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The Role of Multilaterals in the Promotion of Modern Securities Law

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[At the outset let me note that this presentation represents my views and does not necessarily reflect the views of the World Bank Group or its Executive Directors.]

There has been a consensus for some time among the multilateral development banks about the importance of the reform of secured transactions regimes in improving access to finance. A number of studies have sought to empirically establish the proposition that an effective, modern secured transactions regime can reduce the cost of funds and expand the availability of finance to those who would not otherwise be deemed credit worthy. Some of my colleagues on this panel will address this issue. Although it has been difficult to show a cause and effect relationship between modernization of laws relating to security interests and expanded access to credit because of the number and complex interrelationships between the variables that affect access to finance, the correlation between modern legal regimes for finance and overall economic growth and expanded access to finance appears to be well established.

The World Bank and the regional development banks, in particular, the European Development Bank, the Inter-American Development Bank, and the Asian Development Bank, since the 1990's, have given particular attention to the modernization of laws relating to security interests. All of these entities developed guidelines for the reform of secured transactions regimes, including, in some instances, model legislative provisions.

These efforts focused on defining new interests in property (thereby "unlocking dead collateral"), and more generally, enabling the creation, perfection and enforcement, with due regard to priority, of non-possessory security interests in movable property.

Moreover, in addition to the "economic development" rationale for the modernization of laws relating to security interests, the Asian Financial Crisis of the late 1990's exposed the heightened systemic vulnerability of financial systems whose legal infrastructure was outdated and unable to cope with the complex relationships of modern finance and commerce. In 1999, the Financial Stability Forum (a grouping of finance ministers and finance sector regulators of the G-7) identified the strengthening of Creditors Rights and Insolvency Regimes as one of the 12 fundamental areas necessary to support economic development and reduce the systemic vulnerability of the financial sector in developing countries. The Financial Stability Forum mandated that the IMF and the World Bank use standards, or general principles of best practice, in each of the 12 areas to develop comparative diagnostics that would reveal weaknesses and serve as a road map for reform. As part of this process, the World Bank, in consultation with a number of international bodies including UNCITRAL and its expert working groups in these matters, developed the Principles and Guidelines for Effective Insolvency and Creditors Rights Regimes; these principles identified the essential elements of effective creditor's rights regimes and articulated the purposes, goals and functions that the system needs to encompass. An effective regime for security interests in movable property is an essential element of the Principles.

At the same time, there was a growing consensus in a number of developed countries that even their own secured transactions regimes were outdated and cumbersome, and the significant jurisdictional variations among these highly developed systems was adding unnecessary costs and delays to global finance. Not

only did the interdependence among economies of the various developed nations create a need for some degree of convergence on the treatment of security interests to facilitate cross border financing, but the revolution in communication and information technology and the rapid growth of electronic finance and commerce resulted in the creation of new financial products, relationships and expectations that existing laws could not easily address. The United States, New Zealand and France were among the nations who chose to revisit and modernize their laws relating to security interests.

There are four primary drivers that explain the importance given by the international community to the modernization of laws relating to security interest in moveable property: (i) supporting economic development, (ii) enhancing the stability of financial systems, (iii) facilitating globalization by encouraging some degree of convergence of diverse systems, and (iv) addressing the new products, transactions and jurisdictional challenge arising out of the revolution in electronic commerce and the revolution in information technology. Against this background, the UNCITRAL Guide represents, in effect, the international community's effort to reconcile the various separate projects in this area and to respond in a single effort to these four drivers.

The World Bank shares with the other multilateral development banks the view that reform of collateral systems can improve access to finance, and therefore contribute to economic growth. The Finance Sector Development strategy recently adopted by the Board in April 2007 identifies the reform of collateral systems as a priority for the Bank's work in the finance sector.

With the UNCITRAL Legislative Guide nearing completion, the question now is "how should the World Bank and other multilateral development banks use the Guide?"

First, let me note that the secured transactions Guide touches on some of the most fundamental areas of domestic law and covers matters that are and should be the subject of careful policy judgments on the part of domestic legislatures and policy makers. With that caveat in mind, the Guide can serve as a common reference point for policy makers, for developed and developing countries alike. The Guide and the detailed policy discussion and the proposed legislative solutions should be used to trigger inquiry, analysis and debate within the country, among legislators, jurists, and stakeholders. The Guide should not be a prescription; it should not be a device for the circumventing or substituting for a deliberative, participatory legislative process within states. The very complex debates about policies and the costs and benefits of various legislative designs that took place in Vienna and NY in the preparation of the Guide, will and should be replayed in greater detail and with greater specificity in the reforming countries. Our experience has taught us that for reforms to work -- for new rules to be accepted and implemented -- the new laws must be perceived as legitimate; they must reflect the needs and expectations of the various stakeholders; and a consensus must develop on the need for the reforms, their form and the timing and method of their implementation. Moreover, law reform in this area is not only a technical legal matter, but it is more importantly a matter of reflecting particular economic and financial realities, goals, and policy preferences. In addition, the mechanisms adopted must be consistent with the capacity of the system and its institutions.

It is fortunate that we already have an example of how the Guide might be used to focus debate on reform: In June 2006, a group of Swiss scholars and legal practitioners convened an academic conference to discuss the draft UNCITRAL Guide in the context of the 100-year old Swiss secured transactions law and its modernization. The conference examined key policy positions taken by the draft Guide as well as the legislative solutions offered in light of their effectiveness from the Swiss perspective.

I commend the publication to you: the essays present an excellent picture of the Guide "in action" -- that is, the consequences of its recommendations to an existing, reasonably well functioning secured transactions regime. Now consider how much more complex the reform debate would have to be in a less developed country.

There is a great degree of divergence among developing countries in terms of the stages of development, the extent of globalization, legal traditions, local practices, policy preferences and priorities for development. There is also great disparity within developing countries between the modern commercial sector and the poor: indeed, the MICs themselves account for well over half of the world's poor -- those who live on less than \$2 a day. Reforms in developing countries will need to take into account these economic disparities and the existing capacities of domestic institutions. It is difficult to imagine how a

system that might work well in Switzerland would be able to answer the policy and development needs of significantly less developed countries without significant adaptation.

Globalization has by-passed some developing countries. Many of the problems facing developing countries require very specifically tailored solutions. In the development business, one size rarely fits all. Local problems need local solutions. Moreover, the complexity and difficulty of legal and institutional modernization and reform has taught us the importance of encouraging a participatory, deliberative, legislative process within nation states – a process that will require the balancing of competing interests and legislative compromises. Ideally, in the domestic law making process, all stakeholders in a relevant jurisdiction should have an opportunity to have their views duly considered, so that the legislative solutions would be crafted by policy makers within the nation state to suit their particular circumstances. A legislative guide would have fulfilled its primary purpose if it empowers the domestic legislative process – if the Guide is consulted and discussed, and if the purposes and rationale of the more specific recommendations is duly considered, whether or not a specific legislative recommendation is itself adopted.

That said, I believe that the UNCITRAL Guide can be an important resource in any reform exercise: the general principles on which it is based – the purposes, functions and goals that an effective system should encompass – can serve as a basis of comparative diagnostics of national systems. The results of these diagnostics can be used to structure the dialogue with policymakers, economists and stakeholders to identify areas of concern and develop possible solutions. It is important that sufficient political will for reform is developed and that there is sustained interest on the part of stakeholders to support the reforms. The impact of any legislative reform on the local business environment would need to be studied, so that all reforms in related areas can be considered and the stakeholders can be better prepared for changes to be introduced. The need for dissemination, training and capacity building should also be considered. Attention should be given to how reforms should be introduced: whether they should be limited to certain sectors, whether they should be introduced in several stages to ensure acceptance of the reforms and the development of the necessary capacity. Reform is an ongoing process, and attempts to implement wholesale reforms have not met with success; the reforms required for modernizing laws relating to security interests are fundamental, and may require several years of careful implementation. It is important that the reforms address and are perceived to address immediate and local needs and that the national policymakers and legislature be in the driver's seat. Given the importance of a vigorous domestic legislative process to effective reform, and given that diversity of needs, each country should craft solutions appropriate to its needs and policy preferences. If we are successful in our modernization work, we should expect well-calibrated adaptation rather than uniformity and should be satisfied with a degree of workable convergence.

Thank you.