and the crops, thus allowing crops to become truly independent collateral, regardless of who has title to or mortgage in the underlying land. These laws directly addressed an everyday problem faced by subsistence agriculture in Central and South America. Typically, the small producer without access to credit had to sell his crops to an intermediary for a fraction of what he could get in a marketplace located a few kilometers away.[157] Typically, if all he had to offer as collateral was his growing crops, he would be denied credit to purchase or lease the truck or to purchase seed and fertilizer to help him grow a larger and more diverse crop[158] To obtain such a credit, he had to be able to mortgage the underlying land, and if a land mortgagee had an earlier recorded security interest in the land, he would prevail over the small farmer.[159]

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152. Dubovec, *supra* note 113, at 127.
153. *See, e.g., id.*
154. *See* Honduran Statistics, *supra* note 124.
155. OAS MODEL LAW art. 2, ¶ 1.
156. Honduras LGM arts. 2, ¶¶ 1, 4(2) & 7.
157. Honduran Roadmap, *supra* note 114, at 28–30.
158. *Id.*
159. *Id.* at 67.

Inventory of plants and produce as well as of cattle and accounts receivable as collateral thus loom large for development of Honduras's agricultural secured lending.

5. Other Commercial, Industrial, and Professional Equipment Collateral

A review of other filings involving equipment is encouraging because it points to a wide spectrum of collateral and secured debtors—medical ultrasound and x-ray machines, dental drilling machines, air compressors and compactors for use in tire sale and repair shops asphalt spraying machines, electronic printers for printing shops, desktop and laptop computers and printers,microwave ovens, liquefying machines, etc.[160] Some of these filings, such as those relating to microwave ovens and laptop computers, may well reflect micro- and small business loans.

6. Enterprises (*Empresas*) and After-Acquired Collateral, and Debt and Proceeds

Several filings refer to the collateral as "enterprises" (*empresas*).[161] This is also a promising category of collateral, not so much for what it says as for what it does not say.

During the drafting of the law and its regulations, we met twice with justices of the Supreme Court of Honduras to obtain their analysis and hopefully approval of the legality of the proposed law. In one occasion, a justice who had been a lawyer for an enterprise that had obtained a loan from a Honduran bank and secured it with all the assets of that enterprise (its business license, goodwill, and trademarks as well as its inventory, accounts receivable, and proceeds) objected to two concepts introduced in the draft of the Honduran law: "after-acquired collateral" (collateral acquired subsequently to the time of the loan without an additional loan) or "after-acquired debt" (future advances).[162] The other concept she objected to was that of "proceeds," particularly, second or subsequent generations of proceeds.[163] Honduras's Commercial Code of 1952, one of the most progressive in Latin America at the time of its enactment, had transplanted the Italian Civil Code notion of "enterprise" (*impresa*) and allowed its use as collateral that comprised all its assets, but only as they were at the time

160. *See* Honduran Statistics, *supra* note 124.

161. *Id.*

162. Honduran Supreme Court Justices visit the NLCIFT, Tucson, Ariz. (Aug. 18–19, 2008).

163. *Id.*

of the loan.[164] Concepts such as after-acquired collateral allowed by the OAS Model Law, the Guatemalan law, and the Honduran draft law, in her opinion were contrary to the nature of an enterprise whose value and assets were frozen, so to speak, at the moment of extending the loan.[165] Future advances, and after-acquired collateral and proceeds clauses typical of line-of-credit financing were, according to this justice, not enforceable under the pre-existing Honduran law.[166] Typical line-of-credit clauses can be described with language as flexible as, "[The debtor is] obligated to maintain the same aggregate value of inventory as well as the same type of individual goods."[167] In case other e*mpresa* assets were also part of the collateral, such as its intellectual property, accounts receivable, proceeds, etc., nothing in the Honduran law or regulations impedes their enumeration as collateral for the loan to the enterprise.[168] Again, this is another area where Honduran courts must be careful not to restrict the collateralization of *empresas*[169] (if this term continues to be used in future secured loans) by confining its meaning to that in pre-existing law. An important feature that was not discussed then with the Supreme Court justices but that has aided in the popularity and effectiveness of the registry is *the simplification of the secured debtor's ability to act as a legitimate debtor.* In contrast with other Latin American countries, in Honduras, a security interest can be filed at the registry on the basis of the secured debtor's identification number, whether it is his unique personal identification number or his tax identification number, therefore facilitating the identification of micro- and small merchants.

Despite the early stages of the Honduran registry, its volume of filings is impressive by Central American standards. Even more impressive is the fact that 18.48% of the collateral described in the filings involved commercial assets and thus commercial loans. The variety of the business assets used as collateral—from commercial vehicles to agricultural, commercial, professional and industrial equipment; from retail and wholesale inventories and accounts receivable to floating (after-acquired) inventory; and from software licenses to the largely unknown category of contract rights—was also encouraging. Agriculture, professional services, construction, commercial retail, industrial production, and transportation benefitted from the new sources of credit. Further, indications of incipient micro- and small business-secured credit were found, based upon the low value of certain assets used as collateral, such as some of the business equipment.

It is clear that Honduran lenders are lending and that their loans are being secured by assets that up until quite recently were completely unknown to them. Nonetheless, a "to do" list exists, and it must be addressed so that the Honduran

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164. CÓDIGO DE COMERCIO [CÓD. COM.] [Commercial Code] art. 646 (Hond.); Codice civile [C.c.], Libro Quinto, Del Lavoro, Titolo II, Capo I, Dell'impresa in generale (It.).

165. Honduran Supreme Court visit, *supra* note 162.

166. *Id.*

167. Honduran Statistics, *supra* note 124.

168. Honduras LGM art. 2.

169. *Id.* art. 3(7).

registry attains its full development potential. Absent from the filings was collateral required for the financing of small farms, such as their crops, seed, and fertilizer, as well as that required for cattle and fishery loans, including not only their inventory and accounts receivable but also their documents of title. Another very important collateral that should be encouraged is the inventory and accounts receivable of micro- and small businesses. This collateral will require the preparation of simple but reliable accounting statements reflecting the cash flow and expected income of these small merchants as well as their accounts receivable. Hence, it will be necessary to organize workshops for micro- and small borrowers, lenders, lawyers, and registry officials. I should add that the Honduran micro- and small borrowers have an inherent advantage. Unlike their counterparts in many developing nations, they do not have to register their business and obtain all sorts of licenses in order to qualify for the loans governed by the Honduran law and its regulations.[170] All they need to provide their lenders for filing against collateral at the Honduran registry is their national identification numbers.[171]

Agricultural, cattle, and fishery lending workshops, in turn, should stress the preparation of paper-based and electronic documents acceptable to lenders, "blue books," and relevant documentation (such as certificate of quality or weight) that enable lenders' realistic evaluations of the quality and value of collateral.

A detailed analysis of the impact of these secured loans upon Honduras's economy will have to wait a few more months until the lending and repayment statistics are supplied by Honduran banks and regulators. Yet, based upon the number of loans that were made largely, if not solely, because of the presence of the secured transactions law and registry, the positive attitude of Honduran bankers, registry officials, the Tegucigalpa Chamber of Commerce and Industry, the Millennium Challenge Account, and the Honduran government at the highest levels, there is good ground for optimism.

E. Chile: Factoring, Non-Recourse Financing, and Micro and Small Businesses

I visited Chile during the week of April 4, 2011, to participate in a symposium on secured transactions law organized by the Universidad Mayor de Chile Faculty of Law, the *Centro Jurídico de Implementación del Libre Comercio*-ILC (the sister center of the NLCIFT in Chile), and Chile's American Chamber of Commerce.[172] A number of years earlier, I had been contacted by

170. *Id.* art. 44(1); Honduran Registry Regulations art. 2(a).

171. Honduran Registry Regulations art. 2(a).

172. Facultad de Derecho de la Universidad Mayor, Centro Jurídico de Implementación del Libre Comercio, Cámara Chileno Norteamericana de Comercio & NLCIFT, Seminario Internacional: Acceso al Crédito para Empresas de Menor Tamaño

Chile's Ministry of the Treasury for advice on the drafting of Chile's secured transactions law. Unfortunately, the law and the regulations eventually enacted by Chile[173] departed from the text and spirit of the OAS Model Law, its Registry Regulations, and from the NLCIFT 12 Principles. Consider the following, among other departures: a) the only proceeds the Chilean law mentions as recoverable are insurance policies;[174] b) while it professes to accept future or after-acquired things as collateral (unlike the above discussed letter of hypothecations), it seems to exclude future bills of lading or receipts of transport or of storage as collateral despite their importance in financing import and export transactions;[175] and c) as did the original Peruvian law, it subordinates the filed notice of a security interest to the filing of a notarial or formal contract of a loan and/or security agreement.[176] As the reader will recall, this was one of the problems that rendered Peru's registry system inoperative. In addition to the uncertainties it creates when enforcing security interests subject to claims, defenses, and equities of underlying transactions, the system requires expensive notary publics for services as menial as notifying account debtors of account assignments, as well as the drafting of expensive mandatory deeds of loans and/or security.[177] Such burdens are definite deterrents of credit to micro- and small businesses.

Yet, despite these inadequacies, an impressive factoring industry has grown up in Chile.[178] This attests, on the one hand, to the need for such lending in Chile and, on the other, to the disregard of the "official" law by the "living" law being created by Chilean factors and their clients. The lack of connection between commercial and factoring credit and present registry system is immediately apparent. While the registry has filed approximately 22,000 security interests in automobiles sold on credit by the car dealers, less than 1% of these recordings involve Chilean asset-based loans, in contrast with Honduras's 19%.

During a panel discussion of the Chilean symposium, Germán Acevedo Campos, the president of Chile's factoring associations offered startling statistics on the "living law" importance of factoring in Chile.[179] When factoring started in 2003, Chilean factors had less than 6,000 "clients" (assignors or sellers of accounts receivable).[180] By 2010, the number of clients approximated 17,000.[181] Invoices (*facturas*) comprised approximately 68% of the accounts receivable (and

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[International Seminar on Access to Credit for Smaller-sized Businesses] in Santiago, Chile (Apr. 6, 2011) [hereinafter Chilean Seminar].

173. Law No. 20190, Junio 5, 2007, D.O. (Chile).

174. *Id.* tit. III, art. 15.

175. *Id.* tit. II.

176. *Id.* tit. IV, art. 24.

177. *See id.* tit. I, art. 2 & tit. IV, art. 24.

178. Chilean Seminar, *supra* note 172, Germán Acevedo Campos, Presentation, Factoring: An Efficient Tool to Finance Working Capital (on file with the author).

179. *Id.*

180. *Id.*

181. *Id.*

collateral) assigned to or bought by the factors.[182] The remaining accounts were in the form of bills of exchange or drafts (5.50%), checks (4.55%), and miscellaneous other documents (20.56 %).[183]

In the case of micro- and small businesses (*MiPymes*), factoring was "traditional" in the sense that recourse against the *MiPymes* assignors or sellers of the accounts receivable (*con su responsabilidad*) was the norm, and even this recourse practice required that the *MiPymes* provide an additional official bank guarantee, which in turn required a minimum amount of annual sales.[184] Thus, it seemed that, despite the best efforts of the factoring industry, credit to the *MiPymes* was minimal and inadequate. On the other hand, the factoring business now amounts to a whopping 12.85% of Chile's gross internal product.[185]

Upon hearing this, I asked Acevedo if the broad concept of proceeds set forth in the OAS Model Law was part of their collateral. He said that it was not. "Would your industry welcome the addition of collateral that included all the things listed by the OAS Model Law as proceeds?" He said that his industry would surely welcome such additional collateral. "Would it welcome it enough to start lending to *MiPymes* on a non-recourse basis?" He said that he would not discard such a possibility and added that having access to proceeds as collateral would significantly increase the volume of loans to *MiPymes*.[186]

Following this symposium, Dean Clara Szczaranski of the Universidad Mayor Law School, together with Ambassador Esteban Tomic and ILC President and Executive Director Lic. Rodrigo Novoa, agreed to form a working group that would approach the Chilean government officials, banks, banking lawyers, factors, credit cooperatives, and associations of *MiPymes* to propose amendments to the Chilean law. On behalf of the NLCIFT, we pledged our participation and support for such an effort. Given the dynamism of Dean Szczaranski, Ambassador Tomic, and Lic. Rodrigo Novoa, this effort may well bear fruit in the near future.

F. El Salvador

For a number of years, various government offices in El Salvador have been involved in drafting a secured transactions law that follows the OAS Model Law and replicates those of Guatemala and Honduras. Professor Dale Beck Furnish, a board member of the NLCIFT, has been working with El Salvador's drafting commission, and he assures us that the draft is very close to the Honduran law and has a reasonable chance of being adopted in the near future. In addition,

182. *Id.*
183. Acevedo Presentation, *supra* note 178.
184. *Id.*
185. *Id.*
186. *Id.*

El Salvador has a state-of-the-art electronic registry of pledges that, with some adjustments, could be a replica of the Honduran registry.[187]

G. Colombia

The Superintendence of Companies of Colombia has appointed a drafting committee for its law of secured transactions presided over by Professor Francisco Reyes Villamizar, an NLCIFT collaborator and the author of one of the most successful simplified corporate laws in the hemisphere.[188] Prior to traveling to Chile, I attended one of the first meetings of the drafting committee and was impressed by their professionalism, knowledge, and intent to have a law enacted within the next year. The committee has been relying on the Honduran version of the OAS Model Law and intends to follow the OAS Model Regulations. Because Colombian banks are increasingly active in Central America, the Colombian law and registry, as well as the secured lending practices they govern, will be closely harmonized with those of their Central American counterparts.[189]

X. *DE LEGE FERENDAE* AND OF BEST CUSTOMS AND PRACTICES TO COME

On March 4, 2010, U.S. Secretary of State Hillary Clinton, together with representatives of fourteen Latin American nations, announced the adoption of a joint socioeconomic policy in the Americas known as Pathways to Prosperity, which called for great financial inclusion of the poor, disadvantaged, or discriminated against.[190] At the center of this financial inclusion, and as its first goal, is the successful enactment of secured transactions laws and the creation of easily accessible, reliable, and inexpensive registries.[191] In fact, she singled out the Honduran registry as the model to be followed throughout the Americas.[192]

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187. *See* CENTRO NACIONAL DE REGISTROS, http://www.cnr.gob.sv/ (last visited Oct. 28, 2011).

188. FRANCISCO REYES VILLAMIZAR, LA SOCIEDAD POR ACCIONES SIMPLIFICADA 57–58 (2d ed. 2010).

189. After my initial visit, the International Finance Corporation (IFC) contracted with the NLCIFT to advise on the drafting of the new secured transactions law and regulations for Colombia; the NLCIFT is currently working with the IFC and the Colombian drafting committee.

190. Pathways to Prosperity in the Americas, III Ministerial Meeting & III Ministerial Declaration, in San José, Costa Rica (Mar. 4, 2010).

191. *Id.*

192. *Id.* Hillary Rodham Clinton, U.S. Sec'y of State, Remarks. The asset-based lending community as well as those who are likely to be included in it as a result of the efforts described in this article owe an enormous debt of gratitude to Ambassador Charles Shapiro, Senior Adviser for Economic Initiatives, Bureau of Western Hemisphere Affairs,

Our experience at NLCIFT has taught us that the success of regional secured credit markets in the Americas depends upon enacting effective laws and regulations, not only with respect to secured transactions proper but also for bankruptcy and e-commerce, among other concerns.[193] It is very important that the certainty gained by a transparent and reliable law of secured transactions is not lost by a non-existent, manipulable, or chaotic law of insolvency and bankruptcy. Similarly, the electronic transactions that are so necessary for secured lending should not be eroded by laws of contracts or civil procedure unwilling to enforce the functional equivalence of paper-based and authenticated electronic records. In addition, the reforms introduced in secured lending law and practice require thoughtful training of bankers, lawyers, judges, regulators, and small merchants, including familiarity with accounting standards and bookkeeping practices that could be relied upon by lenders, regulators, and judges or arbitrators.[194] Finally, the NLCIFT hopes to be able to participate in the preparation of manuals of best practices for the above participants and especially for lenders and borrowers. Our experience shows that information as mundane as, say, the types of shrimp fished (including classifications as to quality and marketability) is of considerable assistance to a banker pondering the amount to be lent or monitoring the value of a debtor's inventory as well as other terms and conditions of the secured loan. The same would be true with reliable data on the various organic or chemical inputs in crops intended for export from developing to developed nations. Such product information is the raw material likely to become indispensable for the manuals of best lending, storing, shipping, and financing regional practices.

And while the statutes and regulations now being enacted in Central and South America are likely to remain on the books for a considerable period of time much as enacted, the above-described manuals will be periodically revised to account for the latest best practices and thus will become the living law of secured lending in the Americas and perhaps beyond. I can assure those lawyers who question whether their participation in drafting or helping to apply these manuals is an intellectually and legally challenging-enough task, that they should examine the sources of law that govern the most economically significant transactions of the international financial industry.[195] Simply put, the law of commercial and

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at the U.S. Department of State. He has been an untiring, eloquent supporter and salesman of our efforts throughout the Western Hemisphere.

193. Kozolchyk, *Modernization*, *supra* note 81, at 720–47.

194. *Id.*

195. Consider, for example, the case of the International Standard Practices for the Examination of Documentary Credits that started being enacted after the International Chamber of Commerce's (ICC) promulgation of Article 13 of the Uniform Customs and Practice for Documentary Credits (UCP 500), which read in relevant part: "Compliance of the stipulated documents on their face with the terms and conditions of the credit, shall be determined by international standard banking practice . . . ." These standard international banking practices as promulgated periodically by the ICC are being followed without exception throughout the banking world. *See also* Int'l Swaps & Derivatives Ass'n

especially secured transactions, national and international, is becoming more customary and thus more factual and contextual with each passing day.

[ISDA], *2002 Master Agreement Protocol* (July, 15, 2003), *available at* http://www.isda.org/2002masterprot/2002masterprot.html (governing trillions of dollars worth of derivatives transactions (e.g., interest rate swaps)).