STATE BAR OF ARIZONA ANNUAL CONVENTION
INTERNATIONAL LAW SECTION – PANEL: SECURED FINANCING IN LATIN AMERICA

JUNE 11, 2010
TRANSCRIPT

The following transcript records a panel discussion presented at the 2010 Annual Convention of the State Bar of Arizona. The panel was held as part of the International Law Section and focused on personal property secured financing in Latin America. The purpose of the conference was to inform the legal, banking, and export-import communities of the United States, Canada, and Mexico of the progress attained in the adoption of the OAS Model Inter-American Law on Secured Transactions by Latin American countries.

A transcript such as this attempts to capture the dynamic nature of a discussion as it occurred, with a natural flow of conversation and the energy and spontaneity of discussion. This transcript has been carefully and sparingly edited to provide readers with an accurate yet manageable account of the panel discussion. We hope it is a useful tool for practitioners and scholars in providing both substantive insights into the area of Latin American secured financing and demonstrating the compelling characteristics of comparative commercial legal discussion.

PANELISTS

Boris Kozolchyk is one of the world's experts on international banking and commercial law and on the utilization of commercial law as a tool for economic development. He has represented the United States in various law reform projects at the United Nations Commission on International Trade Law (UNCITRAL), at the OAS and at the International Chamber of Commerce. He has pioneered the modernization of the law of secured transactions in the Americas and participated in the drafting of these laws for Colombia, El Salvador, Guatemala, Honduras, Mexico, and Peru. He is the founder and president of the National Law Center for Inter-American Free Trade (NLCIFT) and Evo DeConcini Professor of Law at the University of Arizona. His many books and articles are among the most influential throughout the commercial world. The governments of the United States and Spain have commended his work, as have academic institutions throughout the Americas. Research facilities have been named after him at the Technological Institute of Monterrey and Guadalajara campuses, and at the NLCIFT. He was awarded the prestigious James Theberge prize by the American Bar Association, and in April of 2009, the Peruvian university Universidad Privada Antonio Guillermo Urrelo awarded him a Doctorate Honoris Causa in

recognition of his outstanding contribution to the legal and economic development of the Americas.

Philip Robbins practices law in Phoenix, Arizona, at Philip A. Robbins, P.C., and is of-counsel to the Phoenix law firm Sandweg & Ager. He is a litigator, arbitrator, and mediator for both cross-border and international matters. Robbins is a Fellow of the American College of Trial Lawyers and a member of Maricopa County Bar Association Hall of Fame. He is a member of the NAFTA Advisory Committee on Private Commercial Disputes and has been engaged in a variety of commercial law reform activities as well as training and outreach programs. Mr. Robbins is the chair of the Board of Directors of the National Law Center for Inter-American Free Trade.

D. Michael Mandig is a shareholder in the Tucson law firm Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C. A commercial litigation and trial attorney for over thirty years, he directs the firm's cross-border litigation and commercial practice. He has handled numerous cases and transactions involving the intricacies and implications of differing commercial lending and litigation systems in the Western Hemisphere.

Marek Dubovec earned a law degree from the University of Matej Bel, College of Law, in Slovakia in 2003, and both a Master's Degree (LL.M.) in International Trade Law in 2004 and a Doctor of Juridical Science Degree (S.J.D.) in 2009 at the James E. Rogers College of Law, University of Arizona. Since 2004, he has been a research attorney and secured transactions projects coordinator at the National Law Center for Inter-American Free Trade. Dr. Dubovec has coordinated the secured transactions law reform program in Honduras and has been involved in a number of reform projects in Guatemala, Mexico, and Peru. He is also a consultant to the International Finance Corporation on the secured transactions reform projects in Malawi and Ghana. Since 2005, he has been a member of the United Nations Commission on International Trade Law Working Group VI on Security Interests and was part of the working group that drafted the 2009 OAS Model Registry Regulations. He is also an assistant adjunct professor teaching UCC Article 9 Secured Transactions at the James E. Rogers College of Law.

John Wilson is Senior Legal Officer with the Department of International Law of the Secretariat for Legal Affairs at the OAS. On behalf of the General Secretariat, Mr. Wilson has coordinated the drafting of legislative and procedural recommendations for OAS Member States and political bodies on access to information and data protection, coordinated a study on best practices on access to information, and is coordinating the drafting of a model law and implementation guide on the topic. In other duties within the OAS, Mr. Wilson coordinates the drafting of treaties and other instruments on private international law. Prior to joining the OAS, Mr. Wilson coordinated legal reform efforts in Latin America

for an NGO affiliated with the University of Arizona College of Law, his alma mater.

Dale Beck Furnish has been a member of the faculty at Arizona State University's College of Law since 1970. Professor Furnish has taught Mexican law, secured transactions, contracts, creditor-debtor, NAFTA, and international civil litigation at ASU and as a visiting professor at the Universities of Michigan, Iowa, Illinois, Houston, Baylor University, *Universidad Nacional Autónoma* of México, *Pontificia Universidad Católica* in Perú, and *Universidad de Sonora* in Hermosillo, Sonora, México. He became Professor of Law Emeritus at ASU in 2004. Professor Furnish practiced law in Phoenix as a shareholder in Molloy, Jones & Donahue, P.C. from 1988 to 1992, concentrating on real estate loans, bankruptcy, commercial litigation, and international trade matters. Professor Furnish is one of two U.S. jurists thus far named a Supernumerary Member of the Mexican Academy of International and Comparative Law.

TRANSCRIPT

Philip Robbins: To start with, let me introduce Mike Mandig from Tucson, who is the incoming chair of this Section and is chairing this part of the program. Michael, I will turn it over to you.

Mike Mandig: Good morning. I know some of you, I do not know others of you, some of you are here, I am sure, because you have a deep interest in and maybe some direct involvement in the kinds of things we are going to be talking about this morning; others of you are here because you need some CLE [Continuing Legal Education] hours. And recognizing the need to balance how we make our presentation so everybody gets something out of what we are talking about, I am going to try and keep my role as moderator to one of simplifying and directing a conversation which could easily lose us in the trees if we get too deeply into the minute details of secured financing in Latin America.

First, let me give you some idea of who is on our panel here this morning. We are really fortunate to have the people that we do.

To my immediate left is Mr. John Wilson. John is with the OAS in Washington, and he is the Project Director for the Office of Private International Law—I think I may have said that a little bit off, but he will correct me if need be. John is a graduate of the University of Arizona College of Law, and he hails from Douglas, Arizona; and maybe he will give you a little bit of a thumb-nail sketch of how he ended up in Washington, D.C. But let me see if I can do it justice first.

When John graduated from law school in—what was it, in 1996, John?

John Wilson: Yes.

Mandig: He then went to work for two or three years with a Mexican law firm working in Mexico City. During the third year that he was working for the firm of González Vargas and González Baz in Mexico City, he also began working sort of half-time for an outfit called the National Law Center for Inter-American Free Trade, which is headed by another one of our panel members here, Dr. Boris Kozolchyk. At that time, he got very much involved in the efforts of the Center—which is based in Tucson—on, among other projects, reforming commercial lending laws in Mexico and elsewhere. But John's primary focus was in Mexico. John now works with the OAS, where he has been, I think, for seven years, and he is primarily involved in what he would call the creation and maintenance of the various international conventions that the OAS has created over the years and is creating now. One of his primary focuses recently has been on secured lending, and I will come back and give a few words of what that means in a minute.

Seated directly to John's left is Professor Dale Beck Furnish who, depending on when you ask him, is either retired or not retired from the Arizona State University College of Law, where he taught, for many years, commercial transactions focused on, of course, the UCC. Dale also has a long and distinguished résumé of involvement in teaching in Latin America, including Mexico, and has written extensively on the subject of secured lending in Latin America with an occasional focus on Mexico.

Seated to the very far left against the wall is a gentleman named Dr. Marek Dubovec.

We are very lucky to have Marek here with us. Marek got his initial legal education in Slovakia in 2003 and he then went to Tucson, Arizona, as an enrollee in the Masters of International Trade Law program, where he received a Master's Degree in 2004. He then did something that no one has done before—and I would venture to say nobody else has done it since—in 2009, Marek became the first individual to earn the degree of S.J.D. in Commercial Law from the University of Arizona College of Law. S.J.D., for those of you who do not know, is basically the legal education's equivalent of a Ph.D., and his dissertation topic for his degree was in the area of securities—not secured transactions, but securities and wire transfers and how those concepts function under the UCC. Right now, Marek is the Project Coordinator for a project being undertaken by the Center, of which he is presently an employee. The project he is heading up is on the reform of secured financing laws in Honduras; he will tell you more about that. Most recently, as perhaps some indication that after many years Boris Kozolchyk may be getting ready to pass the baton, he also taught UCC Article 9 at the University of Arizona College of Law. I do not know whether Boris is smiling about what I just said or not.

Boris Kozolchyk: I am.

Mandig: In any event, we are lucky to have this gentleman with us. And, luckiest of all, it is our good fortune to have my good friend and former professor Dr. Boris Kozolchyk, who is the Evo DeConcini Professor of Law at the University of Arizona College of Law and is also the head of the Center, which has, since 1993, dedicated itself to the simplification and harmonization of commercial law in our hemisphere, with the fundamental goal of making it easier for people to do business across borders in North, Central, and South America and the Caribbean, and with special emphasis on methods by which we can make it easier for developing countries to do just that, develop in a sustainable fashion.

We are going to begin by hearing some remarks from Dr. Kozolchyk about the activities of the Center and the subject that we are here to talk about today. So without further ado, I will be quiet and be seated and introduce Dr. Boris Kozolchyk.

Kozolchyk: Thank you very much, Mike, and thanks all of you for being here. It is like an old reunion; I see many pleasant and dear faces in the audience. Before I start out, I would like to introduce some special guests that we have from Spain, Professor Teresa Rodríguez and Professor Jorge Feliu. Both come from the Charles III University of Spain, and they have both come to the Center—Teresa, because she is interested in the subject of secured transactions law and the possibility of Spain doing something along those lines, and Jorge, because he is interested in the area of business associations law and also has some interest in secured transactions law. I have had a long association with the University Charles III; I taught a doctoral course a few years ago, and this is when I first heard about them. I am pleased that they came, and I welcome you.

I also would like to welcome my former student, John Munger. There was a Mexican professor whose name was Raúl Cervantes Ahumada who used to say that in order to qualify as president of Mexico, one had to say and prove that they were a student of Raúl Cervantes Ahumada because he had three former presidents as students of his. I was going to suggest to John, that the next time, in the State of Arizona there should be a requirement that to be governor of the state,[1] one has to have studied at the University of Arizona with Boris Kozolchyk, gotten a J.D. and then an LL.M. John was an LL.M. recently. John wrote perhaps the first article that was written on secured transactions in Mexico, it was published in the *Arizona Law Review*, and it is one of the best articles written on that area. So, I am very happy that you are here with us today.

1. John Munger had just dropped out of the Republican primary for Arizona governor. *See, e.g.*, Jeremy Duda, *Munger Drops Out of Governor's Race*, ARIZ. CAPITOL TIMES, June 1, 2010, http://azcapitoltimes.com/news/2010/06/01/munger-drops-out-of-gubernatorial-race/.

My job is to provide an overview of what is happening with secured transactions law and what could be in it for you as members of the Bar and of the International Law Section.

I should start out by saying that despite everything that has occurred in the United States' economy and in many economies around the world, the law of secured transactions is one of the best indicators of what should be the direction of commercial law, commercial practice, and economic policies around the world. I was just commenting to Teresa as the meeting was about to start that I was in Costa Rica not long ago, where I was told of a $100 million first mortgage securitization. The land registrar indicated: "I had to fire five registrars because of the fact that they were ante-dating mortgages and registering mortgages that did not exist." So, contrary to an area of the law, which, unfortunately, was abused for financial purposes, excessively selfish and bad-faith practices, the law of secured transactions is predicated upon a very sane and healthy principle of doing business—both legally and economically. And it is what I like to call the Principle of Self-Liquidation; that is to say, it is a debt that pays for itself. It was first introduced as a policy of the Bank of England, which classified merchants according to their reputation. They would say, "These are good merchants," meaning that these merchants would pay you regardless of whether they have enough money in cash or they take a longer period of time to pay you, and, "Yes, you should consider lending to these merchants." But when it comes to actually discounting accounts or giving money for existing obligations—that is to say, obligations that have not yet become due—the best people in that classification are merchants that have good assets, like inventory and accounts receivable, assets that could repay the loan by themselves without the lender having to worry about spending many years in court.

The British were the first that started it, and the United States was the institution that magnified it and glorified it, making it the centerpiece for a lot of lending. The World Bank estimates that seventy percent of commercial loans that take place in the United States are secured in one way or the other.

Recently, we had a group of justices from the Supreme Court of Justice of Honduras come to Phoenix. We took them to the Secretary of State's Office, and then we took them to Bank of America. One of the justices asked the lending officer of Bank of America, "If I offer you a mortgage on my house—which is located in the very best area of Tegucigalpa, Honduras—and it is worth, let's say US$200,000, and I want to borrow something like US$150,000, would you say that this is a better type of a guarantee than the accounts receivable that I have as a lawyer—that is to say, people that owe me money in my practice? Which one will you accept as collateral and which one will you discount?" The officer from Bank of America did not hesitate; he said, "I do not want to be taking over houses; I like liquidity, I like the liquidity of accounts receivable. That is what I would lend you on." [The justice then asked:] "How much would you lend me?" The Bank of

America officer said, "About seventy to eighty percent of their value." "At what interest rate?" At that time, it was about six or seven percent. The justices could not believe what they were hearing. Most of the world really does not have that type of ability that secured lending makes possible. In most of the world, you have commercial loans that are usually based upon the real estate of the borrower or its personal signature. Jorge was just telling me that in Spain he has a client that was asked by a bank to secure a one million dollar loan with real property worth that same amount, as well as the signatures of his whole family, including his wife.

Secured transactions make this type of lending possible. In the United States, as you know, it became even more possible as the result of the enactment of the UCC, and the work done by a group of very fine lawyers, professors, and business people that put together Article 9.

UCC Article 9 became a model worldwide for countries to follow, but unfortunately they have not had the success Article 9 had itself. For example, Germany never adopted Article 9, although one of the German delegates to the United Nations Commission on International Trade Law [UNCITRAL]—a very capable commercial lawyer—was telling me that it is inevitable that in the next few years Germany will have to do the same thing because in Germany a few banks communicated information about clients to each other, and that was basically the kind of publicity or notice system that they had. "Now," he said, "we are supporting several countries, including what used to be Eastern Europe, and we do not know a lot of these people; our banks do not have offices there, and we cannot communicate information; so, the time has come for something like Article 9 to be enacted."

The UCC Article 9 introduced something called a "security interest," which is a very interesting concept. If you try to translate it to any other language, there is no direct translation. Many translators get fouled out because they start looking at the word "interest" and they think it is the "interest" rate in a loan, rather than the real right on things.

As time went on and the Center was created—back in 1992—the law of secured transactions became a very critical point of our work, because our work . . . was not only to make trade possible in the Western Hemisphere, but also, very quickly it became apparent that for many countries to trade, they need to have access to credit. In countries throughout Latin America, credit is—if you can get it—forty to fifty percent per annum. A study by the Central Bank of Brazil indicated that the ability to collect is minimal; they estimated that at least thirty to forty percent of the cost of a loan corresponds to the uncertainty of collection and, obviously, the fact that you do not know who is the creditor against whom you are competing.

Shortly after the creation of the Center, this project got started. John Wilson was still a student at the law school. At that time, we had a banking lawyer, Todd Nelson, working on the project; he introduced John to the Center. Eventually, John graduated, and Mexico seemed to be interested in adopting this law, so John went to Mexico for close to two years and worked with a very capable fellow at the now Ministry of Economy, Mr. Francisco Ciscomani. Mr. Ciscomani, John, and I drafted a law that was proposed for Mexico to adopt. Mexico adopted only a part of it, but that law became the original Mexican-U.S. working draft for what is today the OAS Model Inter-American Law on Secured Transactions [OAS Model Law].

One of the functions of the Center is to help represent the United States at entities such as the OAS, the UNCITRAL, the United Nations, and others, in unifying commercial laws. That is how that particular law got to the OAS. And, at the OAS, it was enacted with the active participation of many lawyers throughout the hemisphere—very competent people—after the realization that this was much needed. Upon having the law enacted in the OAS, the law was accepted as "tropicalized" by the Latin American delegates to the OAS and since then has been adopted by four Latin American countries and is being considered for adoption by many others . . . .

Finally, a few months ago, the Center received the visit of Ambassador Charles Shapiro, who had been our ambassador to Venezuela and who was declared *persona non grata* by President Chavez. Ambassador Shapiro was going to be advising the Department of State on issues related to trade negotiations and investment in the Americas. Ambassador Shapiro is a charismatic and perceptive diplomat, and he convinced the Secretary of State of the United States that this item should become a top priority of United States' foreign economic policy throughout the hemisphere.

You will find in the materials, first, the Ministerial Declaration made by all the countries in the hemisphere that are not part of the Chavez orbit in San José, Costa Rica, where the most important priority topic is the law of secured transactions to help small and medium-sized companies acquire credit with which they could improve employment and contribute to the national development of the country. Thereafter, a number of statements were made by the Secretary of State saying that the model, Honduras, in which we have been involved—and Marek has been one of the architects of the registry—is *the* model to follow by the other countries in Latin America.

My hope is that, as a result of all these efforts, the work in international law that you are involved with will also facilitate the development of the buying and selling countries, particularly in this hemisphere. In that respect, I would like to extend to you a very cordial invitation, as I have done to many of my students in the audience, to visit the Center and become familiar with it. Hopefully, the

presentations that you will see now will whet your appetite, and hopefully, will attract more and more of the type of banks that are beginning to come to the States. . . . International banks, Spanish banks—Banco de Bilbao, for example—have opened offices here, and part of their directive is to try to open up markets in Latin America, particularly in Mexico, starting out in Mexico. I believe that we are in the threshold of a new era, and I encourage you to get acquainted with it; I encourage you to participate in it. Hopefully, if you could visit our Center, become involved with the work of the Center, that would be very helpful. So without more, I pass it on to Marek for his presentation.

Mandig: Thank you, Boris. Just to give you a brief introduction for Marek's presentation: those of us who practice exclusively in Arizona may have occasion to represent a client that comes in and says, "A friend of mine is opening a retail store and is going to be selling computers, televisions, and telephones. The store is going to be located in Phoenix, and he has asked me to lend him some money. I am willing to do that, but I need to protect myself." And you are asked to set up the transaction so that he is reasonably well protected. Most of us would think, all right, we have got to do a certain amount of research but focus, ultimately, on creating a security agreement that gives our client a lien against and the right to be paid from the televisions, the computers, the telephones—whatever the inventory of this fellow's store is going to be—as well as the accounts receivable that the fellow generates. What do we do? Well, we write a security agreement, the debtor signs the security agreement. How do we perfect our interest? How do we give notice to the world that we have established a lending arrangement for this client and that he has some prior interest in the inventory and the accounts receivable of this new store? Well, it is pretty simple, you fill out a one-, two- or three-page financing statement, and you ship it to the Secretary of State's Office in Phoenix, Arizona. It gets filed, it gets recorded, and it becomes a public record. Well, it has never been that way in Latin America up until very recently, when the laws began to change. Marek, as Boris suggested, is up to his eyeballs in making a system similar to that reality in Honduras. Marek.

Marek Dubovec: Thank you, Mike, for having me on the panel today. I'm very happy to be here, especially, so close to the hockey arena, hopefully we will keep the franchise here.

Boris mentioned the Honduran Law on Secured Transactions. That law was signed by the president and was published in January 2010, and it will become effective at the end of July. . . . The Chamber of Commerce in Tegucigalpa will be hosting that registry. That is something that the United States and Canadian systems are not familiar with: all United States' and Canadian registries are hosted by the Secretary of States' offices; it is a governmental function to provide registration services. However, governments in Latin America are not as reliable, and the private sector is increasingly taking over this publication function. The Chamber of Commerce in Tegucigalpa, Honduras, already hosts the business

registry (the Registry of Companies), so they will be taking over the function of registration of security interests. We have designed the system over the last couple of years with a United States designer. His name is Thomas Ose, and he helped design U.S. filing offices. He helped thirty or forty jurisdictions in the United States, in setting up their filing systems.

In the United States, probably half of the jurisdictions provide or allow electronic filings. In Arizona, you cannot file electronically, and you cannot file your financing statement directly; typically, what you would do is send a fax. California, Texas, and Colorado all allow electronic filings.

When we were designing the Honduran registry, we were presented with a choice: What kind of a system should we design? Is it a paper-based system that will allow for presentations of paper-based financing statements? Is it a system that will allow only for presentation of electronic documents? Or, is it something that should be a hybrid system so as to allow for the presentation of both types of documents? Given the tradition and history in Latin America and the culture of paper, we decided to create a hybrid registry, a registry that will allow for presentation of both paper-based financing statements as well as electronic financing statements.

. . . .

When we were designing this system, we started out with the UCC filing system, and we adjusted it. We took the UCC financing statements—UCC 1, which is the initial financing statement, and UCC 3, which is the amendment form—and we used those forms as a template, and we adjusted those forms to the local Honduran reality. For instance, one of the major problems under UCC Article 9 is the name of the secured debtor; there have been many cases that came out of the courts in the last decade where financing statements were held ineffective because the name of the debtor was not provided correctly. That was partially due to the lack of clarity in UCC Article 9. UCC Article 9 did not provide rules on what the legal name of an individual is or clear rules on what the name of a legal entity is. And that is one of the reasons why UCC Article 9 will be amended. The amendments were already approved by the National Conference of Commissioners on Uniform State Laws and will take effect in 2013. These amendments include new and improved rules on the names of secured debtors. The name of a secured debtor under UCC Article 9 amendments will be the name as provided on your driver's license. There are two alternatives that states can choose from, but basically as long as you identify the debtor by the name displayed on the driver's license the financing statement will be effective.

What we found out in Latin America is that individuals and entities alike are identified by unique numbers. The only unique number in the United States is the Social Security number. When UCC Article 9 was revised in 1999 and included a model UCC financing statement form, there was an item in which to identify the Social Security number of an individual, so a lot of those financing statements

were filed with the Social Security number of the debtor; but then, somebody thought this would create some problems with identity theft. Therefore, since 2005, all the UCC filing offices have been removing Social Security numbers from financing statements. The only number that you can use in financing statements under UCC cannot be used precisely for these reasons, for identity theft reasons.

However, in Latin America, we do not have such problems. Every individual is identifiable by a unique number that is given to him or her at birth, and that number is carried over even if the individual gets married, divorced—whatever happens in that individual's life—the number stays the same. We designed the registration system in Honduras on the basis of unique numbers for individuals.

We also need to identify what would happen in the situation where your debtor is not a citizen. Non-citizens are not assigned that same unique number. But we found out that there is a similar system for residents—like the green card holders' equivalent in Honduras—those individuals are also identifiable by unique numbers. If you are a foreigner, and you go to Honduras and you want to start a small business, then you can also get a loan and be identified by your passport number. Similarly, entities, corporations, LLCs, and informal businesses are identifiable by a tax number. The whole system, the whole database, is designed on the basis of numbers. When you are filing a financing statement, you file against a number of an individual or a company or whatever the debtor may be.

Kozolchyk: . . . [L]et me tell you a little bit about what went into the procedures that Marek is talking about. In order to transplant an institution like Article 9 and "tropicalize" it—as some of the delegates to the OAS said—the process requires what we call at the Center a Roadmap study, that is to say, a study where a group of people go to the country, and they try to find out exactly what characterizes that market, identifying who are the lenders, who are the borrowers, and what kind of collateral is the most common. Phil was on that trip, and he took some pictures of the stalls in the markets in Honduras, and the study revealed that a license to operate and sell fruit in a market stall was an important type of collateral for that operation. Well, do you want to consider that? How about a lady at a grocery shop that all she has to document her sales and inventory is this little informal booklet, *libreta* as it is called. How can you transform that into a cash flow statement that the banks can actually use to determine whether or not to lend on it?

All of that went into the design of the registry. How do you identify a debtor? It took him quite a while to find out exactly which kind of identification was the most functional one. The same thing was done with respect to the lending practices, the accounting practices, etc. All of this contributed to a real tropicalized registry and to a tropicalized set of rules or regulations. . . . The experience with Honduras was so fruitful that when we teamed up with the

Canadians, who have an excellent electronic registry—perhaps the most advanced in the world—the combination produced a set of regulations that was adopted at the OAS. . . . It tells you exactly how this registry is supposed to work and how it can be accessed from around the world; in fact, in some countries without any charge, which is the case of Honduras.

Dubovec: In Guatemala, they charge up to $1,200 per registration, and in the first nine months of the operations of the registry, they processed 600 filings, which is nothing. The largest jurisdictions in the United States—California, Texas—process over 200,000 a year. So, 200,000 vis-à-vis 600, you do the math.

Kozolchyk: But you see again, that is part of the tropicalization process. Because government entities in Latin America regard registries as cash cows; they see this as the ability to get cash from people. Most of the systems—taxing systems—are ad valorem, whether it is real estate or otherwise; so, the registry becomes a cash cow. This is something that we had warned repeatedly all these countries. This is a registry that has got to be very cheap, very accessible, so that credit becomes cheap itself. What good is it if the bank charges you nine or ten percent, and suddenly in Guatemala you have to pay $1,200 for a fee to register? Obviously, the Caterpillars of this world were extraordinarily happy because they had no way to ensure their secured lending before; now they are very happy to pay $1,200 for it. But what happens to the little people, the small and medium-sized business that we wanted to encourage? Honduras has done it. In Guatemala, we are trying to reverse it, because clearly the credit that is available in Guatemala through this registry and the law is restricted to those people who can afford to pay these fees.

From the audience: Boris, have you recognized yet—I bet there will be—but have you recognized any reduction in the cost of lending, interest rates?

Kozolchyk: Yes, in Mexico, interestingly enough. Even though the law that was enacted in Mexico—first in 2000 and then in 2003—was very defective, the impression was that you could really collect very easily with a *fideicomiso de garantía*, that you could realize in the collateral right away, that brought down the cost of lending significantly from 2003 to 2005. The figures of the Mexican Bankers Association were stunning; even though the law was not perfect, they have a jump in the amount of commercial lending of close to twenty percent and in the amount of consumer lending close to forty percent. But then the news got back that it was not so certain. The Central Bank of Brazil, as I indicated, showed that the cost of not having this system is anywhere between thirty and forty percent in additional interest rates that you have to pay. The World Bank was telling us yesterday in a phone conversation that China adopted such a law and that the results have been extraordinary; I have not seen the figures, but they themselves cannot believe the amount of money that is being lent and the reduction in the rates of interest that it has caused.

I know for example, that in Hungary, which also adopted a deficient law that was a duplication, there was a 100% increase from one year to another in the amount of money lent. I do not know about the interest rates, but the indications are that they will be significantly reduced.

From the audience: One other question, you mention remaining secret liens in Mexico, what are those?

Kozolchyk: Well, they could be anything from a sale with a reservation of title to a financial lease, which is in effect not a lease but a loan. They could be some of the agricultural lending devices—the *créditos de refacción y avío*, etc. There are a number of them that do not have to be recorded, at least not in this registry. If you record it in another registry, and nobody has access to it, it is equal to it being a secret lien.

From the audience: What is the relative priority of them?

Kozolchyk: Exactly! You do not know that. That is precisely the reason why we wanted them to finally say, "We have one security interest that will absorb all the preexisting security interests"—like Article 9 did in 1952.

From the audience: Are they moving that way?

Kozolchyk: It is hard to tell. They seem to be saying yes, but we do not know yet.

Mandig: Let me reframe your question a little bit . . . . Your question was, What kinds of devices can produce secret liens and what is the effect of that? The one that I have seen that creates the greatest risk is the simple assignment of accounts receivable. There is no question in the United States now, that if you assign your accounts receivable for the purpose of securing the payment of a debt, you have got to record something in the appropriate location. In Mexico, there are three or four different ways you can accomplish the assignment of an account, some of which must be recorded and others, which do not have to be recorded. What that means is that it is a secret lien because you, as a potential lender, do not know whether or not there is an assignment that has been made, and it can take place either prior to or in some cases subsequent to the creation of your own security interest. It may never get recorded and pop up later when you are trying to collect your debt. Those are the kinds of things that these new laws are trying to eliminate.

Kozolchyk: I would add, in the case of accounts receivable, I was talking to Minister Gurría, at the time Minister of Treasury in Mexico, and he was telling me about some security interests in accounts receivable, and he said, "We have done you a step further than that, we have gone further than that . . . . We are now

saying to all the suppliers to the Mexican government, that if, for example, the army is buying uniforms, the seller of those uniforms may present the invoices to the Ministry of the Treasury—now I believe it is the National Financial Agency—with the stamp of the state entity. The supplier could then go to the bank and get a discount on that *factura*, on that account receivable."

I said that is great, but what happens if that *factura* is sold to three or four different people, and who knows who has got a better right to the *factura* and to the proceeds? The problem was endemic; the problem continues to be endemic in Mexico.

. . . .

Dubovec: There may also be a problem with secret liens, which are non-consensual liens, like taxes and judgment liens. In the United States, if the IRS wants to have a lien, they need to record that lien. That is not the case in many jurisdictions in Latin America, especially for tax and judgment liens, so they can just come in and take assets and sell them. But in the Honduran law, the idea is to subject all of these consensual as well as non-consensual liens to the same regime of registration. Therefore, in Honduras, if you want to get a judgment lien or a tax lien, you need to record that lien and compete for priority against other creditors.

Going back to the website, we have developed the system bilingually; we can switch between English and *Español*. When a person goes to the Internet, there are certain functions such as searching and forms that are available for download, and then, one can also get a user account, sign in to such account, and submit registration forms electronically . . . .

The financing statement provides pretty much the same information that you would find in a UCC financing statement: identification of the debtor, additional debtors, secured creditor, and the collateral. That is all that is needed . . . . With respect to amendments, under UCC Article 9, there is a model amendment form that is included therein, but that amendment form does too much; it does continuations, terminations, amendments of collateral, amendments of parties, and assignments. So I split out that form into three different forms, so people know what they are filing.

Sometimes United States filers want to *continue* the effectiveness of a security interest, but they check a wrong box for termination, and the entire security interest terminates. Just like what happened with the Heller Ehrman law firm. When it was dissolved, Bank of America wanted to continue the effectiveness of a security interest, they clicked the wrong box, and they lost $53 million. This system is much more simple.

We expect that the majority of our users, like banks, will create electronic accounts, so that they do not have to come into the registry and hand in a paper form. We will give them user accounts . . . . [For] identification of the debtor . . .

it could be, name: Jose. For the identification number . . . we have this ["Get the Name"] function because we were able to get the Honduran database of voters. Every individual in this database is identified by a name and an identification number, so that when I type in an identification number—let's say a customer comes to my bank, shows me his driver's license with his identification number, I get that number, type it in, and the system will verify whether that number is correct; this reduces mistakes. It was funny, in Honduras, they have a postal code, and when we came to Honduras we were asking, do you use postal codes? And we were talking with the person at the Chamber of Commerce, and she did not know what her postal code was. Postal services are not very reliable in Honduras.

From the audience: If you enter their identification number, does the "name box" automatically fill in?

Dubovec: Yes, it is automatically populated.

From the audience: If you just know the identification number, you do not really need to fill in anything else?

Dubovec: That is right. But we have this function only for citizens. So if you are a passport holder you will not have that option. . . .

From the audience: If someone comes in and says, "I am such and such" and gives you a fake identification, how are you going to determine that that is a fraud?

Dubovec: That is right, but that is not the function of the registration system. That is not the function of the UCC filing systems. You have all kinds of bogus financing statements filed against all kinds of individuals. I remember two years ago, we went to the Arizona registry, and they were telling us that somebody that day filed a financing statement against [Governor] Jan Brewer. It was fraudulent, but there was nothing you can do about it. You have to go to the court and get the court to issue an order to remove it from the registry because it is a notice filing system, so there are no safeguards [against fraud] built into the system itself.

From the audience: Marek, what is the typical deal or *a* typical deal of a user of the registry?

Dubovec: Most registrations that we expect will be against vehicles. This system does not follow the UCC system entirely, because under the UCC, you have a certificate of title system for vehicles. This system follows the PPSA [Personal Property Securities Act] in Canada. In the Canadian systems, ninety percent of all registrations are against cars. So we expect that at least seventy-five percent of all registrations in Honduras will be against vehicles.

From the audience: Do you think this will promote the sale of vehicles with the use of the system?

Dubovec: Absolutely. We met with an owner of the largest Toyota dealership in Tegucigalpa, and she told us that it is extremely difficult to finance cars because without this system, she had to retain title to the car until the loan was paid out. But, by retaining title, she was also liable if the driver caused an accident. This system will allow her to transfer title to the borrower, to the driver, and take a security interest and publicize it.

From the audience: How does that compare to the Arizona system where the lien on the vehicle is registered on the title certificate as opposed to the UCC?

Dubovec: For you to register a lien on a certificate of title, the certificate of title must exist. There must be a system for certificates of title; they do not have a certificate of title system in Honduras.

From the audience: So they use this instead?

Dubovec: They have a registry of cars but only for tax purposes. When you sell a car, you need to register the transfer and pay a transfer fee, or transfer tax, but you do not get a certificate of title. That is a similar system to Canada.

Kozolchyk: To add to that question. We expect, at first, a lot of registrations against cars, but the object is, obviously, to be able to rely on much more collateral than that; that is to say, accounts receivable, inventory, equipment, etc. That is where we are expecting a big surge.

. . . .

From the audience: Describe to me how the law, as adopted in Honduras, regulates the description of the different types of collateral and if it has picked up on those amendments to Article 9 that are getting away from specific descriptions of collateral into a system where you are allowed to file against all of the debtor's collateral and have it be enforced by a court.

Kozolchyk: Yes. That is the system. Although we found out—Marek and I and Dale found out—that locally, the Registrar in Phoenix wanted to go back to that system and demanded more detail on the description of the collateral than the actual law required. But all through the OAS Model Law countries, the system is that of a general description of the collateral unless you decide otherwise.

Dubovec: The way I described the collateral as "all inventory" would be sufficient under the Honduran law, the only difference is that under UCC [Section] 9-504, you can describe the collateral as "all assets," but we do not have that super generic description in the Honduran law. However, "all inventory," "all equipment," "now owned and hereinafter acquired" would be sufficient. What

you can also do, because there is this tradition of adding documents and putting too much information in the registry, you can attach a document. You go to "attachment," then "add." So if you want to attach a security agreement with a more detailed description, you can do that. If you want to attach an invoice, a loan agreement—anything can be attached as long as it is in PDF and does not exceed two megabytes.

From the audience: Knowing my limited experience with Mexican judges, when you ask the judges for an order to seize something, they want to have a serial number and a specific description of whatever machine located on whatever farm they are going to seize. Do you see an enforcement and jurisprudence in Honduras, so that what would be contemplated as an optional filing feature in the filing system would, really, under the enforcement mechanisms become mandatory?

Kozolchyk: I do not know that it is going to become mandatory, but I think what you are saying is absolutely correct. That is one of the reasons why we went to the hybrid system; because we heard, not only from the judges but from potential lenders, that they wanted to take a look every once in a while at some of the accounts themselves. They did not believe that they really existed, so they wanted to see them. These attachments do not have any perfection or priority consequences at all; that is, they satisfy people who are coming into a system which is largely electronic and largely intangible, that they really have rights. So this "show me" business, this "show me" attitude, is what is reflected in this option for attachments, precisely to satisfy those who are skeptical, including judges. I am not sure that there will be a civil procedure amendment saying that in order to foreclose you have to have something like that. I doubt it. But at least it will be for purposes of reassuring people.

Mandig: . . . One of the objectives of the new laws is to move in the direction of having what we have become accustomed to; that is to say, a floating lien on inventory, a floating lien on equipment, so that whatever is physically located at a particular location on the day that you enforce your rights is subject to the lien, regardless of whether you can find it specifically identified on a list someplace. But that is going to take a while because it requires people to recognize and forget about the fact that the old way of doing things is going by the wayside.

Dubovec: That was an excellent question about enforcement. And there is a function with a special purpose on attachments; it was a concern in Honduras. A lot of people asked us, "How can you foreclose extra-judicially if you just filed a financing statement that has no signature of the debtor?" So when you attach a security agreement that contains the debtor's signature, under Article 65 of the Honduran law, it says that only in those situations can you foreclose extra-judicially. That was the primary function of having attachments.

Finally . . . click "submit," and . . . the registration is instantaneous. If you fax a UCC financing statement to the Arizona Secretary of State, it is going to take them a while to have the registration completed. Here, you can immediately see the registered form; it has the insignia of the Chamber of Commerce, you can see the watermark, and the information about the registration: "Registration Accepted," and the registration number. So your financing statement is on record.

From the audience: You said there was a watermark. Is there a stamp on it?

Dubovec: It is a PDF form. You can print it out. It won't have any probative value when you take it to the court, but there is another function in the system where you can request a certificate, that form will be printed out by the Chamber, they will stamp it, and they will mail it to you.

Kozolchyk: This is, incidentally, the model for a number of countries, not just Honduras. There is a very strong likelihood that it will be done in the same way in Guatemala, Costa Rica. Dale will talk about El Salvador, and he will tell you what the chance is there, and then, the Colombians that I talked to agreed to have this type of a model for their country as well—this is during the present government. I do not know what will happen in the next one. And Chile was talking about doing exactly the same thing.

Mandig: We have focused specifically on what is happening in Honduras. Now we are going to take a little step back and take a broader look at what is going on throughout the region, primarily through the efforts of John Wilson and others like him, who will now talk about the OAS Model Law, which has served as a model for what is happening in Honduras.

Wilson: Well, thank you very much. Thanks Mike and Phil for the invitation. As Mike mentioned, I am from Arizona originally, I grew up here, I went to school here, I am an Arizona lawyer, I worked for the Center. So it is very nice to be home and talking about secured transactions, in particular, is quite appropriate because Arizona on a global scale is actually one of the places where the impetus for reform actually comes from. It is interesting that I had never met John Munger, but having him sit here—Dale and I were just debating whether the article that he wrote was in the eighties, possibly the seventies—but it provided very important background work at the outset of commercial reform in the world, and the topic of secured transactions reform really does originate in Arizona. A lot of the work that is being done at OAS comes from the work from the Center; the progress that is being done in Central America and even the work that is being done at United Nations and, on a global level, at UNIDROIT [International Institute for the Unification of Private Law] and the Hague Conference of Private International Law as well, finds a lot of its roots here in the work that was done in the Center, law schools, and Arizona itself. So it is a pleasure to be here discussing this issue.

I am going to, as has been mentioned, talk primarily about the OAS Model Law and the Registry Regulations. The OAS Model Law was adopted in 2002, and the Registry Regulations were adopted last year in 2009. I would like to . . . take a minute or so to talk about what the OAS is. I know most of you are familiar with the OAS, but bear with me. The OAS itself, obviously, is a regional organization under the United Nations Charter and functions, in most respects, like the United Nations does. As a regional organization, obviously, there is a much reduced membership, so we have thirty-five member States, versus 160 [in the U.N.], and it is easier, theoretically, to come to consensus on issues such as secured transactions reform, for example, because we are only dealing with the civil law and common law systems, and we are not dealing with four other different types of legal systems and other considerations. This is the objective behind a regional organization. The European Union, the African Union, for example, are other examples of regional organizations.

The main areas of work at the OAS are public international law more so than private international law, which is the field that we are talking about today. And, in public international law, [we are] mostly dealing with democracy, dealing with human rights, and dealing with economic development. In the area of democracy, it is actually interesting to know that one of the OAS instruments on democracy is called the Inter-American Democratic Charter, and because Honduras actually violated the provisions of the Inter-American Democratic Charter, they have been ousted from the OAS. So, you know, a lot of what we have been talking about is whether Honduras is really leading the way as an example. At the moment, Honduras cannot come to the OAS and have its seat at the table. Obviously, Secretary of State Clinton, at our General Assembly just last week, was advocating again for the reincorporation of Honduras, and it is going to come for discussion in September, so hopefully, they will be fully reincorporated into the OAS itself. And, obviously, a lot of the work that is being done here is an example and the State kind of depends on that.[2] So it is an example of another one of the factors that come into play with regard to this issue.

Mandig: John, just a question, was the expulsion a result of the arrest of the president in his pajamas?

Wilson: Yes, it is exactly a result of the coup that is almost exactly a year old, and even though there has been what are internationally recognized as free and fair elections since the coup, there are several states that do not recognize the elections, even though the OAS officially does. Nicaragua, Venezuela, Paraguay, and a couple of other states wanted elections only having President Zelaya on the ballot, and this was something that was not feasible because his term had expired

2. The suspension was lifted in June 2011. Press Release, Organization of American States, General Assembly Approves Honduras's Return to the OAS, OAS Press Release E-698/11 (June 1, 2010), *available at* http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-698/11.

and politically was very difficult to accomplish. So, he was not on the ballot, and there are some states that refuse to recognize the validity of those elections. It may be possible that there will be further elections at some point, and that may be a necessary step for Honduras to have a full seat at the table. Obviously, the other country that is currently, and has been for a very long time, a member of the OAS, but not an active member, is Cuba, which is also because of non-democratic practices; not under the Inter-American Democratic Charter because it did not exist back in the sixties. But Cuba and Honduras find themselves as OAS member states but not at the table in day-to-day discussions.

Kozolchyk: A footnote to what John has just said, we had Phil Robbins as an observer to those elections in Honduras, and I am sure that he would be very glad to share some of his thoughts.

Robbins: They were well-run elections; they could teach the folks in Florida and other places how to have proper elections. And it is also likely that Zelaya was not in his pajamas when he was arrested.

Kozolchyk: Exactly.

Robbins: That begs a question that I had.

Wilson: About the pajamas?

Robbins: Did they not recognize the constitutional provision that called for the ousting of an officer who even talked about extending his term? And that was what the Constitution said?

Wilson: Yes, there was a lot of discussion, and we could talk for the next couple of hours about that. There are states that feel one way, there are states that feel the other way; there are arguments for one, arguments for the other. The OAS never came to a conclusion, a consensus, on that topic.

Robbins: How were they ousted?

Wilson: They were ousted under the Inter-American Democratic Charter because under the Inter-American Democratic Charter, *if* there is a break in the constitutional order, and there was—whether there was legitimate reasons for that break in the constitutional order is something we can debate but there was a break in the constitutional order—Zelaya was ousted, there was an interim government before the elections, and that is a direct violation of the Inter-American Democratic Charter. There was a vote of the states to suspend the membership of Honduras until such time as they restore the constitutional order.

It is very interesting that we have been working on secured transactions reform for many years, and the one government that actually adopts it, ironically, is not part of the OAS at the moment. So it is an interesting side note, I think.

About the CIDIP process, as I mentioned, most of what the OAS does is in the public law arena. The private law arena, which is the area that I am in charge of, is done through this Conference on Private International Law, and even though the name is a Conference, like the Hague Conference on Private International Law, it is not a conference like we have here today at a State Bar Convention Conference. It is a process, and it is a process conformed basically of five stages. The first is where the states get together and say, "OK, let us convene another round of discussions of the CIDIP." The second step is the stage to decide what topics they want to include. So at CIDIP-VI, the process of which concluded in 2002, states decided they wanted a Model Law on Secured Transactions, in addition to other stuff.

Mandig: John, what does CIDIP stand for?

Wilson: The CIDIP is the Spanish acronym for *Conferencia Interamericana de Derecho Internacional Privado*, and it is known as CIDIP because, obviously, it is more commonly known and referred to in Latin America than in the United States. The English translation of that would be the Specialized Inter-American Conferences on Private International Law. The acronym [in English] does not sound anywhere near as catchy as CIDIP. The subsequent stages are the selection of the experts, the Center, Dr. Kozolchyk, Marek, and other folks from the Center. When I was at the Center, I did this as well, participated as part of the United States delegation of experts that negotiated the instruments in the context of the OAS. And, finally, there is the set of a host and a date, and you have the Diplomatic Conference with plenipotentiary delegates that come and ratify whatever convention or other instruments are approved, and the states are obviously open for ratification mostly by OAS member states.

To date, there have been seven conferences, actually six and a half, because we are still struggling with the second topic of CIDIP-VII, which is consumer protection. There is no agreement yet, but we now have the CIDIP-VII portion on secured transactions, and that has been approved.

I will say just two words about some of the previous conventions. At the moment, there are twenty-eight international instruments that come from the Private International Law Process. The Public Law Process has over 100-and-some treaties at OAS. The Private Law has twenty-six treaties, one model law, one model regulation at this point, and two uniform documents.

Most of the treaties fall within the scope of family law, evidence, and conflict of laws. There is an Inter-American Convention on Conflict of Laws concerning the

Adoption of Minors, for example, and an Inter-American Convention on the International Return of Children. With regard to evidence, taking of evidence, proof of information on foreign law, conflict of laws, which is basically the principal component of the CIDIP conferences. There are conventions on enforcement of judgments, conventions on letters rogatory, and then some preventive measures. In a nutshell, and I will not go into any detail on any of these—you can go on our website;[3] there is a lot of information on each one of the different conventions.

Now, as it has been mentioned, OAS started work on secured transaction in 1996. There was a lot of impetus that came, as it has been mentioned before, from Arizona. At that point, the Arizona-Mexico Commission had been working on the issue of cross-border financial and commercial transactions, obviously, trade. NAFTA was recently on the scene, and the border region, obviously, was one of the driving forces in the United States, at least, to get this topic on the CIDIP-VII agenda in that stage two that I mentioned, where the states select topics.

Why was this necessary? I will not elaborate very much, but the basic problem, I think, manifested itself in Arizona/Sonora, United States-Mexico, right after the enactment of the NAFTA in 1993, where you have now opened the borders to cross-border trade on an even level. You have eliminated tariffs, and yet United States commercial entities had access to abundant credit at reasonable rates of interests, but their counterparts in Mexico had no access to credit, and those few that did paid exorbitant interest rates. While a competitor in the United States actually may pay between six, eight, maybe ten percent annual interest rate on a loan, their Mexican competitor would pay thirty to forty percent on a similar loan. Obviously, even though there was a theoretical level playing field, the Mexican business enterprises were competing with a hand tied behind their backs in this respect. It really drove home the point, where some Mexican industries were having a lot of reluctance with regard to the NAFTA because they would be unable to compete under this arrangement. The OAS started the process; it started in Mexico, as Dr. Kozolchyk mentioned earlier, but it worked its way to the OAS based on the importance that it had reached in Mexico and the level of discussion.

In 2002, the OAS adopted this Model Inter-American Law on Secured Transactions. It basically contains, as Dr. Kozolchyk mentioned, the NLCIFT 12 Principles required of secured transactions. It does not come necessarily to the same conclusions that the UCC of the United States does, or the Personal Property Security Act in Canada does, but it does provide the creation of a uniform financing system, a uniform mechanism. It provides for specific rules for creation of the security interest, for taking of security, for establishing priority, and priority, obviously, based on registration. The principle there is first in time, first

3. *Private International Law*, OAS DEP'T OF INT'L L., http://www.oas.org/dil/privateintlaw_interamericanconferences.htm (last visited Dec. 28, 2011).

in right, so he who first registers obviously has priority against the others. But for that to be valid, all security interests have to be subjected to the regime, and the OAS Model Law accomplishes that. They have to be done through a registration system, and the OAS Model Law attempted that as well.

There has been some discussion about enforcement; it is important to have some system of extrajudicial enforcement, and the OAS Model Law includes a lot of features of self-help repossession. It includes some features of extrajudicial enforcement for goods that are tangible [and] for intangibles that you do not need to repossess—enforcement under the OAS Model Law is much easier.

There has been some discussion of the implementation of the OAS Model Law. Obviously, I will not touch very much on that either, but it was not a convention; it is a model law. So it is difficult for OAS to implement model laws itself. The OAS itself has a membership of thirty-five states, and they participate at the level of an embassy. The United States' mission, for example, or the Mexican mission to the OAS, is run directly by the executive branch. And if we wanted to, for example, adopt the potentially upcoming Inter-American Convention on Choice of Law for Consumer Contracts, that process is driven by the executive branch . . . it is a treaty, it is what we do every day. A model law is not driven by the executive branch, which is basically our clients—to use a word I do not like to use, but it is used sometimes at OAS. But a model law has to be implemented by a legislature, and there is no connection between the OAS and the legislatures. It makes for a much more difficult task to implement. Next week, I will be in Argentina working with the Argentine Congress to adopt a different model law that OAS has been working on, this one on access to information. But, it is really one of the first few opportunities we have had to interact directly with the parliament of a state, because the executive branch is usually very jealous and does not allow us to do that. There were a lot of challenges in implementing the OAS Model Law, and I think that is where an institution like the Center and others can play a very important role because since OAS is not doing enough to get these instruments implemented—and implemented correctly. Other players really need to come in and play that role, and in this case, the Center in Tucson does an excellent job with regard to that.

The second topic of secured transactions added onto the CIDIP agenda . . . has to do with the Model Registry Regulations that were adopted last year. When we were done, I think, in 2003, we thought, "We have a good model law, the states will begin adopting it. It will work great." We were quite happy, and it turned out that there was an element missing, and that element was that states, even though they may have the wherewithal to draft the law on secured transactions, did not have the wherewithal to design a registry, or to create a registry and operate a registry.

There was a lot of discussion on Mexico. Mexico really did a lot of work in the area: they opened the SIGER [the *Sistema de Gestión Registral*] under the Fox administration—they advanced enormously. But they did not have any guidance from OAS, and they ended up with, instead of one financing statement, for example, I think they had somewhere between forty and fifty registration forms—you did not know which one you had to use. They tried to centralize the commercial registries, which are currently in the states. They tried to centralize them in the Ministry of Economy, but states were reluctant to lose that part of their income, and there were a lot of negotiations that had to do with that. There were some advances there; there was a change in administration, there was no longer priority, at least given to the SIGER system, there was a new intervening law. I think that law put Mexico in a much better situation than they were before, but the SIGER system still existed out there, and no one said, "OK, you no longer use that." . . . It makes it a little bit difficult to figure out what exactly you need to do. And this was one of the problems, obviously.

We had the same problem in Peru. . . . and they had the same problem in Guatemala. Where Peru, Guatemala, and Mexico, in these cases, were creating registries for secured transactions, they started falling back on the types of registries that they know, and the types of registries that they know are real property registries. So they infused these real property concepts into the movable registry—the secured transactions registry—and I think that was one of the areas that lead to a lot of problems.

So, the OAS recognizes that those countries that are trying to adopt the OAS Model Law are having limited successes and large failures, and the reason is that they do not have the wherewithal to draft, and create, and operate a registry. And that is what is behind the content of the Model Registry Regulations: to try to create a uniform process, to try to create an electronic registry based on financing statements that provides for general collateral descriptions and that does not require the qualification or the analysis of a registrar to decide whether something will be registered or not. . . .

What do we expect now with regard to the implementation? Obviously, we think that now we have the wherewithal to actually take very positive steps with regard to secured transactions reform in the hemisphere. There is the law, there is the registry, and now there are some examples of states beginning to implement those registries and those concepts of law. Our focus, and I think the Center's focus, is Central America, with Honduras leading the way, at least with regard to the substance and the creation of the registry, and with Guatemala, which has a good law but has some problems with the registration system.

If Guatemala can follow the example of Honduras, in this case, to reform that one problem that they have, which is that they charge an arm and a leg for the registrations. In this case, historically, the fees for real estate registrations are set

on a percentage of the amount of the mortgage, and even though that is expensive in Latin America, it is easy to finance because it is added as one more closing cost to a real estate operation and it can be financed. It does not create a prohibitive type of circumstance for the registration of real estate. On top of that, you know what you are getting; it is expensive, but you have real estate registrations for 120 years, so you know how that system operates, you know what you are going to get in return. But to charge a percentage of the loan transaction under a secured transactions system is very difficult because sometimes you do not know what the loan is. It could be a line of credit, so if it is a line of credit, do you charge the upper amount of the line of credit or the lower amount of the line of credit? How do you establish that percentage? And, in this case, that is just one of the modern financing mechanisms that is not possible under a system like Guatemala, at this point. I think that there will be a realization that there needs to be movement away from that also because you do not know what you are getting with regard to a registration. If you are paying thousands of dollars for a registration, but there has never been a case come up before the Guatemalan courts, there has never been an attempt to realize the collateral or enforce your security interest, you are paying an arm and a leg, but you do not know if the system is really going to operate. It is an added disincentive to the operation of the Guatemalan system.

Those are the types of things that we want to correct at this point with the Model Registry Rules, and I think that we are moving in the right direction. If Central America begins adopting this, and I think that they will, other states will take notice, and I think we will make important progress in other regions.

I wanted to conclude, just to say that this OAS work has been followed by UNCITRAL, for example, at the universal level. There was a meeting earlier this year in Vienna to try to decide what UNCITRAL should do. They have a *Legislative Guide on Secured Transactions* at this point that includes a lot of the concepts that come from the OAS Model Law. It was adopted last year, and they are trying to figure out whether they should draft a registry system to work with the *Legislative Guide*. The OAS's position, I think, is that they should, because the OAS experience was that it was a big mistake for us to do the OAS Model Law not doing a registry; it was seven years between the adoption of one and the adoption of the other, and we think it would be important for UNCITRAL, at the universal level, not to repeat that mistake.

So, I will stop there. . . . Thank you very much.

Mandig: I am about to express a personal opinion that is neither the opinion of the State Bar of Arizona nor of the International Law Section of the State Bar of Arizona, but my own personal opinion, which I happen to know is shared by a number of people in this room, also on an unofficial basis. Joaquin Cabrera is a lawyer in Hermosillo, Sonora, and he is one of the couple of people that I know who are very knowledgeable about secured financing and crop lending as it is

practiced in Mexico. He also, as it happens, is the vice-chair of the Sonora-Arizona Commission, which is the counterpart of the Arizona-Mexico Commission, and is the author of the letter that was sent to Governor Brewer in which the Sonora-Arizona Commission declined to attend the plenary session of the two commissions that was scheduled to occur last week.

Why, you ask, did that happen? I think most of us may be able to guess, but the reason was the passage of Senate Bill 1070.[4] And, what happened after that is that despite having a twenty-plus year friendship with Joaquin, he felt compelled to withdraw from participation in this program as well, also in protest to our new state law. John Wilson was kind enough to try and find a replacement among the folks that he got to know in Mexico City working on secured transactions. He contacted a friend of his down there, explained the situation to him, and in a gesture of solidarity, his friend also declined to attend.

So, we do not have on the panel a lawyer licensed to practice law in Mexico who can illuminate what the actual situation is down there in secured transactions and talk about what is on the horizon. But we have the next best thing: Professor Dale Furnish, who I introduced to you earlier, is the nearest thing I know to a Mexican lawyer steeped in knowledge of secured financing practices of Mexico and other countries, and I hope that he will spend a little bit of his time kind of filling in some of the blanks that would have been filled had Joaquin being able to be here with us. Dale.

Furnish: I hope I can be fairly quick and fairly substantive here. I have been quiet for the first part hoping that since I am the last one on the program, we would get to me. But I am moved to make a couple of comments just based on what is going on until now. By my quick-eye-ball count, we have got something in the neighborhood of thirty people in here. I guarantee you that there is no topic of greater socio-economic impact than this topic. We start from the proposition that within the United States and Canada in the last generation, there is more credit than ever in the history of humankind, and not just by a little bit, by a lot. If that kind of impact can be extended through the use of a law throughout the hemisphere and throughout the world, the impact on development and the economy should be enormous, probably beyond any of our ability to compute. Another thing, just a wayward comment perhaps, but take into account, we have now a system in place in the United States, so we assume that this stuff works very well and very quickly, and it was not ever thus. Things like certificates of title for cars, they came in the late Seventies and Eighties, so the UCC system worked for the first decade or two with UCC filings on automobiles. The same with a number of these things; they worked out, but they were not easy at the beginning. And I would simply say, if you are practicing in this area, you should

4. 2010 Ariz. Sess. Laws ch. 113.

anticipate a similar period of adjustment in any country that adopts a system like this and runs it up against old traditions and customs—things will have to be worked out.

Another, perhaps historical point to bear in mind, because it is important, the UCC came in to the United States mostly to deal with the problem of priorities. I do not think the original drafters of Article 9, if you would have said, "What you are really doing is you are going to open up a whole credit system and cheapen credit and make it accessible to many more people"—I do not think that was their real concern. They would have said, "No, no, we are straightening out priorities." Because we had a priority mess during the Great Depression in the year 1930. The ultimate impact, and there are two aspects to this, is that it creates cheap credit, and the other thing about the United States and Canadian system—and systems like it—is it creates a very quick access to credit, so that you can do an eight-figure loan in seventy-two hours with this system. That is one of the real stumbling blocks in other countries, like Mexico. Mexico saw it as NAFTA began to take off that, even if we can get the credit, we cannot do it very fast, and it is a question often of months rather than days. So the system has those two benefits: it cheapens credit, opens the access, and it makes credit very fast in terms of access.

Now, what I would like to do is also pick up just a line of development. Others have referred to it, but if you start with the UCC and the Canadian adaptation of the UCC and then go to the OAS Model Law—and I know Boris and others and I have talked about this—the OAS Model Law is an excellent law conceptually. If you want to see what a secured transactions system is, and could and should be, read the OAS Model Law rather than read UCC Article 9, which is this labyrinthine, really in many points, unintelligible, statute. The OAS Model Law is a much purer statement of the law in this area.

The first countries that took it on—Peru picked it up, they were the first country; in July 2006 they adopted the reform. But if you look at the Peruvian reform, it is just a parade of mistakes and missteps, and it has not functioned well. So, for whatever that process, Peru has the law, but they do not have the law. It is a perfect example of how not to do it. And then Mexico, somebody—I think Boris—used a Churchillian reference to Russia as an enigma wrapped in a mystery covered with a riddle, or something like that. Mexico is just an incredible system to try to penetrate. When the law first came out, it was in the year 2000, they got a sort of a bite on it; then they realized they had not done the whole job. They went back in 2003, took another bite, and did not get it done, but did have a pretty good registry system with one problem. The 2003 registry had an electronic filing form, in pretty simple terms, but it just did not apply to all the security interests; it applied to a couple of them and left this crazy quilt system for all the rest of them. So, you had a nice, neat electronic form if you had one of two

kinds of security interests, but not for all the rest. It essentially was a useless system.

Guatemala came along. We have talked about Guatemala, and I think Guatemala was an excellent first step and gave us a lot of the difficulties, such as the idea of not connecting the registry system with the substantive law. And the other thing about Guatemala—I suppose this is an unsolicited endorsement of the Center—but they used Boris Kozolchyk as their adviser, so he walked the law through as they were drafting it and was available for a lot of the questions that came up and was able to explain it in the context, as he says, of a tropicalized awareness of, "We understand your problems, we understand your concerns. But here are the concepts, here are the objectives of the law, and we need to stick to those."

Honduras, really for me, is the state-of-the-art law. If you want to see the best manifestation of the OAS Model Law in application, it is the Honduran law. It is the OAS Model Law perfected and applied, and tied to a registration system. The Honduran law is really, I would say, the culmination of what the OAS Model Law was supposed to be, the model law.

In El Salvador, in essence, it is really an adaptation of the OAS Model Law through the Honduran law to El Salvador, with the idea that over a period of time, there will be a Central American and, hopefully, hemispheric system that is harmonized so that you can make a deal in Arizona, or New York, or Toronto. Say, we have got a debtor with assets in El Salvador, in Honduras, in Nicaragua, in Mexico, in Peru, and essentially [we would] be able to say the system is the same everywhere; we just need one common form that we can file in all of those countries. It will be very similar, and then, hopefully, conceivably, one day there would be an American—North and South Hemisphere of the Americas—system, a common system for security interests. There will be a harmonized system and a common system of registry.

El Salvador is on the Honduran page. They are using the Honduran law; they have a very good registry system in place. It has been probably the best in Central America, a national registry system. Like the Hondurans, if they can pass the law, it will be a turn-key: the day the law takes effect, so will the registry. They understand the idea of keeping registrations cheap and electronically accessible, so that would work.

Now, back to Mexico, because that may be of greatest concern for most people in here. To recount a personal anecdote, about the time John Munger's article on this matter came out, somebody called me, a business person here in Arizona who dealt in agricultural herbicides, pesticides, and fertilizers, and he wanted to start dealing in northwest Mexico, in Sonora and Sinaloa. He had found some big-time farmers, and he was going to give them chemical tanks on credit. He called me, and he said, "I cannot find where to file the UCC 1." The conversation that then

ensued was, there is no UCC 1, and what there is, is just a bramble bush, it is a thicket. I mean, you are in great difficulty; that is the answer. So if you have extended credit, good luck. There are some things that we can do. Can I guarantee you a priority? Absolutely not. Now, hopefully, today or in the near future, you could say to that person, "Yes, there is a place you can file and be reasonably assured that you have a priority that will stand against other possible priorities."

I would like to work through that and to bring you up to date and to answer some of the questions of the hidden kinds of interests that currently exist under the Mexican system; and then, call into play the UCC and how that may relate because I am presuming that what you are here for is the cross-border operation. You know how to do it if you are an Arizona lender and you are lending to an Arizona debtor; you know how to figure that out. And, we can even say, if your debtor operates in Texas, in New Mexico, in Colorado, in California, you have got that part. It is the part when you reach across the border and you say, "Well, but our debtor is Mexican, and the operation really picks up both sides of the border." Or, "I want to loan money to a Central American debtor who perhaps has operations in three or four Central American countries. What do I do about that?"

And, the first thing . . . is the UCC's answer, because the UCC when it reformed in 2001—and I do not want to flounder off into all of the true issues here—but it simply said, "If you are dealing with a debtor in a country that does not have a system which gives a general registration for security interests, you know what? Go and register in the D.C. registry in the United States, in the District of Columbia, go and register in that registry." Now, how would that work if you are dealing with a Mexican agricultural producer of vegetables or fruits that are going to be exported out of Mexico and sold into the United States to United States buyers creating accounts receivable by that United States buyer in favor of the Mexican grower? You really have both the collateral, the fruits and vegetables, in the United States, and you have got an account receivable in favor of the grower or perhaps a wholesaler in the United States. You have got the assets that back up the loan in the United States, and that filing in the District of Columbia registry gives you priority if you get into litigation and foreclosure in the United States, which is where it should take place, because the assets are here.

Now, one of the most impressive things Mike Mandig did was send me a CD of the filings in the District of Columbia on foreign debtors, and I quit counting. I mean, they are just enormous. Everybody who deals with growers in Mexico files in the District of Columbia; they are beyond count.

Kozolchyk: Dale?

Furnish: Yes.

Kozolchyk: Can I just add a footnote as an example to the importance of what Dale is talking about right now. I do not know if John Wilson will remember this, but when John was at the Center and Todd Nelson was at the Center, we got a request from the largest *maquila* [assembly plant] in the state of Sonora—*Teta Kawi* is the name of this *maquila*. They employed at that time 6,000 to 8,000 people, and they wanted to have financing for a new warehousing operation. It is a shelter operation, which means that they take responsibility for getting the workers that the American company needs and supervising. They had a number of contracts from the likes of Chrysler and Kimberly-Clark; well, a number of American companies that were their tenants in this shelter operation. The question is: How could they get financing for this new warehouse in which they were going to be employing 2,000 to 3,000 more people? They could not get the financing in Mexico because even though the president of that corporation, Mr. Tonela, supposedly was one of the wealthiest people in the state of Sonora and in the Board of Directors of Mexico's largest bank, Banamex, he was being asked forty-five percent interest rate for a loan to finance the construction of this warehouse in Guaymas. As a result of some of the work that Todd Nelson and John did, and I pitched in, we suggested that since they had all these accounts receivable—that is to say, all these leases and credits that they had with the American companies who were leasing operations there—they might be able to qualify for loans if they could domiciliate these accounts in the United States. They did so, and they went to Wells Fargo in El Paso. Wells Fargo in El Paso gave them a loan for 5.5%, roughly 4.5% plus LIBOR [London Interbank Offered Rate]. Today, *Maquilas Teta Kawi* employs 15,000 people.

This was as a result of being able to have this particular type of loan that Dale is talking about. Now, obviously, they would like much more of that, and they have become champions of trying to get this law enacted in Mexico. This will give you an idea in terms of economic development of what it means to a state like Sonora and to the suppliers to that state in Arizona—because those 15,000 people need all sorts of services that can be supplied from the nearest point of entry, which is Arizona.

From the audience: What was the security interest for, Boris?

Kozolchyk: The accounts receivable. That is to say, the leases and other credits that the likes of Kimberly-Clark, Chrysler, and some of the tenants that they had in that shelter operation. That was all that was required.

Mandig: Thank you, Boris.

Furnish: . . . [I]f you have a discussion with a Mexican lawyer and say, "Could you assure me that if we make this loan and we paper it this way and we register it here, we will have priority?" The reaction would be shrugging shoulders, smiling, laughing, and saying, "No, that is not possible. We can do the best we can do, but

to give you any kind of assurance or security that you would be first? No, it is not even remotely possible."

The way Mexico did it was through these traveling reforms, first in 2000, then in 2003 and 2009. I think the reforms in 2009 clearly had that objective in mind: to create a generic concept of security interest, or *garantía mobiliaria*. We have commiserated, and I hope it is not unduly arrogant on the part of the Center, but we have said: if the drafters of this law—the 2009 reforms—had just called the Center and said, "Could you give us language?" Or if they had even looked at the OAS Model Law and copied the language from the OAS Model Law. What they tried to do was to say—and we fought about how you translate it—"a privileged interest in favor of a creditor." That was what the Mexican reforms say: any privileged interest in favor of a creditor should be registered in this universal registry. I do not think they got the job done, and it is worse because the current status of the Mexican law, as opposed to the Guatemalan law, as opposed to the Honduran law, as opposed to the Salvadoran proposed law, does not give you a nice, clean section that you can go to and say, "OK, this is the law on secured transactions." The Mexican approach had been to sort of pepper it through various statutes; we will change these two provisions of the Commercial Code, then we will change this section, then these seven provisions of the General Law of Bills of Exchange. So to really get a picture, you have to track through various parts of the Mexican law.

The hope is that at some future point you could say, "After the reforms of 2009, it is clear what the objective is." Here is a law that does it, so now, having accomplished it, make it clear and neater and more workable and just take this law and say we are not necessarily changing anything, we are just cleaning up what we have already done and creating a law, an organic or integral law, in the model of the OAS Model Law. Then that should have the effect of creating a universal registry for all security interests by whatever name. So perhaps Mexico has not finished its reforms of secured transactions law.

. . . .

From the audience: Could you tell us what the process is or the timing is for the 2009 modifications to take full effect?

Furnish: I wish I could say with total certainty or full assurance, but I am not fully certain. After the reforms of 2009 come into effect, I think the clear intention—I am not sure the intention has been fully accomplished—would be that you should say to anyone [that] regardless of the form your guarantee takes—you can call it anything, call it a conditional sale, call it a trust receipt, call it warehouse receipts, call it a sale or assignment, I do not care what you call it. If it has the effect of a guarantee, you should register it.

Now, there is a problem. The registry system takes time to get up and running in Mexico, and the response may be, "Great, where do I register?" Well, depending

on the state you are in, you may or may not have a registry, or it may be coming. The other problem would be that the language that was used in the 2009 reforms is very problematical, and I can see all kinds of litigation taking place in Mexico, which would essentially make that reform—I do not want to say worthless, but — not do what it was supposed to do. If now, Mexico would pick up the OAS Model Law and say, "Well, we have basically done it anyway, we are just neatening up the system." Then, I think, we could have a result that we could be sure about.

Mandig: Thank you, Dale. Just to take a step back or two with respect to what is happening in Mexico. Mexico has been gradually adopting some new laws that inch closer to the system that we have in Canada and the United States. That is to say, in essence or in general, the idea is that if you are lending money on personal property or proceeds of personal property, in general you have got to file something in a filing office. And in the United States, we have at least fifty of them—one in each state. And we have got one in the District of Columbia; the District of Columbia is where many lenders record interests or liens against foreign borrowers not just from Latin America but from various parts of the world because this sort of uniformity problems are well, basically, worldwide.

What Mexico did last year is it passed a two-page decree . . . that appears to say—depending upon how you translate the language of the law—that one year after August of 2009, that is a couple of months from now, they are supposed to have a single registry, a commercial registry where we think the intent is that all security devices that operate as liens against money and accounts are supposed to be filed in Mexico. If it is implemented, that appears to be the intent. The hypothetical that I have put together for you folks, that we want to talk with you about for a few minutes, really proceeds on the assumption that we are not quite there yet, and when we get to asking questions, the questions are going to be: If you are the bank, what do you want to do to protect yourself? If you are the distributor, MFP [Maxi-Fresh Produce], what do you need to do to protect yourself? Where do you need to make agreements? Where can you file public notice of your rights? Where should you file? Where must you file? . . . The idea really is for us to just think out loud, quickly and concisely, about where the problems are now and why would it be so nice for the lending community to be able to go to a one-stop-shop system, if you will.

Kozolchyk: Mike, before you start, I would like the audience to know that we have the dean of our law school, Larry Ponoroff, here, recently arrived, and who is very supportive of the work that we have all been doing in this area. So, welcome to Dean Ponoroff. Thank you.

Mandig: Dean, thank you for being here with us this afternoon, or this morning, spilling over possibly into the afternoon. The problem is outlined fairly

straightforwardly in the two-page hypothetical.[5] We have got a grower in Mexico that operates in two Mexican states—Baja California and Sonora—he needs money to bring his tomato and cucumber crops to market. He is talking with Maxi-Fresh Produce, LLC, about doing that lending arrangement for him. Maxi-Fresh happens to have offices in three locations, one in California, just across the border from Baja California, another in Arizona just across the border from Sonora, and a third in Alberta, Canada. Why? Because that gives them an opportunity to receive produce that is coming from Sonora in Arizona and ship it elsewhere; it gives them an opportunity to receive produce from Baja and ship it out from the State of California; and in Alberta, presumably, they are not necessarily receiving produce, but they are making sales to Canadian buyers of the produce that is coming out from these two Mexican states.

Now, what does Maxi-Fresh confront? Well, we have got what Kip Martin, who does this kind of work down in Nogales, all day every day, said is—he did not put it this way but I think he was thinking it: "This is the nightmare of my life. Welcome to my world." He has got a grower; he is looking at a grower who has got greenhouses and equipment in Baja California, and greenhouses and equipment in Sonora. The company knows that the grower does not own either of the parcels of land in which the facilities are located. One piece of property is owned by the mother of the guy that owns the company and some aunts and uncles—not at all an atypical thing to find in Mexico. And the other property is owned by Edmundo, the fellow who owns Baja Greenhouses. You start with that snapshot in your mind if you are Maxi-Fresh.

Maxi-Fresh, in turn, like a lot of folks in this business who have the temerity to lend money to growers, is operating with a line of credit, which Maxi-Fresh is thinking either of obtaining or renewing or replacing through the Canadian bank that is involved in this deal. So, you have got some basic questions. And normally, or typically, it is not uncommon to find a lender—maybe it is a bank, maybe it is some other sort of financial institution, maybe it is an individual. The lender establishes a line of credit with Maxi-Fresh who has got multiple growers and produce that it is handling. So, this financial need that Baja Greenhouses has is going to be common to all the other growers that are doing business with Maxi-Fresh. And the question is: What do you do?

Well, I want to try and turn our attention to the panel a little bit and talk first about the Canadian bank and ask Marek to chime in and say a few words about how things can be done or are done in Canada.

Dubovec: Thank you, Mike. I appointed myself as the Canadian expert for the love of hockey, of course. Under Canadian laws, under the PPSA, the law of perfection, priority, and the effects of non-perfection is the law where the debtor

5. *See infra* App.

or the collateral is located—unlike under the UCC, where the law is the law of where the debtor is located. In this situation, we have a United States corporation that is incorporated in the state of Delaware but is not doing any business in the state of Delaware; it is doing business only in Arizona and California border regions. Under these circumstances, the law of the United States would apply; UCC Article 9 of the state of Delaware would apply to the perfection, non-perfection, and priority. Accordingly, the Canadian bank would need to file a UCC financing statement in the Secretary of State's Office in Delaware to obtain a security interest in the receivables, as the hypothetical stated, the receivables owed to the distributor.

However, the distributor also has a facility in Alberta. To that facility, the PPSA would apply because under the Canadian PPSA, the law of the location of the collateral applies to perfection. Accordingly, the Canadian bank would need to file in the office in Alberta to have a perfected security interest in the assets located in Alberta.

Mandig: Well, we also have the ability, at least, to file in California and Arizona, in addition to Delaware. Do you think that filing there would be required or even if not required it is something you might want to do if you are representing the bank?

Dubovec: It is not required under UCC Article 9.

Mandig: All right, well, I guess the question was really prompted by what I would call "the belt and suspenders approach" that sometimes is taken by people in this business, including me, of filing somewhere else just to be sure you do not miss something, in case you end up in a scrimmage, the central question of which was where was the appropriate place to file. Mr. Larson and Mr. Furnish and I are in the middle of one such scrimmage, and I guess I am motivated, in part, by the lessons I am learning there; so I would say file wherever you can if you have a legitimate explanation for why you thought it was appropriate to do that. That is the sane thing to do.

Now, what about hard assets, Marek?

Dubovec: The hard assets of the distributor.

Mandig: Now, hard assets here, we have got some greenhouses, we have got irrigation systems, we have got leases, we have got mortgages in Mexico to worry about, and, most importantly, we have got tomatoes and cucumbers. So . . . you are representing the bank and your worry is what happens if the grower becomes disenchanted with Maxi-Fresh and starts shipping his tomatoes and cucumbers to somebody else.

Dubovec: So you are implying that the Canadian bank is underwriting the grower as well, right?

Mandig: Well, as a practical matter that is obviously true. The question is, How deep down you want to dig representing the bank to make sure that you are covering the bank's interests as completely as possible? Put in another way, Are you just going to file against Maxi-Fresh or are you going to try and do something in addition to that?

Dubovec: That is right. I think you should do something in addition to perfecting against the distributor because the distributor does not really have any collateral, any accounts receivable, unless the grower grows and exports the cucumbers and tomatoes and sells them. So the Canadian bank should take an interest in the grower, making sure that the produce is properly harvested and exported. In this hypothetical, you have a variety of assets that Mike noted—number one, cucumbers and tomatoes. Are those cucumbers and tomatoes growing? Have they been grown? Have they been stored in a warehouse? Then you have the irrigation system and similar fixture property, and you may also consider taking a security interest in the real property which is the workers' housing. So at least you have these three types of assets. Number four, no bank does business with a borrower without a depository relationship. Should the Canadian bank require the Mexican grower to open up a bank account? I think they should. Under the Canadian law, you cannot have a perfected security interest by control. Control is only applicable under UCC, so how do you get a perfected security interest under Canadian law in the deposits of the Mexican grower? Well, you should definitely rely on set-off. So these are the primary four types of collateral that I, as a Canadian bank, would rely on. Take control or set-off against the bank account, file in the real property registry against the workers' housing, file against fixtures probably in the real property registry, and file in the applicable personal property registry against produce and receivables.

From the audience: In Mexico?

Dubovec: In Mexico.

Mandig: All right. Now, I am hoping that our resident expert Mr. Martin will be able to chime in on the practical difficulties that may confront the bank or Maxi-Fresh if they are trying to secure their position with land or improvements in Mexico. Do you have any thoughts about that, Kip?

[Kip Martin, in the audience, speaks.]

Mandig: Just so that our taping system picks up at least part of what Kip's very thorough analysis was, his answer to my question fundamentally is: number one, it is very expensive to search the registries that exist in Mexico because they are in

disparate locations requiring actual trips to each of the registries and searching the records, essentially, to some degree, by hand. And, that if you are talking about a multimillion dollar deal, it makes sense to do your due diligence; if you are talking about a $25,000 lending relationship, you tell your client that it does not make sense to spend $10,000 or $20,000 doing searches and documentation if all you are trying to do is protect $25,000.

Kozolchyk: I wanted to add what we found out when John was at the Center. The way we started out the Mexican work was by doing what we call "financial scenarios." Ron Cumming was part of it, John, Todd Nelson and I; it included lending in various sectors, what the practices were, and what the securities were. One of the first things that came across is that there was no conceptual parity; there is no conceptual parity, for example, in the notion of something as basic, in your hypothetical, as those shades and enclosures or fixtures. Starting out with the concept of a fixture, there is no real fixture filing in Mexico—there is no independent collateral as fixtures. The rule that prevails is the same one as in Spain, which is the principal swallows the accessory. The principal is always the real property, anything that you put into it no matter how valuable, even more valuable than the real property, is still subject to the real property. When you are starting to search in registries that may have something to do with fixtures, you start out with the assumption that the fixture is always subordinated to the real property collateral. That in itself disqualifies it. If you start searching with regard to what are the various laws presently in effect in Mexico on agricultural financing—and there are a number of them and there are different places to file as well—you come up with a notion that for agricultural lending purposes, the concept that prevails in Mexico is that of "product" as opposed to "proceeds."

Mandig: . . . Boris is right. There are numerous pitfalls and expensive problems you confront. Now, let me just ask one final question of Kip. There is no judge here, so no objections to leading questions. Would it be fair to say that if you were able to tell the client that you have searched the single registry where all non-possessory security interests against debtors in Mexico have to be recorded including agricultural liens, would that simplify the lives of you clients?

Martin, in the audience: Yes.

Mandig: We have chewed up way more time than we estimated. . . . I hope you will join me in thanking our panel. We really did bring a pretty good group of people here to speak with you today, and I am really appreciative of it. And I hope you are, too. Are there any questions? Does anybody have anything they want to talk about that we have not beaten to death so far?

Kozolchyk: Let me just add to what I was saying before because I was going to suggest what the difference is going to be if we can get this law enacted, the law that we are waiting for Mexico to enact. In the case that Mexico does enact this

law, you will have a continuum—a legal continuum—in which the law will be the same all along, the filings will be the same. That is to say, the same type of security interest, the searching procedures will be the same, the certificates that have to be issued will be the same, so that all of these questions that Kip was talking about and I was talking about, which at this point really force you to say there is only one answer, and that is: the law is very uncertain. In this respect, it would become basically the same law from point of origin to point of destination of the transaction.

Mandig: Thank you, Boris.

From the audience: I think it was mentioned that in Honduras the registry will be maintained by the Chamber of Commerce. Is that something that is likely to be adopted in other countries as well?

Dubovec: The Honduran Chamber of Commerce in Tegucigalpa is following the model of the Colombian Chambers of Commerce; they recently acquired software used to register companies that was developed by the Chamber of Commerce in Bogota. So there is a pattern in Latin America emerging to give chambers of commerce the powers to maintain these types of registries. Yes, so it is a pattern.

Kozolchyk: And we just heard in the last few days that there is a meeting that is going to take place in Bogota, Colombia, among all the registrars that follow the Honduran model so that it becomes more and more the pattern for Latin America. Whether they go through the Chamber of Commerce or the Ministry of Economy—which is the case in Guatemala—is still open to question. Marek is right, the Colombians have had a very helpful and healthy influence in some of these registry practices.

Furnish: I might add, that is the key question. One of the problems is that some of the state-run registries are extremely vulnerable to politics and budget. Honduras had a beautiful land registry, which is really in disarray now. When Boris and Marek say there is a pattern emerging, I sort of say, "I hope and pray there is a pattern emerging, but this is very difficult for states to give up because it can be a cash cow."

Mandig: Thank you, again.

APPENDIX

Hypothetical Situation for Panel Discussion
International Law Section
Annual Convention, State Bar of Arizona[1]

By D. Michael Mandig[2]

Baja Greenhouses
Crop Financing in Mexico: A Case Study

Baja Greenhouses, S de PR de RL, (*BG*) is a Mexican limited liability farming operation registered to do business in the Mexican state of Queretaro. Its members are Edmundo Gomez and his sisters and brothers. Edmundo holds a majority of the membership interest and is the sole manager of *BG*. The company operates a series of shade houses and high-tech, glass greenhouses located in Baja California near the city of Ensenada. *BG* also has greenhouses in Sonora, Mexico.

BG's facilities in Baja are built on 100 hectares of land. The Baja land is owned by Edmundo's mother, aunts, and uncles, who leased the land to Edmundo on long-term leases. The land, buildings, and other improvements on that land are encumbered by a real property mortgage placed on the land when Edmundo financed construction of the shade houses, a packing shed, and worker housing, as well as installation of a drip irrigation system.

BG's Sonora facilities consist solely of a series of high-tech glass greenhouses built by *BG* on 40 hectares of land owned by Edmundo. This land is subject to another real property mortgage given by Edmundo in exchange for the money used to build the greenhouse facility.

BG grows tomatoes and cucumbers on the land in Sonora and greenhouse tomatoes in Baja. Nearly all of *BG*'s annual production is exported to the United States and Canada. When prices are low or quality is not high enough for export, tomatoes are sold in Mexico.

You are an Arizona attorney and have been asked to represent Maxi-Fresh Produce, LLC (*MFP*). *MFP* is a limited liability company organized under the laws of Delaware, but conducts no business there. Instead, *MFP* has three facilities. One is located in San Ysidro, California, just over the United States-

1. D. Michael Mandig, *Hypothetical Situation for Panel Discussion*, Annual Convention, State Bar of Arizona (June 11, 2010).

2. Moderator, Chair Elect, International Law Section; attorney at Waterfall Economidis Caldwell Hanshaw & Villamana, P.C., Tucson, Ariz.

Mexico border, a second is located in Rio Rico, Arizona, and the third is located in Calgary, Alberta, Canada.

From its three facilities, *MFP* distributes fresh Mexican fruits and vegetables throughout the United States and Canada. *MFP* would like you to help put together a deal under which *MFP* will provide crop financing to *BG* in the coming year to finance purchase of seed and the planting, cultivation, harvest, packing and shipping of the entirety of *BG*'s tomato crop for the season (which, because of the high-tech nature of some of the greenhouses, includes year-round production of tomatoes). *BG*'s Baja produce will be exported to the United States through Otay Mesa. The Sonoran vegetables come into the United States at Nogales, Arizona. The goods are warehoused, inspected, and sometimes repacked in each of *MFP*'s facilities. Sales occur at all three of *MFP*'s offices, and produce is shipped to various locations in the United States and Canada.

MFP has not worked with *BG* before. Edmundo Gomez has a very good reputation in the industry, but, like many farmers engaged in seasonal agriculture; he has had some good years, and some not-so-good years. The rumor is that he parted company with previous distributors under less than ideal conditions, but *MFP* does not know any of these details.

MFP is being financed by a Canadian Bank that is represented by attorneys in Alberta, Canada. The bank is new to agricultural lending, and its attorneys, although they regularly represent the bank in other commercial lending matters, have little experience in agricultural lending and know nothing about lending to Mexican borrowers. The Canadian bank will be providing a line of credit to *MFP* secured by accounts receivable.

Assume that, instead of being asked to represent *MFP*, you were asked to represent the Canadian Bank.

[Consider] the possible structures of these transactions to determine the ideal method for protecting the interests of *MFP* and the Canadian bank.