UNCITRAL, Security Rights and the globalisation of the US Article 9

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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 commentator acutely observes in a slightly different context: “It would be truly

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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.
remarkable for reform of the legal system to be the key to securing the Holy Grail of economic growth fostered by financial development.º³

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 out of the secured property than the generality of the debtor’s creditors and will 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. The secured creditor has therefore greater leverage than unsecured creditors. The debtor may also be more likely to pay a secured debt - failure to pay can result in the loss of an asset that is crucial to the carrying on of the debtor’s business – thereby giving 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.⁴ 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 developed by Oliver Hart and others.⁵

Adverse selection refers to the fact that some borrowers may turn out to be unreliable or untrustworthy. A lender cannot simply raise interest rates to screen out

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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 certain risks i.e. the borrower not being able to repay due to loss of key customers, or losses on foreign exchange, that 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.  

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 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

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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 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

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hinder financial and economic development. 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.

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. 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]”

There is a consensus among international financial institutions that a “liberal” secured credit regime is a general social and economic good. Two examples serve to

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highlight that consensus. The first example comes from the late 1990s upheavals in
the “Tiger” economies of East Asia. An influential International Monetary Fund
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.”

Secondly, 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, EBRD produced a Model Law on Secured
Transactions to guide States in their reform efforts.

But the UNCITRAL Guide goes much further than the EBRD Model Law. In
the context of secured credit law, it is typical to draw a distinction between common law
and civil law jurisdictions. Common law jurisdictions - generally sympathetic to the

12 “Key Principles and Features of Effective Insolvency Regimes” (1998), G22 Working Group on
International Financial Crises, available on the International Monetary Fund website - www.imf.org/
13 See generally J-H Rœver Secured Lending in Eastern Europe Comparative law of Secured
14 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.”
15 Model Law on Secured Transactions (London, EBRD, 1994); on which see J-H Rœver Secured
Lending in Eastern Europe Comparative law of Secured Transactions and the EBRD Model Law
(Oxford, OUP, 2007). There is also extensive discussion of the EBRD Model Law in the edited volume
by Mads Andenas and Joseph Norton Emerging Financial Markets and Financial Transactions
(London, Kluwer, 1998). See also T Engellhardt and B Regitz “The state of nature and lending in an
unreformed environment: experience from early transition countries” in F Dahan and J Simpson eds
16 See S van Erp, “Civil and Common Property law: Caveat Comparator-The Value of Legal Historical-
Comparative Analysis” [2003] European Review of Private Law 394 and more generally R Cuming
concepts of party autonomy and self-help - have a liberal attitude towards security allowing 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.”17 By contrast, civil law jurisdictions have been more cautious in their approach to non-possessory security and typically have imposed restrictions on the taking of security.

The EBRD Model Law attempts to accommodate features from both civil law and common law traditions whereas the UNCITRAL 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 Act18 but dismissed in the US.19 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.20 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

18 Section 176A and see also Insolvency Act 1986 (Prescribed Part) Order 2003.
20 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.
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.21 Divorcing 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 thereby 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 therefore 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

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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” argument has been reinforced by the “legal origins” or “law matters” thesis advanced by La Porta, Lopez de Silanes, Shleifer and Vishny. It is also supported by an indirect offspring of La Porta – the series of Doing Business Reports commissioned by the World Bank. The thesis was first developed in the area of investor protection but it also encompasses creditor rights and legal institutions more generally. The thesis says that “law matters” in that legal institutions impact on economic growth. But more controversially, the thesis also asserts that countries that adopted the common law perform better than those with a civil law origin. Legal families are evaluated on the basis of their economic performance and generally the common law comes out as superior. The alleged superiority of the common law is founded on two propositions. The first is that judges have greater independence in common law than in civil law systems, so that the government has less influence on market developments. The second is that the common law, being based on case law rather than on legislative codes, is more responsive to the changing conditions and

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22 North’s theories are developed in Institutions, Institutional Change and Economic Development (New York, CUP, 1990). See also C Goodhart “Economics and the Law: Too Much One-Way Traffic?” (1997) 60 MLR 1 at 5 referring to Mancur Olson “To realize all the gains from trade, then, there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be.”


24 The “Doing Business” reports are available at www.doingbusiness.org/

25 But see Mark Roe “Legal Origin and Modern Stock Markets” (2006) 120 Harvard Law Review 460 who argues that that politics instead of legal origins is a more relevant causal factor. In “The Economic Consequences of Legal Origins” (2008) 46 Journal of Economic Literature 285 La Porta et al use “legal origins” as a sort of proxy for politics. They “adopt a broad conception of legal origin as a style of social control of economic life (and maybe of other aspects of life as well). . . . They argue that common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations”.


requirements of society.

The legal origins literature has however been criticized for a US-centric approach. The thesis suggests that US law is the benchmark, the goal of legal convergence, the end of (legal) history. The thesis has also been criticized as the work of a small group of economists whose knowledge of legal differences and cross-cultural legal comparisons displays deficiencies. The civil/common law distinction is fundamental to the thesis with membership of a legal family seen as a cause for past and present economic development. But the way in which legal systems are assigned by proponents of the thesis to one or other legal family is crude. For example, France is assigned to the same legal family as Lithuania but their economies (and their laws) are like apples and oranges in many other ways. All legal systems are mixed to a degree and the civil law/ common law divide seems especially irrelevant for the sphere of economic law covered by the legal origins literature. It may be argued that other aspects of a society, such as politics, culture or religion, and geographical position are much likely to influence economic development than membership of a particular legal family. Distinctions such as EU/non-EU, Eastern/Western Europe, and Baltic/non-Baltic countries seem much more salient than the legal origins scheme of classification which for example, has Latvia and Taiwan in one legal category and Lithuania and Syria into another.

Despite the criticism, the legal origins literature has heavily influenced the *Doing Business* reports that have been issued on an annual basis since 2004 by the International Finance Corporation (IFC), a member of the World Bank Group. These reports purport to measure and compare the “ease of doing business” in more than

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130 countries worldwide. Indeed, the lead author of the earlier Doing Business reports is a frequent co-author with the originators of the “legal origins” thesis. While the reports purport to assess attractiveness for investors rather than economic performance per se, there are obvious linkages between the two. The reports have tended to show that credit bureaus, stronger creditor rights and simpler civil procedure rules have a significant impact on access to credit. 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, in four basic categories, that constitute the basis for private credit - (1) mechanisms for the registration of property; (2) information sharing arrangements or credit bureaus; (3) collateral rules and creditor rights; and (4) contract enforcement. The 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. In the main, richer countries are said to 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 security rights, as well as better measures of contract enforcement.

The Doing Business reports have major resonance with national governments which have often taken conscious steps to improve a country’s rankings. This may not be a positive move however, not least because countries may be more inclined to improve their rankings by “gaining” the system rather than taking the politically more problematic step of addressing problems highlighted in the reports. Otherwise the

30 See www.doingbusiness.org/.


32 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).

33 Ibid, at p 20.

Doing Business reports may be subjected to similar criticism as the legal origins thesis; namely, faulty research, insufficient attention to detail, a common law bias (actual or perceived) and a preference for free market solutions and deregulation over other values such as solidarity and justice and the preservation of separate legal cultures.\(^{35}\)

The deregulatory and free market agenda was quite explicit in the first Doing Business report in 2004 which purported to show that a “heavy” regulatory regime produced the worst results in terms of economic outcomes because it was usually associated with inefficiency within public institutions, long delays in reaching decisions, high costs of administrative formalities, lengthy judicial proceedings, higher unemployment and more corruption, less productivity, and lower investment.\(^{36}\)

The report also said "Common law countries regulate the least. Countries in the French civil law tradition the most. However, heritage is not destiny." The overall conclusion was a stark one that "One Size Can Fit All" in respect the legal regulation of business.

France, and French lawyers, were surprised and disappointed with the poor ranking accorded the French legal system in the report. France was ranked forty-fourth behind countries such as Jamaica, Botswana, and Tonga.\(^{37}\) A variety of French institutions and commentators weighed in, severely criticizing the 2004 report for an allegedly faulty understanding of French law and legal culture. Prominent in this regard was the Association of the Friends of French Legal Culture which published two critical commentaries\(^{38}\) and a research institute was also established to demonstrate the attractiveness of French law.\(^{39}\) The impact of these contributions in the international sphere was muted, if not largely nullified, however, by the fact that almost all of them were published in French.\(^{40}\)

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\(^{36}\) See the 2004 Doing Business report at 83 “Heavier regulation of business activities generally brings bad outcomes, while clearly defined and well-protected property rights enhance prosperity”.


\(^{39}\) Fondation pour le droit continental – see www.fondation-droitcontinental.org/

\(^{40}\) See the comment in R Michaels “Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports and the Silence of Traditional Comparative Law” (2009) 57 American Journal of Comparative Law 765 at 772 “Somewhat typically, almost all of these contributions were published in French, leaving them with almost no impact in the international sphere.”
by an Independent Evaluation Group within the World Bank which in a 2008 critique of the Doing Business reports recommends greater transparency and some modifications to the methodology adopted in the reports.\textsuperscript{41} The critique also suggests that the focus on regulatory costs and burdens should only be one dimension of any overall reform of the investment climate in a particular country. Essentially, the Doing Business 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 appears 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{42}

In recent times, a popular exponent of the linkage between property rights and economic development has been Hernando De Soto in writings such as The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else.\textsuperscript{43} De Soto argues that people in developing countries lack an integrated formal property system and he contrasts this with the US where, in his view, a clear system of property rights was created from early on. De Soto suggests that the absence of such a system makes it impossible for the poor to leverage informal ownership into collateral for the extension of credit. In De Soto’s view, property rights are not just privileges for the rich. The poor need them most of all, especially if they want to stop being poor. He argues that in developing countries the combined effect of bureaucracy and outdated legal systems is to drive economic activities underground with investment activity stifled. But property systems in the wealthy West allow assets, through ownership documentation, to lead an “invisible, parallel life alongside their material existence”.\textsuperscript{44} In developing countries, comparable means of documentation are


\textsuperscript{44} De Soto at p 7.
lacking thereby creating “dead capital”.

Formal property systems are said to produce six effects that facilitate the generation of capital. The first is fixing the economic 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 can be revealed, transformed and energised in the same way.\textsuperscript{45} The second effect is the integration of dispersed information into one system. The third is making people accountable – incorporation into a more integrated legal system facilitates individual accountability. The fourth effect is to put assets into 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. To sum up 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 rediscounted and sold in secondary markets.”\textsuperscript{46}

De Soto argues that capitalism is the only game in town but once the vast machine of capitalism was firmly in place in the developed world 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….\textsuperscript{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 currencies, open markets and private businesses …. Everyone forgot that the reason for the delta’s rich

\textsuperscript{45} 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.

\textsuperscript{46} Ibid.
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 with Bill Clinton, for example, 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 are further empirical studies that take issue with the link between property registration mechanisms and the increase in credit to the poor. Many micro businesses operate in the informal sector beneath the radar screen of the authorities.

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49 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.

50 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.”

51 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.

52 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/.

They may not see the merit in availing of a reformed law if this meant appearing on the official radar. Moreover, they 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. 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.”

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. Radical critiques suggest that one must look more to the current distribution of property rights rather than the formalisation of such rights. Mattei for instance, argues that the movement for “formalization” of informal property rights represents an illusory economic theory to justify the freezing and naturalization of the status quo. He suggests:

“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”.

Whatever the validity of the ideological criticism, certainly De Soto’s rhetoric is overblown. “Trifling details” such as significant differences between legal systems and property registration systems in developed countries simply do not concern him.

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54 Ibid at 167.
55 See the review of The Mystery of Capital by C Woodruff in (2001) 39 Journal of Economic Literature 1215.
According to De Soto\(^57\) in the West “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.” But registrationless regimes of personal property thrive in many parts of the developed world. It is almost as if De Soto is carried away by his own rhetoric and forgets the need for qualification asserting 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.”\(^58\) 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.\(^59\) De Soto also ignores the fact that Latin American countries, including Peru, have Civil Codes modeled on the Napoleonic Codes of France and Spain\(^60\). 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 short De Soto’s, and other theses, which suggest that 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, seems much too pat, as well as being belied by the facts.

**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. This correlation has been borne out in an empirical study by Haselmann and Pistor examining the effect of legal change in respect of collateral

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\(^57\) H De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere Else* (London, Black Swan, 2008) at p 60.

\(^58\) Ibid at 53.

\(^59\) 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.”

The study concludes that banks increase the supply of credit subsequent to legal change and that the ability to “collateralize” or use assets as security seems to be an important determinant of credit supplied in the economy. It also finds that foreign-owned banks respond more strongly to legal change than incumbents. This is consistent with the proposition that especially in emerging and transition economies information asymmetries are of greater concern compared to developed markets. Collateral rights tend to reduce information gaps between lenders and borrowers; to even the playing field between foreign and domestic lenders and to open up the credit market to new participants.

Where asset collateralisation is legally possible, it is argued that all but the largest borrowers should get better terms on a secured rather than an unsecured loan. Better terms can take the form of lower interest rates, larger loans relative to income and also more generous repayment periods. A more prosaic example has been cited in the case of a credit union for IMF and World Bank employees: “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. Secured loans are more expensive to set up since the expenses involved in arranging and documenting the transaction are higher.

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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.64

**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.65 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 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

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64 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.
65 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
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. They may be viewed 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. The Chinese experience

67 See J Stiglitz Globalization and its discontents (London, Penguin 2002) at p 6: “countries were told
indicates that a slower, more gradual process is more conducive to long term economic stability. 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 “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.

The Legislative Guide as an instrument of American economic power

There have been many analyses of the role of transplants in the legal modernisation and harmonisation process. It is the case that a variety of factors drive countries to

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 ...”


adopt legal transplants from other jurisdictions and models of greater, or lesser sophistication, have been used to explain the typology of transplants.\textsuperscript{71} 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{72} 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{73}

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 mode - law is a detailed and complex machinery of social control that cannot effectively function without some cooperation from local officials usually consisting 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{74} In this connection, one might also make use of the notion of 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.\textsuperscript{75} There is likely to be a lively dialectic between consent and dissent, and between hegemonic

\begin{itemize}
\item \textsuperscript{71} But for a somewhat different perspective see O Kahn-Freund “On Uses and Misuses of Comparative Law” (1974) 37 MLR 1 and for a response see A Watson “Legal Transplants and Law Reform” (1976) 92 LQR 79. See also W Ewald “Comparative Jurisprudence (11): The Logic of Legal Transplants” (1995) 43 AJCL 489.
\item \textsuperscript{72} A Watson Legal Transplants: An Approach to Comparative Law (Edinburgh, Scottish Academic Press, 1974) at p 30.
\item \textsuperscript{74} 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 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.
\item \textsuperscript{75} See generally G Teubner “Substantive and Reflexive Elements in Modern Law” (1983) 17 Law and Society Review 239.
\end{itemize}
and counter-hegemonic forces. One may also tie in the concept of path dependency.\textsuperscript{76} 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.\textsuperscript{77} 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.\textsuperscript{78} 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.\textsuperscript{79} There is also the risk of “social dumping”\textsuperscript{80} and a so-called race to the bottom.\textsuperscript{81} 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


\textsuperscript{79} See D Esty and D Geradin (eds) Regulatory Competition and Economic Integration: Comparative Perspectives (Oxford: Oxford University Press, 2001).

\textsuperscript{80} 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.

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 may exist side by side with each one retaining its viability. More fundamentally, a recent empirical study of private credit in over 100 countries over 25 years has amassed evidence contradicting the hypothesis that legal institutions converge toward the more successful ones over time. In addition, the study suggests that since credit institutions vary so much across countries and legal origins, the evidence is also inconsistent with the “functional convergence” hypothesis holding that institutions in different countries, while distinct on the surface, functionally converge to accomplish the same goals.

But evidence of a lack of a convergence is not necessarily inconsistent with the proposition that certain legal systems may hold an appeal on prestige or other grounds. John Braithwaite and Peter Drahos in their seminal book on Global Business Regulation 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)”. 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.

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84 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).
Mattei has now moved away from his earlier reliance on “prestige” or “efficiency” to propound a theory of “imperial law”; \(^{86}\) “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 worldwide, 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.” In the realm of literary and cultural discourse, notions of imperialism and American hegemony have been advanced by Edward Said.\(^{87}\) 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.\(^{88}\) In his view, the pressures are subtle, and generally indirect.\(^{89}\) Said makes the point that\(^{90}\) “American attitudes to American greatness, to hierarchies of race, to the perils of other revolutions (the American revolution being considered unique and somehow unrepeateable 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.” Said 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 Guide can be seen as an instrument by which the norms postulated in Article 9 of the American Commercial Code are writ large across the globe. The Guide reproduces the key features of Article 9 emphasising the removal of restrictions on the taking of security, all-assets security,

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\(^{88}\) Ibid at p 392.

\(^{89}\) See p 401.

\(^{90}\) See p 7.
notice filing of security interests on American lines, and the full priority of security rights. US private and public interests combined and collaborated in the formulation and development of the Guide. 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. First World nations, including the US, “have a collective interest in promoting generalized dependency and reverence from the periphery.” But 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…” Best international practice is considered to be represented by the work of bodies 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 such bodies. In simple terms, what is considered to be good for the US is also considered to be good for the world. Of course, others may disagree in the assessment of what is good, both for the US and for the world.

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

96 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.”
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 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”

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97 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.
implementing or enforcing environment. 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. Moreover, there are no magical elixirs that bring about a happy ending to the quest for growth. In short, there is no Holy Grail and the UNCITRAL Secured Transactions Guide, to the extent that it implies otherwise, is a false god.

100 See W Easterly The Elusive Quest for Growth: Economists’ Adventures and Misadventures in the Tropics (Cambridge Massachusetts, MIT Press, 2001) at p 289.