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The Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application

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The Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application

CHARLES W. MOONEY, JR.*

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INTRODUCTION

This essay is Part One of a two-part essay series, which outlines and evaluates two possible future international instruments.¹ Each instrument

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¹ For present purposes, I use “international instruments” in the broadest sense. I consider below various alternative structures for adoption and implementation of the first of the two projects. *See infra* Section IV.C.

draws substantial inspiration from the Cape Town Convention² and the Aircraft Protocol³ (for convenience, unless otherwise noted or implied from the context, references to the “Convention” or to “Cape Town” refer to the Cape Town Convention and the Aircraft Protocol together). This Introduction first provides background on the Convention and then outlines the two possible future projects.⁴ The remainder of Part One will assess the first project on its merits as well as its feasibility from practical and political perspectives, while Part Two (to be published separately) will do the same with regards to the second possible future project.⁵

In 2001, the government of South Africa hosted a diplomatic conference in Cape Town. The conference was jointly sponsored by the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization (ICAO). Sixty-eight States and fourteen international organizations participated in the diplomatic conference.⁶ On November 16, 2001, following almost three weeks of intensive work and negotiations, the Convention and the Aircraft Protocol were opened for signature.⁷ The Convention contains the basic legal regime for secured financing of equipment. The Aircraft Protocol, on the other hand, contains specialized provisions necessary to adapt the Convention to the financing of aircraft and aircraft engines. The Convention cannot apply on a stand-alone basis; it can apply only in connection with a protocol covering a specific type of equipment.⁸

The Convention establishes an international legal system for security interests (which it calls “international interests”) in aircraft objects — large airframes, aircraft engines, and helicopters. The goal is to facilitate efficient secured financing. In addition to conventional secured transactions, the

² International Institute for the Unification of Private Law [UNIDROIT], Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, available at <http://www.unidroit.org/instruments/security-interests/cape-town-convention>.

³ UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, available at <http://www.unidroit.org/instruments/security-interests/aircraft-protocol>.

⁴ This overview derives in part from Charles W. Mooney, Jr., *The Cape Town Convention: A New Era for Aircraft Financing*, 18 AIR & SPACE LAW 4 (Summer 2003).

⁵ Part Two will be published in VA. J. INT'L L. Issue 55:2.

⁶ ROY GOODE, THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT OBJECTS: OFFICIAL COMMENTARY 1 (3d ed. 2013).

⁷ *Id.* The successful conclusion was aided immensely, during the process leading to and during the diplomatic conference, by the Aviation Working Group [hereinafter AWG], a group of major aerospace manufacturers and financial institutions organized by Jeffrey Wool. *Id.* at 5–6.

⁸ UNIDROIT, *supra* note 2, arts. 2(2), 6. Two additional protocols for rail and space equipment have been adopted, but neither has yet come into force. See UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, March 9, 2012 [hereinafter *Space Protocol*]; UNIDROIT, Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Feb. 23, 2007 [hereinafter *Rail Protocol*].

scope of the Convention's "international interest" also embraces the interests of a lessor and a conditional seller of an aircraft object.⁹ The Convention also applies to contracts of sale covering an aircraft object.¹⁰ At the time the Convention was conceived and during its development, the manufacturers of commercial aircraft equipment expected to sell, and airlines worldwide expected to buy, trillions of dollars worth of products. But local domestic legal regimes in many States were (and many remain) inadequate to support secured, asset-based financing. Without needed legal reforms, some desirable transactions would not take place, other financings would be completed only with higher financing costs, and financings might only go forward with the support of the sovereign credit of States in which airlines are based. The Convention provides the necessary reforms to treat these inadequacies.¹¹

The Convention provides for an international registry for the registration of international interests to give public notice of these interests.¹² Registration of international interests in the international registry is the core of the Convention's regime for making international interests effective against third parties and for its priority rules.¹³ The Council of ICAO is the supervisory authority for the international registry.¹⁴ In that connection, the ICAO Council has appointed Aviareto, a joint venture between SITA SC and the government of Ireland, as the Registrar and operator of the international registry.¹⁵

⁹ UNIDROIT, *supra* note 2, arts. 1(i), 1(o), 2 (defining "creditor," defining "international interest," and outlining "scope of international interest respectively).

¹⁰ *Id.* art. 41; UNIDROIT, *supra* note 3, art. III.

¹¹ In many respects, these instruments follow the philosophy and approach of U.C.C. Article 9 on secured transactions (in effect in every state of the United States), as well as various personal property security acts (in effect in the provinces of Canada). The conformity of the Convention to principles of secured credit in North America is no accident, rather the United States delegation sought this result throughout the process, because our legal regime for secured credit works well.

¹² UNIDROIT, *supra* note 2, arts. 16–17; UNIDROIT, *supra* note 3, arts. XVII–XX. For an overview of the development and operation of the Convention's international registry, see Jane K. Winn, *The Cape Town Convention's International Registry: Decoding the Secrets of Success in Global Electronic Commerce*, 1 CAPE TOWN CONVENTION J. 25 (2012). The international registry should not be confused with the national registries for the nationality of civil aircraft under the Convention on International Civil Aviation. Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

¹³ UNIDROIT, *supra* note 2, arts. 29–30; UNIDROIT, *supra* note 3, art. XIV.

¹⁴ UNIDROIT, *supra* note 2, art. 27. Resolution No. 2 was adopted at the diplomatic conference. Final Act, Resolution No. 2, Relating to the Establishment of the Supervisory Authority and the International Registry For Aircraft Objects available at <http://www.unidroit.org/english/conventions/mobile-equipment/conference2001/finalact.pdf>.

¹⁵ Aviareto, available at <http://www.aviareto.aero>. The international registry's website may be found at <https://www.internationalregistry.aero/>. In its capacity as supervisory authority, the ICAO Council has also adopted regulations and procedures for the international registry. See INT'L CIVIL AVIATION ORG., REGULATIONS AND PROCEDURES FOR THE INT'L REGISTRY (6th ed.

The international registry is an object-specific registry (*i.e.*, registrations are made against and searched by criteria such as the manufacturer, model, and serial number of an aircraft object).¹⁶ Although this differs from the grantor-identifier-based¹⁷ filing systems under U.C.C. Article 9 and most national registries of general application, it is consistent with national registries for airframes and aircraft engines, such as the object-specific Federal Aviation Administration (FAA) Registry in the United States.¹⁸ The international registry is fully electronic, more closely resembling the state filing offices under the Uniform Commercial Code (U.C.C.) Article 9 “notice-filing” system.¹⁹ A registration in the international registry contains only information describing the aircraft object, the parties, and the nature of the transaction.

By any measure, the Convention has proven to be the most successful international secured transactions instrument ever implemented. The United States ratified the Convention in 2004 and the Convention entered into force on March 1, 2006.²⁰ The Convention has been adopted by sixty Contracting States (fifty-four of which have adopted the Aircraft Protocol), including the European Union, and signed by twelve others.²¹

2014), *available* *at*
<https://www.internationalregistry.aero/irWeb/pageflows/work/UserDocumentation/DownloadUserDocumentationController.jpf?language=English>.

¹⁶ UNIDROIT, *supra* note 2, art. 22; UNIDROIT, *supra* note 3, art. XX(1).

¹⁷ Grantor identifiers are discussed *infra* Section IV.C. In this essay, I generally adopt the terminology used in the Legislative Guide on Secured Transactions prepared by the United Nations Commission on International Trade Law (UNCITRAL). See UNCITRAL, LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09V.12 (2007), *available at* https://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.htmlhttp://www.uncitral.org/uncitral/en/uncitral_texts/security.html. The person creating a “security right” in a movable asset (personal property) is the “grantor” and the person that acquires a security right is the “secured creditor.” *Id.* at 9, 12.

¹⁸ See 49 U.S.C. §§ 44107–44108 (2014) (describing recordation and validity of conveyances, leases, and security instruments).

¹⁹ See U.C.C. § 9-502, cmt. 2 (2000) (describing the “notice filing” system).

²⁰ UNIDROIT, *Status – Convention on International Interests in Mobile Equipment (Cape Town, 2001)*, <http://www.unidroit.org/status-2001capetown> (last visited May 25, 2014) [hereinafter *UNIDROIT Status – Cape Town*]; UNIDROIT, *Status – Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, <http://www.unidroit.org/status-2001capetown-aircraft> (last visited May 25, 2014) [hereinafter *UNIDROIT Status – Aircraft Equipment*].

²¹ *UNIDROIT Status – Cape Town*, *supra* note 20; *UNIDROIT Status – Aircraft Equipment*, *supra* note 20. Note that the European Union’s adoption extends only to matters on which it has competency, which is quite limited, and as to other matters European Union members have competency to adopt the Convention. Declarations Lodged by the European Union Under the Cape Town Convention at the Time of the Deposit of its Instrument of Accession, [available at http://www.unidroit.org/status-2001capetown?id=1658](http://www.unidroit.org/status-2001capetown?id=1658); see also Statement by the Aviation Working Group on the Occasion of the Accession by the European Community to of the

Part One (this essay) addresses the first of two possible projects. The first project draws inspiration from the Convention and in particular from its path breaking and enormously successful international registry. However, this project actually has nothing to do with the Convention itself. Instead it envisions an international instrument under which a new international registry would be created. Under one approach,²² the new registry would be created pursuant to a multilateral convention and overseen by an international intergovernmental organization as its supervisory authority. This would follow the model of the Convention's international registry.²³ Each State adopting the new instrument would agree that the international registry would constitute that State's *domestic* secured transactions registry for purposes of perfection and priority under the State's *domestic* secured transactions law. Moreover, the registry would be a grantor-identifier-based registry of general application, covering registrations for security interests in movables such as receivables, financial assets, inventory, and equipment, as opposed to a specialized object-based registry, such as an object-based registry covering interests in aircraft, ships, railroad rolling stock, motor vehicles, or intellectual property.

The chief purpose of proposing an international registry of general application is to begin a discussion. My mind is quite open on the details of any such registry, its feasibility, and its wisdom. While this brief essay is far from a definitive analysis, it is a beginning.

Part Two of the essay series (to be published separately) will address a second project. This second project relates directly to the Convention and will explore issues of implementation and compliance that have arisen or that might arise under the Convention. That project contemplates an international instrument that would be available for adoption and use by the Convention's Contracting States. Under the proposed instrument, adopting Contracting States would agree to binding arbitration for the benefit of investors (*i.e.*, creditors holding international interests) located in other Contracting States and for the purpose of enforcing compliance with the adopting Contracting States' obligations under the Convention. This enforcement mechanism would be patterned on those that have become common and familiar under various bilateral investment treaties.²⁴

Convention on International Interest in Mobile Equipment and its Aircraft Protocol (28 April 2009) available at <http://www.awg.aero/assets/docs/AWG%20EU%20Accession.pdf>.

²² I discuss other possible approaches *infra* Section IV.C.

²³ *See supra* note 13.

²⁴ For an example of such an enforcement mechanism, *see* North American Free Trade Agreement [NAFTA], U.S.-Can.-Mex., ch. 11, Jan. 1, 1994, 32 I.L.M. 289 (although NAFTA is a trilateral, as opposed to bilateral investment treaty).

Following this Introduction, Part I of this essay recounts certain of my experiences during the 2001 diplomatic conference in Cape Town. Those experiences provided the inspiration for the international registry of general application discussed here. Part II next provides a brief international overview of the harmonization and modernization of secured transactions laws in recent years and assesses both the progress and the continuing challenges in this area of law. Part III then explains the centrality and indispensable role of a modern registry for the proper functioning of a modern secured transactions law. Part IV outlines the scope and structure, potential benefits, and alternatives for implementation of an international registry of general application. It also addresses the feasibility of such an international registry project. Finally, the Conclusion ends Part One of this essay series.

I. PAST IS PROLOGUE: CAPE TOWN, NOVEMBER 12-16, 2001

Many delegations²⁵ to the Cape Town diplomatic conference thought that the Convention's transition provisions should apply only to post-Convention transactions, while pre-Convention transactions should continue to be governed by pre-Convention law.²⁶ For example, many delegations thought extracting the current status of title, encumbrances, and other interests from millions of records in registries and replicating the same under the Convention regime through the International Registry was, simply stated, unimaginable and unnecessary. Moreover, the prospect of mistakes and unintended consequences, such as the unintentional rearrangement of pre-existing priorities, would be inherent in any such endeavor. Many delegations were also concerned that attempts to export the current status of domestic registries around the world to the International Registry could jeopardize the priority of interests in an enormous number of existing financing transactions. During the last week of the diplomatic conference (November 12-16, 2001), however, the atmosphere concerning the transition provisions began to change. A storm was brewing.

Early that week, several delegations from emerging market States reiterated their strong interest in transition provisions that would permit pre-Convention transactions to migrate to the new International Registry.

²⁵ I served on the U.S. delegation as a delegate and position coordinator. In the years preceding the diplomatic conference, I also served on the U.S. delegations to experts meetings and on the UNIDROIT Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment. However, the views I express in this essay are not necessarily the views of other members of the delegation or the U.S. government.

²⁶ Admittedly, the concepts of "post-Convention" and "pre-Convention" transactions oversimplify considerably more complex issues, but they are sufficient for purposes of the present discussion.

Their primary reasoning was based on perceived inadequacies of their existing domestic registries. Indeed, it was the international registry—even more than modernizing substantive secured transactions and leasing law for aircraft objects—that made the Convention regime most attractive to these delegations.²⁷ It became apparent that many delegations would need to reconsider their positions on the transition provisions. At the “eleventh hour” a modified transition provision, which could be applied through a Contracting State’s declaration, was negotiated and added to the Convention. This modified transition provision applied the Convention to “pre-existing rights or interests.”²⁸ This provision was finalized and agreed to on the last day of the diplomatic conference (an almost unheard-of situation), which even necessitated a delay in the signing of the Final Act.

As to the proposal for an international registry, the lesson from Cape Town is clear: Such an international registry may have great appeal to States seeking to modernize their secured transactions laws, especially States in emerging markets.

II. HARMONIZATION AND MODERNIZATION OF SECURED TRANSACTIONS LAW: PROGRESS AND CHALLENGES

The past twenty five years have seen enormous progress in the modernization of secured transactions laws outside the United States, Canada, and western Europe. For example, States that have adopted modernized registries include Australia, Albania, Bosnia, Cambodia, China, New Zealand, Peru, Romania, and Slovakia.²⁹ Several international organizations have provided substantial financial, educational, and technical support for these law reforms. These include intergovernmental organizations such as the World Bank Group,³⁰ the European Bank for Reconstruction and Development,³¹ the Organization of American States,³² the Asian Development Bank,³³ the Inter-American Development

²⁷ I do not mean to suggest that these emerging market States were the only ones who favored a more flexible transition regime. Although some other states agreed, for different reasons not relevant here, it is my personal view that it was the emerging market States that were concerned about their domestic registries whose support turned out to be the most influential.

²⁸ UNIDROIT, *supra* note 2, art. 60(3); UNIDROIT, *supra* note 3, art. XXXI.

²⁹ Alejandro Alvarez de la Campa, *Increasing Access to Credit through Reforming Secured Transactions in the MENA Region*, 17 (World Bank Policy Research, Working Paper No. 5613, 2011). While these states have adopted registries that embrace modern technology, not all of these registries embrace the efficiency available through the international registry proposed here.

³⁰ World Bank Group, *Secured Transactions Systems and Collateral Registries*, (2010), available at <https://www.wbginvestmentclimate.org/uploads/SecuredTransactionsSystems.pdf>.

³¹ Eur. Bank for Reconstruction & Dev., *Model Law on Secured Transactions*, (2004), available at <http://www.ebrd.com/pages/research/publications/guides/model.shtml>.

³² Org. of Am. States, Dep’t of Int’l Law, *Model Inter-American Law on Secured Transactions*, (2002), available at http://www.oas.org/dil/CIDIP-VI-securedtransactions_Eng.htm.

Bank,³⁴ and the United States Agency for International Development,³⁵ as well as important work on secured transactions continuing to be done under the auspices of UNIDROIT³⁶ and UNCITRAL.³⁷ Non-governmental organizations, such as the National Law Center for Inter-American Free Trade, have also contributed to this body of work.³⁸ Yet an enormous amount of work remains.

The work remaining to be completed is still very important. It is conventional wisdom — supported by overwhelming evidence — that a modern secured transaction framework increases access to credit, lowers the cost of credit, and enhances private sector growth.³⁹ But in many

³³ See, e.g., Press Release, Asian Dev. Bank, Secured Transactions Registry in Palau Goes Online (Jan. 16, 2013), available at <http://www.adb.org/news/palau/secured-transactions-registry-palau-goes-online> (discussing a secured transactions registry funded by Asian Development Bank).

³⁴ Inter-Am. Dev. Bank [IDB], *TC9507255: Strengthening System of Properties Right*, IADB.ORG, <http://www.iadb.org/en/projects/project-description-title,1303.html?id=TC9507255> (last visited May 26, 2014) (describing a project for improving the legal framework and administrative procedures for secured transactions in movable and immovable property).

³⁵ U.S. Agency for Int'l Dev. [USAID], *AGCLIR Lessons from the Field: Getting Credit*, USAID (2011), <http://egateg.usaid.gov/sites/default/files/AgCLIR%20-%20Getting%20Credit.pdf> (discussing *inter alia* importance of a legal framework for security interests in connection with agribusiness credit).

³⁶ In addition to the Cape Town Convention and the Aircraft, Rail, and Space Protocols thereto already mentioned (see *Rail Protocol*, *supra* note 8; *Space Protocol*, *supra* note 8), UNIDROIT sponsored the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009) (also known as the Geneva Securities Convention) and adopted the UNIDROIT Model Law on Leasing (2008). Earlier projects included the UNIDROIT Convention on International Financial Leasing (1988) and the UNIDROIT Convention on International Factoring (1988). Information on all of these instruments is available on the UNIDROIT website. See, e.g., UNIDROIT Instruments, <http://www.unidroit.org/news> (follow “Instruments” hyperlink; then select the appropriate instruments).

³⁷ Relevant instruments include: UNCITRAL, *Guide on the Implementation of a Security Rights Registry* (2013), [hereinafter *UNCITRAL Registry Guide*] available at http://www.uncitral.org/uncitral/en/uncitral_texts/security.html; UNCITRAL, *Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property* (2010), available at https://www.uncitral.org/uncitral/en/uncitral_texts/security/ip-supplement.html; UNCITRAL, *supra* note 17; UNCITRAL, UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, U.N. Sales No. E.04V.14 (2001), available at https://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html. Currently, UNCITRAL'S Working Group VI (Secured Transactions) is preparing a Draft Model Law on Secured Transactions. See UNCITRAL, *Working Group VI, 2002 to present: Security Interests*, available at https://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html.

³⁸ *Project Areas*, NAT'L LAW CENTER FOR INTER-AM. FREE TRADE, <http://natlaw.com/project-areas/> (last visited June 1, 2014) (using project focus to help provide access to credit and secured transactions).

³⁹ See, e.g., Alvarez de la Campa, *supra* note 29, at 3–6. For analysis of potential economic effects of Cape Town, see Anthony Saunders, et al., *The Economic Implications of International Secured Transactions Law Reform: A Case Study*, 20 U. PA. J. INT'L ECON. L. 309 (1999); VADIM LINETSKY, ECONOMIC BENEFITS OF THE CAPE TOWN TREATY (2009), available at <http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf>.

regions of the world, the foundational features of a modern secured transactions framework have been slow to catch on. Many of the reasons for this are familiar, but some are specific to particular jurisdictions.⁴⁰

There are a variety of bases for resistance to reform. For example, in some jurisdictions the resistance has its roots in objections to a registration system from certain sectors, such as the leasing and factoring industries. Also, from the perspective of certain borrowers, such as farmers, enhanced post-default enforcement under a modern regime hardly seems to be a welcome development. But this attitude is shortsighted and overlooks the benefits provided by the modern framework, such as reduced costs of credit and enhanced access to credit. In some States with an English-law tradition,⁴¹ there are perceptions that the fixed and floating charge institutions are sufficient, making modernization unnecessary. In some jurisdictions, a modern registry is an economic threat to notary and registrar positions created under existing registration systems. In others, registration of property interests in movables is essentially unknown in the domestic tradition, which dulls the appetite for a modern electronic secured transactions registry. If there is any overarching or unifying theme for resistance, it is a lack of understanding with regards to the benefits of an efficient system for public notice and, more generally, a modern secured transactions law. This lack of understanding can only be overcome through consistent and effective education of decisionmakers and affected market participants.

More often than not proponents of modernization are central banks or governments who are sometimes encouraged by institutions such as the World Bank and its financing affiliate, the International Finance Corporation.⁴² Generally, there is a single domestic stakeholder or a small

⁴⁰ The following discussion benefited greatly from my conversations with Marek Dubovec, the Senior Research Attorney for the National Law Center for Inter-American Free Trade, who generously shared with me a wealth of experience related to law reform projects in emerging markets.

⁴¹ In general a “fixed” charge is a security interest in a discrete asset and a “floating” charge is one that is based on public registration of a charge in the corporate register of a company and covers all existing and future assets of the company. As Philip Wood has explained:

A peculiarity of the English-Based universal security interest is that it is a mixture of fixed and floating charges. Broadly, the charge is expressed to be fixed over more permanent assets, such as land and shares in subsidiaries, but is expressed to be floating over assets which the debtor must be able to deal with in the ordinary course of business, e.g. inventory and receivables.

PHILIP R. WOOD, *LAW AND PRACTICE OF INTERNATIONAL FINANCE: COMPARATIVE LAW OF SECURITY INTERESTS AND TITLE FINANCE* ¶ 6–012, at 99 (2d ed. 2007).

⁴² See INTERNATIONAL FINANCE CORPORATION, http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home (last visited June 1, 2014) (“IFC Advisory Services offers advice, problem solving, and training to companies, industries, and governments, all aimed at helping private sector enterprises overcome obstacles to growth.”).

number of stakeholders who push for modernization. Even when the need for modernization is recognized, however, some States prefer to copy and modify legislation from a neighboring State instead of turning to the recommendations found in the UNCITRAL Secured Transactions Guide.⁴³ However, this might change after the UNCITRAL Model Law is finished because it might provide a more accessible product with enhanced incentives for States to adopt the UNCITRAL reforms.

In some States, secured credit is primarily accessed by large enterprises and micro enterprises, but less so by the “middle market.” In others, it is available only to firms that have real property to offer as collateral. Moreover, the appeal of a secured transactions regime for financing inventory and receivables is far from apparent in a credit culture that is essentially unfamiliar with the use of such property as collateral.

In sum, it is difficult to generalize about the resistance to and incentives for modernization of secured transactions law. Each State presents a set of *sui generis* circumstances. But it does stand to reason that the better the product—modernized secured transactions law—the better the opportunities for reform. If an international registry of general application would offer incentives for reform by providing a meaningful enhancement to secured transactions regimes, then it may be worth considering as an appropriate next step.

III. CENTRALITY OF A MODERN REGISTRY FOR A MODERN SECURED TRANSACTIONS REGIME

The availability of an efficient modern registry is an essential component of any modern secured transactions law. The importance of a modern registry is best illustrated by the UNCITRAL Draft Model Law. In 2007, UNCITRAL adopted the UNCITRAL Secured Transactions Guide. The UNCITRAL Secured Transactions Guide is a comprehensive set of recommendations and commentary directed toward the modernization of secured transactions laws. As explained in the *Preface* to the Guide:

The purpose of the . . . Guide . . . is to assist States in developing modern secured transactions laws (that is, laws related to transactions creating a security right in a movable asset) with a view to promoting the availability of secured credit. The Guide is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that

⁴³ For a discussion of the UNCITRAL Secured Transactions Guide, see Spiros V. Bazinas, *The UNCITRAL Legislative Guide on Secured Transactions — Key Objectives and Fundamental Policies*, 42 No. 2 U.C.C. L.J. 1 (2010).

already have workable laws but wish to modernize their laws and harmonize them with the laws of other States.⁴⁴

The UNCITRAL Secured Transactions Guide's commentary and recommendations dealing with registries recognized the overarching importance of the registry to a secured transactions regime when it stated: "The promotion of certainty and transparency of security rights in movable assets is a key objective of a modern secured transactions regime. *Nothing is more central to the realization of this goal than the establishment of a general, notice-based, registry system . . .*"⁴⁵ Consistent with this recognition and after several meetings of its Working Group VI (Security Interests), UNCITRAL adopted the UNCITRAL Registry Guide in 2013.⁴⁶ Working Group VI currently is working on a Draft Model Law on Secured Transactions. The Working Group will follow the UNCITRAL Secured Transactions Guide and the UNCITRAL Registry Guide in its deliberations.⁴⁷ As to the implementation of a secured transactions registry, the UNCITRAL Registry Guide and the Draft Model Law represent the most current and enlightened thinking on registries.

The UNCITRAL Registry Guide and, when completed/adopted, the final version of the Draft Model Law are designed to provide guidance to a State's domestic legislative body in the process of modernizing, improving, and implementing a secured transactions registry as a part of that State's domestic law. However, these instruments also form a logical point of departure for developing an international registry of general application such as the one discussed next in Part IV. The UNCITRAL Secured Transactions Guide and the UNCITRAL Registry Guide generally are considered to represent the gold standard for a modern framework of secured transactions. No doubt, in due course, the final version of the UNCITRAL Model Law will join their ranks.

Although a modern registry is central to a modern secured transactions regime, it is alone not sufficient to ensure an adequate legal framework for guaranteeing and enhancing the availability of secured credit. The

⁴⁴ UNCITRAL, *supra* note 17, at 1, ¶ 1 (footnote omitted).

⁴⁵ *Id.* at 149 (emphasis added); *see id.* at 149–83 (providing commentary and recommendations on the registry system).

⁴⁶ For a discussion of key aspects of the UNCITRAL Registry Guide, see Spyridon (Spiros) V. Bazinas, *Part IV in a Great UNCITRAL Saga: The UNCITRAL Guide on the Implementation of a Security Rights Registry*, ___ U.C.C. L.J. (forthcoming 2014). Recognizing the importance of international coordination among national security interest registries, the UNCITRAL Registry Guide recommends that: "States implementing a general security rights registry would be well advised to consult with States that have already implemented a general security rights registry and take into consideration the registry rules and procedures in those States." *UNCITRAL Registry Guide, supra* note 37, at 27.

⁴⁷ *See* WORKING GROUP VI, UNICITRAL.ORG, http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html (last visited June 2, 2014).

substance of a State's secured transactions law must be up to the task as well. Moreover, other important institutions would include adequate mechanisms for enforcing debt and security interests, as well as adequate insolvency laws. The jurisdictions most likely to benefit from an international registry, emerging market States, are those in which these institutions may be the weakest. Even the successful implementation of an international registry with widespread participation alone is not sufficient; States would also need to continue efforts to improve these other conditions in order to increase the availability of credit.

IV. THE PROPOSAL: AN INTERNATIONAL SECURED TRANSACTIONS REGISTRY OF GENERAL APPLICATION

This section provides a basic outline for an international registry of general application. In particular, it addresses the scope and structure of an international registry and also identifies benefits that a registry might provide. It then considers various alternatives for the creation, implementation, and operation of an international registry, including the nature of its organic instrument. Finally, it assesses the feasibility of an international registry.

A. Scope and Structure of the Registry

The international registry envisaged here would be one of general application. That is to say, it would apply to all movables — tangible and intangible — covered by an adopting State's domestic secured transactions law. However, a State could elect to carve out from the registry's scope the types of movables subject to a specialized registry under the law of that State, such as aircraft, ships, railway rolling stock, motor vehicles, or intellectual property. This reflects the fundamental principle that the international registry would constitute the domestic secured transactions registry for each adopting State. Of course in the case of a Contracting State subject to the Cape Town Convention, the international registry of general application would not cover objects, associated rights, or proceeds covered by that convention.⁴⁸

The international registry would be operated by a registrar with the necessary expertise and experience. The Registrar would likely be a private entity, possibly even a public-private partnership such as that used by the Cape Town registry.⁴⁹ Like the Cape Town registry, the international

⁴⁸ See UNIDROIT, *supra* note 2, art. 6. Likewise, were the Rail or Space Protocol to enter into force the relevant international registries under either of those protocols, and not the international registry of general application, would be applicable to property covered thereby.

⁴⁹ See note 15, *supra*. Competitive bids could be solicited during the process of selecting a registrar.

registry would be a purely electronic registry that would be operational for registrations and searches twenty four hours a day and every day of the year. Also as with the Convention, an adopting State could be permitted to provide that registrations in the international registry must be entered through designated entry points located within the State.⁵⁰ Given that the international registry would be accessed via the internet, there would be a significant amount of flexibility as to the physical location of the registry and the operations of the Registrar.⁵¹

To the extent consistent with the essential attributes of a modern electronic secured transactions registry (as reflected by the UNCITRAL Registry Guide), the international registry would accommodate, where necessary, each adopting State's domestic secured transactions law. For example, the UNCITRAL Registry Guide recognizes that States must have some flexibility to deal with the identifiers of natural persons for purposes of registration and searching.⁵² Implicit in this approach is the underlying assumption that the international registry system would maintain registry records for each adopting State that could be organized on a State-by-State basis.⁵³ Even so, the international registry would likely result in substantial harmonization among the separately maintained and operated national registries that exist today.⁵⁴ An alternative approach could be provided if, for example, member States of a regional economic organization agreed

⁵⁰ See UNIDROIT, *supra* note 3, art. XIX; see also, e.g., 49 U.S.C. § 44107(e)(1) (1994) (designating Federal Aviation Administration Civil Aviation Registry as the United States Entry Point to the International Registry). There are downsides to designated entry points. While States may wish to use the entry points as a means of collecting information, the information could be provided directly to the international registry, which could redirect the information to the relevant States. Alternatively, States may wish to block or vet certain registrations. This could provide an environment conducive to corruption and might permit States to preserve old systems of collecting and maintaining transaction documents, which would negate or diminish efficiency gains. On the other hand, in States where broadband access is an issue or in which there is local assistance for those accessing the international registry, if executed properly, local entry points could provide net benefits. See *infra* note 61 (discussing local assistance); *infra* note 75 (discussing broadband access).

⁵¹ Whether and the extent to which internet access could be problematic for some States is discussed below in Section IV.D.

⁵² See UNCITRAL REGISTRY GUIDE, *supra* note 37, at 67–71.

⁵³ The registry could consist of a single database containing all registrations for all adopting States. The database could be organized, sorted, and searched on a State-by-State basis. Under this structure, an interested person could search against the grantor identifier X Co. in the State A registry. The grantor identifiers would be sorted by grantor location and such a search would turn up only registrations against that identifier located in that State.

⁵⁴ However, differences in the data content of registrations would no doubt continue to vary from State to State. For example, some States insist that “statistical” data be submitted with each registration, such as the grantor’s gender, size, industry, etc.

that the international registry would maintain a single combined registry for debtors located in any member State.⁵⁵

The harmonization of registry practices and procedures would not require harmonization of an adopting State's underlying substantive secured transactions law—so long as the system of perfection and priority under that law embraced a grantor-identifier-based⁵⁶ registration notice regime.⁵⁷ Indeed, creation of an international registry could provide a strong (and useful) incentive for States to adopt such a system in their secured transactions laws as a condition for adopting the international registry. Moreover, engaging a State in connection with an international registry could also provide an opportunity to engage the State in modernization of substantive secured transactions law more broadly.

The general international registry would need to address the issue of language used in each adopting State's registry for inputting data, indexing, and searching. This is exactly what the UNCITRAL Registry Guide contemplates on a State-by-State basis for national registries. As there explained:

[A Registry] Regulation typically would require registration information and search requests to be expressed in the official language or languages of the State under whose authority the registry is maintained. While the State could also authorize the use of other languages, this would undermine the efficiency and transparency of the registry record unless

⁵⁵ The seventeen West and Central African States that are members of OHADA would be a perfect fit for this approach inasmuch as they have adopted a uniform law on security interests. *See* Acte Uniforme Portant Organisation Des Sûretés [Uniform Act Organizing Securities], Apr. 17, 1997, LE JOURNAL OFFICIEL N° 3, available at <http://www.ohada.com/actes-uniformes/458/uniform-act-organizing-securities.html>.

⁵⁶ The grantor identifier could be the name of the grantor or another identifier, such as a registration number for the identifier as issued by the registry. *See generally* UNCITRAL REGISTRY GUIDE, *supra* note 37, at 51 (discussing grantor identifiers and grantor-based organization of registries). Secured creditor identifiers presumably could be based on the same system as that employed for grantor identifiers.

⁵⁷ While the UNCITRAL Registry Guide is based on the idea that a State following its recommendations also would embrace the substantive framework outlined in the UNCITRAL Secured Transactions Guide, it only would be necessary for a State to adopt the UNCITRAL Secured Transactions Guide's and UNCITRAL Registry Guide's *registration-related* principles. *See* UNCITRAL REGISTRY GUIDE, *supra* note 37, at 5:

[I]n order to implement the recommendations of the Registry Guide, a State would need to have in place or be prepared to enact a law that provides for, a notice-filing system (*i.e.*, for the registration of notices, rather than transaction documents) and that treats registration as a method of making a security right effective against third parties, or at least as a method of determining priority (rather than of creating a security right). *See* also text at note 19 (describing notice-filing systems).

the typical registry user in the enacting State could reasonably be expected to know that other language.⁵⁸

Name-based identifiers provide special problems with regard to languages, but these same problems arise in the case of a national registry as well.⁵⁹ However, the UNCITRAL Registry Guide's expectations concerning applicable languages used in national registries notwithstanding, in developing an international registry attention should be given to the considerable costs that would be imposed by requiring the registry to deal with the languages applicable to each adopting State. A middle ground would be, for example, selection of a handful of widely used languages, such as the official languages of the United Nations.

B. *Benefits of an International Registry*

With the requisite international cooperation and with the UNCITRAL Registry Guide as a roadmap, one could expect that an international registry could be constructed which is both state-of-the-art and a substantial improvement over many (if not all) of the national registries of adopting States that it would replace. In short, an international registry could offer adopting States the prospect of a better registry.⁶⁰

The substantial harmonization that would result from several States embracing a single registry also could offer substantial benefits. Repeat players in cross-border transactions who regularly register and search against debtors in multiple adopting States would become familiar with the international registry. Moreover, some creditors likely would find the international registry more user friendly than national registries designed primarily to interface with locals.⁶¹

An international registry also would have enormous potential for the reduction of costs. Redundant costs of personnel, facilities, equipment, software, and other capital investments and operating expenses for multiple national registries could be reduced through consolidation under the framework of an international registry.

⁵⁸ UNCITRAL REGISTRY GUIDE, *supra* note 37, at 59. The Registry Guide recognizes the need to accommodate situations in which the name of a debtor (or secured creditor), as its identifier, is in a language different from that used by the Registry. *Id.*

⁵⁹ *Id.* at 59–60.

⁶⁰ In addition to the prospect of an international registry being superior to national registries from technical and performance perspectives, an international registry might inspire enhanced confidence in the integrity of the system. In some jurisdictions, registries have reputations for corruption.

⁶¹ Insofar as users are providers of micro- or small-financing, they may be relatively unsophisticated. Moving from a local registry to an international registry would require that assistance be provided to resolve challenges based on accessing and using an international registry.

It is entirely plausible to imagine the United States signing on to the international registry for purposes of financing statement filings under the various versions of U.C.C. Article 9 as enacted by states of the United States and other U.S. jurisdictions. Over the years critics have bemoaned the lack of uniformity and unnecessary costs associated with multiple filing offices in the United States and some have proposed a centralized, national filing system.⁶² The international registry contemplated here could provide such a regime on an international basis.⁶³

In sum, an international registry offers the prospect of harmonization as well as improvements over existing registries at a lower cost. Moreover, the existence of such a registry could provide encouragement for a State to adopt a modern secured transactions law as it would have access to an already functioning registry. This would spare a State from a great deal of effort on the domestic level.

Of course, an international registry might also have a downside. For example, organizational savings on personnel costs might not be viewed favorably by those who lose their jobs as a result. Also, the costs of implementing an international registry must be weighed against the costs of strengthening national registries. An international registry could also expose users to increased risks were the registry to experience a catastrophic failure. Such a failure could affect the registries of all participating States. But any thorough cost-benefit analysis of a prospective international registry would be premature. To reiterate, the goal of this essay is to initiate a conversation and to invite a dialogue. Identification of the potential upsides of an international registry should be sufficient to meet that goal.

C. *Creation, Implementation, and Operation of an International Registry: Convention, Multilateral Intergovernmental Contract, and Other Approaches*

Assuming that a consensus were to emerge that an international registry of general application would, on balance, be a good idea, it would be

⁶² In recent years, the U.C.C. filing systems in the United States have improved enormously. In addition, as a result of changes in the rules on where to file, fewer filings are required. See U.C.C. § 9-301(1) (outlining the basic rule that the law governing perfection is based on the location of the debtor). On the other hand, a single central registry would have advantages and cost savings over multiple state registries even if the latter were of high quality. See, e.g., *Report of the Uniform Commercial Code Article 9 Filing System Task Force to the Permanent Editorial Board's Article 9 Study Committee (May 1, 1991)*, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9: APPENDICES TO REPORT, 19 (December 1, 1992) (explaining how some who participated in the study favored a modern, electronic, national filing system to replace existing state filing systems).

⁶³ Under an international convention framework, discussed below in Section C, adopting States with territorial units (such as Canada and the U.S.) could adopt the regime for all units or only units designated by declaration. See, e.g., UNIDROIT, *supra* note 2, art. 52.

necessary to consider the process and structure of making the registry a reality. An obvious (albeit path dependent) approach would be the creation of an international registry pursuant to a multistate convention—following in the footsteps of Cape Town. This approach would offer several advantages, chief among them would be mimicking, in part, the enormously successful path of the Cape Town registry. This would also ensure widespread international consensus and support.⁶⁴ Moreover, it would demonstrate the permanence of the commitment of adopting States. Moving in and out of a registration system could play havoc with a State's framework of secured transactions law. Following the Cape Town example, a convention on an international registry could mandate an international intergovernmental organization as the supervisory authority for the Registrar and registry.⁶⁵ Such a supervisory authority could allay any concerns that States might have about turning over the entire responsibility for the international registry to a private entity.⁶⁶ Also following the Cape Town example, a convention could provide methods for keeping the registry up to date through regulations issued by the supervisory authority, through the development of a framework for review conferences, and through modifications of the convention.⁶⁷

Another possibly feasible alternative for development of a registry would be a purely contractual approach. This approach might take the form of a group of States entering into a multilateral contract with the operator of a registry. The absence of an international intergovernmental organization acting as a supervisory authority over the Registrar and registry would make this approach less desirable for some States and completely unacceptable for others. While it is conceivable that an intergovernmental organization could serve as a supervisory authority under a contractual arrangement unrelated to a convention, it is highly unlikely to occur. Moreover, under the law of some States such a contractual arrangement would have the same binding legal character as a convention or treaty. The States simply would have omitted the process of

⁶⁴ The necessity of obtaining adoptions of the international registry by a critical mass of States with the resulting prospect of generating sufficient registrations and other registry actions—and fees—is considered below in connection with the feasibility of an international registry. See discussion *infra* Section IV.D.

⁶⁵ UNIDROIT, *supra* note 2, art. 17; UNIDROIT, *supra* note 3, art. XVII.

⁶⁶ Yet one must anticipate some potential concerns of States about the entirety of their registries being maintained outside of their territories. That Cape Town has been so well received does not necessarily translate to a system for higher volume, lower value transactions. Perhaps a formal advisory body for the supervisory authority, consisting of representatives from each adopting State, would enhance the political acceptability of the international registry.

⁶⁷ See UNIDROIT, *supra* note 2, arts. 17(2)(d), 61; UNIDROIT, *supra* note 3, art. XXXVI. Provisions also should be made for local regulations on access to the international registry, especially if a State were to designate a local entry point or points.

expert meetings and a diplomatic conference under the sponsorship of an intergovernmental organization.

Another approach would be for several States to choose the same contractor for outsourcing their registry operations. That approach might or might not be supplemented by a treaty or enactment of a model law that would harmonize substantive secured transactions law.

Finally, either as an alternative to an international registry or as a part of the process of creating an international registry, States could benefit enormously from the development of internationally accepted standards for registries of general application and electronic registries. Such standards could use the UNCITRAL Registry Guide (including its Model Law once developed), as well as the Cape Town registry, as points of departure. Widely accepted standards would promote a market in electronic registry solutions (software and platforms) and operations using Point-to-Point Protocol.⁶⁸

On balance, my tentative view is that a convention adopted under the usual auspices appears to make the most sense. For convenience, the remainder of the essay proceeds on the assumption that an international registry would come into being only through an international multilateral convention. But adopting a convention under the traditional approach would have the downside of the substantial costs of experts meetings and, eventually, a diplomatic conference. Inasmuch as that consideration relates primarily to the feasibility of an international registry, it is discussed next in Section D.

D. Feasibility of an International Registry

This section considers the feasibility of an international registry of general application from three perspectives. First, would there be sufficient interest and support for an international registry to attract an international intergovernmental organization to be a sponsor? Some of the costs associated with this process are mentioned above; however, there would also be opportunity costs associated with pursuing such a project. Both UNIDROIT and UNCITRAL have invested heavily in the field of secured transactions, which means that each has a substantial stake. Would either have an interest in pursuing the registry project? Perhaps the more relevant question is to ask whether either would have an interest in *exploring* the merits and feasibility of the project. One could imagine the two joining

⁶⁸ As explained in *Webopedia*:

PPP . . . [or] Point-to-Point Protocol [is] a method of connecting a computer to the Internet. PPP is more stable than the older SLIP protocol and provides error checking features. Working in the data link layer of the OSI model, PPP sends the computer's TCP/IP packets to a server that puts them onto the Internet.

PPP, WEBOPEDIA, <http://www.webopedia.com/TERM/P/PPP.html> (last visited June 30, 2014).

forces as co-sponsors, similar to that seen in the UNIDROIT-ICAO partnership on Cape Town, with one or the other taking primary administrative responsibility. UNCITRAL Working Group VI meetings, for example, could simultaneously be joint meetings with UNIDROIT experts. UNIDROIT brings to the table its experience with the Cape Town international registry and UNCITRAL offers its experience with the UNCITRAL Secured Transactions Guide, UNCITRAL Registry Guide, and now the Draft Model Law. Conceivably, either the United Nations, with support of UNCITRAL, or UNIDROIT could serve as a supervisory authority for an international registry.⁶⁹ More plausibly, organizations such as the World Bank or the World Trade Organization could be candidates for that role. At this stage, the international registry project appears plausible enough to make it worthwhile for both UNCITRAL and UNIDROIT to engage in a conversation considering the option—which is the point of this essay.

A second perspective would ask whether there is sufficient support for an international registry among States. Some States that have already modernized their registries might resist participating in an international registry for that reason. For them, the project might be too late. Moreover, notwithstanding the success of the Cape Town registry, some States, as a political matter, might be more reluctant to “surrender sovereignty” to an international registry of general application than they would for a more specialized registry with international dimensions. Also, for the project to be feasible in practice it would be necessary for a critical mass of States to adopt the convention. With the goal of the international registry being self-sufficient, the critical mass would be determined based on the numbers of expected registrations and other fee-generating registry actions (such as searches, assignments, certificates, and the like) that a group of States would generate. Typically a multilateral convention enters into force when a specified minimum number of States have become parties.⁷⁰ In the case of an international registry of general application, it might be necessary to add as a condition to entry into force a requirement that the critical mass of transactional volume be achieved. This could be done by requiring the supervisory authority to create a budget and to appoint an expert committee or independent expert to certify an estimate

⁶⁹ For example, the United Nations, working through UNCITRAL, has established a Transparency Registry that is “a central repository for the publication of information and documents in a treaty-based investor-state arbitration.” *Transparency Registry Introduction*, UNCITRAL, <http://www.uncitral.org/transparency-registry/en/introduction.html> (last visited June 2, 2014).

⁷⁰ See, e.g., UNIDROIT, *supra* note 2, art. 49(1) (describing three States); UNIDROIT, *supra* note 3, art. XXVIII (describing eight States).

of expected fees from adopting States.⁷¹ As a condition to the actual creation and operation of an international registry, pre-commitments (in the form of adoption of the convention) from the requisite critical mass of States would be required. In considering feasibility from this perspective, one must bear in mind that the fees that could be charged by an international registry of general application are likely to be considerably smaller per registration or other action than the fees that can be borne by transactions concerning expensive aircraft objects in the context of the Cape Town registry. In some States, fees are very low currently, and a significant increase under an international regime would discourage interest and participation. Moreover, in some States it likely would be necessary to make special arrangements for the local collection of fees and payments to the registry.⁷²

A final perspective would ask whether the international registry could be successful with regards to the quality of operations and services. Once again, the experience with the Cape Town registry and the performance of its Registrar offers a basis for substantial optimism. But perhaps the more appropriate inquiry is a comparison of the likely quality of the international registry with the quality of national registries, many of which have been or would in the future be created from scratch on a state-by-state basis.⁷³

In considering the feasibility of an international registry of general application, it is useful to consider Jane Winn's thoughtful analysis of the success of the Cape Town registry. She concludes that the Cape Town registry "may be the most successful global electronic commerce network every built in terms of the speed with which it was developed and implemented, and the dearth of controversy surrounding its operation."⁷⁴

Winn identifies several factors to which she attributes the success of the Cape Town registry. One is the enormous efficiency gain that the Cape Town registry has provided working in tandem with the economic benefits

⁷¹ These concerns were addressed in the Rail Protocol by conditioning the initial entry into force of that protocol on certification by the UNIDROIT Secretariat confirming that the International Registry was fully operational. *Rail Protocol*, *supra* note 8, art. XXIII(1)(b). This would provide flexibility in case it would be impractical to actually operate the registry for lack of adequate volume.

⁷² Serious attention to the economic sustainability of an international registry would be essential. The Irish government and SITA SC are content for Aviareto to operate the Cape Town registry on a not-for-profit basis. A global international registry would require substantial risk and investment and it is possible that only a profit-making opportunity could provide the necessary incentives.

⁷³ In some States, however, the lack of adequate broadband internet access could be an obstacle to adopting a modern registry, whether on an international or domestic level.

⁷⁴ Winn, *supra* note 12, at 26–27. Winn compares the Cape Town registry's success with other global electronic commerce networks—the airline computer reservation system, the SWIFT financial network, and payment card networks.

of Cape Town's substantive rules.⁷⁵ To the extent that States that would adopt an international registry of general application also would have moved to modernize their secured transactions laws, one might expect similar gains. On the other hand, it may be that many national secured transactions registries today are more efficient than the various pre-Cape Town aircraft registries. Another factor is Cape Town's mandatory formal regime. Registration of an international interest in the Cape Town registry is the only method of ensuring the effectiveness of the interest against third parties and the priority of the interest.⁷⁶ Presumably the same circumstances would apply in the case of a modern domestic secured transactions law working alongside an international registry of general application.

Winn also explains that the AWG, being confined to a small number of manufacturers and financiers working with airlines, managed to solve significant collective action problems.⁷⁷ She identifies these problems as follows: "[T]he cost of financing acquisition of aircraft was increased for all borrowers because lenders' rights were uncertain, but those rights could not be made certain without the cooperation of a critical mass of interested parties."⁷⁸

Many collective action problems relating to the substantive rules that would apply to an international registry of general application have been addressed already in the process of finalizing the UNCITRAL Registry Guide and will continue to be addressed in preparing the Draft Model Law. A similar approach would be appropriate in the process of producing a convention on an international registry.

Another factor bearing on the Cape Town registry's success that Winn identifies is the maturity of digital signature technology employed in regulating access to that registry.⁷⁹ She notes that parties with accounts must take steps to protect the digital signatures issued to them by the registry. She also notes that the high value of aircraft objects makes it cost-effective for parties to keep the signatures secure.⁸⁰ However, she observes that "[m]andating this level of security could cause electronic commerce systems dealing with *less valuable or more varied assets to fail*."⁸¹ It certainly is true that an international registry of general application would involve collateral that is "less valuable" and "more varied" than aircraft objects covered by Cape Town; however, it does not follow that such a registry

⁷⁵ *Id.* at 43.

⁷⁶ *Id.* at 43–44.

⁷⁷ *Id.* at 44–45.

⁷⁸ *Id.* at 45.

⁷⁹ *Id.* at 45–46.

⁸⁰ *Id.* at 46.

⁸¹ *Id.* (emphasis added).

would infeasible or would fail. There is no reason why an international registry would require security any greater than that State would provide for a national registry. Different adopting State's also might choose different levels and means of security, although that might adversely impair the harmonization to be achieved through an international registry.⁸²

Another factor that Winn identifies is the "successful allocation of labor between . . . [the registry's] staff and its computer systems" in the organic development of the Cape Town registry.⁸³ Management of the registry has been executed well and continues to be effective even as the registry's environment continues to evolve.⁸⁴ There is no reason to believe that management of an international registry of general application could not function just as well.

Finally, Winn points to the governance structure, and the accountability of the Registrar to the ICAO (the registry's supervising authority) and its shareholders as justification for the registry's success.⁸⁵ Any process to create an international registry of general application likewise should take into account these issues of governance and accountability.

At this preliminary stage, there seems to be a reasonable basis for a cautiously favorable view of the feasibility of an international registry of general application.

CONCLUSION

In this essay, I have sought to make the case for opening a serious conversation about the development of an international secured transactions registry of general application. Such an international registry could plausibly provide an improvement over existing and prospective national registries at a lower cost and would harmonize aspects of the registration process for adopting States. It also is plausible that the creation, implementation, and operation of such a registry would be

⁸² For example, the registry could be structured so that each adopting State could determine whether digital signature technology would be a requirement for a registration. While issues of internet security are beyond the scope of this essay, it bears noting that a decision not to adopt uniformly a form of public key infrastructure (PKI) would be significant. As explained by TechTarget: "A PKI (public key infrastructure) enables users of a basically unsecured public network such as the Internet to securely and privately exchange data and money through the use of a public and a private cryptographic key pair that is obtained and shared through a trusted authority." *PKI (public key infrastructure)*, TECHTARGET, <http://searchsecurity.techtarget.com/definition/PKI> (last visited June 30, 2014). In addition, if successful, an international registry of general application would play a critical role in the global financial infrastructure and would be a prime target for a cyber-attack. The international registry would require sophisticated internet and communications security.

⁸³ Winn, *supra* note 12, at 48.

⁸⁴ *Id.*

⁸⁵ *Id.* at 49–50.

feasible. Of course, there are reasons—rational and otherwise—why such a project would not succeed or even get started. For example, past experience suggests that some might claim to reject the idea on its merits; however, their actual motive might be discontent about not having come up with the idea first. Others might reject the project because they believe that an international registry project simply cannot compete with other worthy projects for the scarce resources of interested stakeholders.

What, then, should be the next steps in the process? First, it is my hope that individuals and organizations that are committed to the modernization of secured transactions law would give the idea of an international registry serious thought. Second, if it is sufficiently appealing, then perhaps a symposium or colloquium sponsored by one or more of the interested organizations would be in order. I have in mind a working session—more than a series of presentations.⁸⁶ Given that a registry would be feasible only with sufficient State support to sustain its business model, perhaps a survey also should be considered with a view towards ascertaining the potential State and industry support (or lack thereof) for such an international registry. Finally, if after a preliminary investigation an international registry finds sufficient favor, a detailed and technical feasibility study would be a logical next step. Only after such intense investigation and research should a formal process be commenced.

At a minimum, I hope that this essay will provoke an interesting dialogue.

⁸⁶ By way of example, a morning or afternoon session of a meeting of UNCITRAL's Working Group VI might be given over to the discussion of an international registry project. That approach would ensure that many of the appropriate expert discussants would be present and others could be specially invited for the session. This would involve relatively modest marginal costs.