Universalising the American – Secured Credit and UNCITRAL

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UNCITRAL, the United Nations Commission on International Trade Law, has recently produced a Legislative Guide on more particularly on secured transactions, or secured credit law as it is variously called. The Guide follows the broad contours of Article 9 of the United States Uniform Commercial Code though it is not an exact copy. It aims to harmonise and modernise the law of secured credit across the globe. In UNCITRAL’s view, the Legislative Guide will aid the growth of individual businesses and also in general economic prosperity. Harmonisation and “modernisation” are assumed to equal “liberal” security regimes and the facilitation of secured credit. In this paper the modernisation equals liberalisation agenda is subjected to greater scrutiny. The paper begins by asking what is the effect of recognising security rights? In short, what do security rights do for you? The second part asks why harmonise the law of secured credit particularly in the “liberal” American-nuanced way that the UNCITRAL guide seeks to do? The third part considers why “liberal” secured credit regimes are considered to be beneficial. The fourth part addresses in greater detail critical perspectives on the international harmonisation and modernisation agenda. The final part concludes and summarises the discussion counselling against the “silver bullet” of secured transactions reform especially in the American oriented manner that the Guide seeks to effect. As one

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2 UNCITRAL describes its mission as follows: “The core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years. UNCITRAL’s business is the modernization and harmonization of rules on international business” – www.uncitral.org/. This may represent mission creep from the UN resolution establishing UNCITRAL - Resolution 2205 (XXI) - which spoke of “progressive harmonization and unification” The focus now on “modernization and harmonization” sees UNCITRAL in a more pro-active light actively striving for the reform of global commercial law – see S Block-Lieb and T Halliday “Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law” (2007) 42 Texas International Law Journal 475.
commentator acutely observes in a slightly different context: “It would be truly remarkable for reform of the legal system to be the key to securing the Holy Grail of economic growth fostered by financial development.”

Security rights

While there is probably no universally recognised definition of security rights, it is generally taken as meaning something equivalent to a right over property to ensure the payment of money or the performance of some other obligation. The property over which security is taken is referred to as “secured” or “collateralised”. The security taker has a superior claim to payment of the debt etc. out of the secured property than the generality of the debtor’s creditors. The security taker will also generally have access to speedier enforcement mechanisms. In the event that the secured debt is not repaid, the security taker will normally have a right of sale over the secured assets, whether unilaterally or by seeking the intervention of an administrative mechanism or court. This provides the secured creditor with greater leverage than unsecured creditors through more control over the timing of the realisation of the secured assets. The debtor may also be more likely to pay the secured debt over unsecured debts since failure to pay can result in the loss of an asset that is crucial to the carrying on of the debtor’s business. This gives the secured creditor a stronger hand in debt restructuring negotiations. Security also opens up the possibility of self-help remedies for the secured creditor though self-help is a controversial concept in many jurisdictions, not least because it is seen to be possibly inconsistent with constitutional guarantees safeguarding peaceful possession of property.

Economists suggest that security plays a crucial role in lending decisions by addressing the problems of adverse selection, moral hazard and uninsurable risk. The incentives of creditors and borrowers are aligned and a credible commitment added to the relationship. Security is seen as performing a disciplinary function and is a cornerstone of the theory of control rights and incomplete contracts that has been

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developed by Oliver Hart and others.\(^5\)

Adverse selection refers to the fact that some borrowers may turn out to be untrustworthy or unreliable – knaves or fools. A lender cannot simply raise interest rates to screen out these borrowers because honest borrowers with sound projects will drop out of the picture as well. The potential pay-off from the project may not be enough to meet the borrowing costs. Where security is taken however, adverse selection problems are addressed more powerfully. The lender can back up its assessment of the character of the borrower and the soundness of the business plan with information on the value of the collateral. As well as the revenues generated from the project, the lender can look to the collateral for repayment.

Moral hazard refers to the possibility that a borrower may abscond with the loan. The larger the loan, the greater the moral hazard but if the borrower provides security, the lower are the lender’s costs in monitoring moral hazard. One might say the borrower has given the lender a hostage against flight risk in the shape of security.

Security reduces the risk of adverse outcomes, such as the borrower not being able to repay due to loss of key customers, or losses on foreign exchange. Such risks may not be easily insurable, or insurable at all. Uninsurable risk is reduced in unsecured lending through “spreading” i.e. through making smallish loans to a large number of borrowers. Security allows more concentrated lending and reduces uninsurable risk since the security serves as an alternative repayment mechanism.\(^6\)

By way of summary, security rights provide the creditor with property rights which strengthen the creditor’s contractual claims against the debtor in various ways. Firstly, the security taker should have priority over other creditors in the event of the debtor becoming insolvent. Secondly, the security taker should have a measure of control over the secured assets or at least share control with the debtor, thereby strengthening the debtor’s hands in restructuring negotiations. Thirdly, the security taker should have easier enforcement mechanisms available to it than the generality of creditors including a power of sale over the secured assets. Fourthly, the easier debt enforcement opportunities may include self-help measures such as sale of the

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secured assets through unilateral action by the creditor without having to seek the permission of a court or administrative agency. But not all these features are present in every jurisdiction. Not all jurisdictions, for instance, recognise the full priority of secured claims. A proportion of secured asset realisations may be carved out, or set aside, for the benefit of unsecured creditors. There may also be restrictions on the enforcement of security rights and in particular limitations, or indeed wholesale prohibition, on self-help enforcement. The overall effect however, of recognising security rights however is to improve a creditor’s hand in dealing with adverse selection, moral hazard and uninsurable risk issues.

**Why harmonise the law of secured credit?**

In short, UNCITRAL has advocated harmonisation of the law of secured credit to make the law more liberal and facilitative of security and this in turn is seen as producing positive impacts in terms of economic growth.UNCITRAL has suggested the removal of restrictions on the taking of security and increasing the range of assets that can be used as security. It has also suggested the introduction of mechanisms for the registration of security rights thereby enhancing the amount of information that is available about such rights. In UNCITRAL’s view:

“The key to the effectiveness of secured credit is that it allows borrowers to use the value inherent in their assets as a means of reducing credit risk for the creditor. Risk is mitigated because loans secured by the property of a borrower give lenders recourse to the property in the event of non-payment. Studies have shown that as the risk of non-payment is reduced, the availability of credit increases and the cost of credit falls. Studies have also shown that in States where lenders perceive the risks associated with transactions to be high, the cost of credit increases as lenders require

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increased compensation to evaluate and assume the increased risk.”

There is a suggestion that too many countries have too many restrictions on the taking of security and that countries with “inadequate” secured transactions regimes have suffered significant losses in gross domestic product (GDP) in consequence. These studies suggest that gaps or weaknesses in collateral-based credit systems hinder financial and economic development.\(^9\)

Simply stated, banks and other financial institutions will not engage in large scale lending activities if their position as secured creditors in the liquidation of their borrowers is not sufficiently certain, or that sufficient means for the enforcement of security are not available. More controversially, it has also been suggested that businesses in less developed financial systems and civil law countries substitute less efficient forms of external finance, trade credit and other sources of funds, for bank loans and equity.\(^10\)

There are also sector-specific studies that purport to demonstrate the value of particular types of collateral, and the economic impact of a stable legal environment for security creation and enforcement. One such study concerns the 2001 Cape Town Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment.\(^11\) It was estimated that savings to the aircraft industry from the creation of a sound international legal framework governing aircraft financing amounted to $4 billion a year in borrowing costs. Moreover, since 2003 the Export-Import Bank of the United States “has offered a one-third reduction of its exposure fee on … financings of new U.S.-manufactured large commercial aircraft for buyers in countries that ratify … and implement the Cape Town [Convention]”.\(^12\)

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\(^10\) See the series of studies carried out by the so-called “Gang of Four” Rafael La Porta., Florencio Lopez de Silanes, Andrei Shleifer and Robert Vishny. Their work includes “Legal Determinants of External Finance” (1997) Journal of Finance 1131 and “Law and Finance” (1998) 106 Journal of Political Economy 1113. These studies purport to show that common law countries tend to be economically more developed than civil law countries.


\(^12\) News Release, Cape Town Treaty on Cross-Border Financing of Aircraft, Helicopters and Aircraft
There is a consensus among international financial institutions that a “liberal” secured credit regime is a general social and economic good. Four examples serve to highlight that consensus. Firstly, when the former socialist economies in Central and Eastern Europe were undergoing the transition to a more free market oriented system, the task of reforming credit laws assumed a high priority on the legislative agenda. Organisations like the European Bank for Reconstruction and Development (EBRD) considered that such laws impacted in a crucial way on the pace of private sector investment activity and were essential in fostering market-based decision-making. Consequently, the EBRD produced a Model Law on Secured Transactions to guide States in their reform efforts. The second example comes from the late 1990s upheavals in the “Tiger” economies of East Asia. An influential report on the financial crises highlighted the importance of debtor/creditor and insolvency regimes. It also articulated the features that ideally, in its view, should be contained in such regimes stating: “The law should permit … all economically important assets to serve as collateral for a loan: and security interests in tangible property … and in intangible property … to be created. All economically important agents should be able to act as lenders and as borrowers in secured transactions and all economically important secured transactions should be permitted. The creation of security interests should be inexpensive relative to the amounts lent.”

References:


See also D Berkowitz, K Pistor and J-F Richard “The Transplant Effect” (2003) 51 AJCL 163 at 164 where it was stated that “newly designed model laws for secured transactions marketed the value of Western law to their counterparts in the East, backing their campaign to transplant their home legal system with financial aid promises and/or the prospect of joining the European Union.”


Thirdly, in the Latin American context\textsuperscript{17} it has been argued that the lack of an effective framework for secured transactions has substantially limited economic growth with legal restrictions on the use of collateral also reinforcing inequality in the distribution of wealth. This is because the laws and institutions that support the use of secured credit work well only for wealthy landowners who have clear title to their land. Such landowners have better access to credit allowing them to add more easily to their wealth whereas defects in the system hurts those who are already disadvantaged. Limitations on access to credit in Latin America are also seen in the high interest rate that borrowers must pay even when macroeconomic and country risk is taken into account.\textsuperscript{18}

But the UNCITRAL Secured Transactions Guide goes much further than say the EBRD Model Law on secured transactions. In the context of secured credit law, it is typical to draw a distinction between common law and civil law jurisdictions.\textsuperscript{19} Professor Roy Goode has highlighted this contrast:\textsuperscript{20} “Common law jurisdictions, which are generally sympathetic to the concepts of party autonomy and self-help, have a liberal attitude towards security. This attitude allows security interests to be taken with a minimum of formality over both present and future assets to secure existing and future indebtedness. [T]hey allow universal security rather than require specific security. By contrast, civil law jurisdictions have been more cautious in their approach to non-possessory security and have been anxious about the false wealth which such practices are perceived as permitting…. [In civil law jurisdictions one can find] requirements of specificity or individualization of collateral, the requirements of notice to the debtor as a condition of the validity (not merely priority) of an assignment of debts, and restrictions on self help remedies such as possession and sale of the collateral.”

The EBRD Model Law attempts to accommodate features from both civil law and


\textsuperscript{18} See N de la Pena op cit at 241.


common law traditions whereas the UNCITRAL secured transactions guide is firmly in the common law mould. Moreover, it goes far beyond the English common law appropriating the main features of Article 9 of the American Uniform Commercial Code. For instance, the UNCITRAL guide rejects the idea of carving out a proportion of collateral realisations for the benefit of unsecured creditors – an idea that finds recognition in the UK Insolvency Act\(^\text{21}\) but dismissed in the US.\(^\text{22}\) Likewise, the UNCITRAL guide adopts a functional approach towards the creation and registration of security rights effectively recharacterising certain transactions as security rights although they were not ostensibly designed as such. Again this conforms with the approach evidenced in the US Article 9 but is one that is at variance with the English common law. In addition, in the details of the filing system suggested for security interests, the UNCITRAL Guide maps on to the American rather than the English system.

Filing systems are designed to address information asymmetries in credit markets.\(^\text{23}\) Lenders depend on information about borrowers to perform an initial screening function as well as monitoring and controlling the actions of borrowers during the lifetime of the loan. Information sharing facilities may allow lenders to allocate credit more efficiently and to increase overall lending volumes. Such facilities may also improve the behaviour of borrowers since there is less of an opportunity, or incentive, to over-borrow from several banks simultaneously without any of them knowing.

The UNCITRAL Guide however, follows the Article 9 notice filing system under which the security agreement itself is not filed but instead a so-called “financing statement” providing limited information. Notice filing is party specific rather than transaction specific. The information filed is an invitation to further inquiry rather than a synopsis of the transaction. The filed notice merely indicates that a person may have a security interest in the collateral concerned but further inquiry by a searcher from the potential creditor and/or debtor will be necessary to ascertain the facts. A degree of scepticism about the merits of notice filing seems appropriate.\(^\text{24}\) Divorcing

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\(^{21}\) Section 176A and see also Insolvency Act 1986 (Prescribed Part) Order 2003.


\(^{23}\) See F Lopez-de-Silanes Chapter 1 “Turning the key to credit: credit access and credit institutions” in F Dahan and J Simpson eds Secured Transactions Reform and Access to Credit (Cheltenham, Edward Elgar Publishing, 2008) at p 6.

registration from particular individual transactions opens up the possibility that the
register may become less reliable as a source of information since a searcher cannot
be sure whether a particular entry relates to an actual transaction or to a transaction
that was contemplated but never in fact materialised.

Why “liberal” security regimes are considered to be beneficial

In short, liberal security regimes are considered to be beneficial because they are
seen to promote economic growth. This is for two general reasons. Firstly, there is
the contract/property rights argument which goes along the lines that the secured
creditor has bargained for rights of a proprietary nature. The law should respect this
contractual bargain and the property rights that the secured creditor has acquired in
the debtor’s assets. Recognition of property rights is good, so the argument goes, for
economic growth. Secondly, security is a risk reduction device and thereby functions
as a mechanism that both increases the availability and lowers the cost of credit. The
effect of minimising risk is to encourage lenders to make loans that they would not
otherwise make and also to reduce the risk premium that a lender might otherwise
input into the interest rate calculations. The overall effect is to facilitate economic
activity.

Taking the general value of property rights argument, scholars of new institutional
economics, such as Douglass North, have suggested that financial sector development
occurs best in a stable macroeconomic setting. This includes appropriate monetary,
financial and fiscal policies and frameworks. But they have also argued that
financial systems require certain legal and institutional elements to be in place to
function effectively. These include corporate law situated in a context that supports
effective governance such as the enforcement of contracts and commercial dispute
resolution mechanisms. The necessary legal and institutional elements also entail the
recognition of property rights and the use of property to secure loans.
This “property rights including security rights will produce economic growth”

only civil law jurisdictions to have introduced notice filing are Quebec and Louisiana; see Discussion
paper Registration of Rights in Security by Companies (Edinburgh, October 2002) at para 1.28.

25 North’s theories are developed in Institutions, Institutional Change and Economic Development
(Cambridge, CUP, 1990)
argument has been reinforced in a series of Doing Business Reports commissioned by the World Bank.\textsuperscript{26} These reports have come out with conclusions tending to show that establishment of credit bureaus, stronger creditor rights and simpler civil procedure rules have a large economic impact on credit access.\textsuperscript{27} It is argued that strong creditor protection should lead to deeper credit markets and better financing for firms and individuals. The Doing Business Reports have identified many laws, rules and institutions that are seen to form the framework for private credit. These are grouped into four basic categories: (1) mechanisms and procedures for the registration of property; (2) information sharing arrangements or credit bureaus; (3) collateral rules and creditor rights; and (4) contract enforcement.

The Doing Business reports conclude that the wealth of a particular country is an important indicator of the effectiveness of institutions in that country that guarantee access to credit.\textsuperscript{28} In the main, richer countries have more expeditious procedures to register ownership of property; a higher presence of private credit bureaus; greater coverage and quality in terms of the information collected by information sharing institutions; more extensive creditor rights and rights of security as well as better measures of contract enforcement. Somewhat paradoxically it seems however, that richer nations tend to have fewer public registries.

But paradoxes are not the only point of criticism in respect of the Doing Business reports. Essentially, the reports measure the world’s economy using a creditor-centred approach with the highest grading given to countries that emphasise private contractual solutions rather than court-based ones. This approach is open to the objection that it is one dimensional and overly simplistic. It also ignores the recent economic success of countries such as China where many of the desiderata considered necessary by international financial institutions such as strong property rights are absent.\textsuperscript{29}

In recent times, perhaps the most popular and widely read exponent of the linkages between property rights, including security rights, and economic development has

\textsuperscript{26} The “Doing Business” reports are available at \url{www.doingbusiness.org/}

\textsuperscript{27} See F Lopez-de-Stanis Chapter 1 “Turning the key to credit: credit access and credit institutions” in F Dahan and J Simpson eds Secured Transactions Reform and Access to Credit (Cheltenham, Edward Elgar Publishing, 2008).

\textsuperscript{28} Ibid, at p 20.

been Hernando De Soto. In writings such as The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else. De Soto argues that people in developing countries lack an integrated formal property system. This results in only informal ownership of land and goods and he contrasts this with the United States where, in his view, a clear system of property rights was created during pioneering times. De Soto suggests that the lack of an integrated system of property rights makes it impossible for the poor to leverage their informal ownerships into collateral for the extension of credit. Credit would form the basis for entrepreneurship, whereas many farmers in developing economies today remain trapped in subsistence agriculture. De Soto also argues that the informal ownership of squatters in shanty towns should be regularised through giving them formal titles to “their” properties. Property rights, including collateral rights, are not just privileges for the rich. The poor need them most of all, especially if they want to stop being poor.

The Mystery of Capital advances the thesis that in developing countries the combined effect of bureaucracy and outdated legal systems is to drive economic activities underground. Investment activity is stifled. Property systems in the West allow assets, through ownership documentation, to lead an “invisible, parallel life alongside their material existence” but the property systems in developing countries lack comparable means of documentation and formalization that would integrate property into a broader scheme of investment. This creates “dead capital” whereas a documented system of ownership can “provide a link to the owner’s credit history, an accountable address for the collection of debts and taxes, the basis for creation of reliable public utilities, and a foundation for the creation of securities (like mortgage backed bonds) that can be re-discounted and sold in secondary markets.”

De Soto argues that the formal property systems of the West produce six effects that allow their citizens to generate capital. The first effect is fixing the economic

33 De Soto at p 7.
34 Ibid.
potential of assets. De Soto uses the analogy of generating electric power from the energy in a mountain lake suggesting that the potential value locked up in an asset like a house can be revealed, transformed and energised in the same way. Where property rights are formalised and collateralised, there is the potential to produce surplus assets above and beyond the physical assets. The second effect De Soto suggests is the integration of dispersed information into one system. In his view, the reason capitalism triumphed in the West but faltered elsewhere is because most of the assets in Western nations have been integrated into one formal representational system.

The third effect is making people accountable since incorporating them into a more integrated legal system facilitates their accountability. The fourth effect is to transform assets from a less to a more accessible condition, so that they can do additional work. Assets become “fungible” and can be fashioned to suit practically any transaction. Fifthly, increased fungibility in turn helps to network people and convert citizens into individually identifiable and accountable business agents. Increased information and integrated law makes risk more manageable not least by facilitating the pooling of assets to secure debts. The final effect is the protection of transactions. According to De Soto: “One important reason why the Western formal property system works like a network is that all the property records (titles, deeds, securities and contracts that describe the economically significant aspects of assets) are continually tracked and protected as they travel through time and space.”

De Soto argues that with the end of the Cold War, capitalism is the only game in town, so to speak, but once the vast machine of capitalism was firmly in place in the developed world and its masters were busy creating wealth, the question of how it came into being lost any sense of urgency. “Like people living in the rich and fertile delta of a long river, the advocates of capitalism had no pressing need to explore upstream for the source of their prosperity…. [T]he rest of the world turned to the West for help and was advised to imitate the conditions of life on the delta: stable

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35 The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere Else (London, Black Swan, 2008) at pp 47-61: De Soto’s views are summarised and the mountain lake analogy used in an article “The Mystery of Capital” published by him in (2001) 38 Finance & Development No 1 – which is the quarterly journal of the IMF.

currencies, open markets and private businesses …. Everyone forgot that the reason for the delta’s rich life lay upriver, in its unexplored headwaters. Widely accessible legal property systems are the silt from upriver that permits modern capital to flourish.”

De Soto’s work has been lavishly praised, including by U.S. presidents from both political parties with Bill Clinton calling him “The world’s greatest living economist”. But the work has also attracted criticism on a number of grounds. Some have questioned the statistical validity of the claims about the size of the informal economy. Others would argue that it is excessively narrow in its approach to economic development - basically a "single bullet" approach. It is suggested that there should be a greater emphasis on culture, and how local conditions affect people’s perceptions of their opportunities. For instance, a study commissioned by the UK’s Department for International Development has stressed the attention that must be paid to the local social context and noted many complications arising from the implementation of De Soto’s policy recommendations.

There is also the experience in De Soto’s native Peru which suggests that property registration, of itself, is unlikely to have much effect. To bring about concrete reform, it may have to be followed by more politically challenging steps such as improving the norms and efficiency of the judicial system as well as rewriting bankruptcy codes, and restructuring financial market regulation. Reforms of this nature may entail much more challenging choices for policymakers.

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39 See the review of De Soto’s other famous book El Otro Sendero (The Other Path) by R Rossini and J Thomas (1990) 18 World Development 125.

40 See R Samuelson in “The Spirit of Capitalism” in the Foreign Affairs magazine January/February 2001 “Unfortunately, de Soto strains too much. He wants to make property rights -- or their absence -- the center of everything.”

41 See E Daley and M Hobley Land: Changing Contexts, Changing Relationships , Changing Rights (September 2005). The paper was commissioned by DFID’s Urban-Rural Change Team but views and opinions expressed in this report do not necessarily reflect those of DFID.

42 See the review of The Mystery of Capital by C Woodruff in (2001) 39 Journal of Economic
take issue with the link drawn by De Soto between property registration mechanisms and the increase in credit to the poor.\textsuperscript{43} For a start, it has been pointed out that many micro businesses operate in the informal sector beneath the radar screen of the authorities.\textsuperscript{44} They may not see the merit in availing of a reformed law of secured credit if this meant appearing on the official radar. Moreover, the vast majority of micro businesses may not possess much in the way of conventional collateral, and reforming collateral law is unlikely to change that situation. In many countries, improved access to credit has only come about through the willingness of alternative financial institutions to look at cash flows rather than assets. Expanding the range of secured lending instruments is not a burning issue for the microfinance industry as several other bottlenecks are of greater relevance. Institutional capacity and operating costs remain big challenges and many rural areas are still stubbornly resistant to market penetration. Highlighting secured lending and collateral may put “undue attention on an issue that the pioneer microfinance organizations and practitioners have worked very hard to reduce to a lower status.”\textsuperscript{45}

Certainly De Soto’s rhetoric is overblown. He is big on a big idea but very sparse on details. What he might perceive to be trifling details such as significant differences between legal systems and property registration systems in developed countries simply do not concern him. His is the approach of the bold grand statement. Take, for example, his reference to the “public agencies that are the stewards of an advanced nation’s representations. Public record-keepers administer the files that contain all the economically useful descriptions of assets, whether land, buildings, chattels, ships, industries, mines or aeroplanes. These files will alert anyone eager to use an asset about things that may restrict or enhance its realization…”\textsuperscript{46}

\textsuperscript{43} See S Galliani and E Schargrodsky “Property Rights for the Poor: Effects of Land Titling” Ronald Coase Institute Working Paper (January 2009) who conclude “Our results suggest that land titling can be an important tool for poverty reduction, albeit not through the shortcut of credit access, but through the slow channel of increased physical and human capital investment, which should help to reduce poverty in the future generations.” See also E Field and M Torero “Do Property Titles Increase Credit Access Among the Urban Poor? Evidence from a Nationwide Titling Program 1” available at http://econ.ucsd.edu/seminars/seven_ssrc/Field_Torero914.pdf/.

\textsuperscript{44} M Holtmann “Use of security in challenging environments: the microfinance perspective” in F Dahan and J Simpson eds Secured Transactions Reform and Access to Credit (Cheltenham, Edward Elgar Publishing, 2008) 159.

\textsuperscript{45} Ibid at 167.

\textsuperscript{46} H De Soto The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere Else (London, Black Swan, 2008) at pp 60-61.
This pronouncement is of very questionable accuracy since regimes of personal property without registration, and other forms of security, thrive in many parts of the developed world. Even in the UK, there are important forms of security that exist without public registration regimes. Borrowing by individuals is effectively done on a non-registered basis through quasi-security in the form, for instance, of hire purchase agreements. There is however, a limited private system of registration of hire purchase agreements in respect of motor vehicles.

It is almost as if De Soto is carried away by his own rhetoric and forgets the need for qualification. He asserts with assurance that “citizens in advanced nations can obtain descriptions of the economic and social qualities of any available asset without having to see the asset itself.” As a bald, general statement this is simply not true and casts doubt on the accuracy of De Soto’s own research and his overall thesis about the role of registration of assets as a necessary concomitant of economic development. De Soto also ignores the fact that Latin American countries, including Peru, have Civil Codes modeled on the Napoleonic Codes of France and Spain. These Codes may not be the most “efficient” and comprehensive in terms of protecting property rights, including the position of secured creditors, but they may not necessarily be any better or worse than the Codes in some modern European civilian jurisdictions.

In De Soto’s eyes, the development of the West is explicable on the basis of a better formal structure of property rights which Western economies possess, and developing countries lack. This seems much too pat, as well as being belied by the facts. One need not necessarily go as far as Ugo Mattei however, who in a shrill counterblast puts De Soto firmly in the camp of the imperialist exploiter and someone who blames

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47 For a much more nuanced analysis see R Ellickson “Property in Land” (1992) 102 Yale LJ 1315 and in particular the conclusion at 1397.
48 Ibid at 53.
49 See B Kozolchyk “A Road Map to Economic Development through Law: Third Parties and Comparative Legal Culture” (2005) 23 Arizona Journal of International and Comparative Law 1 at 2-3: “Having practiced and taught commercial lending law for decades in the United States and other western countries I can attest to the fact that a merchant’s inventory is nowhere represented by a ‘property document’ … The preceding objections are not intended as quibbles; they go to the heart of de Soto’s argument.” See also B Kozolchyk, “Secured Lending and Its Poverty Reduction Effect” (2007) 42 Texas International Law Journal 727 text accompanying footnote 36.
underdevelopment on the victim rather than on the oppressor:51
“The Western path of economic development presents itself as a success story, while erasing the fact that imperial plunder has played a much more important role than domestic property law in Western capitalist development. Western capitalist development occurred because of Colonial exploitation, a system of global protracted illegality that paradoxically has used and continues to use the law as one of its most powerful ideological apparatuses.” Mattei argues that the movement for “formalization” of informal property rights presents an illusory economic theory to justify the freezing and naturalization of the status quo. He suggests that the gap between the economic theory of property and the reality of life can only be explained by looking at the underlying current property distribution, which De Soto has purposefully ignored.

Improving credit cost and availability

Studies by various international financial institutions have suggested a correlation between enhanced security rights on the one hand, and greater access to, and cheaper credit on the other. It is argued that all but the largest borrowers should get better terms on a secured rather than an unsecured loan in the form of lower interest rates, larger loans relative to income and also more generous repayment periods. For example, in a credit union for IMF and World Bank employees:52 “When the borrowers offer collateral for a loan instead of only a signature, the credit union offers better terms: it will, lend at interest rates that are about half as high, make loans that are five to ten times larger relative to income and give the borrower as much as five times longer to repay.”

In other cases however, there may not be simple trade-off between interest rates and the cost of credit. For instance, sub-prime borrowers may be charged high interest rates and also required to provide security. With blue-chip borrowers, on the other hand, capacity to service the loan is not considered to be an issue. Security does not

enter into the reckoning and the competition among lenders for a valuable source of business keeps interest rates low. Moreover, there are greater costs incurred in secured as distinct from unsecured lending.\textsuperscript{53} Secured loans are more expensive to set up since the expenses involved in arranging and documenting the transaction are higher. For this reason, it is not just loans to blue-chip borrowers but sometimes small loans, or loans to buyers with strong repayment records, that may be offered on an unsecured basis. While evidence suggests that 60\%-65\% of loans to businesses in the United States are secured, the precise effect of security on credit cost and availability is very difficult, if not impossible, to verify empirically.\textsuperscript{54}

**Critical perspectives on the harmonisation and modernisation of secured credit law**

In this section I consider three critical perspectives on the harmonisation and modernisation agenda of UNCITRAL in the secured credit sphere. The first considers general issues of fairness and, in particular, fairness to unsecured creditors from enhanced recognition of security rights. The second perspective looks at secured credit law reform as part of a neo-liberal economic agenda pushed by international organisations that also includes privatisation and marketisation of key sectors of a national economy. The third perspective considers secured credit reform as a possible instrument of American foreign policy and American economic interests.

**Security and Fairness**

The concept of security runs counter to instinctive conceptions of fairness in that it may involve one creditor being paid whereas other creditors remain unpaid.\textsuperscript{55} In short, the idea of proportionate satisfaction of creditor claims i.e. pari passu distribution, is disturbed. This concern can be met in various ways. For instance, one might argue that the general instrumentalist justifications for security override

\textsuperscript{53} See generally R Mann “Explaining the Pattern of Secured Credit” (1997) 110 Harvard Law Review 626.

\textsuperscript{54} See F Lopez-de-Silanes “Turning the key to credit: credit access and credit institutions” in F Dahan and J Simpson eds Secured Transactions Reform and Access to Credit (Cheltenham, Edward Elgar Publishing, 2008) 3 at 10.

\textsuperscript{55} For a strong critique of pari passu see generally R Mokal “Priority as Pathology: The Pari Passu Myth” [2001] CLJ 581 and see also V Finch Corporate Insolvency Law: Perspectives and Principles (Cambridge, CUP, 2nd ed 2008) at pp
individual conceptions of fairness. In other words, increased credit creation and lower cost credit will help to stimulate economic activity and lead to better economic conditions for all. Moreover, to the extent that security is seen as a fair exchange for the credit, the secured creditor has bargained for security and priority, whereas other creditors have not. Consequently, it does not seem unfair to privilege the secured creditor over other creditors who could equally have contracted for security but chose not to do so. On the other hand, there may be involuntary creditors i.e. creditors not in a contractual relationship with the debtor, who are not in a position to bargain for security. Also there are other non-adjusting creditors, or poorly adjusting creditors, where it is unrealistic to suppose that they could bargain for security or where the transaction costs of doing so are too great. These creditors in a weak bargaining position are perhaps most likely to be the ones that will be hit hardest by the debtor’s insolvency. The insolvency may impact disproportionately on them in that they are not very capable of sharing or passing on the costs of the loss. Large financial institutions most likely to take security are in a much better position to pass on losses. Employees and small trade creditors are typically non-adjusting, or poorly-adjusting, creditors. Different jurisdictions may have different ways of protecting such creditors whether through social safety nets, or insurance schemes, or the like. Other possible approaches would be to impose restrictions on the taking of security thereby leaving a margin of unsecured assets that are available for payment of unsecured debts, or else to set aside a proportion of secured realisations for the benefit of unsecured creditors. The UNCITRAL Legislative Guide however, follows the thread of Article 9 of the American Uniform Commercial Code and counsels against this, recognising the “full” priority of security rights.

Secured credit and “neo-liberal” economic reforms

Secured credit law reform is generally promoted on the basis that it will foster market-based decision making on credit issues. Reform is often seen as part of an overall economic agenda - the so-called Washington consensus - that includes privatization and marketisation.56 Too often they are seen as interlinked ingredients in an overall

growth and development strategy. In the early 1990s, international financial institutions pushed the advantage of a rapid privatization process but, in many instances, this led to a massive transfer of state resources into the hands of privileged insiders, or the economically powerful. There is a growing recognition that rapid privatization is not the best prescription for reform.\footnote{See J Stiglitz \textit{Globalization and its discontents} (London, Penguin 2002) at p 6: “countries were told by the West that the new economic system would bring them unprecedented prosperity. Instead, it brought unprecedented poverty ….The contrast between Russia’s transition, as engineered by the international economic institutions, and that of China, designed by itself, could not be greater …”} The Chinese experience indicates that a slower, more gradual process is more conducive to long term economic stability.\footnote{See J Ohnesorge (2007) 28 “Developing Development Theory: Law and Development Orthodoxies and the North East Asian Experience” (2007) 28 University of Pennsylvania Journal of International Economic Law 219 and see also J Ohnesorge “The Rule of Law, Economic Development, and the Developmental States of Northeast Asia” in Law and Development in East and South East Asia (C Antons ed, 2003).} A gradual process of privatization allows the restructuring of large firms to take place before their move, in whole or in part, into the private sector.

One of the presumptions underpinning the Washington consensus is that markets will intrinsically lead to efficient outcomes but the recent global financial crisis has instead highlighted the possibility of desirable government intervention that can guide economic growth, and make everyone better off. Commentators such as Joseph Stiglitz, have also criticised the focus of the Washington consensus on GDP, which is seen as the be-all and end-all of development. He argues that\footnote{See J Stiglitz \textit{Making Globalization Work} (London, Penguin, 2006) at p 45.} “because GDP is relatively easy to measure, it has become a fixation of economists. The trouble with this is that we measure what we strive for. Sometimes, increases in GDP are associated with poverty reduction, as was the case in East Asia. But that was not an accident: governments designed policies to make sure that the poor shared in the benefits. Elsewhere, growth has often been accompanied by increased poverty and sometimes even lower income levels for individuals in the middle.”

It is submitted that this is a valuable insight and that the merits of secured credit reform should be disaggregated from wider notions about the alleged efficacy of market-based decision making, and the implementation of a privatisation agenda.

\textbf{The Legislative Guide as an instrument of American economic power}

\textit{Note:}
There have been many analyses of the role of transplants in the legal modernisation and harmonisation process.\textsuperscript{60} It is the case that a variety of factors drive countries to adopt legal transplants from other jurisdictions and models of greater, or lesser sophistication, have been used to explain the typology of transplants.\textsuperscript{61} Professor Alan Watson, for example, has acknowledged that reception and transplants come in all shapes and sizes speaking of an imposed reception, solicited imposition, penetration, infiltration, crypto-reception, inoculation and so on.\textsuperscript{62} Another approach is to propound a straightforward distinction between coercive transplants and voluntary receptions. The notion of “coercive” transplants can be used to explain the relationship between a colonial power and its dependencies whereby the law of the mother country is imposed on its “foreign” possessions and territories as part of the project of imperial governance. The concept of “voluntary” reception explains situations where the aura, or prestige, of a particular jurisdiction persuades other countries to adopt its laws.\textsuperscript{63}

The sufficiency of this basic taxonomy has been challenged. In particular, the distinction between imperialistic and non-imperialistic transplants could be seen as a matter only of degree, and not of kind. There is not a straightforward dichotomy between “free” or “coercive” transplants of a foreign model. This is so because law is a detailed and complex machinery of social control that cannot effectively function without some cooperation from local officials. These local officials usually consist of a professional elite possibly created by the imperial power. This elite provides the degree of consent to the reception of foreign legal ideas that is necessary for any transplant to occur.\textsuperscript{64} In this connection, one might also make use of the notion of


\textsuperscript{64} See D Berkowitz, K Pistor and J-F Richard “The Transplant Effect” (2003) 51 AJCL 163 who suggest that indigenous law-making operates as a kind of focal point for cooperative law-making
reflexive law thereby acknowledging that the influence exerted by hegemonic jurisdictions is most likely to be effective when it seeks to achieve its ends not by direct prescription but by inducing second order effects on the part of social actors in the receiving State. There is likely to be a lively dialectic between consent and dissent, and between hegemonic and counter-hegemonic forces. One may also tie in the concept of path dependency. The law, and lawyers, tend to absorb change by digging deeper into existing soil, rather than branching out into new fields. Political and other influences may trigger legal development and cause the law to produce certain outcomes but the form that represents these outcomes is determined by the legal doctrine prevailing in the jurisdiction concerned. In short, the law develops in a path dependent fashion.

Another commentator, Professor Ugo Mattei, has sought to explain transplants on the basis of prestige or efficiency. While acknowledging that each single legal transplant has its own peculiarities that make it different from every other, Mattei deploys economic analysis to explain the perceived convergence of modern legal systems as a movement towards efficiency, despite the large variety of institutional backgrounds. A synergy is also said to exist between “efficiency” and “prestige” with the most efficient models being seen as the more prestigious. The “efficiency” notion links up with concepts of regulatory competition. This implies convergence around a single, efficient system which wins out through the competitive process. But the evidence about regulatory competition suggests that it may produces rules that are far from optimal from the viewpoint of economic theory. There is also the risk of

behaviour which then serves as the focal point for cooperative economic behaviour. See also G Teubner “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences” (1998) 61 MLR 11.


69 See D Esty and D Geradin (eds) Regulatory Competition and Economic Integration: Comparative
“social dumping”\(^{70}\) and a so-called race to the bottom.\(^{71}\) Proponents of the “efficiency” thesis then have to fall back on arguments about the long term benefits of market solutions. In some cases, the idea of co-evolution may better explain the process whereby countries observe and emulate practices in jurisdictions to which they are closely related by trade and institutional connections. The co-evolution concept assumes that a variety of diverse systems can co-exist within the same international environment, with each one retaining its viability.

Mattei has moved away from his earlier reliance on “prestige” or “efficiency”. He now propounds a theory of “imperial law”; which is seen as a dominant layer of world-wide legal systems:\(^{72}\)

“Imperial law is produced, in the interest of international capital, by a variety of both public and private institutions, all sharing a gap in legitimacy, sometimes called the democratic deficit’. Imperial law is shaped by a spectacular process of exaggeration, aimed at building consent for the purpose of hegemonic domination. Imperial law subordinates local legal arrangements world-wide, reproducing on the global scale the same phenomenon of legal dualism that thus far has characterized the law of developing countries. Predatory economic globalization is the vehicle, the all-mighty ally, and the beneficiary of imperial law.”

John Braithwaite and Peter Drahos in their seminal book on Global Business Regulation\(^{73}\) have spoken of how models are adopted “when they appeal to identities that we hold dear. An identity that is particularly crucial in this regard is that of being successful, modern, civilised, advanced. The periphery models the centre in the world system because of this pursuit of modernity in identity (or postmodernity, for the truly avant-garde)”.

\(^{70}\) In the context of EC employment law the ECJ made specific reference to social dumping in Case 341/05 Laval un Partneri Ptd v. v Svenska Byggnadsarbetareförbundet. 2007 ECR I-5751 at para 103.


\(^{73}\) (Cambridge,Cambridge University Press, 2000) at p 591.
The French economist Michel Albert has spoken of the irresistible force of US legal expansionism. US legal paradigms gain a competitive advantage from the political and ideological sway exercised by the United States. Alternative approaches are overwhelmed by American political and cultural influences. Albert explains the spread of American influences using notions of seductiveness and appeal. In his view, the intrinsic characteristics of the neo-American model exalt the success of risk-taking, gambling and “glittery” behaviour. In the same vein, another commentator has talked about how the European Community method of rational planning, bureaucratic solutions, suppression of political passion and a steady incrementalism—is incapable of igniting the popular emotions in a way that would allow Europe to mount a true global challenge to the US.

In the realm of literary and cultural discourse, notions of imperialism and American hegemony have been advanced by Edward Said. He talks about American culture’s phenomenally incorporative capacity and a system of pressures and constraints which induces other States to follow the essentially imperial identity and direction of US norms. In his view, the pressures are subtle, and generally indirect. Said makes the point that “American attitudes to American greatness, to hierarchies of race, to the perils of other revolutions (the American revolution being considered unique and somehow unrepeatable anywhere else in the world) have remained constant, have dictated, have obscured the realities of empire, while apologists for overseas American interests have insisted on American innocence, doing good, fighting for freedom.”

He also links his theory of imperialism with a law-making creed that suggests it is the goal of US foreign policy to bring about a world increasingly subject to the rule of law, as defined in US terms.

In the sphere of secured credit, the UNCITAL Secured Transactions Guide can be seen as an instrument by which the norms postulated in Article 9 of the American

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74 M Albert Capitalism Against Capitalism: How America’s Obsession with Individual Achievement and Short-term Profit has Led it to the Brink of Economic Collapse (London, Whurr, 1993).
77 Ibid at p 392.
78 See p 401.
79 See p 7.
Commercial Code are writ large across the globe. Both US private and public interests combined and collaborated in their formulation and development. As one US commentator remarks “efforts to export U.S. legal models are more likely to succeed if they eschew detailed, distinctively U.S.-derived prescriptions in favour of presenting advise or exemplars in terms of more “general” standards, “international” norms, “universal” principles…”\textsuperscript{80} Best international practice is considered to be represented by the work of organizations such as UNCITRAL.\textsuperscript{81} The US, by virtue of its economic power, and the associated prestige of its economic and legal models, heavily influences the work of such bodies.\textsuperscript{82} The UNCITRAL Legislative Guide reproduces the key features of the American Article 9 emphasising the removal of restrictions on the taking of security, all-assets security, notice filing of security interests on American lines, and the full priority of security rights.

Arguments about the projection of American economic power through foreign lending practices have been given a populist slant by former US consultant, John Perkins, in \textit{Confessions of an Economic Hit Man}.\textsuperscript{83} Perkins spices up generally acknowledged notions of American economic imperialism with tales of sex, confessions and fiery plane crashes. He describes himself as an “economic hit man” with the task of persuading financial and political leaders in developing countries to accept large loans from institutions like the World Bank and the US Agency for International Development. These countries were then faced with large debts that they could not afford to repay and as a result they succumbed to American political pressure on many issues. The long term effects saw developing countries neutralized politically, as well as rising equality gaps and general economic empowerment. Perkins says “First, I was to justify huge international loans that would funnel money back to … U.S. companies … through massive engineering and construction projects. Second, I

\textsuperscript{80} See J deLisle “Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist World and Beyond” (1999) 20 University of Pennsylvania Journal of International Economic Law 179 at 269 and see also his comment at p 202 about the US government promoting the indirect export of US models through multilateral organisations that shape international standards.

\textsuperscript{81} See generally K Pistor “The Standardization of Law and Its Effect on Developing Economies” (2002) 50 AJCL 97.

\textsuperscript{82} For a discussion of UNCITRAL working methods referring to earlier controversies see “UNCITRAL rules of procedure and methods of work: Note by the Secretariat” A/CN.9/676 (31\textsuperscript{st} March 2009). The controversies covered the role of “experts”, the status of non-State actors, primarily American-based organisations, and the dominance of the English language in UNCITRAL’s deliberations. See also C Kelly “The Politics of Legitimacy in the UNCITRAL Working Methods”

\textsuperscript{83} See the 2006 UK edition published by Ebury Press Random House.
would work to bankrupt the countries that received those loans … so that they would be forever beholden to their creditors, and so they would present easy targets when we needed favors, including military bases, UN votes, or access to oil and other natural resources.” 84

The Perkins allegations have been less than favourably received by the US Department of State. They suggest that Confessions of an Economic Hit Man is popular because it is an “exciting, first-person, cloak-and-dagger tale that plays to popular images about alleged U.S. economic exploitation of Third World countries.” 85

The State Department concedes that Perkins raises “legitimate questions about the impacts of economic growth and modernization on developing countries and indigenous peoples”. But, not surprisingly, it goes on to reject the claim that he was acting as an “economic hit man” at the behest of US government agencies as a “total fantasy”.

Others may view the interpretations placed on events in Perkins’ book in a less jaundiced light, while also suggesting that his overall conclusion is less extreme than might originally appear. It is hardly surprising that agencies of the US government, as well as US private interests, should act to defend what they consider to be US business interests. 86 First World nations, including the US, “have a collective interest in promoting generalized dependency and reverence from the periphery.” In simple terms, what they consider to be good for the US they also consider to be good for the world. 87 Of course, others may disagree in their assessment of what is both good for the US and also for the world. Certainly however, the lending and borrowing relationship creates a set of mutual dependencies and helps to build a web of interdependent relationships. Professor Anthony Kronman has talked about contractual relationships, including lending relationships, creating a union. 88 In his analysis: “The parties to an exchange … can reduce the risk of opportunism by taking

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84 Ibid at p 15.
85 See the US Department of State press release of February 2nd 2006.
86 See the following statement by the Commercial Finance Association (CFA) General Counsel - http://www.un.org/News/Press/docs/2004/eco56.doc.htm “This guide is of great interest to my trade association …. CFA members, which include large United States banks but also smaller lenders, often make loans to companies located in other countries supported by collateral. The guide will help countries to modernize their laws, so that lenders who are interested in making loans in other countries will know with certainty and predictability what their rights and obligations are.”
steps to increase the likelihood that each will see his own self-interest as being internally connected to the welfare of the other.” Taking a broad perspective, the entirety of the lending process from calculating risks of default, using collateral and monitoring the debtor, can be viewed as attempts to create a “union” between borrower and lender.

**Conclusion**

Security rights give the credit provider property rights, normally in the debtor’s assets. The whole harmonization and modernization agenda appears to be driven largely by a desire to remove restrictions on the taking of security. This is because of a widespread belief that a “liberal” secured transactions regime promotes economic growth. In many World Bank and other studies, the availability of credit has been identified as one of the key factors driving economic growth. Lack of access to credit, and in particular low-cost credit, is seen as a major constraint on economic development. While economic and other factors may hamper access to credit, legal, regulatory and institutional frameworks are also seen significantly to contribute to this problem. In many jurisdictions, the laws relating to secured transactions are fragmented and antiquated. Businesses may be unable to utilise the full value of their assets or, if they try to do so, they are straightjacketed down a particular and restrictive path. Unlocking the value of collateral to serve as security is seen as a highly important task.

But the harmonization and modernization agenda also has its critics. The law of secured finance is often perceived to embody cultural attitudes and public policy choices that vary greatly among States. In this area of commercial law, sovereignty issues remain central since many of the rules governing enforcement of security rights reflect policy interests that are external to the credit relationship itself. An agreement between debtor and creditor cannot regulate completely the operation of the resulting security right against third parties. In the event of debtor insolvency, there is an additional layer of policy issues to be considered. The rules governing the distribution of the debtor’s assets may reflect local social goals.

Changes to law and legal doctrine in a particular jurisdiction often mirror, to a greater or lesser extent, changes that have taken place in other jurisdictions. The desire for change may stem from societal developments or from a desire to promote the social
and economic infrastructure of a particular country. Turkey exemplifies a country that set out on a path of modernity as a result of top-down political leadership and then consciously borrowed laws and legal institutions from other jurisdictions that were considered to offer a superior product. Changes may also to a greater extent be coerced. In decades and centuries past, England exported the common law to its overseas territories and possessions, and generally these former colonies persisted with the common law as they gained political independence. The French Napoleonic Code found its way to Spain as a result of military conquest and from there it passed to the Hispanic world of Central and South America. In recent times, coercion has come in more subtle forms perhaps through conditions attached to international loans to developing countries from the World Bank and International Monetary Fund (IMF).

The US strongly influences if not entirely controls the workings of these international financial institutions, in particular the IMF. World Bank and IMF conditionality may require economic austerity measures, and also changes to the economic structures of the country concerned, including privatization and restructuring of State-owned enterprises and strengthening the role of the private sector. The conditions may also require changes to corporate law, as well as the enactment of measures to enhance the availability of credit by means of a modern secured transactions regime. Prescriptions in this regard are most unlikely to be expressed as crudely as “Enact Article 9 of the American Uniform Commercial Code”. Instead, they are more likely to call for progress and advancement in line with best international practice. Best international practice is considered to be represented by the work of organizations such as UNCITRAL. The US, by virtue of its economic power, and the associated prestige of its economic and legal models, heavily influences the work of UNCITRAL and analogous bodies. Certainly the UNCITRAL Secured Transactions Guide reproduces the key features of Article 9 of the American Uniform Commercial Code.

89 See Esin Orucu “Turkey: Change under Pressure” in E Orucu, S Attwool and S Coyle Studies in Legal Systems: Mixed and Mixing (London, Kluwer, 1996) 89. See also Esin Orucu Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition (Kluwer, Deventer, 1999) 59 at 81 and available also at (2000) 4 Electronic Journal of Comparative Law text accompanying footnote 311 – see www.ejcl.org/41/abs41-1.html: “No single legal system served as the model. The choice was driven in some cases by the perceived prestige of the model, in some by efficiency and in others by chance. Choosing a number of different models may have given the borrowings 'cultural legitimacy' as the desire to modernise and westernise was not beholden to any one dominant culture.”

90 See K Pistor “The Standardisation of Law and its Effect on Developing Economies” (2002) 50 AJCL 97 at 108 on how the influence of a foreign law can be obscured by the use of an international instrument.
in apparent preference to alternative models from other jurisdictions. While some of the rhetoric about the economic efficacy of property rights including security rights is certainly overblown there is nevertheless some empirical evidence that enhanced and more widely available security rights may open the door to greater economic growth. On the other hand, there is little evidence that following a detailed blueprint such as the American Article 9 writ large in the UNCITRAL Secured Transactions Guide will necessarily give a further boost to growth prospects. Indeed it may even harm them. A study based on the Eastern European experience demonstrates various potential inefficiencies when law is transplanted into an “alien” implementing or enforcing environment. 91 The study sees indigenous norms and institutions functioning better than transplanted ones and while the possibility of borrowing from other countries is not precluded, the “fit” of foreign with domestic law is enhanced by meaningful adaptation of imported laws to local conditions. 92 Moreover, there are no magical elixirs that bring about a happy ending to the quest for growth. 93 In short, there is no Holy Grail and the UNCITRAL Secured Transactions Guide, to the extent that it implies otherwise, is a false god.