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## A Proposal for a National Tribally Owned Lien Filing System to Support Access to Capital in Indian Country

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## A PROPOSAL FOR A NATIONAL TRIBALLY OWNED LIEN FILING SYSTEM TO SUPPORT ACCESS TO CAPITAL IN INDIAN COUNTRY

*William H. Henning, Susan M. Woodrow, and Marek Dubovec\**

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## I. INTRODUCTION

This article sets forth a proposal to develop and implement a national, state-of-the-art, all-electronic filing system to support Native American tribes' secured transactions laws, with the goal of improving access to capital for tribes, tribal consumers, and, most importantly, independent Native-owned businesses. Increasing access to capital is central to any discussion of Indian Country economic development. Numerous testimonies, studies, articles, conferences, workshops, and other forums over the last decade-plus have focused on and underscored how imperative it is for tribal enterprises, tribal consumers, and, especially, Native-owned private businesses to have improved access to both debt and equity capital.<sup>1</sup> This critical need for access to capital to support business development and consumer needs is not an Indian Country-exclusive phenomenon; it is true of every market economy in the world.<sup>2</sup>

Also, there is growing recognition of the need for tribes to have in place sound and effective legal institutions to support and encourage the ready flow of capital. International development agencies widely acknowledge that while legal institutions aren't necessary for some types of economic activity to occur, they are essential for economic growth and the effective functioning of a modern economy.<sup>3</sup> The same holds true for tribal economies.<sup>4</sup> Although an ideal legal infrastructure for a tribe wishing to enhance and modernize its business environment would include many types of laws governing different aspects of commerce, no market economy can flourish without a modern, transparent

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<sup>1</sup> See EXEC. OFFICE OF THE PRESIDENT, 2013 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT 14 (2014); CMTY. DEV. FIN. INST. FUND, U.S. DEP'T OF THE TREAS., THE REPORT OF THE NATIVE AMERICAN LENDING STUDY 1–2 (2001) (identifying a “lack of access to capital” as a significant factor for economic problems in Native American communities); *Oversight Field Hearing on Strengthening Self-Sufficiency: Overcoming Barriers to Economic Development in Native Communities Before the S. Comm. on Indian Affairs*, 112th Cong. 6 (2011) (statement of Hon. Ron Allen, Tribal Chairman & CEO, Jameston S’Klallam Tribe, Treas., Nat’l Congress of Am. Indians) (noting urgent need to enhance access to capital in Indian Country); BD. OF GOVERNORS OF THE FED. RES. SYS., GROWING ECONOMIES IN INDIAN COUNTRY: TAKING STOCK OF PROGRESS AND PARTNERSHIPS 4–5 (2012). The publication resulted from a series of workshops held around the country as part of a federal inter-agency effort designed “to spur conversations for effectively tackling economic development issues facing Indian Country; . . . raise awareness of federal assistance programs; and . . . highlight best practices of economic development strategies that are showing promise in Indian Country.” *Id.* at 1. Almost 600 individuals from thirty states attended the workshops, including over 100 tribal members representing sixty-three unique tribes. *Id.*

<sup>2</sup> See INT’L FIN. CORP., ACCESS TO CREDIT AMONG MICRO, SMALL, AND MEDIUM ENTERPRISES 1–4 (2013) (addressing financing needs of micro, small, and medium-sized enterprises).

<sup>3</sup> See Org. of Am. States, *Secured Transactions in the Americas*, at 2, (2013), [http://www.oas.org/en/sla/dil/docs/secured\\_transactions\\_newsletter\\_aug\\_2013.pdf](http://www.oas.org/en/sla/dil/docs/secured_transactions_newsletter_aug_2013.pdf); see also Elaine MacEachern et al., *Secured Transactions and Collateral Registries*, THE WORLD BANK (Oct. 5, 2015), <http://www.worldbank.org/en/topic/financialsector/brief/collateral-registries>.

<sup>4</sup> BD. OF GOVERNORS OF THE FED. RES. SYS., *supra* note 1, at 7, 14.

framework governing secured transactions. Part II of this article provides an overview of the wide range of transactions supported by secured transactions laws and discusses the status of such laws in the U.S., including Indian Country in particular, and in developing countries around the world.<sup>5</sup> For the purposes of this introduction, it is enough to know that such laws facilitate the use of all types of personal property, tangible and intangible, as collateral for loans and other types of extensions of credit.<sup>6</sup>

Because state civil law, as a general rule, does not apply automatically within tribal jurisdictions, a tribe without a secured transactions law does not have the necessary legal infrastructure to support ready and affordable credit for the tribe and its members.<sup>7</sup> Work-arounds such as tribal resolutions, tailored loan guarantee programs, alternative loan products, small business equity grant programs, specialized lending organizations (such as Native community development financial institutions (CDFIs)), and other mechanisms have been developed and employed to promote lending.<sup>8</sup> However, in and of themselves, these very important but nevertheless interim measures are not sufficient to promote and enable the availability and flow of affordable credit into Native communities at a level necessary to support robust and sustainable business development over the long term. In particular, privately owned Native businesses located within tribal jurisdictions often suffer from the risk attendant to insufficient legal protections for lenders and other investors and creditors.<sup>9</sup>

This phenomenon applies across the globe and is being addressed by, among others, the United Nations Commission on International Trade Law (UNCITRAL), which has identified secured transactions law as a primary engine of economic growth and has developed a *Legislative Guide* that contains a set of principles that any such law should reflect.<sup>10</sup> In 2016, UNCITRAL adopted

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<sup>5</sup> See *infra* notes 19–83 and accompanying text.

<sup>6</sup> Secured transactions laws also facilitate the outright sale of certain types of rights to the payment of money. See U.C.C. § 9-109(a)(3) (AM. LAW INST. & UNIF. LAW COMM'N 2014) (“[A] sale of accounts, chattel paper, payment intangibles, or promissory notes”); U.N. COMM'N ON INT'L TRADE LAW, U.N., UNCITRAL MODEL LAW ON SECURED TRANSACTIONS, at 1, U.N. SALES NO. E.17.V.1 (2016) [hereinafter UNCITRAL MODEL LAW] (providing for “outright transfers of receivables by agreement.”).

<sup>7</sup> Susan Woodrow & Fred Miller, *Lending in Indian Country: The Story Behind the Model Tribal Secured Transaction Law*, 15 BUS. L. TODAY 39, 39 (2005).

<sup>8</sup> See BD. OF GOVERNORS OF THE FED. RES. SYS., *supra* note 1, at 12–13.

<sup>9</sup> Banks are often reluctant to lend to tribal communities because tribal sovereignty, in the absence of a modern secured transactions law, often precludes the use of standard financial security mechanisms, such as property liens, foreclosures, or self-help repossession. W. Gregory Guedel & J.D. Colbert, *Capital, Inequality, and Self-Determination: Creating a Sovereign Financial System for Native American Nations*, 41 AM. INDIAN L. REV. 1, \*10–\*14 (2016).

<sup>10</sup> See U.N. COMM'N ON INT'L TRADE LAW, U.N., UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. SALES NO. E.09.V.12 (2010) [hereinafter UNCITRAL LEGISLATIVE GUIDE].

a Model Law based on those principles.<sup>11</sup> Even prior to its adoption, however, forward-looking countries in the developing world, frequently supported by the World Bank Group and other interested organizations, were racing to adopt laws consistent with the UNCITRAL secured transactions principles.<sup>12</sup>

There is also a model law available to tribes—the Model Tribal Secured Transactions Act (MTSTA)<sup>13</sup>—that is similar to secured transactions laws in the U.S. generally and is also consistent with the UNCITRAL principles. However, a tribe considering adoption of the MTSTA should be aware that the law cannot fully function unless the tribe has access to a system for the filing, publication, and searching of notices of liens created under the law.<sup>14</sup> Without access to an

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<sup>11</sup> See UNCITRAL MODEL LAW, *supra* note 6.

<sup>12</sup> See SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES, AND PRACTICE (Louise Gullifer & Orkun Akseli eds., 2016); RESEARCH HANDBOOK ON SECURED FINANCING IN COMMERCIAL TRANSACTIONS (Frederique Dahan ed., 2015); MAREK DUBOVEC & CYPRIAN KAMBILI, A GUIDE TO THE PERSONAL PROPERTY SECURITY ACT: THE CASE OF MALAWI (2015).

<sup>13</sup> See *infra* notes 56–72 and accompanying text. The MTSTA was promulgated in 2005 by the Uniform Law Commission (ULC) and was revised in 2017. UNIF. LAW COMM'N, IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT (2005) [hereinafter COMMENTARY TO THE MTSTA]; see also UNIF. LAW COMM'N & CTR. FOR INDIAN COUNTRY DEV., IMPLEMENTATION GUIDE AND COMMENTARY TO THE REVISED MODEL TRIBAL SECURED TRANSACTIONS ACT (2017) [hereinafter COMMENTARY TO THE REVISED MTSTA]. The original Act represented years of work by ULC members with the able assistance of representatives appointed by a number of tribes. See *generally* COMMENTARY TO THE MTSTA. The initial Reporter for the project was Professor Maylinn Smith, Director of the Indian Law Clinic at the University of Montana School of Law and an experienced tribal judge and legal counsel. See *id.* at 3. Professor Smith was succeeded by Professor Carl Bjerre of the University of Oregon School of Law. See *id.* at 3. The Act is based on Article 9 of the UCC, but in preparing it, the committee had to reconcile issues peculiar to Indian tribes, such as tribal sovereignty and customs, with consistency and uniformity concerns. See *generally id.* The committee's work was informed by “representatives of and/or legal counsel for the Sac and Fox Nation, the Cherokee Nation, the Navajo Nation, the Chitimacha Nation, the Oneida Nation, the Crow Nation, the Chickasaw Nation, the Confederated Tribes of Warm Springs, and several California rancherias.” See *id.* at 14. The MTSTA was revised in 2017 to incorporate, as appropriate, amendments to Article 9 that were adopted in 2010. COMMENTARY TO THE REVISED MTSTA, at 10. The committee charged with the revision revisited a limited number of the policy issues addressed in the original act. See *id.* Professor Stephen Sepinuck served as Reporter for the revision. See *id.* at 1. By virtue of the principle of tribal sovereignty, the decision to adopt the Act lies with each tribe. James D. Griffith, *The Model Tribal Secured Transactions Act: Self-Determination and Tribal Economic Development*, ARIZ. ATT'Y, July–Aug. 2014, at 34, 34.

<sup>14</sup> The importance of a robust filing system to the successful implementation of a modern secured transactions regime cannot be overstated. In fact, as this article will show, such a system is a *sine qua non* in the reform of outdated or inefficient secured lending frameworks and is inseparably linked to the achievement of access-to-credit goals. See U.N. COMM'N ON INT'L TRADE LAW, U.N., UNCITRAL GUIDE ON THE IMPLEMENTATION OF A SECURITY RIGHTS REGISTRY, at 7–8, U.N. SALES NO. E.14.V.6 (2014) (capturing the fundamentals of best-practice filing systems); Catherine Walsh, *Transplanting Article 9: The Canadian PPSA Experience*, in SECURED TRANSACTIONS LAW REFORM, PRINCIPLES, POLICIES AND PRACTICE 49–94 (offering a deeper critique of Article 9's filing system and its evolution, as well as a comparison between UCC Article 9 and the filing system for Canada's Personal Property Security Act); see also Todd J. Janzen, Note, *Nationalize the Revised Article 9*

effective public filing system, a tribe adopting the MTSTA will not realize the benefits that are intended.

Parts II and III of this article describe how some tribes that have adopted the MTSTA have entered into joint-sovereign agreements with states or have employed other mechanisms that allow the tribes to use the filing systems of the states in which they are located.<sup>15</sup> However, partnering with a state might be unworkable for some tribes or might not be desirable for a variety of reasons.<sup>16</sup> Part III describes the purpose of a filing system and how it functions. The remainder of the article discusses modern filing systems in other countries and presents our proposal for the creation of a national all-electronic filing system for tribes that have enacted the MTSTA or a substantially similar law.<sup>17</sup>

The filing system being proposed would be developed for use and commonly owned by participating tribes. The required technology is available and readily adaptable for a single, multi-jurisdictional tribal system, and implementation of such a system would support tribes' efforts to put in place the legal infrastructure needed to support access to capital. The proposed system would best be housed within a Native American organization with a solid reputation of representing all tribes in the U.S. and whose mission incorporates the promotion of tribal economic development.

The costs of establishing, operating, and maintaining an e-filing system are reasonably low, and they are estimated to be much lower than even a couple of years ago.<sup>18</sup> The recent reduction in cost does not come at the expense of reduced security or efficiency of the system. On the contrary, it results from the incorporation of technology like blockchain, which would make the system less costly to establish and operate while ensuring the highest level of security and transparency. The availability of this filing system, coupled with adoption of the MTSTA, would give a tribe access to a powerful engine for economic growth.

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*Filing System: A Comparison of the Old Article 9 and Canadian Personal Property Filing Systems*, 11 IND. INT'L & COMP. L. REV. 389, 396–402 (2001). Intrinsic to a filing system's efficiency is the existence of a best-practice registry. See Marek Dubovec, *UCC Article 9 Registration System for Latin America*, 28 ARIZ. J. INT'L & COMP. L. 117 (2011) (discussing the requirements of a modern registry as contemplated by UCC Article 9, albeit in the context of Latin America).

<sup>15</sup> See *infra* notes 80–81, 106–08 and accompanying text.

<sup>16</sup> See *infra* note 66 and accompanying text.

<sup>17</sup> See *infra* notes 128–37 and accompanying text.

<sup>18</sup> E-mail from Gavin McCosker, Senior Fin. Sector Specialist, Int'l Fin. Corp. & Chief Operating Officer & Registrar of Pers. Prop. Sec., Austl. Fin. Sec. Auth., to Dr. Marek Dubovec, Exec. Dir., Nat'l Law Ctr. for Inter-Am. Free Trade (Oct. 19, 2017, 09:34 MST) (on file with authors).

## II. WHAT IS SECURED TRANSACTIONS LAW AND WHY IS IT IMPORTANT TO TRIBAL ECONOMIC DEVELOPMENT?

### A. *Types of Transactions*

The basic concept of a secured transaction is quite simple and may best be illustrated by an example.<sup>19</sup> Suppose several tribal members wish to open a car dealership located in their tribal community but lack the capital to acquire inventory to sell or lease, or equipment to operate the repair shop. The business needs these assets to be functional, but without the ability to enter into a secured transaction with a lender it will likely be impossible for the owners to obtain a loan to cover their cost. Even if capital is available, the interest rate may be exorbitant, and the loan term will probably be relatively short. After all, if the business fails, the lender will have nothing but the owners' promises to repay the loan. If they lack the resources to do so, or if they seek protection in bankruptcy court, the loan will have to be written off. The higher interest rate and shorter loan term are applied to mitigate this heightened risk.<sup>20</sup>

With a secured transactions law in place, however, the lender can extend a loan to enable the tribal members to acquire the inventory and equipment that will secure the repayment of the loan. A security interest is a consensual lien that gives the lender the right to take possession of the inventory and equipment as a secondary source of repayment in the event the owners default.<sup>21</sup> In such an event,

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<sup>19</sup> See generally STEVEN L. HARRIS & CHARLES W. MOONEY, JR., SECURITY INTERESTS IN PERSONAL PROPERTY: CASES, PROBLEMS, AND MATERIALS (6th ed. 2016) (discussing the concept of secured transactions). A modern secured transactions law will support many different types of transactions, some significantly more complex than those described in this article. The transactions described in this subsection are typical of those that would be most helpful in developing a tribe's economy. They were selected based on discussions among members of the drafting committee for the original Model Tribal Secured Transactions Act and a group of tribal attorneys and economic development officers who played a central role in drafting and promoting the Act. Two of this article's co-authors (Henning and Woodrow) participated in those discussions.

<sup>20</sup> The *Commentary to the Revised MTSTA* states:

Access to affordable credit is a fundamental component of sustainable economic development in all modern private market economies. When the rules governing lender/borrower relationships are uncertain or nonexistent, the risks to lenders increase. When the risk associated with a transaction increases, the lender may either refuse to lend or may increase the interest rate or other costs of the transaction to offset the risks. Therefore, to effectively enable access to credit by businesses and individuals at affordable rates and on competitive terms, rules are needed to govern lender/borrower or other creditor/debtor relationships.

COMMENTARY TO THE REVISED MTSTA, *supra* note 13, at 8. See also NATIVE NATIONS INST., THE UNIV. OF ARIZ., ACCESS TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES REPORT (2016).

<sup>21</sup> See HARRIS & MOONEY, *supra* note 19, at 19–20. The lender's security interest will extend automatically to the proceeds received by the owners when they dispose of collateral meaning, *inter alia*, that if the owners default the lender will be entitled to collect any payments due to the owners from the various credit buyers and lessees of the inventory. *Id.* at 225–26.

the lender is entitled to possession of the collateral<sup>22</sup> and may sell it at a foreclosure sale,<sup>23</sup> applying the sale proceeds to reduce the outstanding debt.<sup>24</sup> This ability to grant recourse to collateral and to obtain priority as against other claimants, including most importantly a trustee in bankruptcy, significantly reduces the risks to lenders and other types of creditors, such as sellers of goods on credit, and has the effect of making capital available at reasonable interest rates.<sup>25</sup>

A modern secured transactions law will support a very broad array of transactions. Consider the area of consumer transactions.<sup>26</sup> Without a secured-transactions law, a seller of costly goods will typically demand payment in full at the time of sale. With such a law, a tribal member can, as a consumer, buy on credit such goods as a car, home furnishings, or recreational equipment, and can pay for the goods over time. Either the seller or a lender might supply the credit, taking in return a security interest in the purchased goods. There is a necessary trade-off here; if the tribal member defaults, the seller or lender can repossess the goods and sell them at a foreclosure sale. However, without a secured transactions law, or in an uncertain secured transactions environment, the tribal member would have had to purchase the goods for cash or under undesirable credit terms, or perhaps could not have acquired them at all.

The same principle applies in the business world.<sup>27</sup> The owners of the car dealership could not have received a loan, or at least one on affordable terms, and opened for business if they had been unable to use their inventory and equipment as collateral. The utility of the law in the business context extends further, however. Most customers cannot afford to pay cash for big-ticket items like cars, so the success of the dealership will depend on its ability to supply credit to its customers. With a secured transactions law in place, the dealership can do exactly that. It can use its right to collect payments from its customers—an intangible right commonly known as a receivable<sup>28</sup>—as collateral for an additional loan that

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<sup>22</sup> U.C.C. § 9-609(a) (AM. LAW INST. & UNIF. LAW COMM'N 2010); MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-609(b) (UNIF. LAW COMM'N 2006). The section numbering in the Revised Model Tribal Secured Transactions Act is the same for the sections referenced in this article. REVISED MODEL TRIBAL SECURED TRANSACTIONS ACT (UNIF. LAW. COMM'N 2017). Section numbers in the MTSTA were kept as close as possible to the corresponding U.C.C. sections. See U.C.C. § 9-101 *et seq.*; MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-101 *et seq.*

<sup>23</sup> U.C.C. § 9-610(a); MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-610(a).

<sup>24</sup> U.C.C. § 9-615(a); MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-615(a).

<sup>25</sup> UNCITRAL LEGISLATIVE GUIDE, *supra* note 10, at 19.

<sup>26</sup> See HARRIS & MOONEY, *supra* note 19, at 5–6, 56–57.

<sup>27</sup> *Id.* at 77–78.

<sup>28</sup> Neither UCC Article 9 nor the MTSTA uses the term “receivables,” which is used here to refer to various types of rights to the payment of money. See U.C.C. § 9-101 *et seq.*; MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-101 *et seq.* Under both UCC Article 9 and the MTSTA, the dealer’s right to payment will invariably be coupled with a security interest in or lease of a vehicle, and will qualify as chattel paper. U.C.C. § 9-102(a)(11); MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-106(a)(12).



will cover the cost of the credit it has extended, or it can sell its collection rights to someone in the business of buying receivables.

One more example might be helpful. Suppose a tribe wishes to exploit the oil, gas, or minerals that lie beneath its land.<sup>29</sup> The extractive operations necessary to bring these assets to the surface will require enormous expenditures of capital for equipment and labor, and lenders will likely be unwilling to finance the operation without collateral. The tribal lands themselves may be held in trust and thus not readily available as collateral and, until they are extracted, the assets are part of the land and therefore similarly restricted.<sup>30</sup> Once they are severed from the land, however, the assets become goods (a type of personal property), and a secured transactions law will enable the tribe to grant its lender a security interest in them that will become enforceable at the moment of extraction.<sup>31</sup> Of course, the equipment used in the extraction process can also be used as collateral.

The bottom line is that a secured transactions law permits a tribe, its members, and its private businesses to leverage the value of almost every conceivable type of asset other than real estate. Goods, receivables and other contract rights, intellectual property, and a wide variety of other assets may be used as collateral, thereby unlocking their value, and translating that value into productive use. There are no more powerful tools in the economic development plan of most tribes than a modern secured transactions law and the institutions that support it.<sup>32</sup>

### *B. Current Status of Secured Transactions Laws in the Various States of the U.S.*

In the U.S., secured transactions laws generally may be found at the state, rather than the federal, level. Each state has adopted a group of commercial laws known collectively as the Uniform Commercial Code (UCC).<sup>33</sup> The UCC contains articles governing sales of goods, leases of goods, and various payment

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<sup>29</sup> See generally James P. Nehf, *Security Interests in Minerals and Timber: Delicate Balance Between Real Estate Law and the Uniform Commercial Code* (Robert H. McKinney Sch. of Law, Legal Studies Res. Paper No. 2015-18, 2015) (discussing the creation of security interests in minerals).

<sup>30</sup> Much tribal land is held in some form of trust, with the federal government serving as trustee. See BD. OF GOVERNORS OF THE FED. RES. SYS., *supra* note 1, at 8. Land held in trust may be put to productive use, but is not available as collateral for an obligation incurred by the tribe, a tribal member, or a Native-owned business. See *id.*

<sup>31</sup> U.C.C. § 9-102(a)(6) (defining “as-extracted collateral”); MODEL TRIBAL SECURED TRANSACTIONS ACT §§ 9-615, -106(a)(6).

<sup>32</sup> These include a public filing system, which is the focus of this proposal, and a trusted, independent court or other dispute resolution system that, without bias, upholds the rule of law.

<sup>33</sup> Enactment records are maintained for the sponsoring organizations by the ULC and were provided to the authors.

mechanisms (e.g., negotiable instruments including checks, wire transfers, and letters of credit), as well as other topics.<sup>34</sup> The most important part of the UCC is Article 9 on secured transactions, which is by far the single most important commercial law in the U.S. and facilitates hundreds of billions of dollars in commerce annually.<sup>35</sup>

The UCC is the product of a partnership between two organizations dedicated to law reform: the Uniform Law Commission (ULC) and the American Law Institute (ALI).<sup>36</sup> These organizations do not have law-making power and so, for the UCC to become effective in a state, it must be enacted by that state's legislature. The term "uniform" is something of a misnomer because as each legislature considered whether to adopt the UCC, it inevitably made changes reflective of local interests. The changes are quite limited, however, and Article 9 has spurred interstate commerce because a party located in one state can be confident that it understands the laws that will govern a secured transaction entered into with a party located in another state. Without Article 9, a lender would hesitate to engage in interstate financing without spending the time and resources needed to thoroughly analyze the extent to which the laws of the other jurisdiction would protect its vital interests.

### *C. International Developments and Their Relevance for Indian Country*

UNCITRAL has recognized the urgent need for modern secured transactions laws in developing countries and in countries transitioning from a centralized economy to a market economy.<sup>37</sup> Studies have noted that an absence of such a law hinders access to capital.<sup>38</sup> For example, a World Bank report, referencing a survey conducted in over 100 countries, found that over 75 percent of all loans required collateral and stated that:

[m]ovable assets,<sup>39</sup> as opposed to fixed assets such as land or buildings, often account for most of the capital stock of private firms and comprise an especially large share for micro,

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<sup>34</sup> See 1 WILLIAM D. HAWKLAND ET AL., HAWKLAND UNIF. COMM. CODE SERIES ix–xii (Frederick H. Miller ed., 2014).

<sup>35</sup> See *Annual Asset-Based Lending and Factoring Survey Highlights 2016*, COMMERCIAL FIN. ASS'N (May 8, 2017, 8:00 PM), <http://community.cfa.com/Go.aspx?MicrositeGroupTypeRouteDesignKey=46e3ad1c-91b3-4a9d-94f6-21089947ff5d&NavigationKey=4d67e5a8-9a83-48f6-a4f8-8b8d8dba76e5>.

<sup>36</sup> Scott C. Pryor, *Revised Uniform Commercial Code Article 9: Impact in Bankruptcy*, 7 AM. BANKR. INST. L. REV. 465, 465–67 (1999).

<sup>37</sup> UNCITRAL LEGISLATIVE GUIDE, *supra* note 10, at 20.

<sup>38</sup> See, e.g., Inessa Love et al., *Collateral Registries for Movable Assets: Does Their Introduction Spur Firms' Access to Bank Finance* (World Bank Dev. Res. Grp., Working Paper No. 6477, 2013).

<sup>39</sup> "Movable asset" is a reference to all assets, tangible and intangible, other than real property. *See id.* at 2.

small and medium-sized enterprises. . . . However, banks in developing countries are usually reluctant to accept movable assets as collateral due to the inadequate legal and regulatory environment in which banks and firms co-exist. In this context, movable assets become “dead capital[.]”<sup>40</sup>

Recognizing that secured transactions reform is instrumental in unlocking dead capital, UNCITRAL developed its *Legislative Guide* and adopted the *Model Law on Secured Transactions* in 2016. Other international organizations are also promoting secured transactions reform. The Organization of American States has developed the Model Inter-American Law on Secured Transactions for the Americas,<sup>41</sup> and the European Bank for Reconstruction and Development has adopted a model law to facilitate reforms in Eastern and Central Europe.<sup>42</sup> If nations harmonize their laws in this area, the same dynamic that has spurred interstate commerce in the U.S. can be expected to spur international commerce.

UNCITRAL has also adopted the United Nations Convention on the Assignment of Receivables in International Trade to facilitate cross-border financing and sales of receivables.<sup>43</sup> Although ratified by only one country thus far,<sup>44</sup> the ratification process has gained significant traction in the United States.<sup>45</sup> Further unification of secured transactions law has been facilitated through the efforts of the International Institute for the Unification of Private Law (UNIDROIT) that adopted the Convention on International Interests in Mobile Equipment (better known as the Cape Town Convention), and three Protocols thereto to facilitate the financing and leasing of aircraft objects, railway rolling stock, and space assets.<sup>46</sup> The United States has ratified both the Cape Town Convention

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<sup>40</sup> *Id.* (internal citation omitted).

<sup>41</sup> See Org. of Am. States, *Model Inter-American Law on Secured Transactions*, [HTTPS://WWW.OAS.ORG/DIL/MODEL\\_LAW\\_ON\\_SECURED\\_TRANSACTIONS.PDF](https://www.oas.org/dil/model_law_on_secured_transactions.pdf) (LAST VISITED MAR. 17, 2018).

<sup>42</sup> See Eur. Bank for Reconstruction & Dev., *Model Law on Secured Transactions*, (2010) <http://www.ebrd.com/news/publications/guides/model-law-on-secured-transactions.html>.

<sup>43</sup> Spiros V. Bazinas, *Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade*, 11 TUL. J. INT'L & COMP. L. 275, 277 (2003); Harry C. Sigman & Edwin E. Smith, *Towards Facilitating Cross-Border Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade*, 57 BUS. L. 727, 727 (2002).

<sup>44</sup> See *Status: United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2001\\_Convention\\_receivables\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001_Convention_receivables_status.html) (last visited Mar. 13, 2018).

<sup>45</sup> See Peter Roudik, *United States: Conventions Proposed by U.N. Commission on International Trade Law Submitted to Senate for Ratification*, THE GLOBAL LEGAL MONITOR (Feb. 14, 2017), <http://www.loc.gov/law/foreign-news/article/united-states-conventions-proposed-by-u-n-commission-on-international-trade-law-submitted-to-senate-for-ratification/>.

<sup>46</sup> *Convention on International Interests in Mobile Equipment (Cape Town, 2001) – Status*, UNIDROIT, <https://www.unidroit.org/instruments/security-interests/cape-town-convention> (last visited Mar. 1, 2018).

and the Aircraft Protocol, making it one of the seventy-three Contracting States to the Cape Town Convention.<sup>47</sup> While the Cape Town Convention and its Protocols were designed to facilitate access to reasonably priced credit and leasing products, one of its purposes is to bring developing economies within reach of commercial finance previously unavailable in these economies.<sup>48</sup> In March 2017, UNIDROIT initiated the inter-governmental negotiations for a fourth Protocol to govern mining, agricultural, and construction equipment (MAC Protocol).<sup>49</sup>

Even without a model law in place, many developing nations, often working with the World Bank Group, have either adopted or are in the process of adopting modern secured transactions laws.<sup>50</sup> The International Finance Corporation (IFC), a member of the World Bank Group, has conducted specific studies, following enactment of modern secured transactions laws, in Colombia (a developing nation) and China (a formerly centralized economy).<sup>51</sup> It has also conducted a study of sample economies and has found that the laws have had an enormous economic benefit.<sup>52</sup> Countries in the Western Hemisphere that have reformed their laws in recent years include Costa Rica, El Salvador, Mexico, Nicaragua, Guatemala, Honduras, Peru, and Colombia.<sup>53</sup> The many countries around the world that have moved or are moving in this direction include Vietnam, Liberia, Malawi, Rwanda, Kenya, Ethiopia, Sri Lanka, India, Cambodia, Philippines, Jordan, The West Bank and Gaza, Afghanistan, Lebanon, Azerbaijan, and Belarus.<sup>54</sup>

This international movement is highly relevant to economic development in Indian Country. Many tribes suffer from the same deficiencies, in terms of outdated legal infrastructure not supportive of critical credit products, that are

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<sup>47</sup> *Id.*

<sup>48</sup> ROY GOODE, THE OFFICIAL COMMENTARY ON THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT 13 (3d ed. 2013).

<sup>49</sup> *Study LXXII K – Development of a Fourth Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment*, UNIDROIT, <http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol#a2> (last visited Mar. 12, 2018); see Charles W. Mooney, Jr., Marek Dubovec, & William Brydie-Watson, *The Mining, Agricultural and Construction Equipment Protocol to the Cape Town Convention Project: The Current Status*, 21 UNIF. L. REV. 332 (2016) (for an overview of the project); see also Hendry Deeb Gabriel, *The MAC Protocol: Are We There Yet – How Far Do We Have to Go?*, 4 CAPE TOWN CONVENTION J. 67 (2015).

<sup>50</sup> See *Global Secured Transactions Monitor*, NAT'L LAW CTR. FOR INTER-AM. FREE TRADE, <http://natlaw.com/global-secured-transactions/> (last visited Mar. 13, 2018).

<sup>51</sup> See *Secured Transactions and Collateral Registries*, INT'L FIN. CORP., <http://www.ifc.org/wps/wcm/connect/793e79804ac10fff9ea69e4220e715ad/Secured+Transactions+and+Collateral+Registries+Brochure-English.pdf?MOD=AJPERES> (last visited Mar. 12, 2018).

<sup>52</sup> *Id.*

<sup>53</sup> See *Global Secured Transactions Monitor*, *supra* note 50.

<sup>54</sup> See *id.*

common in developing countries and countries with a centralized economy. A secured transactions law can benefit tribal members in their role as consumers, as well as the tribe itself as it conducts business on behalf of its members. But one of the most important effects of such a law will likely be the extent to which it facilitates the development of private, Native-owned businesses within tribal jurisdictions. A study commissioned by the IFC evaluated the effects of China's new secured transactions law on small and medium-sized enterprises and found that of 250 entrepreneurs surveyed, fifty-nine percent indicated that their businesses would have been severely impacted had they not had the access to secured loans that the law facilitated.<sup>55</sup> A modern secured transactions law will allow tribal member-owned businesses, and thus the tribal economy generally, to benefit from the kind of creativity that flows from individual entrepreneurs who have access to affordable capital and a willingness to take risks to build businesses. This, in turn, can help bring important business diversification into tribal economies, which is essential to ensuring sustainable growth as well as economic resiliency.

#### *D. The Model Tribal Secured Transactions Act*

In the early 2000s, the ULC Committee on Liaison with American Indian Tribes and Nations, with the active participation of a number of tribal lawyers and economic development officers, determined that it should work to develop laws that would facilitate economic development in Indian Country.<sup>56</sup> The committee concluded that the most appropriate project for it to undertake initially was the development of a model secured transactions law adapted from UCC Article 9.<sup>57</sup>

In 2002, the committee began work on the MTSTA. Numerous tribes appointed representatives to assist the committee, and many were able to attend

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<sup>55</sup> Dalberg Gl. Dev. Advisors, *Independent Evaluation of IFC Secured Transactions Advisory Project in China* 7 (World Bank, Working Paper No. 83518, 2011). This impact is all the more remarkable given that the Chinese Act covers only inventory and receivables and excludes, e.g., equipment. *Id.*

<sup>56</sup> The formal name is the National Conference of Commissioners on Uniform State Laws (NCCUSL). ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION ch. 2 (2013). Section 1.1 of NCCUSL's constitution was amended shortly after the promulgation of the MTSTA to also permit the use of Uniform Law Commission (ULC) as the organization's name. *See id.* For convenience and to avoid confusion, ULC is used throughout this article, even with reference to publications and events occurring before the amendment of the constitution.

<sup>57</sup> The purpose behind the project to develop the original Model Tribal Secured Transactions Act was "to promote economic development by encouraging and supporting business dealings between tribal entities, tribal member-owned businesses and tribal consumers, and financial institutions and other businesses outside of a Tribe's jurisdiction." COMMENTARY TO THE MTSTA, *supra* note 13, at 20.

one or more of the drafting committee meetings in person.<sup>58</sup> In addition, the Federal Reserve Bank of Minneapolis generously supported the project.<sup>59</sup> Drafting was completed in 2005 and the committee prepared an extensive *Implementation Guide and Commentary*.<sup>60</sup> The stated purposes of this document are:

- (1) to assist tribal legislatures in their review, adaptation and enactment of the Act; (2) to facilitate the use and understanding of the Act by tribal judges, legal counsel and individuals promoting business development in Indian Country; and (3) to assist non-tribal lenders and businesses in understanding the similarities and differences between the Act and corresponding provisions of the Uniform Commercial Code (“UCC”).<sup>61</sup>

In 2010, the UCC’s sponsoring organizations adopted a set of amendments to Article 9 and by 2013 the amendments had been enacted in every state.<sup>62</sup> The ULC subsequently formed a new drafting committee charged with determining which of the amendments should be incorporated into the MTSTA.<sup>63</sup> The ULC approved a revised version of the MTSTA at its 2016 Annual Meeting but the final draft was not completed until early 2017, at which time a revised *Implementation Guide and Commentary* was also published.<sup>64</sup>

While largely consistent with UCC Article 9 (and with the UNCITRAL *Legislative Guide*), the MTSTA contains a number of provisions making it

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<sup>58</sup> Tim Berg, *Growing Indian Economies: The Model Tribal Secured Transactions Act*, ARIZ. ATT’Y, Mar. 2006, at 30 (chronicling the pre-MTSTA secured transactions framework of many Native American tribes and the process that led to the MTSTA). Mr. Berg was the Chair of the ULC Committee on Liaison with Native American Tribes, which drafted the MTSTA. *Id.* at 31. Upon the advice of the tribal representatives whose assistance was critical to the success of the drafting project, after the completion of the project, the committee’s name was changed to the ULC Committee on Liaison with Indian Tribes and Nations. See *Executive Committee Minutes*, UNIFORM LAW COMM’N (July 21, 2005), <http://uniformlaws.org/Committee.aspx?title=Executive%20Committee>. Two of the authors of this article (Henning and Woodrow) took part in every aspect of the drafting process for both the original and revised MTSTA.

<sup>59</sup> One of the authors (Woodrow) was employed, until her retirement, by the Federal Reserve Bank of Minneapolis and has on file extensive documentation of the bank’s support for the project.

<sup>60</sup> COMMENTARY TO THE MTSTA, *supra* note 13, at 11.

<sup>61</sup> *Id.* The revised version of the document adds the following purpose: “for tribes that have previously adopted the 2005 Act, to assist their tribal councils or legislative bodies in the review, adaptation and enactment of the 2016 revisions to the [MTSTA].” *Id.* at 6.

<sup>62</sup> WILLIAM H. LAWRENCE ET AL., UNDERSTANDING SECURED TRANSACTIONS 5 (5th ed. 2012).

<sup>63</sup> The drafting committee also reconsidered some of the policy decisions made during the original drafting process. For example, the original MTSTA omitted any reference to agricultural liens, but the concept was included in the revised draft. See MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-106(a)(6) (UNIF. LAW COMM’N 2017).

<sup>64</sup> See COMMENTARY TO THE REVISED MTSTA, *supra* note 13.

particularly suitable for adoption by tribes.<sup>65</sup> For example, the original drafting committee was informed by its advisors of the great sensitivity within tribes as to the issue of sovereign immunity.<sup>66</sup> The act addressed this concern within its first substantive section, providing that tribes do not waive sovereign immunity without a recorded, properly ratified, express waiver.<sup>67</sup> Other provisions acknowledge that some personal property that might otherwise be used as collateral may be inalienable under federal law (attached to trust land)<sup>68</sup>, that the concept of a

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<sup>65</sup> The MTSTA has drawn both praise and criticism. In the words of one critic,

(1) it maintains the same consumer/commercial distinctions as Article 9 of the Uniform Commercial Code without offering enhanced protection for tribal commercial debtors, (2) it places no additional limits on what can serve as collateral to secure a loan, and (3) it places no limitations to declare default under an “insecurity clause[.]”

Aaron Drue Johnson, *Just Say No (To American Capitalism): Why American Indians Should Reject the Model Tribal Secured Transactions Act and Other Attempts to Promote Economic Assimilation*, 35 AM. INDIAN L. REV. 107, 120 (2010–2011). It has been criticized by another for failing to do enough to protect cultural property, e.g., sacred places and objects. Grant Christensen, *Selling Stories or You Can't Own This: Cultural Property As a Form of Collateral in a Secured Transaction under the Model Tribal Secured Transactions Act*, 80 BROOK. L. REV. 1219, 1221 (2015). With regard to the latter criticism, the drafting committee for the revised MTSTA concluded that there was likely to be too much disparity of treatment and terminology for a model provision to be incorporated into the Act. COMMENTARY TO THE REVISED MTSTA, *supra* note 13, at 15. However, in its guidance to tribes considering enactment, the ULC and Center for Indian Country Development provides the following example:

Tribe has a custom that prohibits the transference of certain religious artifacts or sacred objects for monetary or business purposes. In such a case, the Tribe should consider adding a provision to the Act that prohibits the creation of a security interest in those types of religious artifacts or sacred items.

*Id.* Our research has found no criticism levied at the filing system contemplated by the MTSTA.

<sup>66</sup> The matter of sovereign immunity of Indian tribes is an often-controversial subject and has been the theme of some academic literature. U.S. law considers Indian tribes to be “domestic dependent nations” that retain their sovereignty, subject to certain limitations. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Over time, the exact boundaries of this sovereignty have been molded by treaties, federal laws, and regulations, as well as judicial interpretations of the aforementioned. See Mitchell G. Enright, Comment, *Native Americans – Sovereign Immunity: Determining Whether The Indian Gaming Regulatory Act Abrogates Tribal Sovereign Immunity For Lawsuits Arising Outside Of Indian Country*, 90 N.D. L. REV. 191, 194 (2014); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 148–55 (2004); Ryan Seelau, *In Defense Of Tribal Sovereign Immunity: A Pragmatic Look At The Doctrine As A Tool For Strengthening Tribal Courts*, 90 N.D. L. REV. 121, 136–41 (2014); Case Comment, *Federal Indian Law — Tribal Sovereign Immunity — Michigan v. Bay Mills Indian Community*, 128 HARV. L. REV. 301, 301–10 (2014); Padraic I. McCoy, *Sovereign Immunity and Tribal Commercial Activity: A Legal Summary and Policy Check*, THE FED. LAW., Mar.–Apr. 2010, at 41, 44.

<sup>67</sup> To recognize “sovereign immunity, the MTSTA provides that, if a tribe is a party to a transaction with a non-member, the parties may agree whether the transaction will be governed by the MTSTA or the law of the other party’s state or tribe.” Griffith, *supra* note 13, at 35; see MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-117.

<sup>68</sup> MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-104.

“tribal business day” requires a definition that may be different from the state law definition of “business day”,<sup>69</sup> and that a secured creditor’s right to repossess collateral may be limited unless it occurs subject to tribal judicial process.<sup>70</sup> There are numerous other areas in which the drafting committee made adaptations to UCC Article 9 to reflect tribal customs and needs.<sup>71</sup>

Adoption of the MTSTA can enable a tribe to become part of the global movement toward secured transactions reform. This, along with other institutional developments or reforms, may enhance, perhaps dramatically, a tribe’s ability to attract capital for itself, its members as consumers, and its private Native-owned businesses.<sup>72</sup>

### *E. Current Status of Secured Transactions Laws and Access to UCC Filing Systems in Indian Country*

It is difficult to assess the status of tribal secured transactions laws and associated filing systems accurately because there is no comprehensive, up-to-date repository of all tribal laws. We know that some tribes have enacted such laws, but many (and perhaps most) have not. In 2011, the Federal Reserve Bank of Minneapolis initiated a study to determine which tribes, of the top 100 federally recognized tribes by population, have secured transactions laws and associated filing systems.<sup>73</sup> A comprehensive survey instrument was developed, and an experienced Native American researcher was employed to conduct the study.<sup>74</sup> An introductory and explanatory letter was sent to each member of every tribal council in advance, and the survey was conducted by telephone.<sup>75</sup> The research

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<sup>69</sup> *Id.* § 9-106(a)(60).

<sup>70</sup> *Id.* § 9-609.

<sup>71</sup> Although the MTSTA is based on UCC Article 9, it does not copy or follow Article 9 verbatim. See MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-101 *et seq.* In fact, in a number of areas the MTSTA differs from or simplifies the provisions of Article 9 in order to conform with tribal needs. See *id.* One particularly prominent example is the remedy of self-help repossession, which is readily available under Article 9 as long as the secured party does not breach the peace. U.C.C. § 9-609(b)(2) (AM. LAW INST. & UNIF. LAW COMM’N 2014). The MTSTA forbids self-help repossession, unless the debtor consents post-default in a dated and signed personal statement. MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-609. Therefore, repossession must either be by judicial process or under the debtor’s post-default consent. *Id.* For a detailed comparison between the UCC’s Article 9 and the MTSTA, see Elaine A. Welle, *A Guide to the Model Tribal Secured Transactions Act for those Familiar with the Uniform Commercial Code*, 37 AM. INDIAN L. REV. 467, 477 (2012); see generally Woodrow & Miller, *supra* note 7.

<sup>72</sup> Other institutional developments may include constitutional reform, establishing the independence of a tribe’s court(s) or other dispute-resolution forums, heightened educational requirements for tribal judiciary, and publication of its laws and court decisions.

<sup>73</sup> Unpublished study on file with the Federal Reserve Bank of Minneapolis, with results made available to the authors.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*



proved to be inordinately challenging for a wide variety of reasons and, as a result, significant information gaps persist.<sup>76</sup> Only fifty-six tribes completed the survey, twenty-four of which indicated that they have a secured transactions law.<sup>77</sup> Gathering information regarding filing systems was even more challenging and survey results are not deemed reliable. Based on what we learned from this survey as well as from first-hand information acquired by the authors from their reviews of many tribal commercial laws and interactions with individual tribal members, the best available information can be summarized as follows:<sup>78</sup>

- Some tribes have modeled their codes on the current official text of UCC Article 9.
- Some tribes have used Article 9 as adopted by the state in which the tribe's reservation or community is located as their template.
- Some tribes have adopted verbatim the law of the states in which they are located.
- Some tribes have incorporated a state's Article 9 by reference into tribal law, in some cases carving out a few provisions or making the state law subject to a few specified tribal laws.
- Some tribes have modeled their codes after a model law drafted by the University of Montana's Indian Law Clinic in the 1990s.
- Some tribes have incorporated into contracts either the official text of Article 9 or a state's version of Article 9 for individual transactions only.
- Some tribes have adopted more narrowly purposed collection codes that only address repossession procedures.
- Some tribes have enacted some unique provisions or versions of a secured transactions law; for example, incorporating into that law real property mortgage-lending provisions.
- Some tribes that have enacted some version of a secured transactions law did so in the 1980s and 1990s. Of these, many have not updated their laws to reflect significant

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

revisions that were made to the official text of Article 9 in the late 1990s and since adopted by all the states.

- Approximately 20 or so tribes have adapted and enacted the MTSTA, are in the process of adapting it for enactment, or are reviewing it for possible enactment.
- The majority of tribes, businesses located within tribal jurisdictions, and tribal members default to state law in credit transactions pursuant to boilerplate language in loan agreements.

Regarding the status of tribal secured transactions filing systems (based on the authors' first-hand knowledge and, to a lesser extent, the Federal Reserve Bank of Minneapolis survey results), our observations are as follows:<sup>79</sup>

- Five tribes have entered into compacts, memoranda of understanding, or joint-powers agreements with applicable state divisions to utilize state UCC Article 9 filing systems to support their secured transactions laws.<sup>80</sup>
- Some tribes utilize a state's UCC Article 9 filing system but do so informally, without a compact or other type of agreement.

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<sup>79</sup> *Id.*

<sup>80</sup> The State of Montana's Secretary of State's Office has entered into filing system compacts with the Crow Nation and the Chippewa-Cree Tribes. See *Tribal Forms*, MONT. SEC'Y OF STATE, <https://sos.mt.gov/business/uctribalnations> (last visited Mar. 27, 2018). The State of South Dakota's Secretary of State's Office has entered into a memorandum of understanding with the Oglala Sioux Tribe to provide a filing system arrangement. See *Oglala Sioux Tribe Compact*, S.D. SEC'Y OF STATE, <https://sdsos.gov/business-services/uniform-commercial-code/ucc-efs-information/ogla-sioux-tribe-compact.aspx> (last visited Mar. 27, 2018). The State of Minnesota's Secretary of State's Office has entered into a Joint Powers Agreement with the Leech Lake Band of Chippewa to provide a filing system arrangement. See *Leech Lake Band and State of Minnesota sign lien-filing agreement*, FED. RES. BANK OF MINNEAPOLIS (Jan. 1, 2012), <https://www.minneapolisfed.org/publications/community-dividend/leech-lake-band-and-state-of-minnesota-sign-lien-filing-agreement>. All four tribes have adopted the MTSTA. In addition, South Dakota's Secretary of State's Office has a filing system agreement with the Cheyenne River Sioux Tribe to support the tribe's adaptation of South Dakota's UCC Article 9, as adopted by the tribe by reference. See *Cheyenne River Sioux Tribe UCC/ EFS Forms*, S.D. SEC'Y OF STATE, <https://sdsos.gov/business-services/uniform-commercial-code/forms/cheyenne-river-sioux-tribe.aspx> (last visited Mar. 27, 2018). Both the Montana and South Dakota Secretaries of State UCC websites have specialized tribal financing statements and other forms that recognize the filings as pursuant to tribal law, as well as links to or PDFs of the tribes' laws and the state-tribal filing system agreement.

- At least one tribe utilizes a state system pursuant to a state law granting tribes permission to do so.<sup>81</sup>
- Most tribes designate the tribal clerk of court or other tribal office as the place to file financing statements pursuant to their secured transactions laws.

In sum, the environment for supporting secured lending across Indian Country is significantly non-uniform in nature, with the majority of tribes having no reliable legal infrastructure in place to support and promote secured financing for business development and consumer purposes.<sup>82</sup> The lack of a legal infrastructure creates a confusing environment, raising significant risk issues for lenders and other creditors. Efforts to ameliorate the risk often result in what are perceived in Indian Country as discriminatory lending practices (such as higher interest rates, shorter loan terms, or simply no deals) but are, in many cases, simply risk mediation practices commonly and necessarily employed by lenders and other creditors in high-risk credit transactions.<sup>83</sup>

### III. THE CENTRALITY OF A FILING SYSTEM TO SECURED TRANSACTIONS LAW

#### A. *The Purpose and Importance of a Filing System*

Without a publicly searchable filing system, a court may hold as fraudulent a consensual transaction in which a debtor retains possession of personal property but grants a creditor a lien on the property that can be enforced upon default. The reason for such a holding is that third parties, such as other creditors, may be misled about the debtor's financial condition because they will assume, based on appearances, that the debtor owns the encumbered property outright.<sup>84</sup>

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<sup>81</sup> In 2001, the Seminole Tribe of Florida adopted a variation of UCC Article 9 as its Secured Transactions Ordinance No. C-01-01. See Burt Bruton, *Financing Issues in Indian Country*, ACREL (Oct. 2005), <https://acrel.site-ym.com/search/all.asp?c=&bst=burt+bruton+financing+issues+in+indian+country>. The law designates the privatized Florida Secured Transactions Registry as the place to file pursuant to Florida Statutes Chapter 285.20. See *id.*

<sup>82</sup> In some tribes, "once the code is adopted as tribal law, the law languishes on the books without any additional work to ensure that the code is effectively implemented." Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357, 362 (2006).

<sup>83</sup> Other factors that impact credit decisions and assessment of risk include the credit-worthiness of the potential borrower, trust that the tribal court system will fairly and impartially uphold contract and property rights, trust that the lender will be permitted to repossess its collateral in the event the potential borrower defaults, and trust in the tribal administration. See GROWING ECONOMIES IN INDIAN COUNTRY: TAKING STOCK OF PROGRESS AND PARTNERSHIPS, *supra* note 1, at 4–10.

<sup>84</sup> Prior to the advent of publicly searchable filing systems with the chattel mortgage acts that began to be adopted in the early nineteenth century, courts treated non-possessory security rights as fraudulent. Grant Gilmore, *Security Law, Formalism and Article 9*, 47 NEB. L. REV. 659, 659

A filing system alleviates the problem by allowing the secured creditor to give third parties notice of its lien.<sup>85</sup> Analogous to a recording system for giving notice to third parties of interests in land, a secured transactions filing system permits a creditor with a consensual lien on personal property to file a notice of the lien, indexed under the debtor's name, in a publicly searchable database maintained by the state.<sup>86</sup> The purpose of a filing system, then, is to provide notice of liens on personal property and thereby avoid the problems that might arise if a third party is misled about the debtor's rights in assets that serve as collateral.<sup>87</sup> In the absence of a filing system, the secured party may have no choice but to resort to costly field warehousing arrangements that ensure the secured party can perfect its security interest through constructive possession while allowing the debtor to remain in possession of the collateral.<sup>88</sup> These late nineteenth century arrangements were particularly suitable to the needs of seasonal industries,<sup>89</sup> but after the adoption of UCC Article 9 and development of effective collateral management capabilities, became a rarity.<sup>90</sup>

UCC Article 9, the MTSTA, the UNCITRAL and UNIDROIT instruments, and the modern secured transactions laws being adopted around the world cannot be utilized effectively in practice without a publicly searchable filing system. The UNCITRAL *Legislative Guide*, recognizing the centrality of filing systems (called “registries” in the Guide), states that “[t]he 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.”<sup>91</sup> Tribes

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(1968). In the words of one of the principal drafters of UCC Article 9, Professor Grant Gilmore, “[r]ight-thinking people seem always to have felt that there was something vaguely dishonorable, if not outright dishonest, about transactions in which a loan is secured by a debtor's personal property—particularly about transactions in which the debtor is allowed to remain in possession of the property and to enjoy its full use during the loan period.” *Id.*

<sup>85</sup> UNCITRAL LEGISLATIVE GUIDE, *supra* note 10, at 21.

<sup>86</sup> *Id.* at 151.

<sup>87</sup> *See id.* at 21.

<sup>88</sup> Harold F. Birnbaum, *Form and Substance in Field Warehousing*, 13 L. & CONTEMP. PROBS. 579, 579–80 (1948) (describing the mechanics of field warehousing). Under field warehousing, the secured creditor retains a collateral manager that sets up a warehouse on the premises of the debtor from which the collateral may be released against specific payments. *Id.*

<sup>89</sup> GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 146–49 (1965).

<sup>90</sup> *See* Nicholas Budd, *Field Warehousing: Security for Developing Countries and the New Market Economies*, INT'L BUS. LAW., Mar. 1995, at 120, 122.

<sup>91</sup> UNCITRAL LEGISLATIVE GUIDE, *supra* note 10, at 149 (internal citation omitted). UNCITRAL concluded that countries considering secured transactions reform need recommendations on the functioning of a registry more than they need a model act and adopted the UNCITRAL Guide on the Implementation of a Security Rights Registry in 2013. UNCITRAL GUIDE ON THE IMPLEMENTATION OF A SECURITY RIGHTS REGISTRY, *supra* note 14. A subsequent UNCITRAL project to develop a model act was completed in 2016. *See* UNCITRAL MODEL LAW, *supra* note 6.

adopting the MTSTA (or any other version of a secured transactions law) must have access to a well-designed, modern filing system.<sup>92</sup>

### B. *Types of Systems for Providing Notice of Liens*

There are two basic types of filing systems for providing notice to the world of a lien on personal property. Some systems are asset-based; that is, notices are indexed according to a description of the encumbered asset and searchers must be aware of that description in order to access the notices (financing statements).<sup>93</sup> An example of an asset-based system is the registry developed for commercial airframes, aircraft engines, and helicopters pursuant to the Cape Town Convention, Aircraft Protocol.<sup>94</sup> Because airframes and aircraft engines are readily identifiable by their serial numbers, they are well suited for an asset-based filing system.<sup>95</sup>

The other type of system is based on the debtor's name (or other identifier) and is the only type of system suitable for a general secured transactions law and the wide range of transactions it covers. For example, if a tribal business borrows money and uses all its existing and subsequently acquired inventory of goods as collateral, the lender need only file a simple notice identifying the business by name and describing the collateral in generic terms (i.e., "inventory"). It would be impractical to require the creditor to list the serial number of each item of inventory, especially with regard to new inventory acquired by the business, after the notice is filed.<sup>96</sup> Another lender considering a loan to the same business to be

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<sup>92</sup> In some instances, notice to third parties of a lien can be accomplished by a creditor taking possession or control of its collateral, and some modern secured transactions laws may protect from third-party claims a creditor that neither files a notice of its lien nor takes possession of its collateral. See UNCITRAL MODEL LAW, *supra* note 6, at art. 24. However, filing is by far the most common method by which creditors obtain protection from third parties and it is the method that will support asset-based loans secured with accounts and inventory, equipment, etc. (i.e., income-producing collateral). U.N. COMM'N ON INT'L TRADE LAW, U.N., DRAFT PRACTICE GUIDE TO THE UNCITRAL MODEL LAW ON SECURED TRANSACTIONS, at 20–21, 33 A/CN.9/WG.VI/WP.77 (2018).

<sup>93</sup> One such U.S. registry is operated by the Federal Aviation Administration for the recording of conveyances, including security interests in aircraft objects. See Charles W. Mooney, Jr., *United States of America: Reconsidering the Transaction Document Filing Requirement for National Registry*, in IMPLEMENTING THE CAPE TOWN CONVENTION AND THE DOMESTIC LAWS ON SECURED TRANSACTIONS 197, 200 (Souichirou Kozuka ed., 2017).

<sup>94</sup> See Rob Cowan & Donal Gallagher, *The International Registry for Aircraft Equipment—The First Seven Years, What We Have Learned*, 45 UCC L.J. 255 (2014).

<sup>95</sup> Certificate-of-title acts in U.S. states, applicable to such assets as motor vehicles, boats, and manufactured homes, utilize an asset-based approach. See UNDERSTANDING SECURED TRANSACTIONS, *supra* note 62, at 211–15. However, creditors generally do not obtain notice of a lien by searching a filing system. See *id.* Rather, the certificate of title issued to the owner by the state contains information identifying creditors with liens on the asset. See *id.*

<sup>96</sup> It would be equally impractical for the creditor to have to release an item of inventory from the financing statement when it is sold and add new one(s) that replenish the inventory.

secured by the same collateral will be alerted to the potentially existing lien by searching the filing system under the business's name. A properly designed filing system is inexpensive for filers and searchers, and provides the underpinnings for a vast array of transactions.

### C. Filing Systems in the U.S. (including Indian Country)

Under UCC Article 9 each state maintains its own filing system. The systems are operated by a public agency, most commonly the office of the secretary of state. The systems were established in the 1950s and 1960s and thus were initially paper-based. Most states still accept paper filings,<sup>97</sup> but in recent years the systems have increasingly transitioned to electronic format. States incentivize filers to use electronic methods of delivering financing statements primarily by reduced filing fees.<sup>98</sup> However, such incentives have not yet fulfilled the objective of transitioning into e-filing and rendering paper delivery obsolete.

In Delaware, as of December 2015, 40% of all filings were still being delivered in paper form.<sup>99</sup> For this reason, Delaware and four other states no longer permit filers to submit their financing statements on paper.<sup>100</sup> A financing statement can be filed from a creditor's computer, and a searcher can access the system electronically.<sup>101</sup> Most states have adopted a set of regulations that govern the internal functioning of their systems and that are consistent with, and build upon, the substantive rules of UCC Article 9.<sup>102</sup> The International Association of Commercial Administrators (IACA), whose membership includes the officers that oversee each state's filing system, has developed a set of model regulations that have been adopted in many states.<sup>103</sup> The original *Implementation Guide* to the MTSTA contained a set of model regulations,<sup>104</sup> based on those developed

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<sup>97</sup> UCC Article 9 itself is medium neutral and will support an all-electronic filing system. See U.C.C. § 9-101 *et seq.* (AM. LAW INST. & UNIF. LAW COMM'N 2010).

<sup>98</sup> See *UCC Fees*, WYO SEC'Y OF STATE (Jan. 2016), <https://ucc.state.wy.us/PublicInfo/fees.pdf>. The cost of a paper filing is thirty dollars; the cost of an e-filing is fifteen dollars. *Id.*

<sup>99</sup> Norman M. Powell, *Delaware Goes Paperless (Sort of): Direct Submission of Paper or Imaged UCC Filings Is No Longer Permitted as of December 1, 2015*, 45 UCC L.J. 1 (2017).

<sup>100</sup> Colorado, New Jersey, Delaware, and West Virginia prescribe mandatory e-filing by administrative rules or filing office policy, while North Dakota has done so by amending a statute. Paul Hodnefield, *Blurred Liens: Understanding the Nuts and Bolts of UCC Filing Methods*, 47 UCC L.J. 1 (2017).

<sup>101</sup> See *Department of State: Division of Corporations*, STATE OF DEL., <https://icis.corp.delaware.gov/Ecorp/UCC.aspx> (last visited Mar. 21, 2018) (allowing for electronic filing and searching).

<sup>102</sup> See INT'L ASS'N OF COMMERCIAL ADM'RS, MODEL ADMIN. RULES (2015).

<sup>103</sup> *IACA Model Administrative Rules*, IACA, <https://www.iaca.org/model-administrative-rules-for-ucc-article-9/> (last visited Mar. 21, 2018). IACA is also responsible for the design of the basic forms used for filing information in the state systems. *Id.*

<sup>104</sup> COMMENTARY TO THE MTSTA, *supra* note 13, at 107–41.

by IACA,<sup>105</sup> that can be readily adapted for tribal use and are available to any tribe that decides to operate its own filing system. The regulations are also well-adapted for use by a consortium of tribes operating a communal system. The revised *Implementation Guide* omitted the regulations because, as of the date of its publication, no tribe or consortium of tribes had created a filing system and it seemed unlikely that any tribe or consortium would do so. That situation would change if our proposal is implemented, in which case a robust set of regulations will be necessary.

As noted above, at this time only a few tribes utilize a state filing system through a memorandum of understanding, compact, or joint-powers agreement, or pursuant to a state law authorizing such an arrangement.<sup>106</sup> Some tribes designate the state system as the place to file under tribal law, but without formalizing such an understanding with the state.<sup>107</sup> Other tribes designate the tribal clerk of court or other tribal office as the place to file, but it is unclear whether the filings can efficiently and inexpensively be searched by interested parties.<sup>108</sup> Without access to a fully functional, modern filing system, a tribe's secured transactions law will not be fully effective in terms of supporting increased economic activity.<sup>109</sup> However, the cost of a system that will be credible and trusted by lenders, other creditors, and prospective buyers of assets tends to be beyond the capacity of most tribes.<sup>110</sup>

#### *D. The International Movement to All-Electronic Systems*

As noted in the preceding section, states created the UCC Article 9 filing systems before the advent of modern electronic means of filing and searching.<sup>111</sup> Because most states continue to accept paper filings and have only moved

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<sup>105</sup> IACA generously permitted the ULC to make use of its copyrighted regulations.

<sup>106</sup> COMMENTARY TO THE REVISED MTSTA, *supra* note 13, at 111–15 (containing a detailed Model Joint Sovereign Filing System Agreement). The model agreement is based on the Joint Sovereign UCC Filing Compact between the Crow Nation and the State of Montana. See *Crow Nation, State of Montana sign UCC filing compact*, FED. RES. BANK OF MINNEAPOLIS (May 1, 2008), <https://www.minneapolisfed.org/publications/community-dividend/crow-nation-state-of-montana-sign-ucc-filing-compact>.

<sup>107</sup> See *supra* note 73 and accompanying text.

<sup>108</sup> The Minneapolis Federal Reserve Bank's Center for Indian Country Development made calls to many such tribal clerks of court or other tribal offices to gather information about how to file and search for notices. In most cases, tribal staff were not aware of these functions of their office or of the procedures for filing and searching, if any. Navajo Nation has the most utilized tribal filing system, but it is entirely paper-based. One of the co-authors (Woodrow) was the founding director of the Center and has access to the results of the calls.

<sup>109</sup> DIV. OF ECON. DEV., U.S. DEP'T OF THE INTERIOR, TRIBAL ECONOMIC DEVELOPMENT PRINCIPLES AT A GLANCE SERIES: WHY TRIBES SHOULD ADOPT A SECURED TRANSACTIONS CODE 6 (2015).

<sup>110</sup> COMMENTARY TO THE REVISED MTSTA, *supra* note 13, at 103.

<sup>111</sup> See *supra* notes 97–98 and accompanying text.

incrementally toward the electronic filing format,<sup>112</sup> their systems are somewhat cumbersome and expensive to operate. In the international arena, many countries engaged in secured transactions reform have opted for all-electronic systems, thereby dramatically reducing the cost of establishing, staffing, and maintaining their systems. Canadian common-law provinces initially developed these electronic systems and today they are the norm in both developed and developing jurisdictions.<sup>113</sup>

In 2010, Mexico launched a new registration system that processes all notices of liens and search requests exclusively by electronic means.<sup>114</sup> Such a design dramatically reduces the costs of operation, as filing officers do not have to store paper filings or even transcribe information submitted by way of a paper filing into the registry database. The cost of processing an electronic filing is minimal, and Mexico decided to subsidize the use of its secured transactions law by making the system available to both filers and searchers free of charge.<sup>115</sup> In early 2014, Colombia launched an all-electronic system and in its first two months of operation the number of filings processed exceeded the number processed by the old system in the previous 40 years.<sup>116</sup> The cost of registration is about \$10

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<sup>112</sup> In 2012, Colorado became the first state to move to an all-electronic system. See Mooney, *supra* note 93. By contrast, Arizona still accepts only paper filings, most of which are faxed to the filing office. See *Uniform Commercial Code (UCC)*, ARIZ. SEC'Y OF STATE, <https://www.azsos.gov/business/uniform-commercial-code-ucc> (last visited Mar. 21, 2018).

<sup>113</sup> See *Secured Transactions and Collateral Registries*, *supra* note 51.

<sup>114</sup> The reforms of 2009 amended the Commercial Code to create a single registry of security interests, known as the RUG, in which any “guaranty or special privilege or a right to possession of personal property in order to secure performance of an obligation” may be recorded. DECRETO por el que se reformatan y adicionan diversas disposiciones del Reglamento del Registro Público de Comercio [Decree by Which Various Provisions of the Regulations of the Public Registry of Commerce are Added and Amended], art. 1(II) (2010) (Mex.). Implementing regulations for the RUG were issued in 2010. D. Michael Mandig, *Secured Lending Reform in Latin America: A Practitioner's Point of View in Mexico*, 28 ARIZ. J. INT'L & COMP. L. 183, 192 (2011); Dale Beck Furnish, *Mexico's Emergent New Law of Secured Transactions: Recent Developments 2000–2010*, 28 ARIZ. J. INT'L & COMP. L. 143, 175 (2011). Since the RUG did not address all the deficiencies of the prior framework, e.g., it did not amend the substantive laws that apply to each security device, further reforms were made in 2014. Isis N. Isunza, *The Impact of Secured Transactions Reforms in Mexico and Colombia*, 33 ARIZ. J. INT'L & COMP. L. 125, 128–29 (2016).

<sup>115</sup> Marek Dubovec & Harry C. Sigman, *Some Thoughts (and Facts) about the Process of Secured Transactions Law Reform, with Special Emphasis on Registration, the Key to Achievement of Reform's Goals*, in INTERNATIONAL AND COMPARATIVE SECURED TRANSACTIONS LAW, ESSAYS IN HONOUR OF RODERICK A MACDONALD 181 (Spyridon V. Bazinas & Orkun Akseli eds., 2017).

<sup>116</sup> Colombia enacted a new secured transactions law in 2014, modeled after the Organization of American States' Model Inter-American Law on Secured Transactions, and subsequently created a collateral registry. Isunza, *supra* note 114, at 134–37. Since the registry came into operation, more than one million registrations have been made, relating to secured obligations in excess of US \$93 billion. WORLD BANK, DOING BUSINESS 2017: EQUAL OPPORTUNITY FOR ALL 55 (14th ed. 2017); Boris Kozolchik, *The Second Colloquium for the Harmonization of Commercial Law in the Trans-Pacific Region: A Summary and Analysis of its Proceedings and of Future Steps*, 33 ARIZ. J. INT'L & COMP. L. 1, 5 (2016).



and searches are free.<sup>117</sup> In both countries, the pre-existing decentralized filing systems were inefficient and cumbersome to use.<sup>118</sup> The new systems operate on a nationwide basis and replace the multiple filing systems operated by states (in the case of Mexico) and provincial Chambers of Commerce (in the case of Colombia).<sup>119</sup>

The cost of operating a single system to which users from multiple jurisdictions have access is significantly lower than the cost of operating a system in each jurisdiction. Australia realized these cost-savings benefits when it transitioned from local filing offices to a federal filing system in 2012. Its new Personal Property Securities Register (PPSR) replaced over 70 pre-existing registries that recorded notices and documents with respect to some secured transactions.<sup>120</sup> The Australian Financial Security Authority, tasked with management of the PPSR, has the duty to operate it under the cost recovery model, thereby ensuring that the functions and services operate at a certain level, but the fees charged do not exceed the cost necessary to operate the system and provide such services.<sup>121</sup> In 2015, the Authority requested the fees be reduced by 15% since they sufficiently covered all of its reasonable costs.<sup>122</sup> In 2017, the cost of filing is about US\$5.<sup>123</sup> These are examples of a nationwide electronic filing system that replaced fragmented state/provincial regimes.

Even the jurisdictions with the least developed economies have overwhelmingly implemented all-electronic filing systems. Liberia launched such a system in June 2014, and all-electronic systems are also in operation in Afghanistan, Ghana, Malawi, Sierra Leone, and many other countries.<sup>124</sup>

Finally, the International Registry established under the Aircraft Protocol to the Cape Town Convention is a wholly electronic global system in which

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<sup>117</sup> See *Tarifas del Registro del Garantías Mobiliarias*, CONFECAMARAS, <https://www.garantiasmobiliarias.com.co/Ayuda/Legislacion/Tarifas%20del%20Registro%20de%20Garantias%20Mobiliarias.pdf> (last visited Mar. 13, 2018) (including information on how the Colombian Registry charges fees).

<sup>118</sup> Isunza, *supra* note 114, at 126–27.

<sup>119</sup> *Id.* at 128.

<sup>120</sup> David Brown, *Australian Secured Transactions Law Reform*, in *SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES, AND PRACTICE* 145, 146 (Louise Gullifer & Orkun Akseli eds., 2016).

<sup>121</sup> The Australian Financial Services Authority must produce cost recovery statements with respect to the fees collected by the PPSR on an annual basis. See AUSTL. FIN. SEC. AUTH., *COST RECOVERY IMPLEMENTATION STATEMENT* (2015). These statements are the basis to adjust registry fees. See *id.*

<sup>122</sup> *Id.* at 3.

<sup>123</sup> *Fees for Using the PPSR*, AUSTL. GOV'T, <https://www.ppsr.gov.au/fees> (last visited Mar. 12, 2018).

<sup>124</sup> See *Global Secured Transactions Monitor*, *supra* note 50.

registrations and searches against aircraft objects may be made.<sup>125</sup> Over the decade since its establishment in 2006, the number of registrations has grown by 12.75% on an annual basis.<sup>126</sup> The registration fee is US\$100, which is negligible as compared to the value of the collateral, which may be upwards of US\$200 million for the newest models of airplanes.<sup>127</sup>

Tribes seeking to adopt a secured transactions law or to modernize an existing law can also realize the efficiencies that result from a single, integrated, all-electronic filing system.

#### IV. THE DESIGN OF A NATIONAL TRIBAL FILING SYSTEM

The fundamental operational features of a tribal filing system, such as electronic access for filers and searchers and the indexing of filed notices based on the debtor's name, have been described above.<sup>128</sup> It is essential that the law and the regulations governing the functioning of the system be in place before commencing the development of a filing system. But, unlike the situation in some developing countries where funds have been wasted procuring assets for a system that is never built because the law and regulations are never adopted, the legal framework for a national tribal filing system is already in place: the MTSTA and the supporting regulations set forth in the original *Implementation Guide*.<sup>129</sup> Thus, the information technology company that codes the software for the system will know the legal requirements and will be able to properly develop the individual system functions, such as indexing and search logic.

The technology supporting a modern, all-electronic filing system consists of readily available software and hardware.<sup>130</sup> In designing the system, it may be helpful to survey the recently developed systems in other countries and in the most electronically advanced U.S. states to identify the types of hardware that have been the most successful. As for software, the most economic approach will likely be to license an existing software application already powering a successful

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<sup>125</sup> See Charles W. Mooney, Jr., *The Cape Town Convention's Improbable-But-Possible Progeny Part One: An International Secured Transactions Registry of General Application*, 55 VA. J. INT'L. L. 163 (2014) (detailing a proposal to establish an international registry that states may utilize for the purposes of perfecting and determining priorities of domestic security interests, patterned on the International Registry Under the Aircraft Protocol).

<sup>126</sup> *The International Registry After 10 Years – Civil Aviation's Great Success Story* 9 (Int'l Civ. Aviation Org., Working Paper No. A39-WP/422, 2016).

<sup>127</sup> *Registry Fees*, INT'L REGISTRY OF MOBILE ASSETS, <https://www.internationalregistry.aero/ir-web/registryFees> (last visited Mar. 12, 2018) (including the fee structure).

<sup>128</sup> See *supra* notes 93–101 and accompanying text.

<sup>129</sup> See *supra* notes 102–05 and accompanying text.

<sup>130</sup> For instance, the Ghanaian software company BSystems developed a registry software platform that has been deployed in Ghana, Liberia, Malawi, Nigeria, Sierra Leone, and Zambia. See BSYSTEMS, <http://bsystemslimited.com/newcollateralstyem.php> (last visited Mar. 13, 2018).

system in another country or state and engage an information technology company to customize the application to fit the legal framework of the MTSTA and supporting regulations.<sup>131</sup> Licensing an existing software application that has already been tested and regularly updated will reduce costs and potential delays and will minimize the risk that the system will not function to the required capacity. A joint project of the UNIDROIT Foundation and the Commercial Law Center associated with Oxford University has been attempting to identify the best practice standards for e-registries.<sup>132</sup> The findings resulting from this project should further aid in the development of a nationwide tribal filing system, ensuring that it is robust and built on technology that complies with the best practice standards.<sup>133</sup>

Furthermore, the recent emergence of blockchain technology to power various applications relating to commercial transactions, including trade finance, promises to provide a further option for consideration. Blockchain is a distributed ledger that is not controlled by any single party. Rather, anyone can inspect it, and authorized participants may update it.<sup>134</sup> In fact, Delaware recently launched “smart UCC filings” on a distributed ledger.<sup>135</sup> Open-source distributed ledger applications, such as Quorum from JP Morgan Chase, are available and could be adapted for the tribal filing system. The implementation of blockchain technologies has been hampered by an inadequate legal structure, but that will not be an impediment for the proposed tribal filing system because the substantive law, the MTSTA, and the related filing-office regulations will readily support the use of such technologies.<sup>136</sup>

Robust technology is available and has been utilized successfully in central filing systems for multi-jurisdictional countries such as Australia and Mexico. This technology should be considered for a filing system that will have to accommodate tribes located across the U.S. The technology is flexible enough to process a wide

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<sup>131</sup> See Marek Dubovec, *A Guide to a Successful Adoption and Implementation of the Organization of American States Model Law on Secured Transactions and Registry Regulations in Honduras—the National Law Center Experience*, 43 UCC L.J. 825, 842 (2011).

<sup>132</sup> See *Best Practices in the Field of Electronic Registry Design and Operation*, UNIV. OF OXFORD FAC. OF L., <https://www.law.ox.ac.uk/research-subject-groups/best-practices-field-electronic-registry-design-and-operation> (last visited Mar. 13, 2018).

<sup>133</sup> *Id.*

<sup>134</sup> See Scott J. Shackelford & Steve Myers, *Block-by-Block: Leveraging the Power of Blockchain Technology to Build Trust and Promote Cyberspace*, 19 YALE J. L. & TECH. 334, 342–43 (2017).

<sup>135</sup> Andre Tinianow & Caitlin Long, *Delaware Blockchain Technology Initiative: Transforming the Foundational Infrastructure of Corporate Finance*, HARV. LAW SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Mar. 16, 2017), <https://corpgov.law.harvard.edu/2017/03/16/delaware-blockchain-initiative-transforming-the-foundational-infrastructure-of-corporate-finance/>.

<sup>136</sup> See Jason Kravitt et al., *The Blockchain Moves Fast; The Law Less So*, THE SECURED LENDER, Mar. 2017, at 12 (arguing that inadequate laws are a roadblock to the full potential of distributed ledger technology).

range in terms of number of filings. Such flexibility will be an important feature of a national tribal filing system, which may have to process only a relatively small number of filings and search requests at the outset but must have the capacity to handle the much larger number of filings and search requests that can be expected as tribes and creditors begin to realize the benefits of the MTSTA. Given the exclusive electronic access for filings and searches, the costs of operating these systems are low requiring minimal staffing since no human input is necessary to file and search for financing statements.

#### V. CONCLUSION AND PROPOSAL

The need to break down barriers to capital access is critical for tribal communities that wish to expand and diversify, thereby strengthening and sustaining, their economic activity. The importance of developing legal institutions to address this need is borne out by the experience of emerging and transitioning economies across the globe. Organizations dedicated to international economic development have almost universally identified secured transactions reform as their highest legislative priority, recognizing that such laws are a primary engine of economic growth.

Similarly, many tribes in the U.S. are beginning to recognize the importance of secured transactions reform, and increasing numbers of tribes have taken advantage of the MTSTA to address this critical need. However, the overall environment for secured transactions law across Indian Country remains in disarray. The significant non-uniformity of existing tribal secured transactions laws, as well as the lack of functioning filing-system arrangements for most tribes, have contributed to perpetuating an uncertain and confusing environment for lending, which continues to be deemed high-risk. Efforts have been underway for several years to educate tribes about the MTSTA, and many tribes have adopted the act or are in the process of reviewing it for adoption. However, it has become increasingly apparent that a lack of access to a reliable filing system for many of these tribes remains a significant barrier to the effectiveness of that act. Some tribes have been able to successfully “piggyback” onto state filing systems, but many state systems cannot easily accommodate such an arrangement for a variety of reasons, including legal barriers and structural impediments. Also, some tribes are unwilling to utilize state systems even if they are available, and developing a system for an individual tribe is likely to be cost-prohibitive.<sup>137</sup>

In the international arena, emerging and transitioning economies moving forward with secured transactions reform have taken advantage of new, all-electronic filing systems that are significantly less expensive, less labor-intensive,

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<sup>137</sup> DIV. OF ECON. DEV., *supra* note 109, at 6.

more secure, and more efficient than the state systems in the U.S. that accommodate paper filings. The experience of these economies demonstrates that the technology to support a state-of-the-art national tribal filing system is readily available. Ideally, such a system would be maintained by a Native-owned national organization dedicated to serving the interests of tribal communities. Access to such a system would enable tribes that have enacted the MTSTA to realize the enormous benefits that flow from effective secured transactions reform and encourage other tribes to opt for the MTSTA approach.

The purpose of this article is to propose that a national, all-electronic, multi-jurisdictional tribal filing system based on the MTSTA and its supporting regulations be developed to enable tribes to more readily participate in the global movement of secured transactions reform. With the MTSTA and such a filing system in place, lenders and other creditors will have increased confidence that a tribe's laws will protect their vital interests, and the availability of collateral as security may significantly reduce the cost of credit. The time is right, the technology is available, and the resources can be readily obtained. There is every reason to move forward without delay.