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Modernizing International Trade Law to Support Innovation and Sustainable Development

Coordinating Secured Transactions Law and Capital Requirements

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Abstract

The newly adopted Model Law on Secured Transactions crowns the UNCITRAL's efforts to facilitate access to finance. One of the drivers for reforming secured transactions laws has been the assumption that a modern legal framework allows banks to reduce capital charges, thus lowering the costs of credit. Yet, pursuant to the capital requirements enshrined in the Basel Accords – promulgated by the Basel Committee on Banking Supervision (BCBS) – security rights trigger capital charges below the level of those attributed to unsecured credit only if the soundness of individual banks and the stability of the entire banking system are deemed to be preserved. If this is not the case, banks are required to treat secured credit in the same manner as unsecured credit, frustrating the desired effects of modern secured transactions law reforms. It follows that further cooperation and coordination between UNCITRAL and the BCBS is required to resolve such a critical, and often overlooked, impediment to both domestic and cross-border finance. As a result, we recommend the elaboration of a Guide that national law reformers could follow to ensure compliance with both the UNCITRAL Model Law and the Basel Accords.

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I. Introduction

The newly adopted Model Law on Secured Transactions crowns a longstanding effort of the United Nations Commission on International Trade Law (UNCITRAL) to facilitate access to finance through secured credit. In the context of security rights, the engagement of UNCITRAL dates back to 1968, when the possibility of designing a modern and harmonized legal framework was considered and followed by exploratory studies.¹ In 2002, UNCITRAL's Working Group VI (Security Interests) commenced its work "on the development of an efficient legal regime for security rights in goods involved in a commercial activity."² The rationale for developing a modern and internationally harmonized legal framework for security rights in movables (tangible and intangible assets) is to broaden access to credit at a lower cost and, consequently, further international trade and economic growth. The mandate of Working Group VI was fulfilled in 2007 when UNCITRAL adopted the Legislative Guide on Secured Transactions (Legislative Guide), equipping national law reformers with an instrument to design a modern legal framework for secured transactions along the lines of the recommendations set forth therein. Working Group VI assisted national policymakers with the adoption of two additional instruments complementing the Legislative Guide – the Supplement on Security Rights in Intellectual Property (2010) and the Guide on the Implementation of a Security Rights Registry (2013). Finally, in 2016, the Model Law on Secured Transactions (Model Law) was adopted. These instruments benefited from the discussions that occurred during the last UNCITRAL Congress, titled "Modern Law for Global Commerce" (2007),³ when several issues pertaining to secured transactions law were discussed using the Legislative Guide as a point of reference. In light of recent economic, social, and technological developments in the last decade, it is now time to re-examine some of those issues and explore new ones in connection with the instruments on security rights adopted by UNCITRAL, particularly the Model Law.

¹ See Report of the United Nations Commission on International Trade Law on the Work of its First Session (A/7216, 1968) paras 40-48; Report of the United Nations Commission on International Trade Law on the Work of its Third Session (A/8017, 1970) paras 139-145.

² Report of Working Group VI (Security Interests) on the Work of its First Session (A/CN.9/512, 2002) para 1.

³ UNCITRAL, *Modern Law for Global Commerce*, Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission, Vienna, 9-12 July 2007 < https://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf > accessed 20 June 2017.

One of the drivers for defining UNCITRAL standards that guide domestic secured transactions law reforms has been the assumption that a modern legal framework allows regulated credit institutions, or banks, to accept a wider range of collateral in order to benefit from reduced capital requirements. Amongst the various issues relating to securing obligations with movable assets, one panel at the 2007 Congress examined the regulatory impact of secured transactions on regulated financial institutions under the Legislative Guide.⁴ It was noted then that an expeditiously enforceable security right with the highest priority allows banks to benefit from lower capital charges. The same panel advanced a parallel with mortgages over immovable property, noting that these arrangements are recognized under international capital standards elaborated by the Basel Committee on Banking Supervision (BCBS) as a factor that may reduce the risk associated with a loan.⁵ Following this logic, one of the justifications for modernizing secured transactions laws along the lines of the Legislative Guide was that security rights in movable property would benefit from a similar regulatory treatment. This expectation also underscores the Model Law, which was designed to be in line with the Legislative Guide, as well as many secured transactions reform projects at the national level. However, such an assumption is not entirely correct and reflects an over-simplification of the functioning of international capital requirements.

It is argued here that the relationship between secured transactions laws and capital requirements should be more carefully explored to ensure an effective coordination between these two critical areas of the law. Our argument builds upon a research project comparing legal and regulatory treatments for certain types of assets – financial collateral and tangible assets – taken as collateral to secure commercial obligations.⁶ Through this prism it emerged that secured transactions law and capital requirements, in pursuing different programmatic objectives, namely access to credit and financial stability, are based on a different understanding of what should constitute a valid protection against credit risk.⁷ In particular, capital requirements display a traditionally skeptical attitude towards the possibility of using movable assets as valid credit protection against credit risk. Practical experiences in law

⁴ UNCITRAL, *Modern Law for Global Commerce* (n 3) 124.

⁵ *ibid.* It is worth noting that, following the 2007-2008 financial crisis, new capital adequacy standards have been defined and are currently debated. In general, the new approaches to calculate capital charges over immovable property are more stringent than the one considered at the time of the 2007 UNCITRAL Congress.

⁶ Giuliano Castellano and Marek Dubovec, 'Regulatory Perspectives on Security Rights' (*mi meo* 2017).

⁷ *ibid.*

reforms at the national level show that banks in a number of developing countries have not been able to significantly increase the volume of secured credit, notwithstanding the implementation of a novel secured transactions law regime. One of the chief reasons for this is the lack of coordination between secured transactions law and capital requirements which, in turn, does not provide an incentive to banks to engage in secured lending when movable assets, such as equipment or receivables, are offered as collateral. To address this and other related issues limiting credit creation through the banking system, different strategies may be developed at the national level.⁸ However, these strategies are naturally confined within the perimeters established by the two distinct legal frameworks i.e. secured transactions law and capital requirements. Accordingly, the problem should also be addressed at the international level; precisely by furthering coordination between UNCITRAL instruments and the Basel framework – promulgated by BCBS and composed of the Second and Third Accords (Basel II and Basel III).⁹

Pursuant to the Basel framework, security rights trigger capital charges below the level of those attributed to unsecured credit only if the soundness of individual banks and the stability of the entire banking system are deemed to be preserved. If this is not the case, banks are required to treat secured credit in the same manner as unsecured credit, frustrating the purpose of reforming national legal regimes for secured lending. This is not to say that banks or, more generally, the banking industry, do not benefit from a modern secured transactions regime. On the contrary, if legal certainty is ensured and the creation, priority, publicity, and enforcement of security rights are governed by a predictable and coherent legal regime, banks are likely to extend loans to borrowers that absent such a modern secured transaction law would not be possible or issued at a high cost. Nonetheless, the lack of coordination between the efforts to modernize the law pertaining to security rights in movable assets and the efforts to strengthen the stability of the financial system may generate the unintended consequence of limiting bank loans generating a gap in the market for secured credit. Such a gap is likely to be filled by

⁸ For other reasons impeding the use of collateralized transactions – such as the lack of expertise and the need for training on asset-based lending – and for a possible solution to address these issues, including recommendations on how to coordinate secured transactions law and capital requirements at the national level, see Giuliano Castellano and Marek Dubovec, ‘Bridging the Gap: The Regulatory Dimension of Secured Transactions Law Reforms’ *Uniform Law Review* (forthcoming 2017/2018).

⁹ BCBS, *International Convergence of Capital Measurement and Capital Standards - A Revised Framework* (BIS 2004, revised 2006) (Basel II); BCBS, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking System* (BIS 2010, revised 2011) (Basel III).

lenders operating outside the banking system, within a sector commonly referred to as “shadow banking.”¹⁰

It follows that furthering cooperation and coordination between UNCITRAL and international prudential regulators, notably the BCBS in conjunction with the Financial Stability Board, is of pivotal importance, at least for three reasons. First, coordination would reinforce the understanding of the differing objectives of these two legal regimes governing secured credit. This is, in essence, an attempt to build bridges. Second, UNCITRAL and BCBS would better achieve their objectives in discharging their tasks in a coordinated fashion. Third, the result of this inter-institutional coordination would offer guidance to national law reformers and regulators, fostering cooperation and capacity building in both areas of law. Overall, the instruments developed by UNCITRAL would contribute to addressing stability concerns as part of its broader agenda of promoting sustainable development and supporting innovation. Similarly, BCBS, alongside other relevant organizations, would be in a position to assess whether and, if so, in what instances secured transactions laws contribute to the stability of credit-based economies. The proposed coordination entails an inter-institutional dialogue potentially leading to a recalibration of international legal and regulatory standards. More immediately, a Guide to indicate how national law reforms may be implemented to promote, simultaneously, access to credit and financial stability could be prepared to ensure coordination between domestic regulatory environments and the Model Law.

II. The Perimeters of the Issue: The Problematic Intersection between Secured Transactions Law and Capital Requirements

We have noted elsewhere that the dissonance between secured transactions law and prudential regulation stems from different rationales and operational logics characterizing these two areas of law.¹¹ While secured transactions law is concerned with the establishment of a legal environment that is conducive to private negotiations in order to stimulate economic growth, prudential regulation, through capital requirements, responds to a regulatory rationale that is sustained by the necessity of controlling the risk associated with banking activities. Capital

¹⁰ See Financial Stability Board, *Strengthening Oversight and Regulation of Shadow Banking: Recommendations of the Financial Stability Board* (Basel 2011). In the literature, see Steven Schwarcz, ‘Regulating Shadow Banking’ (2012) 31 *Review of Banking and Financial Law* 619.

¹¹ See Castellano and Dubovec (n 6).

requirements are imposed on banks with the intent of preventing excessive risk-taking, which may have detrimental implications for the stability of individual banks as well as for the entire financial and economic system. This reflects a twofold rationale. First, following the paradigms of micro-prudential regulation, minimum capital standards are concerned with the solvency of individual banks. Second, in line with the increasing need to focus on the macro-prudential dimension of financial regulation, capital requirements aim at maintaining the stability of the financial system in its entirety. Upon these premises, capital requirements prescribe the standards to calculate the amount and the composition of regulatory capital, i.e. that portion of own (or “unborrowed”) funds that banks must hold against the risks generated by their operations. Promoting economic growth also permeates the debate over the definition of an optimal level of regulatory capital.¹² In this respect, capital requirements should not stifle banks’ ability to expand the availability of credit in support of economic growth and development. Hence, capital requirements – by controlling the associated risk – strike a balance between economic growth and financial stability, by influencing and, to an extent, limiting the lending choices of individual banks.

At the heart of the Basel framework to calculate regulatory capital is the Risk Weighted Asset (RWA) approach. RWA is a form of legal technology that establishes capital requirements in proportion to the level of risk taken by a bank. To each and every financing operation corresponds a coefficient that should be used to calculate the corresponding capital charge. Such coefficients reflect the likelihood of repayment and the level of liquidity for different classes of financing operations and borrowers. To calculate risk-weighted capital charges, banks may adopt different methodologies. Basel II, in fact, introduced three methodologies to determine the regulatory capital. Under the basic methodology, known as “standardized approach,” Basel II and Basel III statutorily prescribed the RWAs to calculate capital charges in accordance to the riskiness of various operations.¹³ For instance, small business loans are risk-weighted at 75 percent,¹⁴ and only security rights over highly liquid assets, such as bank accounts, may be considered to reduce credit risk and thus capital charges.

¹² See Jihad Dagher and others, ‘Benefits and Costs of Bank Capital’ (2016) IMF Staff Discussion Note SDN/16/04; Anat Admati and Martin Hellwig, *The Bankers’ New Clothes: What’s Wrong with Banking and What to Do About It* (Princeton University Press, Princeton 2014).

¹³ Kern Alexander, ‘The Role of Capital in Supporting Banking Stability,’ in Niamh Moloney, Eilís Ferran, and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* 344 (OUP, Oxford 2015).

¹⁴ Basel II (n 9) para 69.

RWAs feed into the capital adequacy formula and, assuming there are no other risks, capital charges are calculated by multiplying: (1) the loaned amount, by (2) the risk-weight, by (3) eight percent. By way of example, a small business loan with a value of 100,000 euros requires a capital charge equal to or greater than 6,000 euros. Under the standardized approach, RWAs are defined by regulators and the possibility of considering factors mitigating credit risk is limited. With the introduction of two additional Internal Rating-Based (IRB) methodologies – the Foundation Internal Rating-Based (F-IRB) and the Advanced Internal Rating-Based (A-IRB) – banks have been allowed, upon regulatory approval, to adopt their own estimations to adjust RWAs and ultimately benefit from lower capital charges. The probability of default and the resulting losses associated with lending operations may be calculated using the banks’ own estimations. Hence, through IRBs, the risks associated with a specific lending operation may be further mitigated taking into account specific factors, such as the protection offered by a security right in tangible assets or receivables. However, even under the IRB variants, a security right may lead to reduced capital charges only if banks comply with specific regulatory requirements.

A. *Secured Transactions in the Basel Framework: Credit Risk Mitigation*

Regardless of the methodology adopted, to unveil how secured transactions are considered in the Basel framework, it is necessary to look at the function that those instruments are to perform from a regulatory perspective. Secured transactions are funded credit protections, belonging to the broader category of Credit-Risk Mitigation (CRM) techniques.¹⁵ CRMs are primarily designed to lessen the risks associated with individual financing operations and, eventually, with a bank’s entire portfolio of financing operations. When CRM techniques are employed, the resulting RWA charge should be lower than that imposed for an otherwise identical transaction not supported by any CRM.¹⁶ However, if providing inadequate credit protection, secured transactions may result in capital charges that correspond to those applied to unsecured

¹⁵ CRMs are defined as techniques whereby “exposures may be collateralized by first priority claims, in whole or in part with cash or securities, a loan exposure may be guaranteed by a third party, or a bank may buy a credit derivative to offset various forms of credit risk;” Basel II (n 9) para 109.

¹⁶ Basel II (n 9) para 113. This principle is a mainstay for CRM and has been restated in BCBS, Second Consultative Document: Revisions to the Standardised Approach for Credit Risk (BIS 2015), issued for consultation on 11 March 2016 (Second Consultative Document) para 104.

credit.¹⁷ This is because collateralized transactions generate new risks, including: legal risk, hindering the exercise of secured creditors' rights; operational risk, arising from defective procedures to monitor, inspect, or assess the value of encumbered assets; and liquidity risk, arising from difficulties in the disposal of collateral.¹⁸ A security right reduces a capital charge below the level of that applicable to unsecured loans only if it ensures the appropriate management of those risks, thus promoting the soundness of individual banks and the stability of the entire banking system.

Under the Basel framework, to determine whether a given CRM reduces capital charges, banks must deploy specific procedures and follow the prescriptive rules of either the standardized approach or, if authorized by national regulators, one of the two IRB variants. Subsequently, depending on the methodology adopted, various provisions apply to determine if a given type of transaction constitutes an eligible CRM and its corresponding coefficient for the computation of the risk-weighted capital charge.¹⁹

For CRMs to mitigate credit risk and thus discount capital charges, the Basel framework identifies a series of specific requisites.²⁰ Encumbered assets should be sufficiently liquid with a predictable value over time or included in a list of assets that contains collateral considered to be very liquid, such as gold, bank accounts, and certain types of debt and equity instruments.²¹ Moreover, banks should demonstrate – through written and independent legal opinions – that they have the right to liquidate (or retain) the encumbered asset promptly in the event of the grantor's default or insolvency, in all relevant jurisdictions.²² The intent of these provisions is to ensure that lower capital charges correspond to lower levels of credit and liquidity risk by focusing on the effective realization of the value of encumbered assets. Legal

¹⁷ There are some exceptions to this rule and in some instances non-eligible CRMs may also result in lower capital charges; see Basel II (n 9) para 77. However, the application of these exceptions does not affect the regulatory treatment of security rights here examined.

¹⁸ Basel II (n 9) para 115.

¹⁹ This may occur in different fashions. In general, if a coefficient is not statutorily attributed to a specific operation, the risk-weight of the collateralized transaction results from the reduced exposure calculated after the CRM is multiplied by the risk-weight of the counterparty; Basel II (n 9) para 148.

²⁰ The regulatory framework for CRMs is contained in Basel II and their treatment is specified for the standardized and IRB approaches. It comprises two methods, i.e. simplified or comprehensive; see Basel II (n 9) para 121. The framework is currently under revision following the Second Consultative Document (n 16) Annex 1. The Capital Requirements Regulation adopted in the EU contains most of the proposed changes; see Castellano and Dubovec (n 6).

²¹ For the general principles on CRMs, see Basel II (n 9) paras 123 and 125; for the list of eligible financial collateral, see Basel II (n 9) para 145.

²² Basel II (n 9) para 118.

certainty and enforceability of security rights are of paramount importance and they are reflected in the entire set of granular provisions concerning the eligibility of CRMs for different classes of assets and types of transactions. Yet, rather than looking to the secured transactions legal framework for defining what legal certainty and efficient enforcement entail, the Basel framework appears to be primarily focused on identifying assets that are easily sold in secondary markets and for which enforcement is generally more expeditious. Through these lenses, the resulting regulatory framework strongly privileges transactions secured with liquid assets, such as financial collateral, over those that are less liquid, such as equipment. Movable assets taken as collateral are considered eligible credit protections only when banks adopt one of the IRB variants.²³

B. *Capital Requirements Meet Secured Transactions Law*

The regulatory understanding of what constitutes an eligible credit protection reveals a number of discrepancies with the legal framework anticipated by the Model Law, some of which are illustrated in this section. First, the Basel framework requires the security agreement to contain a detailed description of the movable assets.²⁴ On the contrary, the Model Law recognizes that a reference to “all assets,” or to all movable assets within a category, suffices.²⁵ Second, the Basel framework does not consider how banks may exercise their right to conduct regular inspections to ensure the integrity of the encumbered assets.²⁶ Hence, the implementation of the relevant provisions from the Model Law is *de facto* irrelevant to this end.²⁷ It thus remains to be determined whether a requirement to inform the grantor prior to any inspection, which may be agreed on by the parties under the Model Law, would impair the effectiveness of the credit protection, from a prudential regulation perspective. Third, capital requirements demand that banks be able to rapidly enforce their rights by retaining or liquidating encumbered assets in the event of the financial distress or insolvency of the grantor. For security rights in tangible assets, the Basel framework compels banks to ensure that the value of the collateral may be realized within a reasonable timeframe. Also in this respect, legal systems have adopted

²³ Basel II (n 9) paras 521 and 522.

²⁴ Basel II (n 9) para 522.

²⁵ UNCITRAL Model Law art 9.

²⁶ Basel II (n 9) para 522.

²⁷ According to the Model Law, a secured creditor may inspect the collateral, as established by the agreement between the parties, but in a commercially reasonable manner. UNCITRAL Model Law art 53(2).

different approaches. The Model Law, for instance, prescribes that the secured creditor must provide a notice of the intention to repossess the encumbered asset.²⁸ It is uncertain whether such a requirement corresponds to the prudential expectation of rapid and effective enforcement of security rights. Fourth, the Basel framework establishes that only security rights enjoying first priority are eligible credit protections.²⁹ The problem is more complex, however, as in most legal systems, preferential claims reflect specific policy choices.³⁰ Thus, a precise graduation of competing claims is often difficult to determine. Moreover, depending on the characterization of a given security right (e.g. an acquisition security right), a different priority status may be attributed.³¹ A fifth issue relates to registration. The Basel framework generally establishes that banks must take the required actions to fulfil legal requirements to ensure “the enforceability of security interest (eg, by registering a security interest with a registrar).”³² However, this locution may lead national lawmakers (and regulators) to intend registration as the only mechanism to render a security right effective against third parties.³³ Furthermore, given that the Basel framework does not differentiate among registration systems, a law that requires the registration of the actual security agreement and its review by a registrar prior to its entry into a paper-based system, may accord with international capital requirements similarly to a law that establishes an electronic registry system where a simple notice with respect to a security right suffices.

C. Identifying the Consequences of an Uncoordinated Interaction between Capital Requirements and Modern Secured Transactions Law

A direct consequence of the thus far uncoordinated co-existence of these two areas of law is the reduced effect of secured transactions reforms. The provisions on eligible collateral clearly

²⁸ UNCITRAL Model Law art 77(2)(c).

²⁹ Basel II (n 9) para 522.

³⁰ See José M Garrido, ‘No Two Snowflakes are the Same: The Distributional Question in International Bankruptcies’ (2011) 46 *Texas International Law Journal* 459.

³¹ Floating vs fixed charges.

³² Basel II (n 9) para 123.

³³ For instance, the European Banking Authority (EBA) noted that: “[a] lien is perfected by registering it with appropriate statutory authority so that it is made legally enforceable and any subsequent claim on that asset is given a junior status;” EBA, Draft Regulatory Technical Standards on Assigning Risk Weights to Specialised Lending Exposures under Art 153(9) of Regulation (EU) No 575/2013 (CRR) (2015) Consultation Paper EBA/CP/2015/09, at n 43. For a more detailed examination of the implementation of the Basel framework in Europe, see Castellano and Dubovec *supra* (n 6).

prioritize financial instruments and, to a more limited extent, receivables, thus failing to provide the same level of credit-cost reduction for grantors involved in farming or manufacturing, whose assets are crops or equipment. One of the reasons for this dichotomy is the difficulty in assessing the value of tangible collateral, which is comparatively higher for used equipment than for financial instruments or receivables. Furthermore, the Basel framework reflects the legitimate concerns about the liquidity of tangible assets that are more difficult to dispose of upon default, compared to offsetting a balance on a deposit account.³⁴ Historical data on tangible collateral is often unreliable or non-existent due to the absence of secondary markets and the inability of banks to properly assess and monitor their value. It follows that reforming secured transactions laws per se is not sufficient to broaden access to credit extended through the banking system.

A second and related effect is that the implementation of a reformed secured transactions law is more likely to benefit those lenders that are not affected, or less affected, by capital requirements, such as micro and online lenders, and lessors. In fact, the stringent requisites set forth by capital requirements naturally induce banks to be selective when considering certain assets as security for loans. The banking industry's retraction from these lending operations leaves part of the demand for (secured) credit unmet, widening a gap that is increasingly filled by non-bank operators, which are not subject to capital requirements. These lenders are less constrained to cater to borrowers deemed too risky for banks. Higher interest rates may be charged to these borrowers not only in order to compensate for greater risks, but also because non-bank lenders' cost of capital is higher as compared to regulated banks. Ergo, the sole adoption of a modernized and simplified legal regime for securing obligations with movable assets, may broaden access to secured credit in terms of the types of potential borrowers, but, given the greater involvement of non-bank operators, may not necessarily reduce the cost of secured credit.

III. Concluding Remarks: Towards a More Structured Coordination

From the above, it appears that coordination between secured transactions law and capital requirements is an essential piece to foster innovation and sustainable development via legal

³⁴ See David Clementi, Risk Sensitivity and the New Basel Accord, Speech by Deputy Governor of the Bank of England (London, April 2001).

reforms. Such coordination is needed to ensure that legal rules promoting access to credit are also informed by financial stability considerations, and vice versa. Ideally, the Basel framework should reference international standards that exemplify a modern secured transactions system, such as the Model Law, provided that those standards ensure a prudentially sound legal regime for extending credit through the banking system. For instance, the Basel framework may encourage States to reorder the nexus of preferential claims in order to render the techniques to manage credit risk more effective, thus supporting the implementation of the relevant article of the Model Law. Moreover, BCBS may indicate that only notice-based electronic registries satisfy the prudential requirements because of the lower level of legal risk and reduced costs, as compared to document-registration and paper-based systems. As a result, current gaps and grey areas would be clarified – promoting a more harmonious and coherent implementation of both secured transactions laws and capital requirements. Ultimately, the question of whether to amend some of the existing soft-law instruments should be explored with the intent of maximizing the impact and the effective implementation of the core legal components sustaining credit-based economies.

To reach this ambitious, yet attainable, goal there are two practical steps that could be taken. First, a dialogue between UNCITRAL, the BCBS, and other interested bodies should be established. The primary intent is to elucidate critical aspects of the interaction of the two areas of law, such as with regard to the standards for describing encumbered assets in security agreements and in respect to whether enforcement of security rights through authorities other than courts would satisfy the policy expectations pursued by the Basel framework. Within this dialogue, official inquiries should be conducted to reveal the extent to which the simultaneous application of a modern secured transactions regime and capital requirements affects the cost of credit and stimulates shadow banking activities.

To define an inter-institutional mechanism for cooperation, UNCITRAL's past and current experiences indicate a possible way forward. The UNCITRAL Secretariat has been traditionally keen to ensure coordination with existing legal texts and projects carried out by international and regional organizations. During its 49th Session, the Commission acknowledged these efforts, particularly the coordination with the World Bank, the European Commission, the International Institute for the Unification of Private Law (UNIDROIT), the Organization of American States (OAS), and the Asia-Pacific Economic Cooperation

(APEC).³⁵ The Commission renewed the mandate of the Secretariat to continue its coordination activities, but also extended it to focus more on providing training and technical assistance.³⁶ The 49th Commission also considered a specific report on the coordination of the UNCITRAL Secretariat's activities in the area of security rights with various organizations.³⁷ Although at that time there was no reference to prudential regulation or capital requirements, the possibility of fostering coordination between UNCITRAL and BCBS is expressly mentioned in a note of the Secretariat presented to the Commission for its 50th Session.³⁸ In view of this explicit novel interest, a dialogue with prudential regulators could start by following the mechanism deployed, in the field of security rights, to coordinate the activities of UNCITRAL, the Hague Conference on Private International Law, and UNIDROIT.³⁹ To this end, meetings were held (in 2008 and in 2009) between the aforementioned multilateral institutions to: (i) assure the coherence of the substantive terms of the instruments that they sponsor; and (ii) avoid overlap and inconsistency among activities and instruments.⁴⁰

A second essential step that UNCITRAL can immediately undertake is to prepare a Guide for States that decide to implement the Model Law. The proposed Guide should set out how a legal regime for secured transactions should be modernized in line with the policy objectives of prudential regulation and the specificities of capital requirements. To this end, the Guide should include specific recommendations for adapting domestic legislative and regulatory frameworks to international legal standards. In particular, it should illustrate to national law reformers and regulators how to assist their domestic banking industry to meet the conditions for tangible and intangible assets to be considered as valid credit protections, such as by providing a list of eligible collateral, by incentivizing the creation of secondary markets, and by determining what kind of non-eligible collateral could be used to calculate capital

³⁵ UNCITRAL, 49th Commission Report, para 126.

³⁶ *ibid* para 127.

³⁷ United Nations General Assembly, UNCITRAL Coordination Activities (A/CN.9/875) 10-11.

³⁸ United Nations General Assembly, UNCITRAL Possible Future Legislative Work on Security Interests and Related Topics (A/CN.9/913) 8. The note of the UNCITRAL Secretariat reflects the discussion held during the Fourth International Colloquium on Secured Transactions (Vienna, 15-17 March 2017) organized with the purpose of gathering views and advice concerning possible future work on secured transactions law. The program of the Colloquium is available here: < <http://www.uncitral.org/uncitral/en/commission/colloquia/4thint.html> > accessed 20 June 2017.

³⁹ See UNCITRAL, Hague Conference and UNIDROIT, Texts on Security Interests: Comparison and Analysis of Major Features of International Instruments Relating to Secured Transactions (United Nations, May 2012) < http://www.uncitral.org/uncitral/en/uncitral_texts/security/2011UNCITRAL_HCCH_Unidroit_texts.html > accessed 20 June 2017.

⁴⁰ *ibid* 1.

charges for loans that are past due, or non-performing. The Guide would have utility beyond the projects aimed at implementing the Model Law, as it could be equally useful for those economies that have opted to follow different models, such as the model laws developed by the Organization of American States and the European Bank for Reconstruction and Development.