

Virtual Forum
Inter-American Law in Times of Pandemic
“IMPROVING ACCESS TO CREDIT POST COVID-19”
JULY 13th, 2020
Edited Transcript of Remarks

This session explained the importance of access to credit in the reconstruction of post-COVID-19 economies, particularly for the agri-food sector and SMEs, and considered the legal instruments designed for this purpose.

MODERATOR:

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PANELISTS:

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Dr. Jeannette Tramhel, Senior Legal Officer, Department of International Law, Secretariat for Legal Affairs

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Introduction by Moderator:

Welcome. My name is Dante Negro; I am the Director of the Department of the International Law at the OAS. I want to welcome you to this 12th webinar, which is part of the series of webinars that have been organized by the Secretariat for Legal Affairs of the OAS.

As you will recall, one of these webinars was held on June 22nd and concerned *Food Security as a Challenge post-COVID*. That session considered the role of international law as a vehicle to build resilience for food security in the wake of the pandemic. Today, we have a session on improving access to credit that will explore the importance of access to credit in rebuilding economies post-COVID, particularly 1) for the agricultural sector, given its importance for that sector as may be recalled from the discussions held at the June 22nd webinar, and 2) also for micro, small and medium-sized businesses [MSMEs]. We will consider the legal instruments designed for this purpose both at the OAS and also in other international organizations. For that purpose we have, as somebody said last week, “an all-star panel.”

We will start with **Dr. Valeria Piñeiro**, an economist who works for the Markets, Trade and Institutions Division at the International Food Policy Research Institute in Washington D.C. Then we will have somebody from home, **Dr. Jeannette Tramhel**, a senior legal officer in our Department of International Law at the OAS Secretariat for Legal Affairs, where she is in charge of all matters relating to private international law. Then we will hear from a very good friend of ours with whom we have been cooperating the past couple of years in a number of projects, **Dr. Marek Dubovec**, Executive Director of Kozolchyk National Law Center [NatLaw], Tucson, Arizona. Last but not least we will hear **Professor Anna Veneziano** from a sister organization with whom we also have been working very closely the past few

years. She is the Deputy Secretary General for the International Institute for the Unification of Private Law [UNIDROIT] based in Rome.

Each panelist will have 15 minutes to address the specific matter that they have been assigned. For clarification, the Concept Note that has been posted to the webpage can be consulted. This webinar will be conducted entirely in English. Unfortunately, we will not take any questions at the end because the purpose of this event is to generate some interest among stakeholders on this important matter of access to credit.

Panelist 1: Dr. Valeria Piñeiro – The Importance of Access to Credit – Now and Post-COVID

***Question:** Can you provide us with an overview of the importance of access to credit for the development of the agri-food sector, in the wake of the pandemic? Can you identify and explain major constraints, where, perhaps law acts as a barrier and needs reform?*

First of all, I would like to thank the OAS for this invitation, most of all to Jeannette for putting this panel together. It is really a pleasure to be here.

As we already know, access to credit is very important, particularly for the agricultural sector, which will be the focus of this panel. The agricultural sector, looking at it as a whole, includes the primary sector and agro-industry, but also, the restaurants, hotels and all the other sectors throughout the economy that are impacted by agriculture, or the production of the primary food products. It plays a key role from the demand or consumption side, and the supply or production side, but also, it is key for countries in terms of the entry or exit of foreign currency, and this will depend on if they are net food exporters or net food importers and I will go back to this in my presentation.

I would like to start by giving you some context, and by mentioning the impact time that this crisis has had, and that can be divided into three stages.

First, we have had the short-term effect. This we have already seen in the beginning of 2020 with logistics uncertainties and export restrictions imposed by some countries on food products. There were not that many but the most important one was, for example, rice; export restrictions were imposed by Vietnam on this product and really created some complications and some volatility in the global markets for this product. Then there was the logistical problem with food waste. At the producer side, this occurred when they were not able to harvest, because of lack of workers or problems in transportation. At the consumer level, we saw some hoarding on the part of consumers because of unemployment and of course, closures workplaces and schools.

Secondly, in the medium term, which is what we are living through these days, employment cuts continue and problems are arising in production chains and in the supply of inputs. This will be super important for the next year's production cycle. Impacts are beginning to be seen in terms of declining incomes and increases in food insecurity.

Thirdly, we also anticipate a long-term problem, when we start seeing a world recession and the probability of less nutritious diets that favor staple goods rather than fruits and vegetables. Like any other shock, the impact is transmitted to the economy through different channels. For this specific crisis, the transmission channels through which the crisis affects Latin America and the Caribbean are more complex, and can be seen in the following aspects:

1. Trade. The volumes of trade will be constrained in a recession and will decrease demand for agricultural products; international prices have been falling.

2. Macro. We see this in the exchange rate; again, food exporters vs. food importers will experience a difference in the impact on the exchange rate but also in inflation. The stimulus packages that governments have been imposing, the problems in logistics, and the changes in demand and supply will have some impact on inflation in each country.
3. Supply. We already mentioned supply cuts due to work restrictions, problems with mobility of workers and goods as well as transportation problems.
4. Demand. There will be income reductions because of lack of employment and a need for cash transfers from governments to households. Something that is important to note here is remittances, which are very important for some Latin American countries, especially in Central America, and the Caribbean; the World Bank has already said that a drop of almost 20% in remittances is going to be seen in the region.
5. Capital and financial markets. Capital outflows of \$US 100 billion and increasing international loans.

Summarizing, this crisis can be seen through three stages: IMPACT-TRANSMISSION-MITIGATION. The analysis of the policies that accompany each of these three stages, and their prioritization, will be very essential to understand.

I also would like to highlight a couple of peculiarities of the region that will help us understand the region's vulnerability to this crisis. The economies of Latin America started from a more delicate situation than the rest of the emerging and advanced economies to face the COVID-19 pandemic, for several reasons:

1. In the second half of 2019, growth in the region continued to be very weak.
2. Although the degree of trade openness is lower in the region compared to other emerging areas, some countries have a very high dependence on connectivity with certain economies; for example, Chile and Peru depend heavily on connection with China and Mexico with the United States. This is for the export of goods, but also for participation in global value chains.
3. Composition of exports and the important role of commodities in the region. Agriculture (and mining) play a key role and comprise a very high share of exports. If we look at the six largest Latin American economies, in all of them the export of primary products represents the highest share. Only Mexico shows the manufacturing sector with more than 50% of total exports.
4. Reduced fiscal space. As we know, in situations of crisis, capital outflows and currency depreciations, the most vulnerable economies are those with higher external debt or with greater financing needs. If we compare the current situation with that in the region during the 2008/09 crisis, we can see that Latin American countries have increased their external debt (especially Brazil and Argentina) with public debts greater than 90% of current GDP. The only country that is an exception in the region is Peru, which it was definitely better prepared for this crisis. And also, there are some other registered deficits in their current account balances for Latin America.
5. And, finally, the high level of informality in the economies would also play a key role in dealing with this crisis.

During the lockdown, supply chains of agricultural commodities, particularly that of perishables, faced some inefficiencies, such as poor access to marketing channels, inadequate transportation, improper storage, handling and processing, post-harvest losses and information asymmetry. This is highlighted by:

1. Transport and logistics costs. (There is a big difference between the looking at air and maritime transportation.) Air transport costs were on a record high affecting perishable products, while maritime transport have not had major increases in cost so far. However, we need to keep an eye on potential problems, now that ships are staying in port for longer periods. It used to be only one day in port and now they are staying at least three days. Also, we need to keep an eye on what is going on with sailors to make sure to switch; in general, they have been at sea for six or eight months, and then they are switched and they are having issues in being able to make it to the territories and to exchange workers (extra days in port and lack of empty containers in needed locations). There also have been some problems for trucks. For example, the border between Nicaragua and Costa Rica was closed for a while, although now that has been fixed. Another issue here is what happens with containers. There was a lag between where empty containers could be found to be taken from one side to the other.
Fortunately, all these problems - in terms of prices, with air freight being super high and maritime being a little bit flat - have been reversed this month, showing some signs of recovery.
2. International Prices. Compared to other years, the food price index of the FAO, is lower, far lower than it is usually. If we look at price variations in 2020 between January and May, we can see that prices for some products increased, especially oranges, because of the increased demand for vitamin C and also for rice, as I already had explained due to Vietnam's export restrictions of this good. But prices for the rest of agricultural products have been falling. There is now a gap between producer price and consumer price of food goods due, again on the producer side, to issues in getting the product to market, and then from the market the problems with logistics has increased their prices. So now we can see a big gap between producer and consumer prices, which is definitely an issue that needs to be monitored; increased logistics costs throughout the value chain.
3. Exchange rates – a matter for import capacity and trade competitiveness. One of the immediate outcomes of the 2020 COVID-19 crisis has been an adverse change in exchange rates in most LAC countries.
4. Credit markets are tightening. FAO has said in 2020, debt is soaring in lower-income countries. As in the case of the 2008/09 recession, the 2020 crisis is also expected to have a negative impact on credit markets, with developing countries being hard hit, given their high indebtedness in foreign currencies, sharply depreciating exchange rates and low commodity and energy prices, which make it harder to service these debts. In response to the COVID-19 crisis, many central banks around the world intervened by lowering interest rates.

One way to overcome some of these barriers could be the use of digitalization of procedures at customs and other smart technologies – artificial intelligence and block chain – alongside incentivizing the logistical role played by e-commerce and delivery companies. E-payments and e-transfers have been very important in some African countries and we have seen some of these in Latin-America, for example, the whatsapp case in Brazil.

On this, Jo Swinnen and Reardon just posted a blog at the IFPRI webpage which highlights the discussions about the vulnerability of the world's food systems and food supply chains looking at the roles of different types of supply chains, e.g. local vs. global, and the innovations that have been introduced in response to COVID-19. I would like to highlight the importance of differentiating between global chains (where the food or agricultural raw material is produced in one country and consumed in another) and domestic chains (where food is produced and consumed in the same country). Within domestic chains, we need to differentiate between those relying on small and medium enterprises (SMEs) in logistics, trade, processing,

and retailing; and those dominated by large-scale enterprises, including fast food chains, supermarkets, large processors, and big logistics firms.

Still, there are important differences among food supply chains in developing countries. Global food supply chains have been more resilient because trade is mostly undertaken by large enterprises in coordinated and capital-intensive supply chains (except, for example, meat processing in the US, which relies on labor-dense processing) that can mostly adjust to disruptions geographically and temporally. For example, Walmart can buy bananas from Peru instead of Ecuador. Similarly, adjustments can be made somewhat in product composition; the size of packages of flour, for example, can be modified for home consumption vs restaurants. Also, it is important to note that there has been a shift in vegetables, to produce these closer to consumers with vertical production and more intensive technology.

Moving to a little more of a micro perspective, ECLAC has estimated that the economic crisis caused by the coronavirus will cause the closure of more than 2.7 million companies, most of them micro-businesses, and the loss of at least 8.5 million jobs in Latin America. Reflected in that figure is that the vast majority of companies in the region have registered significant declines in their income and difficulties in maintaining their business activities, since they have serious problems in meeting their salary and financial obligations, and difficulties in accessing financing for working capital. Until now, companies have faced the crisis by postponing payments.

However, these measures assume that companies will generate profits with which to repay credit, taxes and deferred payments. But the IMF projects that GDP growth will decrease by 10% in Latin America this year (2020) and that it is not going to recuperate next year. It does not indicate that this will happen within a couple of years, most likely, the recovery of the business sector will be slow and gradual.

A survey carried out in Argentina last May, reveals that almost 60% of the families in the Buenos Aires Metropolitan Area suffered a fall in their income as a result of the unemployment generated by the pandemic. In Peru, almost 70% of people affirm that they have debts that have accumulated during the quarantine. The COVID-19 crisis has affected the supply and the demand side, affecting production and consumption at the same time.

Countries in the region have made a variety of political decisions to deal with the COVID-19 crisis. The packages often include fiscal and monetary measures, such as increasing public spending, allowing tax deferrals, or lowering interest rates. Also, some regulations have been softened in some countries as a way to support business continuity despite the current physical distancing measures.

On the fiscal front, additional spending is intended to protect the most vulnerable segments of the population, including those who are unable to work or have lost their jobs as a result of containment measures. Resources are transferred to workers and households by increasing coverage and unemployment insurance benefits and providing direct money transfers. Other measures focus on supporting businesses, helping them cope with falling earnings, and encouraging them to keep workers on the payroll. A typical measure in this regard is deferment of tax payments and social security contributions. The size of the fiscal stimulus packages being adopted in the Latin American and Caribbean region is considerable. The stimulus packages of some countries, like Brazil, Chile and Peru, have dedicated almost 7 % of GDP to this, which is comparable to the packages provided by advanced economies; other countries, like Honduras and Mexico, have not even dedicated 1% of their GDP to this.

Final message: Policies will be needed to mitigate the effects of the crisis. The answers will depend on the particularities of each country. Fiscal and monetary space is important. On the fiscal side, as I have already mentioned, are debt and access to international capital. On the monetary side, if they are net exporters or importers, the type of good they export will affect the appreciation or depreciation of their currency.

Dollarized countries, like El Salvador, Ecuador and Panama, do not have that instrument available, so they print money. Also to consider are infrastructure of pre-crisis social programs; production structure; if there is export of agricultural products, minerals or oil; dependencies on tourism; remittances received; the level of informality of the economy; as well as the recovery trajectory that occurs in each of the countries, which is represented in the curvature of the recovery trajectory as to whether or not they will have another peak.

Governments need to find a way to maintain cash flow for firms and individuals, but in doing so, they have to do it efficiently to avoid border problems.

Thank you very much.

Panelist 2: Dr. Jeannette Tramhel – Legal Tools to Improve Access to Credit

Question: *Can you explain how reforms to secured transactions laws or other legal instruments can improve access to credit, particularly for MSMEs?*

Good morning. Valeria has given us a wonderful explanation on the need for access to credit, particularly for the agricultural sector. As explained, this is because the agri-food sector represents a significant part of the economy in many countries within the region, and is vitally important both to their domestic economies and in export trade. She has also explained how the corona pandemic has exposed many of the vulnerabilities in the food system – both globally and at national and local levels – and how access to credit will be vitally important in the months and years ahead during the recovery and rebuilding phase.

Introduction: Access to credit is important for all types of business, large and small. Some international legal instruments that are particularly useful to MSMEs and others, such as those under the Cape Town Convention and its protocols, which will be mentioned by Anna, that are better suited to larger businesses.

To begin my remarks, I would like to point out that the Sustainable Development Goals call for improved access to credit for MSMEs in several of the individual goals. For example, in Sustainable Development Goals (SDG) #2, Food Security, target 2.3 seeks “to double incomes of small-scale producers, in particular women, [and other marginalized groups], including through secure and equal access [not only to land, **but also to other financial resources**]....” and SDG #8, Economic Growth, target 8.3 seeks to promote policies that support entrepreneurship and encourage the formalization and growth of MSMEs, **including through access to financial services**. In addition, access to credit is one of the elements considered by the World Bank in its “Doing Business” country rankings and its assessment on “Enabling the Business of Agriculture.”

In many parts of the world, lenders still prefer traditional forms of collateral - land and large equipment. What about those who don't have such assets? They are either unable to access credit at all, or only in “unsecured form” at very high rates of interest. This particularly true for women and other marginalized groups. In times of crisis like these, without access to credit, in order to obtain the liquidity to continue business operations or cash to survive, MSMEs may have to resort to selling off their business assets – their equipment, inventory, etc. and in the case of small-holder farmers, that means selling off seedstock or livestock. But what if these productive assets, these items of value, could instead... be used as collateral??!!

Secured Transactions: That is where secured financing becomes vitally important. Over about the last twenty years, a number of legal instruments have been developed to modernize and improve the domestic laws that govern secured lending. One of the first of these was developed here at the OAS: during CIDIP-VI, the *Model Inter-American Law on Secured Transactions* approved in 2002 - and during CIDIP-VII – the accompanying *Model Regulatory Regulations*, approved in 2009. Subsequently, UNCITRAL (the UN Commission on International Trade Law) developed its Model Law (2016) together with a number of

supplementary tools, such as legislative guides and practice guides. Similar models have been developed by other organizations.

In recent years, several states in Latin American and the Caribbean - and around the world - have engaged in reforms of their domestic legislation on the basis of these models. The overall objective is the same, namely, to replace outdated laws with a modern secured transactions regime that will facilitate access to credit. The main challenge, however, lies in the implementation. Moreover, one of the overarching goals of private international law reform is the harmonization and codification of domestic laws in order to encourage and facilitate international trade and commerce. This goal would be much more easily achieved if the reform efforts by individual states could somehow be coordinated. In fact, such an initiative is presently underway; starting in 2017, there have been a series of meetings held among the main entities called upon to provide technical assistance to states engaged in secured transactions reforms; these meetings have included the OAS as well as the World Bank, UNCITRAL, and UNIDROIT; aid agencies of state governments, such as USAID; academic and other entities, such as the National Law Center and the International Insolvency Institute. This work is in furtherance of the mandate from the OAS General Assembly, which has instructed the Secretariat: 1) to continue promoting the Model Law on Secured Transactions and 2) to continue dissemination of private international law, in collaboration with organizations engaged in this area (International Law, AG/RES. 2930).

Let me provide a few of the key elements of the Model Law to explain how it operates to improve access to credit. In many states, there is frequently a multiplicity of registries that depend on the type of collateral – there may be one registry for vehicles, another for intellectual property, and so forth. This creates both gaps and overlaps, resulting in confusion and inconsistencies. By contrast, a modern secured transactions regime is based on the following elements:

1) first, on the concept of the single “security interest” – even though that security interest can be in a wide range of moveable property – both tangible (such as vehicles, physical goods, inventory, etc.) and intangible (such as intellectual property). This requires a functional approach – in other words, it does not matter what the transaction is called – if the main function is that the borrower gives the lender “security” in some kind of moveable property and the lender is entitled to rely on the value of that property for payment of the debt, then in essence, it is a “secured transaction.”

2) secondly, it is based on a single, comprehensive registry – the secured transactions registry. All security interests are registered in this single public registry, using simplified procedures, without required interventions by third parties (such as notaries, which add to the cost); the registry is freely accessible and searchable, ideally free of charge or at a nominal cost.

3) third, the law provides a clear set of priority rules, based fundamentally on publication of registration. In other words - first to register, first to rank - the first creditor to register a security interest has first priority to the collateral.

4) fourth, it provides for extra-judicial execution. In other words, if the borrower defaults on the loan, the creditor does not need to initiate costly and time-consuming court procedures to resort to the collateral.

By providing for these elements, the Model Law and Registry Regulations can help establish the legal certainty necessary for a modern secured transactions regime. But undertaking the type of reform envisioned by the Model Law is not easy; it is a comprehensive reform that requires a “paradigm shift” - Sometimes it will require more than one single reform effort to “get it right.” However, the key message is that this is a vehicle said to “democratize” access to credit by making it affordable for those who need it most. And to help MSMEs withstand a crisis.

Reforms in the region have been undertaken by a number of states. The secretariat has collaborated on a recently published monograph that provides an update on the status of these reforms in the region and that should be available shortly.

Other Instruments: Reform of secured transactions law is a key first step; it forms the basis, or foundation, of a modern secured transactions regime. With that as a base, other instruments can be added that even further enhance credit availability. I have time only to mention two of these.

1) Assignment of Receivables: First, is receivables financing. Simply put, a receivable is a debt owed. I could sell you this coffee in exchange for an IOU for \$50, I could give or “assign” that debt to Marek in exchange \$50, and then Marek as “assignee” will be entitled to seek repayment from you, the original debtor. Those “receivables” represent value for many MSMEs. Now let’s add a few zeros and make that debt \$50,000 – imagine that you are in Mexico, I am in Guatemala, and Marek is in the US. When such transactions cross borders, things become more complicated, starting with the question of which state’s law should be applicable to different aspects of the transaction (should it be the law of the state of the original debtor? That of the assignor? The assignee?) The *UN Convention on Assignment of Receivables in International Trade (2001)* seeks to clarify a number of legal issues in this respect and thereby to remove some of the uncertainty, which will help facilitate increased access to lower-cost credit. It is an important companion - or supplement - to secured transactions reform.

2) Warehouse Receipts: The second area I would like to highlight is warehouse receipts financing, which is particularly important in the agricultural sector. At the end of the season, upon harvest, many producers have no choice other than to sell their produce immediately. This is because 1) cash requirements to pay debts and/or buy inputs for the next season; and 2) absence of any other mechanism. But at harvest an abundance of produce typically forces prices to their lowest levels (and some smallholders that sell their harvest at low prices are forced to buy back *their own produce* – for their own consumption - later on at much higher prices!) Access to credit would better enable such small-holders to weather such price volatility and to avoid the necessity of selling productive assets (seed or livestock) during times of crisis, to obtain liquidity.

It was out of concern for such lack of credit in the agricultural sector that prompted the OAS Inter-American Juridical Committee to take up a project in warehouse receipts finance. To explain the concept briefly, at harvest, a grower who deposits goods – say coffee - with a licensed warehouse receives a receipt that represents title to those goods; with that receipt, the grower is able to obtain a loan, secured by the stored goods as collateral. To clarify legal uncertainties around the use of this mechanism, in 2016, the Committee produced a draft set of Principles for Electronic Warehouse Receipts for Agricultural Products. These principles laid the groundwork for further work, which the Committee has put into abeyance, pending a decision on whether the topic is taken up as a joint project by UNCITRAL/UNIDROIT to develop a model law instrument.

There are a number of initiatives underway to develop international legal instruments that seek to improve financial inclusion and improved access to credit. But I would be remiss, if I did not take this opportunity to mention another important area of the law, that serves almost as a prerequisite to access to credit. That is the area of business registration and formalization. How is this relevant? Imagine an informal business and then consider how that informal business could obtain a bank loan – virtually impossible.

Simplified Business Registration: In many countries, registration of a business is complex, and therefore requires either a high-level of skills or assistance by a third-party, making the process time-consuming and costly. As a result, “formal” business start-up and registration is often out of reach for MSMEs, many of which, as a consequence, conduct their business activities in the informal sector. The figures are staggering;

in Latin America and the Caribbean, between 40-70% are employed in the informal sector. Without access to credit!!

The need for formalization has been recognized in the SDGs, specifically Target 8.3, which I noted previously, and specifically in relation to improving access to credit. An important legal instrument that can assist in this regard is the *Model Law on the Simplified Corporation* that was approved by the Inter-American Juridical Committee. The OAS General Assembly has taken note of the Model Law and instructed the secretariat to disseminate it as widely as possible.

As has been explained, simplified incorporation is an important initial step, but distinct from the entire process of business registration. Work on this broader topic has been ongoing at UNCITRAL in Working Group I since 2012 which the OAS secretariat continues to follow closely.

This has been a brief overview of key international legal instruments and how these can help to improve access to credit, a critical need for all kinds of business in the recovery and rebuilding phases post-COVID. This concludes my remarks and I turn the floor over to Marek, who will look at some of the immediate measures that have been taken by governments to improve access to credit during the pandemic.

Panelist 3: Dr. Marek Dubovec – Immediate Measures to Provide Access to Credit

Question: To what extent is the pandemic affecting countries in the region in their efforts to improve access to credit? How will this help (or hinder) efforts to “build back better” post-COVID? What are some of the immediate measures available to governments to assist with easing credit?

Introduction

Thanks to the organizers for inviting me to participate in this forum; to Dante for organizing this panel, to all of my co-panelists and to Valeria and Jeannette for setting the scene and reminding us that legal reform is just one step in recovery. Jeannette identified a number of areas of the law that ought to be taken into account; in addition to secured transactions, she mentioned projects on warehouse receipts, simplified business incorporation, to some extent also insolvency and property law. All of those need to be looked at and taken into account when devising a strategy for recovery. Valerie also touched on some regulatory aspects that I will also flesh out in my own presentation and which are an important part of this credit ecosystem. What I want to stress during my presentation is the need for a coordinated approach. We may have the most wonderful secured transactions law but if there are some disincentives in this broader ecosystem, then banks might be reluctant to lend.

I also wanted to acknowledge the event organized by UNCITRAL earlier today, which exactly highlighted these issues of security transactions and insolvency. To some extent there might be a difference in the focus of the two events; our focus here is not so much on insolvency but rather, secured transactions. In the area of insolvency, the issues are more pressing as companies file for bankruptcy; even though they may be viable, they are facing some temporary liquidity issues, so the measures are more of an emergency. In access to credit, what we are looking at is how important these instruments are, in terms of facilitating recovery.

Valeria mentioned a number of statistics that are important to our discussion. I want to highlight one of them, building on Jeannette’s explanation on receivables financing. In the context of receivables finance, the Bank for International Settlements, which is the standard setter for regulators, issued a paper last month with findings that the volume of receivables (the most common type of collateral for MSMEs) essentially equals the volume of outstanding corporate bonds. So that shows us the importance of this area of the economy and that the focus of the law should not only be on how to facilitate financial transactions with

financial instruments such as securities; obviously, this is not the kind of assets, as Jeannette explained that, MSMEs would typically have - what they have are most likely inventory and receivables.

Then the final point I want to highlight is in terms of this coordination effort. Jeanette had touched on some of the UNCITRAL instruments, particularly the receivables convention; indeed, there are different building blocks in this legal infrastructure, including the Cape Town convention that Anna will explain in a minute. So it is very important that coordination also occurs in that phase of implementing commercial law instruments; certainly, there are many models for members states of the OAS to follow.

The underlying theme of my presentation is coordination of private law and public, fiscal, monetary and regulatory measures to facilitate recovery as extraordinary measures expire.

Financial Institutions Propping Up Economy and Commerce

a. Commercial banks. So with that background, I want to highlight some of the key steps or actions taken, more generally on a global basis, but also regionally. What we have seen is an increasing role of different types of financial institutions as lenders, whether they are commercial banks, facilitating credit from their own funds, but also channeling credit that is dispersed or extended by public sector agencies to facilitate the flow of credit.

b. Development banks. We also have development and state-owned banks, which are quite popular and prevalent in the region whose role has been reactivated and ramped up in the pandemic. We also have a number of development regional institutions such as the Inter-American Development Bank and the World Bank. During the UNCITRAL forum earlier this morning, the World Bank mentioned that they will be extending US\$60 billion in finance globally.

c. Central banks. A key player in this path to recovery are the central banks, which, for the most part, facilitate transactions at a high level, but those actions and targeted policy also trickle down to the real economy. It is not just the transmission of the difficulties through the system, as Valeria has explained; it is also the other way around with the benefits flowing from the big players to the small players in the economy. For example, large corporations may benefit from corporate repurchase programs launched by central banks and this, in turn, enables them to extend more credit to their customers that they deal with in their supply chains. So, there are a variety of actions taken by a variety of lenders, some of which do not directly target MSMEs but the benefits trickle down to the MSMEs.

At the same time, we should also acknowledge some of the externalities. If you are one of these MSMEs that is part of a supply chain, when a large corporation benefits from a central bank program, this is great for you. But there are many MSMEs that are not part of these chains and they suffer as compared to MSMEs that are part of such chains. So some of these programs create externalities that need to be taken into account.

Access to Credit Measures

Now I will address some of the concrete measures that have been taken globally and in the region. Earlier during my UNCITRAL presentation, I divided them into three categories, namely, 1) private law, 2) public measures of a non-regulatory nature that do not concern capital requirements, and 3) capital requirements and the corresponding regulatory measures.

a. Private. In that first category we see a variety of measures that are being undertaken voluntarily by lenders, such as restructuring of debts (for practical reasons) or deferral of utility payments, interest payments and fees. Obviously, this is done for good measure and the “new normal”, given that there are no

secondary markets these days where the collateral may be sold. Yes, the law may give you the remedy to repossess the collateral, but while some items may have some market value, an old piece of machinery perhaps does not. People have different concerns on their minds today, rather than going to auctions and buying reprocessed machinery.

b. Public measures of non-regulatory nature. The more important measures have been taken by public agencies, whether these are government loans, including forgivable loans, such as in the United States, but also elsewhere in Brazil, Chile, Panama that launched these kinds of programs primarily with the purpose to retain employees. These are temporary measures that will expire, either at end of the year or within the one-year expiration date on them. So, we already need to start thinking ahead about what to do when these measures expire.

There are all kinds of other public measures to ramp up. For instance, increasing capacity of export credit agencies and credit insurers that “prop up” receivables financing, particularly in the international context where, especially today, the lender will need an extra level of assurance that the receivable will be paid.

The final important tool within this category of public measures are public guarantee schemes, which OECD identified as one of the two primary drivers of access to credit, along with secured transactions frameworks. Some are existing, such as in Japan and Korea at 6 and 7% of GDP while others are new, including those in Argentina, Brazil and Chile.

In the time period that we are living in, the secured transactions framework plays sort of a secondary role where market-based financing faces some difficulties, but these other public guarantee systems have been ramped up and they also create some externalities. For instance, in Chile after it was launched, delinquencies actually increased by 1.5%. Globally, these guarantees have been found to support business that are no longer viable, essentially creating zombie companies. So, when we look at different kinds of access to credit measures, we should also assess what sort of externalities they cause.

c. Regulatory measures. The third category includes other regulatory measures taken on the capital requirements side of the spectrum. Financial regulators and supervisors face challenges to maintain financial stability, preserve the functioning of core markets and to ensure the flow of credit to the real economy. On that I will just mention what I believe is a coordinated approach between commercial law reforms and regulatory reform. This can imbue positive effects; just as we are concerned here with providing legal protections to creditors to be able to clean up their balance sheets of non-performing loans, that is exactly the same concern of the regulator that wants to clean up the balance sheet of the banks. So how do we coordinate these overarching objectives to come up with an ecosystem that facilitates the achievement of their objectives? Obviously, there are measures and aspects that neither the law nor regulation can address. For instance, concerning valuation of the collateral, as I mentioned earlier, how do I put a value on the collateral in these circumstances if there is no secondary market. We have seen, for instance, that this is an issue in the aviation industry where the value of the collateral dramatically went down because people are just not flying. If a bank reposes an aircraft, what would they do with it? This affects determination *ex ante* as to whether or not they are able to extend a loan secured by an aircraft.

I see hope at the end of the tunnel, but I think all organizations should proceed in a coordinated fashion to create a coherent ecosystem. I have seen measures taken in the past that have delivered good benefits. For instance, in Mexico, they established an exchange for receivables, which is operating by nothing that facilitated receivables financing. We have seen some programs for the repurchase of loans that are secured with warehouse receipts, again in Mexico, by a governmental agency called FIRRA. So, there are these secondary mechanisms that facilitate transactions in the primary market. The role of secured transactions law is not only to facilitate an initial loan secured with a receivable, but also to facilitate a secondary transaction where, for instance, the bank would like to sell a pool of receivables into a bigger pool and

securitize those receivables or perform some other transactions that in turn generate more liquidity to channel into the primary market.

And finally, I see some benefits and promises in the blockchain area. There are a number of emerging applications to the supply chain issues that Valeria touched on, but we haven't seen anything that would be a panacea to the current problems. As we move forward with devising this ecosystem, technology will be playing an important part.

Thank you very much.

Panelist 4: Prof. Anna Veneziano

– UNIDROIT's legal tools on access to credit and food security and their impact on the current crisis

Question: *Can you explain how the MAC Protocol operates to improve access to credit? Are these various instruments intended to work together? Any other examples from within the “financial eco-system” where international law or model legislation can offer suggestions?*

Allow me even if only briefly to thank the Secretariat for Legal Affairs of the OAS for the invitation to UNIDROIT to participate in this panel and our Chair Dante Negro and Jeannette Tramhel in particular for organizing it. As a global intergovernmental organization, UNIDROIT has a significant and active membership in the Americas, and we are delighted that we are strengthening our ties and cooperation with the OAS.

I am also privileged to speak after Valeria, Jeannette and Marek, who have already highlighted the central role potentially played by international tools developed to sustain and enhance access to credit in the agricultural sector, especially in the aftermath of the Coronavirus economic crisis, and have already referred to some of the instruments developed by UNIDROIT or on UNIDROIT's current work programme.

And indeed, UNIDROIT has adopted, or is working on, various legal tools in the field of secured transactions and contract law relevant to our discussion today, which links access to credit to food security. All those instruments are complementary to those already developed by other organisations, including UNCITRAL and the OAS, and have benefited, or are benefiting, from their active participation as well as support and expertise of NatLaw, and not the least discussion in international fora such as the mentioned coordination initiative of the National Law Center and the International Insolvency Institute.

As suggested by the Chair with his questions, I will focus in particular on two of the already completed instruments developed by UNIDROIT, which are very different in nature and scope but converge in helping create an advantageous environment for investments in agricultural production:

- a) the Mining, Agricultural and Construction Protocol (“MAC Protocol”), a newly adopted treaty within the family of the very successful Cape Town Convention on international interests on mobile equipment, which provides an international legal regime for the financing of high-value, uniquely identifiable mobile equipment, among other in the agricultural sector. What is the significance and potential benefit of such an instrument especially in relation to the economic consequences of the present crisis?
- b) the “Legal Guide on Contract Farming”, a guidance instrument developed in cooperation to FAO and IFAD, relying on voluntary implementation, which applies to agricultural production under contract and contains a discussion of contract clauses, solutions provided by the applicable law and suggestions of best practices. Contract farming is often linked to credit arrangements in various ways (with participation of a third party financing the activity, or through direct financing by the contractor who supplies material inputs, technical know-how, credit etc.). One of its potential

benefits is to provide a secured output market and stabilised income for the producer. Together with the legal departments of FAO and IFAD we are now conducting an analysis of how this instrument can help solving contract disruptions caused by the pandemic as well as the containment measures taken by governments. I would like to share with you some of the questions we are considering in this ongoing discussion.

Before going back to the question raised by the Chair on the MAC Protocol, however, I would like to clarify that there are a number of UNIDROIT projects in the pipeline addressing issues relevant to the topic of this webinar, ranging from a Legal Guide on Agricultural Land Investment Contracts (ALIC Guide), due to be approved this year, to work on a Factoring Model Law.(included in the new Work Programme). In the interest of time, I will not be able to cover them in any detail, but allow me to mention the one which was already referred to by Jeannette in her presentation:

- c) project of a Model Law on Warehouse Receipts, in cooperation with UNCITRAL. Jeannette has already explained the importance of warehouse receipt financing in the agricultural sector, particularly for SSMEs, and the work they have already done in this area. Warehouse receipts financing can be a day-to-day financing tool for producers, even smallholders. Thus, the project promises to be of great practical relevance and benefit for governments seeking to introduce a modern regulation in this sector. The project is still in a preparatory phase but has already attracted much interest from our governing bodies, member States as well as stakeholders. Our Governing Council has just approved its inclusion in the Triennial Work Programme 2020—2022 and UNCITRAL will bring the matter to discussion at its Commission session in September.

The Mining, Agriculture and Construction (MAC) Protocol

As already mentioned, the MAC Protocol has been adopted at a diplomatic conference in South Africa in November 2019, and is a new treaty, now open for signature and ratification, developed in the framework of the very successful Cape Town Convention which has now reached 81 contracting States and one Regional Economic Integration Organisation (REIO).

Its purpose is to facilitate financing for the acquisition and use of high value, uniquely identifiable mobile equipment in the three strategic sectors of mining, agriculture, and construction.

I would like to point out that though the categories of MAC equipment included in the scope of application of the Protocol comprise “high value” items, this value typically ranges between \$10,000 and \$7,000,000 and therefore its potential usefulness would not be limited to very large companies but could affect smaller producers, especially if organized in cooperatives or the like).

But how does the MAC Protocol operate to achieve the goal of facilitating access to credit, and what is its added value in relation to the Coronavirus crisis?

Let me start with an example: a producer needs a new harvesting machine which would ameliorate production but also, thanks to developments in technology, operate in a more eco-friendly way. Such equipment can be costly and the producer will usually need finance to acquire it; financiers in their turn would typically evaluate the risk and decide whether or not to extend credit and determine its cost accordingly.

The Cape Town Convention and the MAC Protocol together establish an international legal regime whose purpose is to reduce many of the uncertainties connected to financing, particularly when there is a cross-border element, thereby lowering the cost of credit, or in certain cases allow access to credit where it would not be available otherwise.

They do so through provisions allowing for the creation, enforcement, registration and priority of security interests, including interests deriving from a secured agreement (e.g. a loan secured by the value of the asset

the company is acquiring), a retention of title agreement (e.g. a company buys high value equipment from a seller, who retains title on it until full payment of the price), or a leasing agreement.

Thus, the conventional regime is in line with modern secured transactions legal regimes such as the ones offered by the international instruments discussed by previous panelists, with the additional international enforceability deriving from its status as a Treaty.

In particular, at the core of the system there is an online, remotely accessible international registry for the registration of creditor's interests. Because of the specific scope of application of the Protocol, the registry is asset-based and unique identification of the equipment is required. A registered international interest has priority, with well-defined and transparent exceptions, over existing security interests under domestic law, subsequently registered international interests and unregistered interests.

The other feature at the core of the system is a set of effective remedies that the creditor can exercise in the event of a default by the debtor, also in insolvency. The Protocol, incorporating a typical feature of the Cape Town Convention, enables Contracting States to enhance these remedies, should they wish to increase the attractiveness of investments, by opting into provisions inter alia strengthening extrajudicial enforcement and advance relief pending final determination of the claim.

But are there any specific benefits of a legal framework such as the one provided by the MAC Protocol in relation to the Coronavirus crisis?

One should distinguish between the emergency period, and its aftermath, that is the crisis which is likely to affect world economies for a long period of time, with the concomitant need for actions underpinning recovery.

During the emergency phase, we have seen governments passing extraordinary measures directly suspending or reducing creditors' rights to exercise their remedies (by introducing suspensions of enforcement actions, not allowing secured creditors' repossession, etc.). Those are intended to be exceptional and temporary measures. In such circumstances, however, the existence of a solid international legal framework such as the one provided by the MAC Protocol would establish a favourable default position for creditors. Referring back to Marek's presentation, this could allow them, for example, to more easily accept even voluntary temporary deferments of payment or renegotiation of terms, irrespective of the location of the debtor, until the ordinary commercial situation is restored.

But the strongest case for adopting a legal regime such as the one of the MAC Protocol can be made for the period following the immediate sanitary emergency, where producers, and indeed the entire supply chain will suffer the consequences of the uncertainty of markets and economic crisis. Enlarging the palette of private law instruments that parties can use in order to access credit is a powerful tool in the hands of Governments to boost the economy and facilitate economic recovery.

The UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (LGCF).

Let me shift the attention to a different topic, and a different instrument developed by UNIDROIT in cooperation with UN Rome-based specialized organisations.

As mentioned at the outset, it is a non-binding guidance instrument applying to agricultural production under contract and containing a discussion of contract clauses, solutions provided by the applicable law and suggestions of best practices.

Why have we initiated a project with our partners on the LGCF's impact in the current crisis and its aftermath?

I refer back to Valeria's presentation where she made concrete examples of the impact of the sanitary emergency as well as the consequent measures taken by Governments to contain it. Let's imagine that a producer has to abide to containment measures to avoid the spread of contagion among workers which

increase the costs of production, or even force the producer to stop its activity because it is unable to comply; or a contractor is bound to provide inputs to the producer, usually supplied by a company in country X which passed legislation to ban export of such inputs, and therefore has to find another supplier at a greater cost. All these situations range from a full impediment to perform (situations that often fall under the concept of “force majeure” or the like in national laws) to adverse supervening change of circumstances (“hardship”).

A contract farming arrangement, is, typically, a medium-to-long contractual relationship where there is a very strong interrelation of parties’ performances, and a strong interest of both parties to continue the relationship and keep its value notwithstanding adverse circumstances. While not all legal systems provide a satisfactory answer to all these problems, the Legal Guide takes this situation into account in various ways. In particular, it puts emphasis on legislative or contractual remedies that allow for risk sharing instead of leaving the burden of the supervening circumstance on one party only, and to keep the investment alive even if with some adjustments (e.g. temporary suspension of performance and/or renegotiation or adaptation of the contract to the new circumstances, mechanisms to facilitate reaching an agreement on renegotiation etc.). The Legal Guide further explores the advantages and possible pitfalls of introducing force majeure or hardship clause in the contract. This is important also for future contracts, or for renegotiations of existing contracts. Through the project initiated with the Legal Offices of FAO and IFAD we hope to gain factual information on the types of disruptions that are currently faced by agricultural producers and contractors and to develop advice to regulators and parties.

The project on Legal Structure of Agricultural Enterprises: Allow me to conclude by referring to an important remark made by Jeannette at the end of her contribution. She referred to the relevance of business registration and formalization as a pre-requisite for companies to be able to access credit in a structured and transparent way, as well as to the need to simplify procedures for incorporation of companies. In this respect, as she mentioned, there are several initiatives at a more general level taken by international organizations, particularly the Inter-American Juridical Committee of the OAS and UNCITRAL. I would like to refer to a project of a guidance instrument *specific to the agricultural sector*, which has been approved as part of UNIDROIT Triennial Work-Programme 2020-2022 and will be developed in cooperation with FAO: “Legal Structure of Agricultural Enterprises”.

This was one of the original topics identified during the Colloquium on “Promoting Investment in Agricultural Production: Private Law Aspects” held in 2011 and has long been seen as the natural follow up on the LGCF and the ALIC project. The intent of the planned Legal Guide is to provide clarity and guidance on how to develop vehicles for agricultural contracts and the use of agricultural land.

Noting the involvement of OAS in other projects on the structure of companies we see that there is a potential new avenue of cooperation between our two organisations in the area of access to credit and food security.

Thank you very much.

Concluding Remarks by Moderator:

I think you will all agree with me that we have had an excellent panel. I want to thank **Valeria, Jeannette, Marek** and **Anna** for their wonderful presentations.

We have received comments from people that are really interested in this matter. Unfortunately, as I told you at the beginning, we don’t have time for questions and answers but hopefully this is just the first activity in a number of others in which we can continue exploring this specific issue on access to credit.

One idea that arose and that I want to highlight is that we need to coordinate. That is certain. There are different international organizations working on this specific issue with different approaches. We need to

coordinate, and we need to do that which we know best in order to contribute with a specific skill or expertise. This is important not only during these hard times but as Anna mentioned, also during the post pandemic period. Valeria gave us very important information about what we can expect in the near future, it seems there are very challenging times to come. So, we will need to keep working on, again, what we know to do best.

Again, thank you very much to our four panelists.