OVERCOMING APATHETIC INTERNATIONALISM TO GENERATE HEMISPHERIC BENEFITS: ANALYSIS OF AND ARGUMENTS FOR RECENT SECURED TRANSACTIONS LAWS IN MEXICO

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Table of Contents

I. INTRODUCTION

In a world that moves at an increasing pace towards globalization, transnational mobility and internationalization of business transactions, U.S. legal practitioners and investors –

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jointly with business entrepreneurs, government officials, diplomats and academicians – must become familiar not only with the beautiful language of Cervantes and Octavio Paz but, more importantly, *with key areas of Mexican law*.[1]

In light of the recent changes that will undoubtedly have a substantial impact on all NAFTA members, one such key area on which U.S. parties must focus their attention is the secured transactions legislation in Mexico. While Mexico has repeatedly demonstrated its desire to strengthen its economy, attract foreign investment, participate in multilateral agreements and accelerate its overall development, this nation has faced a major obstacle: archaic commercial laws governing secured transactions which, in effect, have impeded Mexico from reaching its goals. Due to its traditional protectionist policies, Mexico has not been obligated to enact a comprehensive law addressing secured transactions. With the increased exposure to foreign investment and other external influences, though, "the need for updated, efficient means for dealing with secured credit and multi-national insolvency is clear."[2] Cognizant of the need to modernize its legislation in these fields, in May 2000, Mexico adopted a package of commercial laws including the *Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de Crédito* (the "*New Secured Transactions Law*"), thereby replacing the former legislation in place and unaltered since 1932.[3] Although the potential benefits of such legal reform, at a minimum, for the Americas may not be readily apparent, further analysis clearly demonstrates that such

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1. Foreward to symposium *Law, Business and the U.S.-Mexican Border*, 35 SAN DIEGO L. REV. 711, (1998) (emphasis added).

2. John A. Barrett, Jr. *Mexican Insolvency Law*, 7 PACE INT'L L. REV. 431, 462 (1995).

3. Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de Crédito , D.O., May 23, 2000 (Mex.). This New Secured Transactions Law is not a "law." Rather, it is a "decree" that amends provisions in the (i) General Law of Credit Instruments and Operations, (ii) the Commercial Code, and (iii) the Law of Credit Institutions that affect, indirectly or directly, secured transactions. *See also* Decreto por el que se reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, del Código Federal de Procedimientos Civiles, del Código de Comercio y de la Ley Federal de Protección al Consumidor, D.O., May 29, 2000 (Mex.). In conjunction with the enactment of the New Secured Transactions Law, this supplementary decree was issued to amend the provisions relating to the registration/filing of security interests. Unlike Article 9 of the Uniform Commercial Code which encompasses both the creation and registration of security interests, these aspects are governed by separate laws in Mexico. For the sake of clarity, in this article, the two decrees are collectively referred to as the "New Secured Transactions Law."

legislative modifications in Mexico will generate positive repercussions for all nations desirous of conducting business with Mexico, including the U.S.

Accordingly, this article advocates the offer of U.S. support for the New Secured Transactions Law and is organized in the following manner. The first section provides a synopsis of modern secured financing law and an explanation of the major terms utilized in this area. In the second section, the principal reasons for the discrepancies between secured transactions laws throughout the Americas are examined. Next, section three sets forth, in detail, the predominate shortcomings of the Old Secured Transactions Law, and illustrates the negative effects of such deficiencies on the Mexican economy and legal system.[4] The following section, by contrast, describes the New Secured Transactions Law and identifies the most significant changes that spawned from this new legislation.[5] After dispelling all myths with respect to the true objective of this article, section five furnishes numerous policy justifications in favor of offering U.S. support to Mexico in connection with the implementation and future modification of the New Secured Transactions Law. Finally, based on the multitude of policy arguments, this article concludes that a collaboration among the NAFTA partners with this Mexican legal initiative, constitutes sound policy that will prove advantageous for all parties involved.

II. SECURED TRANSACTIONS LAW IN GENERAL

A. Secured Transactions in the U.S. and Canada

This article is not intended as a diatribe on the law of modern secured transactions. However, to better understand the problematic aspects of the Old Secured Transactions Law and to fully appreciate the policy arguments in this article in favor of

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4. Ley General de Títulos y Operaciones de Crédito, D.O., Aug. 27, 1932 (Mex.).

5. Neil B. Cohen, *Harmonizing the Law Governing Secured Credit: The Next Frontier*, 33 TEX. INT'L L.J. 173, 174 (1998). As part of this bundle of new commercial laws, Mexico enacted the *Ley de Concursos Mercantiles* (the "*New Insolvency Law*"). The laws regulating secured transactions and commercial insolvency are closely related. In legal terms, these two bodies of law frequently cross-reference one another. Likewise, in economic terms, they both share the common "desire to facilitate mutually profitable credit transactions." In Cohen's opinion, this interrelationship can be summarized as follows: "What, after all, does secured credit have to do with international insolvency law? The answer . . . is 'quite a bit.'" *Id.* Accordingly, although the primary focus of this article is the New Secured Transactions Law, the New Insolvency Law is also utilized occasionally in making certain policy arguments.

U.S. support of the New Secured Transactions Law, it is necessary to briefly examine the basic elements in this area. Such elements are exemplified in Article 9 of the Uniform Commercial Code ("Article 9"), which governs secured transactions in the U.S. and serves as the basis for similar transactions throughout Canada.[6] While not affording full protection to any creditor, the existence of these security devices has fostered the extension of credit and the strengthening of the U.S. economy for approximately three decades.[7]

In terms of its scope, Article 9 applies to "any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights."[8] For its part, a "security interest" is defined as "an interest in personal property or fixtures which secures payment of an obligation"[9] (*e.g.* the obligation to repay a loan in a timely fashion). The principal participants in a secured transaction are the "debtor" (the party receiving the loan) and the "secured party" (the party granting the loan). In basic terms, the debtor desires to borrow funds from a creditor, who, in turn, is willing to loan money to the debtor on the condition that such debtor grants the creditor a security interest in some collateral of the debtor to ensure repayment. Although this arrangement between the parties can be evidenced by the creditor retaining possession of the collateral, the realities of an increasingly sophisticated business world dictate that it is usually memorialized in a security agreement.[10] Provided that the

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6. R.C.C. Cuming, *Canadian Bankruptcy Law: A Secure Creditor's Heaven*, *in* CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 381 (Jacob S. Ziegel ed., 1994). This expert explains that Canadian and U.S. laws concerning security interests are similar. As evidence thereof, the author states that "[f]ive out of ten provinces and one out of two territories have enacted Personal Property Security Acts based roughly on Article 9 of the American Uniform Commercial Code [and] the Civil Code of Quebec has recently been revised so as to implement in that province a system of general application for taking security interests in moveable property that will bring it closer to the mainstream of North American developments in this area of law." *Id.*

7. William Davenport & Daniel Murray, *Secured Transactions*, A.L.I. § 1.01 (1978). The authors suggest that even though Article 9 has dramatically increased security for creditors since its original enactment in 1972, this statute alone does not constitute a panacea. They explain, for example, that "[i]t is in the nature of the beast that *no creditor* . . . possesses *complete* security. But the availability of sophisticated devices to attain various degrees of security have emboldened creditors to lend in ever expanding amounts." *Id.* (emphasis added).

8. U.C.C. § 9-102(1) (1972). Exceptions to the applicability of Article 9, which are outside the scope of this article, are set forth in § 9-104.

9. U.C.C. § 1-201(37) (1972).

10. JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 23-10 (2d ed. 1980). While acknowledging that the

requirements of Article 9 are met, "attachment" occurs when the security agreement is executed, thereby making such agreement enforceable between the two parties. This attachment may apply not only to the collateral that the debtor currently possesses, but also to the "proceeds" obtained upon the disposition of such collateral,[11] and to any "after-acquired collateral" of the debtor.[12]

With respect to enforceability, attachment affords the secured creditor several options if the debtor "defaults" on its obligation (*i.e.* the debtor fails to make timely payments).[13] First, the secured creditor may seek judicial foreclosure, whereby it obtains a judgment from the court against the debtor, and the seizure of the collateral and ensuing public auction is conducted by law enforcement officials.[14] Second, provided that it is performed without "breaching the peace," the secured creditor may personally repossess without judicial intervention, resell the collateral, and apply the proceeds to the debt. Third, strict foreclosure may be the method chosen by the secured creditor. In

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relinquishing possession of the collateral by the debtor is commercially unfeasible in the majority of situations because removal of such collateral would effectively preclude the debtor from earning the funds necessary to repay the loan, the authors argue that recognizing possession as an acceptable method of perfection is quite understandable, especially in nations with less-developed economies. They explain, in particular, that "in a crude economy where few [can] read and concepts of ownership in personal property [are] not sophisticated, possession of personal property [is] a powerful indication of ownership . . . Even in our society, accustomed as we are to the idea that a possessor may have only a minimal interest in the goods he possesses, we at least expect owners to have possession or control of their assets." *Id.*

11. U.C.C. § 9-306(3) (1972). In accordance with this section, a security interest in "proceeds" from the sale or other disposition of the collateral is automatically and continuously perfected for a period of ten days if the interest in the original collateral was properly attached. If, for instance, a secured party perfects a security interest in inventory and the debtor sells the inventory on credit, thereby generating an accounts receivable, then the secured party automatically retains a security interest in the receivables for the period. Perfection can thereafter be extended if any of the standards set forth in this section of Article 9 are satisfied.

12. U.C.C. § 9-204(1) (1972). Pursuant to this Section, with certain minor exceptions, a security agreement may establish that "any or all obligations covered by the security agreement are to be secured by after-acquired collateral." *Id.* This concept is fundamental for the floating lien, whereby the parties agree that the security interest continuously "floats over" or encompasses the existing collateral and the property acquired by the debtor in the future alike. In modern financing transactions, a floating lien customarily covers future inventory and accounts receivable.

13. Davenport & Murray, *supra* note 7, § 6.02. Article 9 does not define the term "default", thus security agreements typically set forth several of the following events of default: (1) failure to make timely payment, (2) breach of any warranty made by the debtor in the security agreement, (3) creation of another encumbrance on the collateral, (4) any levy, seizure or attachment of the collateral, (5) death or dissolution of the debtor, or (6) insolvency of the debtor.

14. U.C.C. § 9-501(1) (1972). The U.C.C. mandates that a secured creditor may "reduce [its] claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure." *Id.*

such case, assuming that the value of the collateral exceeds the amount of money owed by the debtor at that juncture, the secured creditor would repossess the collateral and simply retain it in satisfaction of the debt.[15]

While attachment allows enforceability of the security agreement, a secured creditor may continue to be vulnerable to other creditors with potential claims in the same collateral if such arrangement is not "perfected." In simplified terms, perfection can be accomplished in three principal manners, including (1) filing a "financing statement" in the proper location (*e.g.* with the local registry or secretary of state), (2) taking physical possession of the collateral, or (3) enjoying automatic and short-term perfection of certain types of collateral that were properly attached.[16] All of these perfection devices are designed to warn potential creditors and purchasers that such collateral is already encumbered. Once a security interest is "perfected, " the secured party has safeguarded its position in relation to that of other creditors in the same collateral, including that of the trustee in case of bankruptcy of the debtor. In the words of one expert, "a secured party who perfects prior to bankruptcy is likely to have the right to snatch the collateral out of the trustee's hands, but an unperfected secured party will invariably have to eat from the general creditors' trough in bankruptcy."[17] Forgoing a detailed description of the intricacies related to priorities among creditors contained in Article 9, the general rule is that a secured creditor, even if unperfected, enjoys superior rights in the collateral to

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15. WHITE & SUMMERS, *supra* note 10, § 26-4. While common sense seems to dictate that the self-help repossession options are preferable, the authors argue that such non-judicial actions may not be the best option for the following reasons: (i) if self-help repossession is conducted in a manner that "breaches the peace," the secured creditor will suffer legal repercussions, (ii) where the value of the collateral is less than the balance of the loan, the secured creditor will be forced to go to court anyway to seek any deficiency, and (iii) the secured creditor may purchase the collateral at a *public* sale held by law enforcement officials, whereas it is precluded from doing so at a *private* sale which it personally conducts as part of self-help repossession.

16. *Id.* § 23-5.

17. *Id.* The authors emphasize that since the bankruptcy trustee's function is to amass the debtor's estate, reduce it to cash and distribute the proceeds to the unsecured creditors, the trustee has an incentive to negate the validity of each security interest. The "acid test" of the effectiveness of a security interest, therefore, is its ability to withstand the scrutiny of the trustee in bankruptcy. *See also* Davenport & Murray, *supra* note 7, § 2.02(a). This author concurs with this priority analysis, stating that by perfecting, the secured party "can be confident that [its] interest in the debtor's collateral will survive an attack by a trustee in bankruptcy, should the debtor declare bankruptcy." *Id.*

those of any other creditor, unless Article 9 specifically provides to the contrary.[18]

B. Secured Transactions in Latin America

In contrast to the U.S. and Canada, the overwhelming majority of Latin American countries have yet to adopt modern legislation regarding secured transactions. These antiquated legal regimes are attributable, in large part, to the distinct levels of development. For instance, while the concentration of wealth in the U.S. and Canada has changed from real property to personal property (*e.g.* inventory, accounts receivable, equipment, intangibles, etc.), land continues to represent the preferred storehouse of wealth in Latin America. Accordingly, in this region, ownership of real property is pivotal to participating in secured transactions since land has historically constituted the only type of collateral acceptable to lenders.[19] Another problem endemic in the area is the abundance of mechanisms, each designed in their own idiosyncratic manner, which allow for the creation of security interests. Such multiplicity and inconsistency have dissuaded many potential creditors from lending to Latin American entities. According to one expert in this arena, gaps in the law have traditionally been filled by "piecemeal legislation" and the "truncated and non-uniform evolution of security devices in Latin America has created what some scholars refer to as a 'crazy quilt' of varying devices."[20]

As a direct result of the shortcomings of the legal frameworks regarding commercial credit throughout the region, creditors customarily find themselves obligated to approve only debtors with low risks of default and to charge higher interest rates on all loans. In other words, one detrimental effect of the archaic laws on secured transactions is "making credit prohibitively expensive, when available at all."[21] In light of these historic inadequacies and the inevitable advance of globalization, potential debtors in Latin America have urged their governments to implement

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18. U.C.C. § 9-201 (1972). The first sentence of this Sections states that "[e]xcept as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." *Id.*

19. John M. Wilson, *Secured Financing in Latin America: Current Law and the Model Inter-American Law on Secured Transactions*, 33 UCC L.J. 43, 55 (2000). The author explains that land is the most important security device in Latin America because: (1) wealth is centered in real property, and (2) the pervasiveness of political instability and economic underdevelopment in the region have hindered the progress of lending practices, thereby making personal property unnecessary.

20. *Id.* at 59-60.

21. *Id.* at 107.

remedial actions rapidly. As one scholar describes it," [f]acing increased competition and hard-pressed to combat the flow of foreign goods, Latin American producers have become increasingly vocal about the lack of commercial credit, demanding solutions."[22] Similar to other nations in this region, economic development in Mexico has been retarded historically due to, among other things, antiquated legislation regarding secured transactions. Fortunately, however, Mexico has recently adopted the New Secured Transactions Law, which is designed to modernize the entire system and cure a variety of problems associated with secured lending. As one of the most significant nations in Latin America (geographically, economically, politically, etc.), the introduction of the New Secured Transactions Law in Mexico will undoubtedly have repercussions for all of Latin America.

III. THE OLD SECURED TRANSACTIONS LAW

Minor deviations aside, the majority of commercial law experts agree that contemporary secured transactions laws must embrace, at a minimum, the following key concepts:

> (1) creation of a single, uniform security device to avoid duplication and incongruity; (2) recognition of security interests in collateral that is not in existence at the time of perfection, such as proceeds and after-acquired property; (3) availability of rapid and effective enforcement procedures (judicial and non-judicial) in case of default by the debtor; (4) establishment of a central, modern registry in which to file all security agreements, thereby perfecting the security interests and placing all potential creditors and purchasers on notice of the encumbrance; (5) allowance of non-possessory pledges so that debtors may retain custody of the collateral during the term of the loan in order to earn the funds necessary to repay the debt; (6) recognition of personal property,such as equipment, inventory, intangibles, etc., as legitimate collateral; (7) existence of purchase money security interests, which serve to facilitate further lending to debtors who are already encumbered while adequately

22. *Id.*

> safeguarding the interest of the subsequent secured creditors; and (8) establish a buyer-in-ordinary-course exception to protect consumers who innocently purchase collateral without knowledge, constructive or actual, of the pre-existing security interest.[23]

Unfortunately, prior to the enactment of the New Secured Transactions Law, Mexico's pertinent legislation suffered considerable deficiencies.[24] These faults were so substantial that,

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23. *Id.* at 65-68. *See also* Boris Kozolchyk, *What To Do About Mexico's Antiquated Secured Financing Law*, 12 ARIZ. J. INT'L & COMP. L. 523, 526-28 (1995); John W. Wilson-Molina, *Mexico's Current Secured Financing System: the Law, the Registries and the Need for Reform*, NAT'L L. CTR. FOR INTER-AM. FREE TRADE, *at* www.natlaw.com/pubs /spmxbk3.htm (last visited Oct.5, 2000).

24. The majority of legal and financial experts suggest that the Old Secured Transactions Law was deficient, inexact, duplicative, outdated, etc. This perspective, however, is contested by several authors. Andrea E. Migdal et al., *Mexico: An Overview of Secured and Unsecured Transactions in Mexico*, LATIN AM. L. & BUS. REP., Dec. 31, 1997, *available at* 1997 WL 9499219. Migdal criticizes the reluctance of U.S. financial institutions to grant loans secured by Mexican-based assets since, in his opinion, the Old Secured Transactions Law functioned adequately. Migdal explains, in particular, that Mexican banks successfully financed for decades without problems and "[t]he same mechanisms that these Mexican institutions have been using are available to foreign financial institutions, and there is really little reason that these foreign entities could not have the same success." *Id.* at 1. To the issue of the excess of instruments by which to create a security interest, Migdal argues that all have been successful "when used correctly in the Mexican market." *Id.* at 4. *See also* Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 7 U.S.-MEX. L.J. 85, 94-95 (1999). Irritated with the very idea of introducing a law resembling Article 9 in Mexico, Canova argues that those supporting a law of this nature are parts of "elite corporate groups within the U.S. that have vested interests in altering particular aspects of Mexico's legal system while maintaining other aspects that have certainly done far more damage to Mexico's economic development." *Id.* at 94, 95 (footnotes omitted). He contends, furthermore, that the "ethnocentric mind-set [that] permeates these dominant discourses" is faulty for several reasons, including: (i) it fails to recognize the legitimate political and structural limitations to transplanting Article 9 to Mexico and other developing countries; (ii) the flaws in Article 9 are overlooked; and (iii) it fails to provide convincing evidence that the Old Secured Transactions Law was the "primary and direct cause" of Mexico's economic hardships. *Id.* at 95. According to Canova, the real cause of the economic problems is the neoliberal model imposed on Mexico by the United States, which makes it impossible for any law to function well. "In the context of such financial conditions, even the most comprehensive legal protections for creditors will not suffice. One cannot draw blood from a stone; and creditors cannot easily stay solvent by trying to collect on debts and attach assets in an economic environment in which jobs are disappearing and real incomes are falling, no matter what the legal protections." *Id.* at 95-96 (footnote omitted). *See also* Agustín Berdeja-Prieto, *Debt Collateralization and Business Insolvency: A Review of the Mexican Legal System*, 25 U. MIAMI INTER-AM. L. REV. 227 (1993). Berdeja-Prieto attributes the problems in Mexico to unsatisfactory risk assessment, and not to the Old Secured Transactions Law. According to this author, "Mexico's system provides the lender and the investor that requisite degree of certainty and meets the standards of the world's advanced legal systems." *Id.* at 279. *See also* Thomas M. Shoesmith, *Financing Cross-Border Businesses and Access to U.S. Capital Markets*, 35 SAN DIEGO L. REV. 805, 809 (1988). While acknowledging the lack of transparency of the Mexican legal system,

according to one observer, "Mexican secured financing legal institutions failed in their mission because they ignored the above enumerated principles."[25] Although examples are numerous, set forth below are five major shortcomings identified with the Old Secured Transactions Law.

First, the abundance and overlap of mechanisms theoretically available to perform secured transactions generated a tremendous amount of confusion, thereby undermining the entire system. According to observers, identifying the proper legal instrument to create a binding security agreement was tantamount to navigating a labyrinth of different requirements."[26] Prior to the enactment of the New Secured Transactions Law, numerous devices could be used in Mexico to create a security interest including, among others, commercial pledges (*prenda mercantiles*), chattel mortgages (*hipotecas*), guaranty trusts (*fideicomiso de garantía*), production credits (*créditos de habilitación o avío*), installation credits (*créditos refaccionarios*), and industrial mortgages (*hipotecas industriales*). Instead of providing for a uniform security interest applicable to all situations, this multiplicity of uncoordinated instruments served to dissuade skeptical creditors from lending and to incite copious litigation once items were deemed unencumbered due to a technicality, *i.e.*, that the wrong device had been utilized. In the words of one expert, Mexico faced "a virtual smorgasbord of secured financing mechanisms to choose from. Choosing among these, however, may cause indigestion – especially if [you] choose the wrong one."[27] Likewise, other observers claim that the reluctance of foreign entities to lend in Mexico was a foregone conclusion in light of such pervasive legal confusion.[28]

A second problem is that, unlike modern secured transactions regimes that expressly allow future items to function as collateral,

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Shoesmith refuses to accept that Mexico is unable to handle sophisticated financial transactions. According to the author, "[f]undamentally the system works. People successfully do business in Mexico. . . . Mexico is not terra incognito. Therefore rule number one in understanding the secured financing system in Mexico is 'get over it, it works; just do your homework.'" *Id.* at 809.

25. Kozolchyk, *supra* note 23, at 528.

26. David W. Eaton, *Mexico: Working Capital Loans for Mexican Suppliers in the Maquiladora Industry: The Need for Asset-Based Lending Reform*, LATIN AM. L. & BUS. REP., Sept. 30, 1997, *available at* 1997 WL 9499182.

27. Wilson-Molina, *supra* note 23, at 7.

28. Todd C. Nelson, *Receivables Financing to Mexican Borrowers: Perfection of Article 9 Security Interests in Cross-Border Accounts*, 29 U. MIAMI INTER-AM. L. REV. 525, 546 (1998). Sympathizing with frustrated lenders, this author explains that "[f]aced with this gauntlet of uncertainties, it is hard to blame U.S. creditors for shying away from cross-border accounts receivable [financing]." *Id.*

the inability of a security interest to attach to after-acquired property under the Old Secured Transactions Law made inventory and accounts receivable financing virtually unfeasible. A multiplicity of factors contributed to the reticence of Mexican entities to expand the types of acceptable collateral. In particular, observers suggest that legal, cultural, and economic factors combined to impede the use of accounts receivable and future inventory as guarantees of repayment. Simply stated, "Mexican lenders [had] yet to express much interest in accounts receivable financing or asset-based lending in general for that matter."[29] Coupled with this ubiquitous aversion to recognizing novel types of collateral were rigid and unnecessarily specific collateral description requirements.

While modern legal frameworks allow relatively broad descriptions of collateral in certain situations, the Old Secured Transactions Law demanded absolute specificity, which effectively negated the use of future inventory as collateral. Under Article 9, for example, a description of the collateral in broad terms such as "all inventory" is effective. Pursuant to the Old Secured Transactions Law, on the other hand, this same classification would be considered invalid, thereby leaving the creditor virtually defenseless against third parties claiming rights to the same collateral. Consequently, to adequately protect its interest, a lender would be obligated to execute and record a new security agreement or formally amend the original document each time a piece of inventory was sold and subsequently replaced. As summarized by one expert," [s]uch a cumbersome system is not commercially viable."[30] This demand for precision in identifying the collateral also served to frustrate the establishment of a revolving line of credit, a cornerstone of modern financing. Article 9 permits the debtor's monetary obligation to vary without prejudicing the validity of the underlying security agreement. Traditional Mexican law, however, "disdain[s] such fluctuating indebtedness."[31] Accordingly, the security agreement was required to disclose the precise amount of a loan, which had to be paid in its entirety prior to the cancellation of the security agreement. This requirement led lenders to make multiple loans in lesser quantities, yet this too failed to satisfactorily circumvent

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29. *Id.* at 537. Simplifying the former attitude that prevailed in Mexico, this author explains that "accounts receivable financing has simply never caught on in Mexico." *Id.* As a direct result of this pervasive disinterest, Nelson argues, the legal instruments and enforcement mechanisms necessary to facilitate modern financing "have yet to evolve." *Id.*

30. Eaton, *supra* note 26.

31. *Id.*

the legislative shortcomings. "Such repetitive filings are costly and time-consuming, and may cause a lender to lose priority vis-à-vis intermittent third-party lenders," complained experts.[32]

The lack of quick and inexpensive remedies following a default of the debtor constitutes a third problematic area. Although Article 9 explicitly allows self-help remedies (*i.e.* personal repossession) when the debtor fails to meet its payment obligations, the Old Secured Transactions Law provided only for judicial remedies characterized by overwhelming sluggishness. Observers estimate, in fact, that a judicial foreclosure in Mexico customarily involved several years of laborious procedures. According to observers, it was "not unusual for a judicial or strict foreclosure in Mexico to take five years to perfect."[33] Aside from irritating the secured creditor, such excessive delay created various risks, including (i) the permanent disappearance of the debtor, (ii) the intentional depletion of funds by the debtor, or (iii) the depreciation of particular assets over time.[34]

Fourth, retention of the collateral by the secured creditor undermined the ability of the debtor to successfully repay the loan. As a result of the deficiencies under the Old Secured Transactions Law, particularly in terms of enforcement and public registration of security interests, creditors customarily required possession of the collateral as a condition to extending credit to the debtor. While protecting the secured creditors, relinquishing possession of the collateral by the debtor made timely repayment of the loan impracticable and, in effect, forced the debtor to confront a virtual *Catch-22*. This financial paradox can be explained in the following manner. In Mexico:

> if you do not maintain possession of the [collateral], you cannot take [it] back. Of course, if you have the items in your possession, you would not need to take them back. However, if the items are in your possession it is difficult for the purchaser of the goods to sell them.[35]

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32. *Id.*

33. Boris Kozolchyk, *The Basis For Proposed Legislation to Modernize Secured Financing in Mexico*, 5 U.S.-MEX. L.J. 43, 48 (1997).

34. Eaton, *supra* note 26.

35. Shoesmith, *supra* note 24, at 811; *see also* Eaton, *supra* note 26. Eaton concurs with the absurdity and impracticality of a system whereby a debtor is obligated to surrender the collateral to a secured creditor when it is essential that the debtor use that very same collateral to earn the money to repay the loan. This practice, explains Eaton, virtually cripples the maquiladora industry and ignites a series of successive defaults on previous obligations. "Handing over physical possession of assets as collateral is

Fifth, the registry system, whereby a secured creditor may file its security interest to notify all other potential creditors of the encumbrance on the collateral, has proven woefully inadequate in Mexico. As explained previously, perfecting a security interest pursuant to Article 9 is commonly accomplished by simply filing notice of the encumbrance in a centralized, computerized system provided by the secretary of state. Barring certain minor exceptions, once filed, the secured creditor has protected its interest. The Mexican registry system, by contrast, has been plagued by unreliability and utter confusion. The process is so unsettling that, according to one observer, "[t]he most prohibitive aspect of the Mexican filing system is the daunting task of identifying the proper office in which to file and search for competing interests."[36] The improper filing of documents and subsequent searches that fail to identify competing security interests are the principal by-products of the antiquated registry system.[37] Such ineffectiveness in terms of registration has significant ramifications because of its intimate relationship with the rules governing the creation of a security interest. In other words, "the underlying legal mechanisms and principles are of little use unless third parties can rely on a properly functioning registry system."[38]

In conjunction, these shortcomings negatively affected Mexico in several ways. For example, although some entities managed to obtain credit despite the inadequacies of the Old Secured Transactions Law,[39] the overwhelming majority of small and mid-

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disastrous for a sub-maquila or supplier in need of short term financing because it forces the plant to relinquish possession of parts and components needed to manufacture goods called for under *existing* contracts." *Id.* (emphasis added).

36. Eaton, *supra* note 26.

37. *Id.*

38. Wilson-Molina, *supra* note 23, at 18. The author argues that the role of registries is by no means subordinate to that of the substantive law regulating the creation of security interests. Rather, the equality in terms of importance of these aspects induced Wilson-Molina to demand rapid reform: "Mexico must implement and preserve a registry system that protects the legal mechanisms which create property rights, since the value of these rights is greatly undermined if the registries do not function correctly." *Id.*

39. Regardless of the defects under the Old Secured Transactions Law, larger Mexican companies — with considerable real property assets that can be used as collateral — have managed to obtain the necessary credit. *CapMAC Wraps U.S. $200 Million Mexican Future Flow Transaction; U.S. Dollar Financing Achieved at Attractive Rate*, BUS. WIRE, Jan. 14, 1997. Capital Markets Assurance Group (CapMac), a financial guarantee insurance company based in New York, guaranteed a $200 million Mexican future flow transaction issue by Bancomer Receivables Trust, which was secured by future credit card merchant voucher receivables; *see also Mexico Covarra Gets $25M Credit Line to Expand Production*, DOW JONES NEWS SERV., Dec. 29, 1997. Grupo Covarra S.A., a Mexican

size businesses failed to obtain credit at a reasonable cost because they did not possess land, the only collateral acceptable to skeptical lenders.[40] Whereas obtaining a loan is normally not an overly onerous task for a smaller business in the U.S., those located in Mexico were required to provide cash or property located in the U.S. as collateral.[41] If these types of collateral were not available, "then the ability of a Mexican company to obtain credit [was] severely limited because of concerns by U.S. banks as to their ability to obtain enforceable security interests in Mexico."[42] Past experiences justified this pervasive trepidation among foreign lenders regarding the recuperation of personal property serving as collateral. Due to the ease with which a debtor was able to transport personal property over the U.S.-Mexico border and the patent pitfalls in the Old Secured Transactions Law, a security interest in movable property was essentially worthless. According to one attorney who specializes in cross-border financing, "[t]he bank is well aware of the true value of the security interest [in a small machine]: that as soon as there is non-payment, they will see only dust coming out the back wheels of a truck."[43] Although not resolved, this inability for smaller businesses to obtain credit was acknowledged by previous Mexican governmental officials.[44]

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manufacturer of clothing for men, obtained a $25 million credit line to expand production capacity and to construct a factory to make clothing liners. *Id.*

40. Chris Kraul & Jose Diaz Briseno, *Latin Entrepreneurship Is Stifled by Lending Curbs; Banking: Efforts Are Underway in Mexico and Elsewhere to Change Rules That Drive Up Cost of Borrowing*, L.A. TIMES, Feb. 20, 2000, at C1. This article indicates that small and mid-size businesses in Mexico typically paid an interest rate of 40 percent, whereas their U.S. counterparts operating under the auspices of Article 9 obtained credit easier and at a significantly lower cost. The reason for this disparity, explain the authors, is clear: "would-be business borrowers in Mexico and other Latin nations are severely limited in what they can pledge as collateral for a secured loan." *Id.*

41. John E. Rogers, Esq., *The Prospects for Modernization of Financing of Mexican Business*, United States-Mexico Law Institute, Inc., *at* http://natlaw.com/pubs/usmxlaw/usmjnm26.htm (last visited Oct. 8, 2000).

42. *Id.*

43. Shoesmith, *supra* note 24, at 808. The author suggests that the garment industry is a good example of the challenges facing U.S. lenders under the Old Secured Transactions Law. Garment manufacturing requires a substantial amount of equipment such as sewing machines, pocket setters, etc., all of which are relatively mobile. To obtain funding, the Mexican garment manufacturer would enter a U.S. bank and state, "I'd like to buy a machine which you could put on the back of a truck, and I'd like to take it to Mexico. Would you please lend me $100,000 for that machine? I'll give a security interest in the machine." *Id.* Based on prior experience, the highly mobile nature of the collateral, and the shortcomings of Mexican laws in this area, the banks refused to lend.

44. Heriberta Ferrer Arias, *Ernesto Zedillo envió a la Cámara de Diputados una iniciativa de Ley de Garantías de Crédito*, LA CRÓNICA DE HOY [CR.H.], Apr. 7, 1999, *available at* http://webcom.com.mx/cronica/1999/abr/07/nac17.html. Upon introducing the Federal Law of Secured Transactions (*Ley Federal de Garantias de Credito*) that preceded the New Secured Transactions Law, former Mexican President Ernesto Zedillo emphasized

Another negative effect of the Old Secured Transactions Law was that all but the upper echelon of Mexican society were effectively excluded from obtaining credit at a reasonable rate. In Mexico, instead of the credit worthiness of a potential debtor constituting the determinative factor, loans are commonly made based on established personal and political relationships.[45] Accordingly, loans formerly went almost exclusively to "Mexico's political and industrial elite" and theses practices "contributed to the development of a system in Mexico in which lenders have placed very little importance on security interests in personal property."[46]

Finally, the Old Secured Transactions Law impeded Mexico from maximizing profits from the maquiladora industry, despite its physical location in Mexico.[47] This industry is a major factor in the Mexican economy because, among other things, it (1) creates jobs, (2) generates hard currencies to pay Mexico's dollar-based international debts, (3) facilitates the transfer of foreign technology to Mexico, and (4) serves to redistribute economic and political power to Mexico's border states.[48] Nevertheless, a scarcity of working capital attributable to foreign investors' distrust of legal regimes in Mexico has hindered the growth of the maquiladoras.[49] According to one observer, the situation was clear: "companies will not be able to participate in the growing maquila industry unless Mexico substantially reforms its lending laws."[50]

IV. THE NEW SECURED TRANSACTIONS LAW

After many years of debate, the New Secured Transactions Law became effective in May 2000, thereby introducing numerous new and desperately needed concepts into Mexican law. First, the security interest of the creditor may be non-possessory. Therefore, instead of being forced to relinquish control of the collateral during the course of the loan and causing the financial *Catch-22* explained earlier, the debtor may continue to use the collateral in its operations to facilitate the timely repayment of

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the need to modernize the legal framework so as to provide enhanced accessibility to businesses of all sizes since "the current legal regime impedes access to credit for small and medium-sized businesses . . . ." *Id.*

45. Eaton, *supra* note 26, at 3.
46. *Id.*
47. *Id.* at 1.
48. *Id.*
49. *Id.*
50. *Id.*

the loan.[51] Second, both judicial and extra-judicial repossession are permitted in case of default by the debtor. Accordingly, the secured creditor may opt for expeditious self-help remedies to avoid the arduous court procedure that tended to last numerous years.[52] Third, centralized registration of security interests will provide appropriate notice of the existing security interest to potential creditors and purchasers.[53] Fourth, the scope of the items that may be used as collateral has broadened to include, among other things, intellectual property, such as trademarks and copyrights.[54] Fifth, the acceptance of general descriptions of collateral and the recognition of future items facilitates floating liens in inventory, accounts receivable, proceeds and after-acquired property.[55] According to one expert, "[t]his new development changes Mexico's old and obsolete process of perfecting a security interest on personal property only by specific identification of each item."[56] Sixth, the creation of purchase money security interests encourages additional lending to debtors who are already encumbered.[57] Finally, buyers-in-ordinary-course (*i.e.* persons who purchase the collateral without any knowledge of the existing security interest) are granted additional protection.[58]

Like all new legislation, the New Secured Transactions Law has been intensely scrutinized.[59] Notwithstanding minor

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51. Jorge A. Garcia & Luís A.Unikel, *Mexico Upgrades Laws on Security Interests*, 7 INTER-AM. TRADE REP. 1818, 1819 (2000).

52. John M. Wilson, *Mexico: New Secured Transactions and Commercial Registry Laws*, 7 INTER-AM. TRADE REP. 1815, 1817 (2000).

53. Garcia & Unikel, *supra* note 51, at 1818.

54. *Id.* at 1819.

55. *Id.*

56. *Id.*

57. Wilson, *supra* note 52.

58. *Id.*

59. *Id.* at 1816-17. Although pleased with the overall changes introduced in New Secured Transaction Law, the author makes the following criticisms: (i) the traditional title-retention rules used to create the purchase money security interest have potential to cause disputes between the original secured parties and a PMSI creditor because of inadequate notice requirements, (ii) inconsistencies between the New Secured Transactions Law and its predecessor regarding future advances may "render future advances inoperable," and (iii) the provisions regarding buyers-in-ordinary-course are poorly drafted, thus allowing persons to circumvent the policy behind the rules. *Id.* *See also* Miguel Arroyo Ramí, *Justicia Financiera: Comentario a la nueva Ley de Garantías*, EL ECONOMISTA (Mex.), June 1, 2000, *available at* http://www.economista.com.mx/historico.nsf/ef3489850c5f26a886256696006cf174/8625671f00828c1b862568f10002b67f?OpenDocumen. This Mexican expert attacks the non-possessory pledge and claims that the New Secured Transactions Law "lacks all legislative technique and it is excessive, copious and redundant." Moreover, he argues, despite its lofty intentions, the law "is shipwrecked in incoherence and inconsistency" because it fails to adequately take into account the existing legislation in this area. *Id.*

criticisms, this law was well received, both in Mexico and the U.S.. According to Mexican experts,

> [t]hese amendments are long awaited by Mexican companies seeking more flexible ways of obtaining financing as well as by foreign banks and other lending institutions who, prior to the amendments, were reluctant to provide financing in Mexico because of the lack of regulations and collateral mechanisms of the modern world . . . with these amendments, Mexican companies will receive much needed financing in order to compete in today's economy, while creditors will have the comfort of obtaining a perfectly legal and flexible, security interest on collateral.[60]

On the American side, likewise, praise for the new legislation abounds. In the eyes of one expert, "the new law represents a colossal step in the modernization of Mexico's commercial lending law."[61]

V. POLICY REASONS FOR U.S. SUPPORT OF MEXICO

According to experts, an inadequate legal system addressing international insolvency and secured transactions is detrimental to absolutely all parties involved, including the U.S. and Mexico. It is argued that "[d]ebtors, lenders, workers and other creditors alike get cheated by a dysfunctional system, as do ultimately, the taxpayers who must pay for higher social costs as well as higher credit costs caused by needless loss of value in the national

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60. García & Unikel, *supra* note 51, at 1821. *See also* Pascual Lilián Cruz, *Con reformas financieras aprobadas no se requiere abrir el secreto bancario: IMEF*, EL ECONOMISTA, Apr. 13, 2000. Mexican experts also claim that the New Secured Transactions Law will make it more difficult to defraud creditors and commit other crimes such as money laundering. *See also* Gabriel Martínez & José Yuste, *Se reactivará el crédito bancario con la Ley de Concursos Mercantiles*, LA CRÓNICA DE HOY, Apr. 27, 2000. Experts predict that the combination of the new president Fox and the enactment of the new laws will placate the population, lower inflation and interest rates, and allow for more credit.

61. Wilson, *supra* note 52, at 1816. This author suggests that, thanks to the New Secured Transaction Law, Mexico is now "at the brink" of real secured financing reform. *Id.* Wilson states, furthermore, that "[t]he new law creates a system that allows parties to a secured transaction to encumber present and future goods to secure present and future obligations. If combined with carefully drafted regulations, . . . this new system will provide the legal certainty and flexibility necessary for lending to increase. Additionally, this new law will hopefully reduce interest rates to make borrowing attractive and will create a new credit market to meet current financing needs." *Id.* at 1818.

economy."[62] Nevertheless, internal initiatives within Mexico to revamp these legal regimes and external offers from foreign nations to assist in this process have been negligible to date. The concept of public policy dictates that

> no subject can lawfully do that which has a tendency to be injurious to the public or against the public good . . . . Thus, certain classes of acts are said to be 'against public policy,' when the law refuses to enforce or recognize them, on the grounds that they have a mischievous tendency, so as to be injurious to the interests of the state.[63]

Based on this well-accepted definition, if public policy entails disallowing actions that are contrary to the public good, injurious to the state, or prejudicial to mankind, then logically the converse must be allowed. That is, if the introduction of the New Secured Transactions Law and New Bankruptcy Law were beneficial to, among others, Mexico and the U.S., then sound policy would prescribe that the U.S. support such initiatives.

Prior to setting forth the arguments supporting this premise, it is imperative to clarify three things that this article is not. First, it is not simply another example of unwarranted paternalism toward Mexico. In the past, lamentably, U.S. decision-makers have persistently heeded negative stereotypes and "taken a paternal attitude toward Latin Americans, reluctant to relinquish predominance in the region . . . and assuming that Latin Americans were incapable of handling their own affairs without U.S. supervision."[64] Far from being paternalistic, this article applauds Mexico's introduction of the New Secured Transactions Law, recognizes this nation's autonomy, and simply advocates U.S. assistance if, by doing so, the entire hemisphere will benefit.

Second, the support herein advocated does not constitute merely another instance of U.S. hegemony stealthy cloaked in

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62. MALCOLM ROWAT & JOSÉ ASTIGARRAGA, LATIN AMERICAN INSOLVENCY SYSTEMS: A COMPARATIVE ASSESSMENT 13 (World Bank, Technical Paper No. 433, 1999).

63. BLACK'S LAW DICTIONARY 1157 (6th ed. 1993). The term "public policy" is defined, furthermore, as the "general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation." *Id.* at 1231.

64. G. POPE ATKINS, LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM 109 (3d ed. 1995). According to the author, U.S. contempt for the people and institutions of Latin America was evident from the outset of inter-American relations and has been pervasive thereafter.

terms of pragmatic foreign policy. Numerous persons claim that nearly all U.S. assistance abroad is an attempt, albeit well disguised at times, to feed this nation's insatiable appetite for world dominance.[65] For example, one author argues that U.S. foreign policy is driven solely by self-interest and that recently this nation "promote[s] American corporate interests under the slogans of free trade and open markets . . . [and] bludgeon other countries to adopt economic policies and social policies that will benefit American economic interests."[66] It is suggested, furthermore, that the U.S. suffers from the erroneous delusion known as "the benign hegemon syndrome," which prevents it from comprehending that its allegedly benevolent interventions into the business of other nations are, in reality, resented by the affected parties.[67] Other observers agree that such U.S. hegemony, regardless of the manner in which it is characterized, has been pervasive to date. Nevertheless, they warn that the power is ephemeral, thereby necessitating enhanced cooperation between nations such as Mexico and the U.S. to resolve situations.[68] On the basis of the policy justifications set forth subsequently in this article, assistance from the U.S. in the implementation of the New Secured Transactions Law and New Insolvency Law appears logical, and perhaps, inevitable. In other words, far from being merely another imperialistic intervention or

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65. Philip Stephens, *Vulnerability of a Superpower*, FIN. TIMES, Jan. 5, 2001, at 13. This author argues that effectively every U.S. action is self-motivated. He states, specifically, that "America's interests are blind to old-fashioned frontiers. Everywhere it cares to look, the U.S. has a stake . . . Sometimes what matters is the success of U.S. businesses or, in times of financial turmoil, the solvency of Wall Street's banks. *Always, however, there is an interest*" *Id.* (emphasis added).

66. Samuel P. Huntington, *The Lonely Superpower*, FOREIGN AFF., Mar.-Apr. 1999, at 35, 38.

67. *Id.* This author suggests that many U.S. officials hail themselves the "benevolent hegemon" and, as such, they tend to "lecture other countries on the universal validity of American principles, practices and institutions." *Id*. To other nations, however, this U.S. attitude is detestable. As Huntington explains, while these nations do not consider the U.S. a military threat, it is seen as a "menace to their integrity, autonomy, prosperity and freedom of action." *Id.* at 43. Moreover, these nations commonly describe the U.S. as "intrusive, hegemonic, hypocritical," and feel that it engages in both "financial imperialism" and "intellectual colonialism." *Id.*

68. Richard N. Haass, *What to Do With American Primacy*, FOREIGN AFF., Sept.-Oct. 1999, at 37, 38. Although viewing this point from a militaristic perspective, the author argues that U.S. superiority will not endure. He theorizes, in particular, that "[a]s power diffuses around the world, America's position relative to others will inevitably erode. It may not seem this way at a moment when the American economy is in full bloom and many countries around the world are sclerotic, but the long-term trend is unmistakable." *Id.* at 37-38. Accordingly, Haas argues that any attempt by the U.S. at this juncture to increase its hegemony is doomed to fail. Instead of control by imposition, the author recommends that the U.S. encourage "cooperation and concert rather than competition and conflict." *Id.* at 38.

hegemonic maneuver under the guise of international altruism, participation by the U.S. in the implementation and ensuing surveillance of the new commercial legislation represents sound policy favorable to both nations.[69]

Finally, the action endorsed by this article is not a fantastical, unachievable notion fueled by excessive idealism. In terms of policy, there are two major perspectives: realism and idealism. The former dictates that national interest is the primary concern in policy making and that a country's (*e.g.* the U.S.'s) quest for self-preservation, independence, territorial integrity, military security, and economic well-being drive all decisions. The realists believe, thus, that "[t]he wise and efficient use of power by a state in pursuit of its national interest is . . . the main ingredient of a successful foreign policy."[70] The latter perspective, on the other hand, suggests that policies based on moral-ethical principles are more effective than power politics since they are more enduring and better promote unity among different countries.[71] The U.S. assistance sanctioned in this article is not simply theoretical; rather, it is a mixture of realism and idealism. This combination, according to experts, is a highly acceptable way of establishing policy: "Realism and idealism may converge, and policy debates and decisions *often attempt to reconcile the two*. In practice, policies often have combined some mixture of realism and idealism. In such cases, *realism specifies the means* for achieving goals and *idealism justifies the policies* adopted."[72]

Now that the possibility of conjecture regarding the true motives for writing this article has been eliminated, the following policy arguments in favor of eradicating apathetic internationalism to foster hemispheric benefits may be discussed. Such arguments are set forth below without adhering to any particular order of importance.

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69. AMERICAN HERITAGE COLLEGE DICTIONARY 629 (3d ed. 1997). The term "hegemony" is defined as "[t]he predominant influence of one state over others." *Id.* *See also* FONTANA DICTIONARY OF MODERN THOUGHT (1999). The concept of "hegemony" is "political and economic control by a dominant class, and its success in projecting its own way of seeing the world, human and social relationships as 'common sense' and part of the natural order by those who are, in fact, subordinated to it." *Id.*

70. ATKINS, *supra* note 64. The author also explains that the realist emphasizes the balance of power between all nations as the principal guide to policy-making and to understanding the structure of the international system.

71. *Id.* The idealistic view also assumes that foreign policies should aim "to create a better world order and emphasizes international law, organization and other regimes that regulate the system by accommodating conflict and facilitating cooperation." *Id.*

72. *Id.* at 339 (emphasis added).

A. Furtherance of Previous and Current Initiatives

Support of Mexico in this situation would provide continuing assistance to initiatives presently underway in the fields of international insolvency and secured transactions. For nearly two decades, national governments, civil organizations and various external assistance agencies have attempted to assist with the reformation of Latin American justice systems. The support is so pervasive that, according to at least one expert in the field, the overabundance of efforts may actually be hindering the issue.[73] With regard to multinational insolvency issues, notable initiatives have been undertaken by organizations such as the United Nations[74], International Bar Association[75], International Monetary Fund[76], Practicing Law Institute[77], Inter-

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73. Linn Hammergren, *Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress*, USAID Center for Democracy and Governance (1999), *at* http://darkwing.uoregon.edu/~caguirre/hammergrenpr.html. From the perspective of this expert, "we are reaching a point of diminishing returns – too many [groups] chasing too many objectives with a resulting reform agenda that no set of national institutions could possibly realize." *Id.*

74. Press Release, United Nations, United Nations Trade Law Commission Concludes Session, Adopting Model Law on Cross-Border Insolvency, U.N. Doc. L/2831 (June 2, 1997), *available at* http://www.un.org/News/Press/docs/1997/. The United Nations Commission on International Trade Law ("UNCITRAL") developed the Model Law on Cross-Border Insolvency. During discussions of this project, the group explained that "[t]he increasing incidence of insolvencies with a cross-border nature reflects the continuing global extension of trade and investment. When a debtor with assets in more than one State becomes bankrupt, *there is an urgent need for cross-border cooperation and coordination* in supervising and administering the debtor's assets and affairs." *Id.* (emphasis added).

75. INTERNATIONAL BAR ASSOCIATION, MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT (Third Draft 1988); s*ee also* Timothy E. Powers, *The Model International Insolvency Cooperation Act: A Twenty-First Century Proposal for International Insolvency Cooperation*, *in* CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW, *supra* note 6, at 687, 691. According to Powers, while the authors of the Model International Insolvency Cooperation Act ("MIICA") do not suggest that such legislation is the "ultimate solution," they do believe that it is, at a minimum, a good starting point to call attention to the difficulties associated with international insolvencies. If adopted, Powers argues, the MIICA would yield positive results and promote teamwork among nations: "In its almost pristine simplicity, MIICA offers a manageable framework that helps us to imagine a world in which international insolvency cooperation is a reality; by doing so, the Model Act fosters the spirit of cooperation it envisions." *Id.*

76. News Brief, International Monetary Fund, *IMF Completes Mexico Review and Approves U.S.$1.2 Billion Credit* (Mar. 17, 2000), *available at* http://www.imf.org/external/np/sec/nb/2000/NB0017.htm. The International Monetary Fund (IMF) recently congratulated Mexico for adhering to economic reforms that, in large part, avoided a turbulent transition to next presidential administration. Also, Eduardo Aninat, Deputy Managing Director of the IMF, praised bankruptcy reform in this country, stating that "[t]he proposed reforms to enhance bankruptcy procedures and enforcement of creditors' rights . . . are critical, to strengthening further the banking system and for facilitating financial intermediation in the domestic economy." *Id.*

American Development Bank[78], World Bank[79], Organization of American States[80] and the American Law Institute.[81] Although experts tend to agree that the Model Law introduced by the United Nations is the most important global development to date, the next logical step seems to be applying and strengthening these concepts on a regional level.[82]

In the NAFTA countries (Canada, Mexico and the U.S.), the Transnational Insolvency Project spearheaded by the American Law Institute has the most relevance. Throughout its five-year existence, efforts under this project have focused on developing general principles related to multinational insolvencies that may be applied throughout "this regional family."[83] Some of these

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77. *See*, *e.g.*, PRACTICING LAW INSTITUTE, INTERNATIONAL BANKRUPTCIES: DEVELOPING PRACTICAL STRATEGIES, Commercial Law and Practice Series, No. 628 (1992).

78. Press Release, Inter-American Development Bank, *Review of Latin American Judicial Reform to be Held in Washington* (Sept. 21, 1995), *available at* http://www.iadb.org/exr/PRENSA/1995/cp19395e.htm; s*ee also* Press Release, Inter-American Development Bank, *IDB Organizes Second Conference on Judicial Reform in Latin America* (Sept. 1995), *available at* http://www.iadb.org/exr/PRENSA /1995/cp19395e.htm. Justifying the purpose of the conference, the IDB announced that it "is aware that international capital flows and commerce are directly related to the existence of a judicial system that is independent, reliable, efficient and accessible." *Id. See also* Eduardo Fernández-Arias & Ricardo Hausmann, *Getting it Right: What to Reform in International Financial Markets* (Inter-American Development Bank, Working Paper, Aug. 2000), at 14. In the context of sovereign debt, the authors propose the formation of the International Bankruptcy Court.

79. *See, e.g.*, MALCOM ROWAT ET AL., JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN (World Bank, Technical Paper No. 280, Oct. 1995).

80. Organization of American States, Convocation of the Sixth Inter-American Specialized Conference on Private International Law, June 7, 1996. Among other topics, the leaders at this international workshop recommended that the issue of international bankruptcy be addressed.

81. E. Bruce Leonard, *The American Law Institute's Transnational Insolvency Project*, AM. BANKR. INST. J., Jan. 2000, *available at* http://www.abiworld.org/abidata /online/journaltext/99decintl.html. Started more than five years ago, the ALI insolvency project is predicated on a comparison of the bankruptcy regimes in the U.S., Canada and Mexico, and establishes a statement of principles and guidelines for cooperation among these three countries in cross-border reorganizations and insolvencies.

82. AMERICAN LAW INSTITUTE, *Transnational Insolvency Project: Principles of Cooperation In Transnational Bankruptcy Cases Among Members of the North American Free Trade Agreement*, (Council Draft, Nov. 24, 1999), at 9. The authors of this project stated that "it seems likely that the next stage in international reform will come at the regional level." *Id. See also* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 458 (1991). Alluding to the progress in the countries of the European Community, the author opines that "[a]t present the legal treatment of troubled multinationals is primitive and chaotic . . . This deplorable situation increases the costs of all transnational business activity, and imposes on claimants against such enterprises serious burdens of expense, delay, and injustice. An amelioration of these difficulties *is essential to the progress of regional economic integration* and to a robust growth in transnational enterprise generally, but the obstacles are complex and intractable." *Id.* (emphasis added).

83. AMERICAN LAW INSTITUTE, *supra* note 82, at 28. Experts claim that the principles contained in the ALI Transnational Insolvency Project will have profound applicability

general principles include: (i) cooperation among the three nations with the goal of maximizing the value of the debtor's worldwide assets; (ii) recognition of bankruptcies initiated in NAFTA throughout the region; (iii) a free exchange of information because "[f]raud by debtors and creditors, or even simple evasion of domestic rules, cannot be prevented in transnational cases without full disclosure between courts and administrators;" (iv) sharing of value of debtor's assets on a worldwide basis; (v) granting national treatment to all claimants; and (vi) making adjustments of distributions to prevent one creditor from obtaining a disproportionate share of the debtor's assets by using distribution in multiple countries.[84] One of the primary purposes of NAFTA is to promote trade and investment throughout the region, which naturally requires legal predictability in the case of insolvency. In the words of one expert, "[b]usiness decisions would be facilitated greatly if participants in the process knew in advance that transitional loans or multinational transactions ultimately would be subject to predictable administration in the event of insolvency."[85] As explained in detail above, the New Insolvency Law indubitably provides an improved insolvency regime in Mexico that, among other things, tends to protect the interests of foreign creditors. In particular, in accordance with the principles of the Transnational Insolvency Project, U.S. and Canadian creditors and businesses would enjoy enhanced protection when dealing with insolvency issues arising in Mexico.

Likewise, with respect to secured transactions, copious are the international efforts to develop and improve legislation in this area. For instance, initiatives to reform secured transactions legislation have commenced under the auspices of, among other organizations, the International Institute for Unification of Private Law, United Nations Commission on International Trade Law, European Bank for Reconstruction and Redevelopment, American Bar Association through its Central and Eastern Europe Law Initiatives Project, World Bank, Inter-American Development Bank, National Law Center for Inter-American Free Trade, and Organization of American States.[86] Consequently,

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"because of the close economic and political relationships within NAFTA, so that the principles underlying the Model Law can be carried further in practice within this regional family than is possible in the context of a Model Law meant to be universal." *Id.*

84. *Id.*

85. Perry B. Newman, *When Things Go Wrong: Hazy Insolvency Regimes Are Flip Side to Business Success*, NAT'L L.J., Mar. 6, 1995, at C1, *available at* http://test01.ljextra.com/na.archive.html/95/02/cb1995_0225_1727_1.html.

86. Cohen, *supra* note 5, at 180.

U.S. support of the New Secured Transactions Law and the New Insolvency Law clearly concords with the goals of both NAFTA and the aforementioned initiatives currently existing at a regional and global level.

B. Heightened Protection of U.S. Companies and Investors

Many large U.S. companies such as General Motors, Coca-Cola, Kodak, and Hewlett-Packard have a major presence in Mexico. According to experts, such a notable presence is an indication of investor confidence in the country: "[M]ore and more multinational companies come to the conclusion that this country is a great place for business."[87] Other commentators agree, arguing that the economic resurgence after the Mexican *peso* crisis of 1994, together with a population that is increasingly desirous of purchasing U.S. products, makes Mexico "an attractive prospect when U.S. companies think about undertaking joint ventures in Latin America."[88] Concurring, still others speculate that the recently enacted bankruptcy and secured transactions laws "will change the legal landscape for the international business community for many years to come" and make Mexico "ripe for the continued interest by investors."[89]

This realization, though, is far from novel. In fact, since the introduction of NAFTA in 1994, over $64 billion in direct foreign investment has entered Mexico and experts predict increased interaction in the near future in diverse areas.[90] In complying with its NAFTA commitments, for instance, Mexico has opened new investment opportunities for U.S. entities dealing in energy, railroads, financial services and telecommunications.[91] Moreover, due to an amendment to the banking law in 1998 that lessened restriction on foreign ownership of Mexican banks, U.S. investors are now able to own a majority interest in Mexican financial

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87. Jim Robinson, *The Top 50 Foreign Companies in Mexico: As Mexico Embraces Free Trade and Puts its Fiscal House in Order, More Multinational Companies Pour Into the Country*, BUS. MEX., July 1, 2000, *available at* 2000 WL 22458756.

88. Fernando R. Carranza & F. Bruce Cohen, *Foreign Investors Form Alliances in Mexico: The Government's Decision to Reform Investment Laws Has Facilitated Global Acceptance*, NAT'L L.J., Mar. 2, 1998, at C12, *available at* http://test01.ljextra.com /na.archive.html/98/02/1998_0223_123.html.

89. Lynn P. Harrison et al., *Mexico Enacts New Bankruptcy and Secured Transaction Laws*, BCD NEWS & CMT., Aug. 16, 2000.

90. Robinson, *supra* note 87. The author argues that "it will come as little surprise that Mexico has overtaken Japan as the United States' second-largest trading partner. And, in less than 10 years, Mexico expects to beat out Canada for the coveted role as the United States' number-one trading partner." *Id.*

91. BUREAU OF INTER-AM. AFF., U.S. DEP'T OF STATE, FACT SHEET: NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), May 1, 1996.

institutions.[92] Financial experts argue that such banks will actually help Mexican-owned institutions, through leading by example and making better loan decisions.[93]

Despite the historic U.S. investment (both direct and indirect) in Mexico, prior to the enactment of the New Secured Transactions Law and New Insolvency Law, many experts were openly skeptical of the idea due to, among other things, the uncertainty of the insolvency regime in Mexico. In the words of one practitioner, "many businesses in the United States and Mexico are finding their venture to a foreign land to be an adventure of many perils. They are finding the pitfalls of cross-border insolvency have created a bridge that they do not want to cross."[94] Others analogized doing business in Mexico to entering a virtually "impenetrable jungle" characterized by corruption, an absence of sound business management practices, and an intense distrust of Americans.[95] One of the major problems, it is argued, is that business people and legal practitioners on either side of the U.S.-Mexico border simply misunderstand each other. In terms of business, many over-zealous merchants tried desperately to close a deal, thereby exposing themselves to excessive liability in Mexico.[96] Similarly, U.S. attorneys tended to criticize projects in Mexico because they failed to comprehend the nuances of resolving a dispute within a foreign legal system.[97]

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92. Gil Anav, *Foreign Ownership for Banks*, NAT'L L.J., Apr. 13, 1998, at A14.

93. Chris Humphrey, *Laws to Enforce a Payment Culture*, LATINFINANCE, June 2000, at 33. Paul Warme, Mexican banking analyst, believes that the majority of Mexican banks currently offer commercial loans without the covenants and strictures common in the U.S. and Europe. Thus, "[t]he influence of the foreign banks will be positive here because they will insist on these sort of things." *Id.*

94. Charles A. Beckham & Roberto Fernandez, *Cross Border Insolvency: The Bridge You Never Want to Cross*, NAFTA: L. & BUS. REV. OF THE AMERICAS, Winter 1998, at 50, 50.

95. Alex D. Moglia, *Mexico: Where the Investment Action Is!*, AM. BANKR. INST. J., June 1, 1993, *available at* http://www.abiworld.org/abidata/online/articles/join170.html.

96. Beckham & Fernandez, *supra* note 94, at 53. These experts in cross-border insolvency explain that they repeatedly encounter situations in which a U.S. party doing business in Mexico unsuccessfully tries to conduct a transaction in the same manner as a domestic transaction in the United States. On the other hand, claim the authors, some U.S. parties go too far by completely relaxing their normal standards claiming "'it is not the way to do business in Mexico.'" *Id.*

97. Gary Taylor, *Mexican Lawyers' Advice: Negotiate, Sí; Litigate, No*, NAT'L L.J., Mar. 18, 1996, at B1. One Texas lawyer with substantial experience in resolving disputes in Mexico explains that, unlike in the U.S., the preference for negotiation over litigation is deeply rooted in the Mexican legal culture. This distinction is described in the following manner: "Here [in the U.S.] you can make the other side pay attention to you [with the threat of litigation], but there you can't make them do anything. You'll find more excuses [for delay or failure to reply, for example] than you can possibly imagine." *Id.* Consequently, U.S. attorneys encounter difficulties when they utilize their assertive, confrontational tactics.

These former attitudes notwithstanding, U.S. investment in Mexico should proceed to grow in the early part of this millenium, thereby affecting both business and legal determinations.[98] The New Secured Transactions Law and New Insolvency Law, therefore, will impact many levels of commerce on a regular basis, not simply the most sophisticated entities. The issues are significant because U.S. businesses operating in Mexico are beginning to deal with cross-border issues on a regular basis. Accordingly, as one expert explains it, "[t]hese aren't issues of major international conglomerates trying to reorganize in multiple jurisdictions; [rather], the issues are more similar to how your client recovers its collateral in Mexico or gets paid when all of the debtors' assets are in Mexico."[99] With such a significant presence in Mexico, U.S. entities and investors will likely seek asset protection in the near future.[100] Recently introduced legal regimes, especially in terms of the protection of security interests, will help to ensure the rights of such foreign interests in Mexico. The New Insolvency Law drastically improves the legalities in the event of a multinational insolvency and, according to one author, it "has come a long way to assure foreign investors of the increasing transparency of the Mexican legal system."[101] Other

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98. Moglia, *supra* note 95. According to this author, due to the increased U.S. investment in Mexico, essentially all professionals must be familiar with the Mexican bankruptcy structure: "If you are a U.S. banker . . . you will increasingly face lending decisions involving operations in Mexico. If you are an insolvency professional, there is much that can be done to minimize losses in the failure of Mexican operations." *Id.* *See also* Michael Wallace Gordon, *Mythical Stereotypes – Dealing With Mexico as a Lawyer*, 37 J. LEGAL EDUC. 1, 3 (1987). This text explains that this lack of understanding of foreign legal systems is endemic in law firms and governmental agencies that are "brimful of lawyers" with limited knowledge of Mexico, who erroneously base their thoughts solely on images from old western movies and news stories about the massive influx of illegal aliens. This mistaken conception, unfortunately, carries over into the legal world and, according to the author, will eventually backfire on U.S. attorneys. He explains, specifically, that "[t]hese Mexicans come carrying, not large hats, but diplomas from UNAM or Escuela Libre, and often from Michigan or Harvard as well. They embarrass us with their fluent English, their knowledge of our legal system, and their familiarity with our culture. They have read those writings of Octavio Paz and Carlos Fuentes which reach deep into the meaning of what it is to be Mexican and yet irretrievably fused to the United States." *Id.*

99. Charles A. Beckham, Jr., *Badges? Badges? We Don't Need No Stinking Badges – Or Do We?*, 17 AM. BANKR. INST. J. 12 (1998).

100. Barrett, *supra* note 2, at 462. The author explains that 10 years ago, the only reason for legal practitioners to be concerned with Mexican legislation was "academic curiosity." *Id.* at 431. The U.S. connections with Mexico have dramatically increased, however, since the inception of NAFTA in 1994. With these enhanced connections, suggests the author, it is quite probable that insolvency issues between the U.S. and Mexico will become extremely prevalent: "When coupled with the likely expansion of numerous additional businesses [in] Mexico, cross border insolvencies involving an entity with assets, a branch, or a subsidiary in Mexico will certainly increase in the years to come." *Id.* at 434.

101. Robinson, *supra* note 87.

observers suggest that this legislation will actually serve to protect foreign assets by preventing fraud, the incidence of which is increased by the internationalization of the economy.[102] In view of the pervasiveness of these connections between the U.S. and Mexico, logical policy requires U.S. support of the enactment, application and improvement of these new laws.

C. *Strengthening of the Mexican Economy for the Stability of NAFTA*

Due to Mexico's proximity to the U.S., the facets of the relationship between these two nations are plentiful. Major issues dealt with on a regular basis include, for example, migration, illicit drug activity, environmental and natural resources, trade, human rights and political reform. In fact, the economies of these two countries are so inextricably linked that the relationship has been described as an "economic partnership for American prosperity."[103] On the basis of this description, it is apparent that the strength of the Mexican economy is of paramount importance to both the U.S. and Mexico, for stability in the latter benefits the NAFTA region in its entirety. A significant portion of the Mexican economy is derived from foreign investment, which is promoted by the increased certainty supplied by the enactment of the New Secured Transactions Law and New Insolvency Law.[104]

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102. AMERICAN LAW INSTITUTE, *supra* note 82, at 19. According to representatives of Mexico, Canada and the U.S., "[t]he prevention and undoing of fraud may be even more important on the international level than domestically. The growth of global finance has made it all too easy for debtors and others to engage in fraud. Funds and other assets can be moved around the world very quickly and can be concealed in less-than-scrupulous jurisdictions. Only expeditious international cooperation can detect and prevent fraud on a scale that may otherwise seriously burden the international financial system." *Id.* The New Insolvency Law symbolizes such cooperation, which will protect foreign assets.

103. BUREAU OF INTER-AM. AFF., U.S. DEP'T. OF STATE, *Working with Mexico: Building America's Future*, June 10, 1998, *available at* http://www.state.gov/www/regions/wha/.

104. Jodi S. Finkel, *Judicial Reforms in Latin America: Market Economies, Self-Interested Politicians, and Judicial Independence*, Paper presented at the American Political Science Association, Atlanta, Ga., (Sept. 2-5, 1999). According to one expert, "[i]nternational economic factors have provided a universal demand for judicial reform in emerging-market countries. . . . The revised judiciary is intended to uphold property rights, enforce business contracts and facilitate economic transactions. Judicial provision of economic safeguards, it is hoped, *will spur international and domestic private investment*. The new judiciary is intended to be both the symbol for and the provider of a stable and secure business environment." *Id.* (emphasis added). *See also* Thomas McLarty, *Judicial Reform: A Kitchen Table Issue*, Address at IDB Headquarters in Washington, D.C., *in* IDBAMERICA, May 1998, http://www.iadb.org/exr/IDB/stories/1998/eng/e598d.htm. This economist explains the direct relationship between legal predictability and foreign investment in the following manner: "The sanctity of contracts is a critical part of any

Recent studies analyzing the Mexican economy are positive, suggesting that the economy is growing as a result of sound monetary policy and political stability.[105] The economy should be strengthened even further if the plans of Vincente Fox, the new president-elect of Mexico, are implemented. Fox is determined to fortify the Mexican economy and relations with the U.S. Evidence of such ambition is apparent in his frequent visits with U.S. politicians even prior to officially assuming his presidential role[106] and his campaign promise to drastically reduce inflation while enhancing job opportunities.[107] According to experts, Fox is highly qualified to accomplish such goals since, unlike previous Mexican presidents who have been everything from "fervent nationalists to bean-counting economists," Fox is "a businessman to the core."[108] From the outset of his presidential campaign, Fox has repeatedly emphasized his goal of bolstering the Mexican economy. In fact, the strength of the economy constituted such a major plank of Fox's political platform that, in the opinion of some

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business agreement, and I have seen throughout our hemisphere that countries with the strongest judicial systems attract the greatest amount of both internal and foreign investment." *Id.*

105. Deborah L. Riner, *Solid Ground: With Elections Looming, AMCHAM's Chief Economist Gives You the Low-Down on the Mexican Economy*, BUS. MEX., June 1, 2000, at 28. A report by the Mexican-American Chamber of Commerce indicates that the economy should continue to grow:

> There seems to be a broad consensus on the fundamentals of sound economic policy. The political process, which could culminate in the PRI's losing the presidency for the first time since the party's birth in the 1920's, has not derailed the economy or sent the financial markets into turmoil. There's still a lot of ground to cover, but markets and democracy are more strongly rooted in Mexico than ever before. *Id.* at 29.

106. Mimi Hall, *Mexico's Fox Seeks More Open Borders: Next Mexican Leader Wins Praise, But No Promises*, USA TODAY, Aug. 26, 2000, at 1A, *available at* http://www.usatoday.com/usatonline/20000825/2584851s.htm. Fox met with both Bill Clinton and Al Gore in Washington D.C. just one month after his election. While Clinton did not instantly embrace Fox's proposal to open U.S. borders to a freer flow of labor, products and services, he did recognize Fox as "a visionary determined to improve his country's economy." *Id.* *See also* Rebecca Rodriguez, et al., *Fox Meets With Bush: President-Elect of Mexico Lays Out His Vision*, FORT WORTH STAR-TELEGRAM, Aug. 26, 2000, *available at* http://www.star-telegram.com/news/doc/1047/1:TOPSTORY6/1:TOPSTORY60826100.html. Not taking any chances, during his visit to the U.S., Fox met with both major presidential candidates, Gore and Bush.

107. *Mexico's President-Elect: Firebrand Politician, Successful Businessman*, AGENCE FRANCE-PRESSE, July 3, 2000. During his electoral campaign, Fox promised to spur "a new economic miracle" by cutting inflation and creating 1.3 million new jobs. In addition to grandiose assurances, Fox also tended to launch polemic comments during his campaign. According to the author, in fact, Fox called his political rival, PRI candidate Francisco Labastida, a "sissy and a transvestite." *Id.*

108. *Happy Birthday, Señor Fox*, THE ECONOMIST, July 8-14, 2000, at 31.

observers, Fox actually won the presidential election by "promising to throw Mexico's economic development into overdrive."[109] For its part, it appears that investors throughout the region have faith in Fox's economic plan,[110] especially those banks situated in close proximity to the U.S.-Mexico border.[111]

In order to reach these economic goals set by Fox, foreign investment in Mexico must increase. Under the former presidential administration, Mexico moved from economic collapse in 1994 to steady growth, yet the benefits were primarily obtained by large firms linked to the U.S. economy by NAFTA. Fox believes that the economy can grow at 7% per year if foreign direct investment is doubled and small businesses are granted more credit.[112] To achieve this goal, though, investors must be convinced that there is legal predictability in Mexico in case of insolvency and/or default. Based on his years of business experience and proven political savvy, Fox undoubtedly comprehends that while financial stability is sufficient to attract foreign capital initially, a solid legal system is imperative to retain such investment amid the ever-increasing international competition for funds.[113] As discussed earlier, the New Secured Transactions Law and New Insolvency Law should provide such certainty to creditors, foreign and domestic alike.

According to experts at the International Monetary Fund, the New Insolvency Law, like all insolvency regimes, will play a role far more important than simply "mechanisms for cleaning up

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109. Brendan M. Case & Alfredo Corchado, *Fox Tells Texas Business Leaders He May Allow Casinos in Mexico*, DALLAS MORNING NEWS, Aug. 26, 2000, at 1F.

110. *Id*. This author explains that Fox "has excited the North American business community with talk of increasing foreign investment in Mexico from already high levels of $11 billion a year." *Id.*

111. James R. Kraus, *U.S. Banks Winners in Mexican Trade Boom*, THE AM. BANKER, Feb. 9. 2000, at 18. Based on the fact that banks throughout Texas experienced up to 100% increases in foreign exchange, cash management, corporate lending, and even retail business, the author explains that "[r]iding an enormous surge in trade between the United States and Mexico, U.S. banking is booming on the border." *Id.* And, Kraus adds, "judging by their forecasts, that business is only just getting started." *Id.*

112. *Happy Birthday, Señor Fox*, *supra* note 108, at 32.

113. Hammergren, *supra* note 73. This author explains that at an early stage, a country may attract foreign investment based solely on stabilization and fiscal balance, but once other countries have achieved these, additional changes are needed to attract capital. Experts postulate that legal reformation is attributable to foreign investors, instead of local capitalists, because the latter have other resources and extra-judicial methods they use to protect their investments. In other words, international capital requires a higher level of transparency because it is less adept at maneuvering in the local system and wields negligible local influence. In this author's opinion, it is "international competition that motivates bureaucratic rationalization and the extension of the rule of law."

economic trash."[114] In particular, if designed and applied effectively, it "can boost confidence in [the] economy, thereby fostering growth and helping to prevent or resolve financial and economic crises."[115] Other observers concur, arguing that the New Insolvency Law may have positive repercussions for foreign banks and investors that are anxious to demonstrate their confidence in this legislation and the accompanying changes to the judicial infrastructure. Examples of such faith in the New Insolvency Law are the recent merger and acquisitions of the three largest Mexican banks by foreign entities, which "reflect improved investor confidence in Mexico's financial market and should revitalize consumer and business lending in Mexico, which have been stagnant since the crisis of 1994."[116] Likewise, both businesses and the Mexican government have openly acknowledged the importance of the New Insolvency Law to reactivating the local economy.[117] This opinion is also shared by Mexican bankers who believe that the New Insolvency Law will open a different panorama in a country that has not enjoyed healthy banking since the *peso* crisis in 1994.[118]

Fox has unequivocally announced his intention of increasing foreign investment, which should strengthen the Mexican economy. An enlargement of foreign investment, however, will be infeasible without the existence of legal predictability in Mexico, particularly in terms of insolvency and secured lending. Thus, like his predecessor who introduced new legislation in these areas

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114. Sean Hagan, *Promoting Orderly and Effective Insolvency Procedures*, FIN. & DEV., Mar. 2000, at 50.

115. *Id*.

116. Josefina Fernandez McEvoy, *Mexico's New Insolvency Act: Increasing Fairness and Efficiency in the Administration of Domestic and Cross-Border Cases*, 19 AM. BANKR. INST. J. 16, n.19 (2000), *available at* http://www.abiworld.org/abidata/online/journaltext/00augintl.html.

117. Norma Patino Villalobos, *La certidumbre reactivará los créditos*, NOVEDADES, Oct. 1, 1999. Former president Ernesto Zedillo announced that "[a]s long as legal security does not exist for financing operations, the credits will not be reactivated." *See also* Jaime Contreras Salcedo, et al., *Con la Ley de Garantías y Concursos Mercantiles, renacerá el crédito en el país*, EXCELSIOR, Jan.14, 2000; *see also Ley de quiebras afianzará a los bancos de México*, EXCELSIOR FINANCIERA, Apr. 21, 2000, *available at* http://www.excelsior.com.mx/0004/000421/fin06.html. Financial analysts from JP Morgan predict that the promulgation of the New Insolvency Law will foment increased foreign investment in Mexico within the next year. *See also* Martinez & Yuste, *supra* note 60. The president of the Mexican Bankers Association, Héctor Rangel, described the New Insolvency Law as an impetus to the economy: "It will serve as the detonator that will allow the bank to retake its role as the motor of the economy." *Id.*

118. Jaime Hernandez, *Evidencia Vilatela a una banca Mexicana incapaz de apuntalar el desarrollo y la competitividad*, EXCELSIOR, Apr. 27, 2000. Enrique Vilatela, director of Banco Mexicano de Comercio Exterior, described the devaluation in 1994 as the "Aquilles heel" of Mexico's competitiveness with the North American markets.

out of virtual necessity, it is logical that Fox has a vested interest in ensuring that the New Secured Transactions Law and New Insolvency Law function correctly.[119] As explained earlier, due to their proximity, physical and otherwise, the U.S. and Mexico are inextricably linked. The fortification of the Mexican economy, therefore, will undoubtedly benefit all the countries throughout the region, including the U.S.. Accordingly, pragmatism and public policy necessitate U.S. support of the new legal regimes.

D. Leadership in Legal Reform Throughout the Region

Legal systems throughout Latin America have been heavily criticized for their shortcomings. Such criticisms have focused on, inter alia, the inadequacies of the insolvency and secured lending systems in the region. With a population of over 90 million people, an economy that has grown steadily since the *peso* recession in 1994, and its nexus with the U.S. pursuant to NAFTA, Mexico is unquestionably one of the strongest and most influential nations in Latin America. As such, any success that Mexico has, particularly in the field of judicial reform, will likely be imitated to varying degrees in the remainder of the hemisphere.

1. Leader in Secured Transactions Reform

As discussed previously, problems stemming from antiquated secured transactions laws are not unique to Mexico. In fact, several major difficulties are endemic throughout legal systems in Latin America, including: (i) uncertainty and excessive expense in creating a security interest; (ii) the impossibility of establishing a floating lien over collateral that is perpetually changing form; (iii) archaic registry systems that fail to adequately catalog or disclose existing security interests; (iv) slowness in enforcement of security interests upon debtor default; (v) an inability to use movable personal property as collateral; and (vi) the abusive use of secured transactions laws to impose criminal penalties.[120] On

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119. Scott P. Studebaker, *Market Notes*, LATIN AM. L. & BUS. RPT., May 31, 1999, *available at* 1999 WL 25897419. Although it did not attain congressional approval, former Mexican president Ernesto Zedillo introduced the Federal Law on Secured Lending (*Ley Federal de Garantías de Crédito*), that preceded and served as a basis for New Secured Transactions Law. Zedillo proposed the legislation because, according to the author, "[t]he lack of adequate secured financing laws has been blamed for the difficulties Mexican businesses and foreign investors have had in obtaining credit in Mexico." *Id.*

120. Heywood Fleisig, *Secured Transactions: The Power of Collateral,* FIN. & DEV., June 1996, at 44-46. In Uruguay, creditors use a post-dated check to convert the civil offense of non-payment of debt into a criminal act, which occurs in the following manner.

the basis of such troublesome aspects, many nations in the region have attempted legislative reform in this area such as Haiti[121], Colombia[122], Argentina[123], Uruguay[124], Bolivia[125], Peru[126], Nicaragua[127] and Venezuela.[128] Despite good intentions, such initiatives have not consistently rendered the desired amount of positive results.

In comparison to its Latin American neighbors, with the enactment of the New Secured Transactions Law, Mexico is notably advanced. According to observers, "Mexican lawmakers *have taken the lead* in reforming the present legal framework and alleviating the credit crunch and are *setting the foundation for a hemispheric solution* to these pressing problems."[129] Many

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If the borrower cannot pay on the due date of the loan, then the creditor deposits the check. Once the bank marks such check not paid for "insufficient funds," the creditor takes this to police station. In many Latin American countries writing a check without funds is prima facie evidence of criminal fraud. Accordingly, the defaulting debtor is arrested and criminally convicted. As a result, explains the author, "faced with the prospect of jail if they are unable to repay, business people tend to borrow less and borrow only for operations with very high returns – and costly for society because incarcerating risk-taking entrepreneurs stifles development." *Id.*

121. INTER-AMERICAN DEVELOPMENT BANK, *at* www.iadb.org/mif/projects/apr /tc9505449.htm (last visited Oct. 8, 2000). In November 1995, a secured transactions reform project with a price tag of some $685,000 was commenced in Haiti.

122. *Id.*

123. Roberto A. Muguillo, *Posibilidades de Creacion de un Nuevo Regimen de Garantias Reales Registrables*, ENCUENTRO DE INSTITUTOS DE DERECHO COMERCIAL DE COLEGIOS DE ABOGADOS DE MAR DEL PLATA, Oct. 30-31, 1997, at 48-50.

124. Fleisig, *supra* note 120.

125. *See generally* Heywood W. Fleisig, et al, *Legal Restrictions on Security Interests Limit Access to Credit in Bolivia*, 31 THE INT'L LAWYER 65 (1997).

126 *See generally* Heywood W. Fleisig & Nuria de la Peña, *Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit*, NAFTA: L. & BUS. REV. OF THE AMERICAS, Spring 1997, at 33.

127. *See generally* Heywood W. Fleisig & Nuria de la Peña, *Nicaragua: How Problems in the Framework for Secured Transactions Limit Access to Credit*, CENTER FOR THE ECONOMIC ANALYSIS OF LAW (CEAL) (Feb. 1998).

128. *See generally* Horacio E. Gutierrez-Machado, *The Personal Property Secured Financing System of Venezuela: A Comparative Study and the Case for Harmonization*, 30 MIAMI INTER-AM. L. REV. 343, 344 (1999). The author explains that after decades of governmental economic protectionism and paternalism, the private sector in Venezuela, like that in many other countries, has been forced to "wake up to the reality of fierce global competition." *Id*. at 343. Currently, espouses the author, the availability of commercial and consumer credit is limited and costly, which constitutes an impediment to national progress: "This scarcity of credit undercuts global competitiveness, makes it very difficult for entrepreneurs to obtain start-up capital and even makes it difficult for successful businesses to finance growth. In turn, a lack of credit to finance new and established businesses curtails job generation. Thus, scarce credit inhibits economic development." *Id*. at 344-45. To remedy this situation, the author suggests that Venezuela adopt a variation of Article 9 in order to reach "international harmonization of the secured financing system without a traumatic breach of the philosophical integrity of [its] legal systems." *Id*. at 369.

129. John Wilson, *Solutions for a Credit Shortage*, LATINFINANCE, (Latin Banking Guide & Directory 1999-2000 Supp., July-Aug. 1999), at 1 (emphasis added). In terms of positive ramifications of adopting this new legislation, the author speculates that the

organizations agree with this assessment of Mexico's efforts, stating that the legislation after which the New Secured Transactions Law was modeled will also serve as the archetype for a new law to be implemented throughout Latin America.[130] Still others agree that Mexico's progress is noteworthy since "[t]he mere fact that Mexico has started the process of modernization of its secured transactions law has *begun to attract attention around the globe*."[131] Evidence of the remarkableness of Mexico's legislative change is its acceptance by important groups such as the Organization of American States, which announced that it "took up the Mexican package *as a possible model for all Latin nations*."[132]

2. Leader in Insolvency Reform

Efforts to improve bankruptcy regimes have also been witnessed in several Latin American countries. A recent comparative study by the World Bank illustrates that significant reforms have been implemented in Colombia, Venezuela, Argentina, Brazil, etc.[133] The impact of such legal reform, both on a local and regional level however, has in many cases been negligible. Since civil law systems predominate in the region, it is logical to think that leadership by one country in the field of insolvency law reform would have positive ramifications in the rest of the area. In Mexico, true to the campaign promises of former president Ernesto Zedillo, the federal judiciary was completely overhauled in December 1994.[134] Since this time, constantly mindful of its desire to improve the economy by means of foreign investment, Mexico has continuously introduced improvements in its legal system that have served to silence formerly outspoken critics. As one diplomat explains, measures taken by Zedillo have earned the confidence of the world, put

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current reform efforts, "will create the legal certainty and flexibility necessary for lending, will reduce interest rates to make borrowing attractive and will create a new credit market to meet current financing needs." *Id.* at 5.

130. Wilson, *supra* note 52, at 1816. The authors explain that the draft secured transactions law made by National Law Center for Inter-American Free Trade, Mexico Ministry of Commerce, Mexican Central Bank, and Mexican Bankers Association acted "as the model for reform within Mexico and has provided the basis for a Model Inter-American Law on Secured Transactions currently under work at the Organization of American States." *Id.*

131. Kozolchyk, *supra* note 33, at 52 (emphasis added).

132. Kraul & Briseno, *supra* note 40, at C1 (emphasis added).

133. ROWAT & ASTIGARRAGA, *supra* note 62, at 10-12.

134. AMERICAN LAW INSTITUTE, *International Statement of Mexican Bankruptcy Law,* (Council Draft No.1, Dec. 1, 1997), at 5.

Mexico's economy back on the road to long-term growth, and proven wrong "so many in the United States who said the money would never come back."[135] One example of such enhancements is the May 2000 enactment of the New Insolvency Law, which appears to adopt many of the recommendations offered by insolvency experts. In a recent study by the World Bank of various insolvency systems in Latin America, numerous general suggestions were made regarding ways by which the systems in these nations could keep pace with tenacious globalization. This report indicated, in particular, a need to: (i) increase the training of judicial personnel in insolvency-related issues; (ii) create specialized bankruptcy courts; (iii) diminish corruption; (iv) facilitate the preservation of businesses amid the insolvency procedure; (v) minimize procedural delays; and (vi) promote cooperation in cross-border insolvencies.[136] The New Insolvency Law incorporates all of these major provisions, particularly those related to multinational insolvency. Accordingly, experts have already labeled Mexico a forerunner in this field. It is claimed, specifically, that by being the first nation to adopt the Model Law, "Mexico has set a remarkable example for both civil law countries and common law countries in making it possible to facilitate effective cross-border coordination and cooperation in the administration of insolvency cases."[137]

In an attempt to emulate this leader in Latin America, it is likely that other nations will adopt similar provisions in the future, thereby lending increased predictability to cases involving secured transactions and/or insolvency. In light of the benefits that will be derived throughout the hemisphere as a result of Mexico's decision to promulgate the New Secured Transactions Law and New Insolvency Law, sound policy requires U.S. support of such efforts.

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135. Secretary Warren Christopher, American Businesses: Removing Barriers and Building Bridges in Mexico, Remarks to the American Chamber of Commerce in Mexico City, Mexico (May 7, 1996), *in* DISPATCH MAG., (Bureau of Inter-Am. Aff., U.S. Dep't of State), May 13, 1996, at 2, *available at* http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1996/html/Dispatchv7no20.html.

136. ROWAT & ASTIGARRAGA, *supra* note 62, at 13; s*ee also* Izak Atiyas, *Bankruptcy Reform: Breaking the Court Logjam in Colombia*, PRIVATESECTOR (World Bank Group Note No. 51, Sept. 1995), *available at* http://www.worldbank.org/html/fpd/notes/51/51summary.html.

137. Fernandez McEvoy, *supra* note 116, at 23.

E. Support for Existing U.S. Foreign Policy

Another reason for which U.S. support of the Mexico's recent legislative reforms constitutes sound policy is that such assistance concords directly with current U.S. foreign policy. Far from gestures of altruism, the aid given by the U.S. to Mexico is self-motivated due to the tight interrelationship between the two neighboring countries which, in the words of former president Harry S. Truman, have the common purpose of living together in harmony and working together for prosperity on both sides of the border.[138] For instance, approximately 500,000 Americans reside in Mexico, 2,600 U.S. companies operate there and 60% of foreign direct investment in Mexico originates in the U.S. Mexico is also an important trading partner, obtaining nearly 75% of its imports from the U.S. Furthermore, Mexico's importance in setting American policy has increased in the last few years as a direct result of the signing of NAFTA in the 1990s.[139] Based on these facts, the U.S. government has publicly recognized that:

> U.S. relations with Mexico are as important as those we have with any other country in the world. A stable, democratic and prosperous Mexico is fundamental to U.S. national security. How the United States engages this neighbor and international partner now will have a direct effect on the lives and livelihoods of millions of Americans in the years to come.[140]

The idea that U.S. foreign policy involves, among other things, an emphasis on Mexico due to the reciprocal benefits that the U.S. may derive from such actions has been announced on numerous occasions. According to representations of U.S. foreign affairs officials, for example:

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138. Secretary of State Madeline K. Albright, Remarks at Binational Commission Opening Plenary (May 5, 1997), *available at* http://secretary.state.gov/www/statements /970505.html. Extending the theme introduced by Truman decades ago, the current Secretary of State explained the depth of the relationship between these two nations: "Our agenda is broad because U.S.-Mexican relations are broad. Our border is long; our people visit each other, study with each other, work with each other, conduct business with each other and influence each other every day." *Id.*

139. *Changing Hats Across the Rio Grande*, THE ECONOMIST, July 8-14, 2000, at 30. The author also explains that due to the fact that there are approximately 20 million Mexicans in America, this country is becoming "a touchstone of sorts for the United States."

140. BUREAU OF INTER-AM. AFF., *supra* note 103.

> to preserve *our own* freedom in the United States and our own values; to keep *the U.S.* economically strong and prosperous; to protect *our* citizens from such transnational threats as terrorism, drug trafficking and environmental degradation, we must be fully engaged in promoting democracy and prosperity in this hemisphere, and must maintain a close cooperative relationship with the region.[141]

This aspect of U.S. foreign policy should acquire heightened importance as an increasing amount of U.S. investment and products enter Mexico under NAFTA. According to the U.S. Department of State, the stabilization of the Mexican economy and the signing of NAFTA, have created new opportunities for U.S. exporters and investors from which the countries will derive numerous mutual benefits.[142]

One aspect of modern U.S. foreign policy has been its willingness to assist Mexico with economic and judicial reform. The U.S. Department of State has announced that since such reform "can only strengthen bilateral ties and improve cooperation," the U.S. is prepared to offer appropriate assistance

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141. Jeffrey Davidow, U.S. Foreign Policy Toward Latin America and the Caribbean in the Clinton Administration's Second Term, Address Before the Council of the Americas, Apr. 28, 1997 (emphasis added), *available at* http://www.state.gov/www/regions/wha/970428_davidow_coa.html; *see also* Anne W. Patterson, US Priorities in the Americas, Remarks by the Deputy Assistant Secretary for Inter-American Affairs at the Council of the Americas Conference, Washington, DC (May 6, 1996), *in* DISPATCH MAG., (Bureau of Inter-Am. Aff., U.S. Dep't of State), May 20, 1996, *available at* http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1996/html/Dispatchv7no21.html. Solid economic prospects and the strengthening of democracy "make Latin America and the Caribbean an excellent partner for the U.S. Our relations with Latin America are based on *mutual benefits* and mutual responsibilities," remarked the Deputy Assistant Secretary for Inter-American Affairs. *See also* Albert C. Zapanta, President and CEO of the United States-Mexico Chamber of Commerce, *Effects of NAFTA on US Economy*, Congressional Testimony – Committee on Ways and Means, Subcommittee on Trade, (Sept. 11, 1997), *available at* 1997 WL 14150682. In the opinion of this expert who monitored and assisted in the implementation of NAFTA, the fates of Mexico and the U.S. are inextricably linked. During a discourse before Congress, Zapanta argued that "[c]learly, a growing, prosperous Mexico is in the interest of *every citizen in the U.S.* Not only will this lead to lower illegal immigration and a healthier environment in Mexico, but a vibrant Mexico will be better able to deal with illegal drug activities which are hurting *both* of our societies." *Id.* (emphasis added).

142. *Fact Sheet: Cooperation With Mexico: In Our National Interest*, *in* DISPATCH MAG., (Bureau of Inter-Am. Aff., U.S. Dep't of State), May 20, 1996, at 4, *available at* http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1996/html/Dispatchv7no21.html. According to the State Department, as the Mexican economy recovers after the *peso* crisis and the recession of 1995, "NAFTA will create important new opportunities for U.S. exporters and investors." *Id.* Furthermore, this ever-deepening relationship will affect many areas including maintaining democracy, human rights, migration, illicit drugs, export/import, economic, and environment.

to Mexico "if requested."[143] In view of the intricacies of the relationships within NAFTA and the potential benefits for all nations in this region, adoption of the New Secured Transactions Law and New Insolvency Law merits external support, including that of the U.S.

F. Seizing the Opportunity to Overcome Apathetic Internationalism

The U.S. has repeatedly announced its interest in issues involving Latin America including the formation of both NAFTA and the Free Trade Area of the Americas (the "FTAA")*.*[144] Recently, for instance, the government has announced that George W. Bush may seek fast-track authority to facilitate FTAA negotiations and highlighted the president's proposal to increase the importance of Latin America during his administration.[145] Contrary to such governmental proclamations, it appears that the American public has limited interest in supporting initiatives of this nature.[146] This disinterest is attributable to the dominant position that the U.S. has recently been occupied in world affairs and is detrimental to U.S. foreign policy. This pervasive "apathetic internationalism" is causing neglect of foreign affairs,

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143. BUREAU OF INTER-AM. AFF., *supra* note 103; *see also* John E. Rogers, *Financing Commercial Transactions in Mexico and the United States: Panel Discussions on Personal and Real Property*, 2 U.S.-MEX. L.J. 149 (1994). While not commonly manifested as an overt pronouncement, some experts in the field claim that Mexico has discreetly sought outside advice on occasion. The author states, for instance, that "[w]e have heard rumblings that Mexico is occasionally glancing our way to consider whether elements of United States law are worthy to assist the Mexican government as it modifies its laws in the area of economic development [and] one area of United States law that could benefit Mexico is Article 9 of the UCC." *Id.* at 161.

144. Rosella Brevetti, *USTR Announces Draft FTAA Text, Releases Summaries of U.S. Positions*, 18 INT'L TRADE REP. 113 (Jan. 18, 2001).

145. Richard Lapper, *Latin America to Take Greater Role in U.S. Agenda*, FIN. TIMES, Jan.4, 2001, at 4. This text indicates that "Mr. Bush made it clear from early on in his campaign that the region would be a bigger priority." *Id.* Similarly, a spokesperson described Bush as "a president who will be instinctively oriented to Latin America." *Id. See also* Edward Alden, *Bush Faces Huge Trade Divide*, FIN. TIMES, Jan.3, 2001, at 13. During a speech on trade policy, President Bush announced that he hoped to attend the next FTAA summit "armed with fast-track authority to negotiate trade agreements." *Id.*

146. Kim R. Holmes, *Assessing the Administration's Foreign Policy: The Record After Six Years*, Congressional Testimony, (Oct. 8, 1998), *available at* 1998 WL 18089181. This author believes that such unconcern is readily understandable based on the well-being that many U.S. citizens enjoy. In her words, "[a]bsent a clear and present danger, Americans understandably leave foreign affairs to their leaders who, they assume, know more about these issues than they do. If a major threat were to emerge, the American people undoubtedly would become very interested again in foreign affairs . . . [but] foreign affairs, by their very nature, must be of a life-or-death nature before they garner the kind of immediacy and urgency in the daily lives of Americans that, say, taxes or education do." *Id.*

distorting policy choices, and impeding the President's ability to lead.[147] Accordingly, the most formidable challenge facing U.S. political leaders today is "persuading the American people to pay more than lip service to their internationalist beliefs."[148] The public is cognizant of the injury that such indifference generates, yet it fails to take affirmative steps to rectify the situation. In other words, "Americans approach foreign policy the way they approach physical fitness–they understand the benefits of being in good shape, but they still avoid exercise."[149] Still other observers claim that prolonged U.S. success will eventually become this nation's downfall because its "unrivaled strategic position" creates a paradox in foreign policy.[150] In terms of general negative consequences, apathetic internationalism: (i) allows politicians to neglect fundamental foreign policy decisions since they act in a manner designed to please the greatest number of their constituents; (ii) empowers the "squeaky wheels" (the loud minority) of this society to reap a disproportionate amount of benefits; and (iii) impairs the President's capacity to foster U.S. interests abroad due to a lack of requisite funding.[151]

With respect to Mexico, despite the numerous links between the U.S. and Mexico, apathetic internationalism abounds. As one expert explains, "Americans tend not to think much about Mexico, home to their 100 million neighbors. When they do, most U.S. policy-makers take the stability of their NAFTA partner for granted."[152] This Mexican stability, however, is still quite precarious, especially after the *peso* recession in the mid-1990s and the recent democratic ousting of the *Partido Revolucionario Institucional* after nearly a century of political rule. Experts suggest that irrespective of the profound commitments made by the U.S. and Mexico under NAFTA, these two nations have yet to

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147. James M. Lindsay, *The New Apathy: How an Uninterested Public Is Reshaping Foreign Policy*, FOREIGN AFF., Sept.-Oct. 2000, at 2.

148. *Id.*

149. *Id.* at 4.

150. Stephen M. Walt, *Two Cheers for Clinton's Foreign Policy*, FOREIGN AFF., Mar.-Apr. 2000, at 63, 64. According to the author, the U.S. is the unquestionable world leader in "higher education, scientific research, and advanced technology." *Id.* This dominance, though, is contradictory in the sense that, by holding such a strong position, the U.S. stands to gain less by actively participating in the international scene. *Id.* This, says the author, is "the central paradox of unipolarity: the United States enjoys enormous influence but has little idea what to do with its power or even how much effort it should expend." *Id.* at 65.

151. Lindsay, *supra* note 147, at 4-7. With regard to the vocal minority obtaining benefits incommensurate with their numbers, the author simply explains that the intensity of the protest is the key factor: "In politics, as in the rest of life, squeaky wheels get the grease." *Id.* at 3.

152. M. Delal Baer, *Mexico's Coming Backlash*, FOREIGN AFF., July-Aug. 1999, at 90.

understand the magnitude of their interdependence. It is argued, for instance, that Mexico and the U.S. have "chosen to link their destinies via NAFTA, but neither country has come to grips with this intimate embrace."[153] Supporting the New Secured Transactions Law and New Insolvency Law would provide the U.S. the opportunity to fortify bilateral relations with one of its leading trading partners. More importantly, though, any type of conspicuous collaboration between these NAFTA co-parties may help to mitigate the apathetic internationalism that continues to plague the U.S. and handicap its ability to effectively conduct foreign affairs.

G. Spearheading Judicial Reform in Latin America

As discussed in considerable detail earlier in this article, the introduction of the New Secured Transactions Law and New Insolvency Law have transformed Mexico into a leader in Latin America in legal/legislative reform. Likewise, these new laws will also serve as an impetus to judicial reform in Mexico and throughout the region. Changes in both these areas, explain experts, are necessary due to the undeniably close connection between the two. It is suggested, for example, that "if accompanied by other needed judicial and regulatory reforms" the new legislation would induce foreign banks to increase lending in Mexico, thereby creating competition and lowering interest rates.[154] Observers indicate, furthermore, that "secured-credit reform is *only part* of what's needed to energize Mexico's anemic loan market . . . [since] [r]eforms in bankruptcy law and judicial and regulatory procedures are also essential . . . ."[155]

Historically, the legal systems in Latin America have been criticized for numerous reasons. For instance, according to one expert, the legal institutions in this region are "too congested, too poor, too corrupt and, in general, too incapable of adequately performing the functions for which they exist."[156] Others suggest

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153. *Id.* at 103. The author explains that NAFTA represents the best evidence of Mexico's dedication to free-market reforms, yet it still constitutes "a source of recriminations on both sides of the border." *Id.* For instance, "Mexican populists and U.S. protectionists" both criticize the "supposed loss of sovereignty, jobs and investment"; and "growing anti-Mexican sentiment" in the U.S. congress thwarts the capacity of the U.S. "to play essential, if distasteful, roles in bilateral affairs." *Id.* at 103-104.

154. Kraul & Briseno, *supra* note 40.

155. *Id.* (emphasis added).

156. Guy P. Pfeffermann, The Way Ahead: Economic Reform in Latin America, Speech at the Center for Global Energy Studies Second Latin American Conference (Mar. 4, 1998), *at* http://www.ifc.org/economics/speeches/march98/march98.htm. The speaker, Mr. Pfefferman, is the chief economist of the International Finance Corporation.

that these systems are characterized by uncertainty derived from the ambiguity of the laws and the unpredictable behavior of the judges.[157] It is argued, moreover, that certain problems are endemic of legal systems throughout Latin America including: inadequate resources to support courts and judges, inefficient dispute resolution procedures, political judicial appointments and promotional opportunities which result in unsuitable judges, and biased decisions due to external influences.[158] In addition to these shortcomings, observers have identified other problematic areas such as a noticeable deprofessionalization due to the appointment of unqualified friends by large political parties, the replacement of judges and officials at the outset of each new presidential administration, the virtual absence of specialized judicial training programs, and a resistance to reforming "archaic legislations which are unfit to adapt to modern times."[159] As a result of these problems, legal systems in Latin America suffer from extremely low public confidence. In fact, surveys reveal widespread dissatisfaction with the legal system in general, as well as specific complaints about corruption, trafficking of influences, excessive formalism, inaccessibility, and sluggishness.[160]

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157. Jeffrey Davidow, The Law and Demands of an Interdependent Economic System: An Assessment, Speech at Georgetown Law Center (Oct. 16, 1998), *at* http://www.usembassy-mexico.gov/et98101Gtwn.html. Davidow, a U.S. Ambassador, explained that some experts argue that "an inefficient legal system is the most important source of underdevelopment in the Third World." *Id.*

158. *Id.*

159. Hammergren, *supra* note 73. The author suggests that traditionally the judiciaries in the region have been either manipulated or ignored by the powerful. Consequently, in the absence of a politically or financially influential clientele, the courts have been converted into "nests of secondary vested interests relying on survival strategies that range from intentional irrelevance to abject subservience to the power holders of the day." *Id.*

160. *Id.; see also* Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345 (2000). In addition to these problems, Nagle-who formerly worked as a judge in Latin America-explains that several more negative situations plague the judiciary in this region. For instance, due to meager salaries and a generalized lack of respect for court officials, being a judge is not deemed a "prestigious milestone in Latin America" and the top legal talent opts to work in the private sector. *Id.* at 359. As a result, says Nagle, "lawyers get appointed to the bench who may not have the legal training or mental capacity to do their jobs. Admitting that the judiciary is incompetent, however, goes against the Latin mentality of machismo and infallibility." *Id.* (footnote omitted). A second problem is the infinite procedural hurdles which tend to unnecessarily extend cases. *Id.* at 366. The process is so inefficient, in fact, that "[c]ases commonly take up to twelve years to be resolved in court." *Id.* Furthermore, because of the factors from colonial Spanish domination continue to exist in Latin American countries, the judicial systems are "dysfunctional" and would require not only judicial reform, but also "sweeping reforms of political, social and cultural character." *Id.* at 347-348. A further problem is the partiality and bias of some judges, which undermines the entire system. According to Nagle, the "judiciary is used as a pawn in conflicts among political and economic elites . . . " and "[t]he courts have long been filled with political appointments

These problems have affected all aspects of the legal system, including bankruptcy and secured lending issues. Nevertheless, with the advent of the modern global economy, these Latin American countries have realized that changes, especially in these two areas, are necessary. In the words of one author, "[i]n a globalizing economy with acute needs for capital investment, a national government could reasonably conclude that the allocation of rights made years ago by now antiquated bankruptcy laws is not serving the national interest."[161] Other observers concur, explaining that with the spread of globalization and the increasing incidence of international bankruptcies, "[i]t has become apparent that traditional legal doctrines and procedures are inadequate to the task of managing a general default across national borders."[162] In a broader perspective, advocates of judicial reform identify economic and global trade as the principal reasons to support judicial reform. Such proponents argue, in particular, that "[a]n autonomous and dependable judicial system is not only needed for development on a microeconomic level, it is also a requirement for participation in an increasingly complex and competitive marketplace."[163]

To rectify these problems, many countries, including Mexico, have recently introduced judicial reform. Such changes, according to experts, are imperative to a country's survival and do not constitute a short-term strategy. On the contrary, it is argued that judicial reform in Latin America "is more than a fad: it is a critical effort indispensable to establishing the rule of law and consolidating the democratic system which is, in turn, fundamental to an efficient market and growth with equity."[164] Specialists with international organizations explain that local leaders are acutely aware of the need to create effective judicial institutions, a situation evidenced by the fact that in virtually every Latin American country leaders have openly expressed their concern about the importance of strengthening their

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owing their loyalty to individual presidents and political parties." *Id.* at 353 (footnote omitted). Finally, a blatantly obvious and improper relationship between the executive and judicial branches has frustrated ideals of independence. *Id.* at 354. Nagle explains that courts "commanded little respect from citizens or from the other branches" since they consistently approved and identified constitutional authority of questionable merit to justify executive actions. *Id.*

161. ROWAT & ASTIGARRAGA, *supra* note 62, at 45.

162. AMERICAN LAW INSTITUTE, *supra* note 82, at 1.

163. Nagle, *supra* note 160, at 373.

164. Christina Biebesheimer, *At the Front Line of Judicial Reform*, IDBAMERICA ONLINE, (Jan.-Feb. 1999), *at* http://www.iadb.org/exr/IDB/stories/1999/eng/e1299d.htm.

respective judicial systems.[165] Notwithstanding this preoccupation, the actors dedicated to implementing judicial reform in the region are often frustrated for several reasons. For example, the multiplicity of participants and the bureaucracy involved in introducing significant changes tend to impede the process.[166] Furthermore, irrespective of the official position of a country on legal reformation, the approach in most of Latin America to judicial reform has traditionally been "mechanistic," adopting measures previously utilized in Europe or the U.S. to address isolated problems. This technique, lamentably, has yielded minimal impact because "[n]ew codes when enacted were never fully put into practice [and] compliance with their mandates was often merely formalistic or symbolic."[167]

Like that of the majority of countries in the region, Mexico's legal system has undergone serious scrutiny. For example, observers argue that because "Mexico's legal system is often inadequate and ineffective at handling complex bankruptcy cases," the majority of debt crises are resolved in an extra-judicial manner.[168] Although such out-of-court arrangements are common in many countries, the results in Mexico have been markedly unjust because of the dominance of powerful Mexican banks.[169] As one expert explains it, "[t]hese banks are often able to exploit the workout process to negotiate favorable terms for themselves, leaving the growing number of foreign investors with little or no recovery."[170] To halt criticisms that would, inter alia, discourage foreign entities and investors from dealing with Mexico, this country's leaders believed it imperative to enact news laws and

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165. McLarty, *supra* note 104.

166. Paul Constance, *Cleaning the Courts: Judicial Independence Called a Key Challenge*, IDBAMERICA ONLINE, (May 1998), *at* http://www.iadb.org/exr/IDB /stories/1998/eng/e598f2.htm. According to the author, "[p]oliticians, lawyers and jurists trying to reform Latin America's national judicial systems often voice frustration over how slowly the process is moving forward." *Id.* However, the U.S. Attorney General, Janet Reno, opines to the contrary, stating that she has been impressed by the "'tremendous and enthusiastic commitment to making fundamental, sometimes controversial, changes in legal structures in order to improve the performance, efficiency and basic fairness of judicial systems.'" *Id.*

167. Hammergren, *supra* note 73.

168. Kimberly D. Krawiec, *Corporate Debt Restructurings in Mexico: For Foreign Creditors, Insolvency Law Is Only Half the Story*, 17 N.Y.L.J. SCH. J. INT'L & COMP. L. 481 (1997).

169. *Id.* This author suggests that a true understanding of a nation's insolvency system may only be accomplished by examining the relevant legislation, as well as the informal methods and customs used locally. *Id.* According to Krawiec, "[t]his is particularly true in Mexico . . . ." as a result of the recession in 1994 and the inadequacies of the Old Insolvency Law. *Id.* at 481-82.

170. *Id.* at 481.

institute drastic judicial reform. Former President Ernesto Zedillo, for instance, utilized a political campaign that repeatedly emphasized the importance of judicial reform in Mexico.[171] Upon election, Zedillo introduced a judicial reform package that contained over twenty-five constitutional amendments.[172]

The introduction of the New Secured Transactions Law, New Insolvency Law and judicial reform measures has yielded Mexico considerable notoriety. Among other things, such positive attention could be used advantageously to foster judicial reform throughout Latin America by transferring the Mexican model to the other countries in the region.

H. Increased Opportunities for U.S. Lenders

Due to its potential for profitability, lending money is a desirable activity for financial institutions. With a population of nearly 100 million and one of the strongest economies in Latin America, Mexico should be attractive to U.S. lenders. Nevertheless, the inadequacies of the Old Secured Transactions Law made U.S. lenders reluctant to extend credit to Mexican entities in the past. According to experts, "[t]here are numerous lenders in the United States and elsewhere who would like to come into Mexico to do business if the Mexican laws were more supportive to the lenders."[173] Similarly, other observers claim that the legal deficiencies in terms of secured lending actually contradicted the spirit of NAFTA. While this trade agreement allows U.S. and Canadian institutions to take part in lending transactions in Mexico, "they are constantly rejecting otherwise viable requests for loans from Mexican companies because of the inability to create security interests in assets located in Mexico."[174]

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171. Nagle, *supra* note 160, at 356.

172. *Id.*

173. Rogers, *supra* note 143, at 162.

174. David. W. Eaton, *Study Finds Flaws in Lending Laws*, 7 BUS. MEX. 1, 3 (1997); *see also* Kraul & Briseno, *supra* note 40. These experts claim that acceptable judicial and legal reform would persuade foreign banks such as Bank of America and Citicorp to increasing lending in Mexico. *See also* John E. Rogers & Carlos de la Garza-Santos, *General Goods: A Case Involving Security Interests in Inventory and Accounts in the United States, Canada and Mexico*, 5 U.S.-MEX. L.J. 3, 6-7 (1997). According to these authors, financial institutions in the U.S. and Canada that are accustomed to making loans guaranteed by the debtor's accounts receivables and inventory, are hesitant to extend credit to Mexican debtors while discrepancies in the national legislations still exist. *See also* Jonathan J. Higuera, *Work Here May Boost Mexico Trade – A Proposed Mexican Law Would Benefit Both Nations, a Tucson Group Says*, THE TUCSON CITIZEN, Jan. 8, 1999, at 13C. The text highlights the overt desire of U.S. financial institutions to lend in Mexico once favorable laws are enacted. According to Higuera, "many U.S. banks have been

This dilemma was injurious to both the U.S. and Mexico. As one expert explains, the decision not to lend is unfortunate for the debtors who are unable to obtain necessary funds and, at the same time, constitutes a disappointment for potential creditors since "foregoing an extension of credit is foregoing a potentially profit-making activity."[175] This dual loss has also been explained in another manner. One commentator, for instance, acknowledges that U.S. lenders rejected otherwise acceptable credit risks because of the inadequacies of the Old Secured Transactions Law, which produced the following result: "Mexican borrowers are shut off from a much needed source of capital, and U.S. lenders are missing out on a potentially lucrative credit market."[176]

The passage of the New Secured Transactions Law has eliminated much of the former reticence of U.S. lenders. In fact, according to one expert, the impact of this new legislation "would be huge and could set off a wave of economic growth that would create prosperity. This will put Mexico and Latin America firmly in the global marketplace in that lenders will be more predisposed to make loans because they will know what the security is. . . ."[177] Evidence of the benefits derived from the New Secured Transactions Law is the increased lending activity already underway in some southern states. Observers explain that "[i]nvestors in Arizona and Sonora, [Mexico] have started to take advantage of a new Mexican commercial finance law that should stimulate business growth in Mexico and boost exports for both border states."[178] The economic benefits provided to U.S. lenders and Mexican debtors alike, merits full support of the New Secured Transactions Law by both nations.

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following the secured transaction developments in Mexico closely, preparing to jump in when the new law takes effect." *Id.*

175. Cohen, *supra* note 5, at 75.

176. Nelson, *supra* note 28, at 532-33.

177. Higuera, *supra* note 174, at 2. Higuera recognizes that the potential benefits of any new law in Mexico for U.S. institutions "sounds esoteric," but assures that "in the real world this will help a lot of folks." *Id.*

178. Jeannine Relly, *Mexican Investment Spur*, THE ARIZ. DAILY STAR, July 25, 2000, at D1, *available at* 2000 WL 10245807; s*ee also Arizona Governor Heads Broad Trade Delegation to Mexico*, ASSOCIATED PRESS NEWSWIRE, Oct. 12, 1999. In order to fully capitalize on the opportunities for U.S. banks generated by the New Secured Transactions Law, prior to the official enactment of this legislation, a 40-member trade mission for Arizona met with top Mexican officials to fortify business and personal relationships.

I. Preserving Sustainability of NAFTA

Among other things, NAFTA was enacted in order to facilitate the cross-border movement of goods and services, promote conditions of fair competition in the free trade area, and substantially increase investment opportunities.[179] Unfortunately, these lofty goals have been impaired by the Old Secured Transactions Law. As explained previously, due to legislative deficiencies regarding secured transactions in Mexico, many entities were unable to obtain loans or were forced to pay an enormous interest rate to receive funds. As one author explains, "the availability of competitively priced credit is, at least in part, a function of the legal [Mexican] system (most notably, adequate secured financing legislation, reliable filing offices, and a predictable and efficient judicial enforcement system)."[180] As a result of these disadvantageous financial conditions, Mexican businesses could not compete with their U.S. and Canadian counterparts. In the words of one expert, Mexican companies were "competing with a hand tied behind their back if they do not have access to cheaper credit."[181] Other experts, likewise, have emphasized the inherent unfairness of this situation and argue that such disparity will have grave ramifications for NAFTA. They warn, in particular, reform in the area of secured lending is absolutely necessary to revitalize the Mexican economy and protect the long-term sustainability of [NAFTA].[182] Other admonishments are even more explicit, claiming that if new secured lending laws were not passed "NAFTA [would] not succeed."[183]

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179. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 102(1)(a–c), *available at* 1992 WL 812384.

180. Nelson, *supra* note 28, at 528.

181. Wilson-Molina, *supra* note 23, at 7.

182. Wilson, *supra* note 52, at 1815.

183. Kozolchyk, *supra* note 33, at 44. The author explains that, without radical secured transactions law reform, small and medium-sized Mexican enterprises will not be able to compete businesses in the U.S. and Canada that pay considerably less for credit. In fact, argues Kozolchyk, "Mexican enterprises will continue to fail in massive numbers *and NAFTA will not succeed* [and] Mexico and the United States will suffer from the serious economic and political dislocations that will follow such a failure." *Id.* (emphasis added). *See also* Kozolchyk, *supra* note 23, at 523. This text explains that while the recordings of personal property transactions in the U.S. and Canada is quite common, despite its population of over 20 million people, such records in Mexico City "do not exceed a handful per week." *Id.* Also, accepting inventory and accounts receivable as collateral is extremely rare. Consequently, the cost of commercial and consumer loans in Mexico is often three times higher than in Canada or the United States. According to the author, the effect of this cost disparity "on NAFTA's ability to succeed and on Mexico's ability to develop its internal and external markets is quite significant." *Id.* at 524.

To avoid this failure of NAFTA, numerous experts recommended the harmonization of the secured transactions laws of all the member-countries. According to one expert, "[c]learly, the time has come for Mexico to facilitate cross-border accounts receivable financing by harmonizing its secured financing laws and filing systems with those of the United States and Canada."[184] This opinion is shared by other commentators who believe that influence from various sources within NAFTA will eventually force the change. It is argued, specifically, that (i) ever-increasing demands for efficiency, and (ii) pressure from subsidiaries of U.S. and Canadian financial entities located in Mexico on local legislators will eventually result in the homogenization of secured lending laws.[185] For others, increasing the compatibility of secured transactions legislation throughout the entire region represented the only logical solution, thereby making it a virtual foregone conclusion. Proponents of this theory explain that "[u]ltimately, these problems can be addressed *only* through legislative changes designed to achieve greater harmony among the NAFTA partners."[186] Instead of starting from scratch in Mexico, experts claim that the requisite harmonization could be more rapidly accomplished by using an existing system as a model.[187] Due to the development of this law during its three-decade existence in the U.S., numerous experts believe Mexico and the rest of Latin America should accept a variation of Article 9.[188] In addition to its applicability to Mexico, this concept of

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184. Nelson, *supra* note 28, at 528. This author agrees that the compatibility of the laws addressing secured transactions is paramount, stating that such laws "should be harmonized with those in effect in Canada and the United States, as well as those in other countries entering into free trade agreements with NAFTA countries." *Id.*

185. Ronald C. Cuming, *Harmonization of the Secured Financing Laws of the NAFTA Partners*, 39 ST. LOUIS U. L.J. 809 (1995).

186. Nelson, *supra* note 28, at 550 (emphasis added). According to this author, as a first step Mexico should "junk its plethora of legal mechanisms in favor of a single security device which, with respect to non-documentary accounts, would be perfected by public registration." *Id.* at 550-551.

187. Concept Paper on Secured Transactions Law, American Bar Association Central and East European Law Initiative (CEELI), Chapter III – Selecting a Collateral Law Model, (Mar. 24, 1997), *available at* http://www.abanet.org/ceeli/conceptpapers /securetrans/sec3.html. In addressing the updating and harmonization of secured lending laws in Europe, this article explains that "[i]f the drafters were to start from scratch, it is likely they would soon become swamped in a tangle of theoretical alternatives, greatly impeding the process of arriving at a comprehensive and internally consistent statutory scheme." *Id.* Accordingly, it is advisable that "the drafters' initial efforts will be to select some form of model or existing legislation in another jurisdiction as a starting framework." *Id.*

188. Alejandro M. Garro, *Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform*, 9 HOUS. J. INT'L L. 157, 199-201 (1987). This text suggests reform in the area of secured transactions in Latin America would be

harmonization of secured transactions laws on a worldwide scale has been proposed.[189] In light of this global trend and the importance of adopting reasonably uniformed laws to the very sustainability of NAFTA, policy dictates supplying assistance to Mexico both in the initial implementation and subsequent modification of the New Secured Transactions Law.

VI. CONCLUSION

Based on the myriad of problems generated by outdated legislation and its desire to attract additional foreign investment, Mexico has taken a drastic step by adopting the New Secured Transactions Law, which will essentially reshape the secured

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best accomplished with a legislative framework resembling Article 9 since it has already achieved in the U.S. exactly what needs to be done in Latin America: an overall reform of the chattel security laws. Due to the different legal traditions and financial structures in the U.S. and the Latin American countries, some argue that adopting Article 9 elsewhere will prove "discouraging, and confusing." *Id.* at 200. The author argues, however, that "the analytical insight, the neutral terminology, and the rational structure of Article 9 appeals as much to the civilian mind as to the common law mind." *Id. But see* Michael Owen et al., *A Case Study of Three Opportunities to Improve the Private Financial Infrastructure of Mexico: Secured Financing of Inventory; Accounts Receivable and Equipment; The Securitization of Assets; The Laws of Bankruptcy and Insolvency Moderator*, 7 U.S.- MEX. L.J. 121, 134 (1999). These authors oppose the adoption of a law in Mexico resembling Article 9 because legal, political, financial and culture factors will not allow it. They argue, in particular, that:

> Efforts to 'Americanize' or find an American solution to this . . . will fail. Even if an American-type law is passed in this respect, if it does not respect our traditions, constitutional and otherwise, it will not work. That is important to keep in mind. There are many efforts to help Mexico with that. Some of them, though, are just trying to create a U.C.C. type of thing in Mexico. The idea of change, in and of itself, is not necessarily bad if Mexico's old and well-established principles of law are dealt with in a proper way.

Id. at 134.

189. Cohen, *supra* note 5, at 178-80. This author explains that there have been several unsuccessful attempts since as early as 1915 to harmonize secured transactions laws on a global scale. Nonetheless, argues Cohen, former failed attempts and feasibility studies belie the fact that modern society is now ready to reintroduce harmonization on a massive level. He states, specifically that:

> The international secured transactions landscape has changed dramatically, requiring a rethinking of that study's pessimism. Particularly within the last decade, initiatives for the reform of both international and domestic law governing secured transactions have mushroomed. While many of these initiatives are still in progress and uncertain of success, modernization and harmonization *are no longer far-fetched dreams.*

Id. at 180 (emphasis added). *See also* Jim Mayer, *Securing Your Collateral Outside the U.S.*, 55 SECURED LENDER 54, 54-59 (1999); Steven L. Schwarz, *Towards a Centralized Perfection System for Cross-Border Receivables Financing*, 20 U. PA. J. INT'L ECON. L. 455 (1999).

lending regime in this nation. As demonstrated in this article, the New Secured Transactions Law contains substantive and procedural changes that, if appropriately applied, will improve all aspect of secured lending in Mexico. The effectiveness of this new legislation will depend, in large part, on the ability of the Mexican courts to justly apply the well-founded provisions. In view of the pervasive pessimism among experts regarding the functionality of Mexico's tribunals, this may present a formidable challenge. For instance, according to one local expert, "[w]e can have nearly perfect laws but if the judiciary doesn't apply them, it would not help us at all."[190] The effectiveness of the New Secured Transactions Law will also be reliant upon the improvement of the legal system as a whole since, as some observers argue, the most important factor "is establishing a system that is internally consistent and a strong institutional infrastructure that ensures effective implementation."[191]

While the New Secured Transactions Law appears sound in theory, the true benefits provided by this recent legislation will not be revealed for years to come since "[t]he dysfunctional credit system has made thousands of Mexicans distrustful of banks and leery of borrowing [money]."[192] Other observers, likewise, suggest that adopting progressive provisions regarding secured transactions is simply one step in the "building-block approach" necessarily used to establish a truly functional legal system.[193] On the basis of such opinions, it is apparent that the New Secured Transactions Law will require a sizable period during which to develop. In the meantime, based on the potential benefits to all

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190. Humphrey, *supra* note 93. According to Jorge Marín Santillán, president of CCE, a Mexican business group, the new commercial laws are designed to encourage lending, but politics and capricious courts remain an obstacle. *See also* Constance, *supra* note 166, at 1. U.S. Supreme Court Justice Stephen Bryer describes the gap between a law and its implementation. "This a problem we all really face. . . . Systems of law that are clear on paper may confer rights that are valid only on paper unless those rights are enforceable in courts that are fair and efficient and are staffed by well-trained and unbiased judges." *Id.*

191. Hagan, *supra* note 114. This author explains that experience has proven that the existence of a strong institutional infrastructure is more important than the design of an insolvency law. In particular, he explains "given the complexity and urgency of insolvency proceedings, effective implementation requires judges and administrators who are efficient, ethical and adequately trained in commercial and financial matters." *Id.*

192. Kraul & Briseno, *supra* note 40.

193. Joseph J. Norton, *A New International Financial Architecture? Reflections on the Possible Law-Based Dimension*, 33 INT'L LAW. 891 (1999). According to this author, "a law-based approach [does not simply encompass] laws and legal processes [because] law is merely one societal means to achieving and legitimizing appropriate policy objectives." *Id.* Therefore, a law-based approach should really be an interdisciplinary approach, where law is the "thread that weaves together economic, political, and social objectives with a transparent and fair implementation process . . . ." *Id.*

members of NAFTA, as well as the numerous public policy justifications described in this article, the U.S. should offer (but by no means impose) assistance to Mexico in this endeavor. To the contrary, the U.S. would both violate its pledge to aid Mexico's development "upon request" and forego a superb opportunity to fortify secured lending throughout the hemisphere.[194]

194. BUREAU OF INTER-AM. AFF., *supra* note 103. U.S. officials have repeatedly declared that the U.S. supports Mexico's efforts to strengthen democracy and advance economic development. Accordingly, the government has pledged to "continue to support these efforts and offer appropriate assistance if requested." *Id.*

FORUM NON CONVENIENS CHECKMATED? - THE EMERGENCE OF RETALIATORY LEGISLATION

WINSTON ANDERSON*

Table of Contents

I. INTRODUCTION

Eight years ago, in the pages of an earlier volume of this Journal, I argued that the doctrine of *forum non conveniens* raised a serious constitutional issue of access to the courts.[1] That suggestion led to my involvement in a long-running transnational litigation,[2] the high watermark of which was probably the

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Declaration of interest: Dr. Anderson provided consultancy services to Charles Siegel and Fred Misko, Jr. of the Texas law firm who represented the plaintiffs in the *Delgado* case. In the course of the consultancy, Dr. Anderson prepared the original draft of the Transnational Causes of Action Act (Products Liability), no. 16 of 1997, enacted into law in The Commonwealth of Dominica on January 15, 1998.

1. Winston Anderson, *Forum non conveniens and the Constitutional Right of Access: A Commonwealth Caribbean Perspective*, 2 J. TRANSNAT'L L. & POL'Y 51, 51-102 (1993).

2. *See* Declaration of interest, *supra*. Mr. Charles Siegel indicated that having read my article in the JOURNAL OF TRANSNATIONAL LAW & POLICY, *supra* note 1, his firm had determined that I could contribute to the debate of the jurisdictional issues involved in the

decision by Justice Lake in *Delgado v. Shell Oil*.[3] In that case, nearly 26,000 plaintiffs from developing countries, including hundreds from the Caribbean, sought compensation in the courts of Texas for injuries allegedly caused by exposure to the fumigant dibromocloropropane (DBCP).[4] The primary defendants were Shell Oil and Dow Chemical, two large American multinational corporations which manufactured DBCP in the United States.[5] Justice Lake acceded to the defendants' request and declined to exercise jurisdiction because, in his view, alternative forums existed in the plaintiffs' home countries and trial there would best serve the private interests of the parties, the public interest of the states involved, and the ends of justice.[6] The dismissal of the American action led to atomization of the litigation as thousands of suits were filed in hundreds of courts across the twenty-three affected foreign countries. Not unexpectedly, the actions became mired in wrangling over procedural and evidential matters. Eventually, in 1998, the parties agreed to a settlement, but the plaintiffs received only a fraction of what they could have reasonably anticipated to receive had the trial taken place in the United States.[7]

While *Delgado* undoubtedly represents another victory for the beneficiaries of *forum non conveniens*,[8] the case may very well turn out to be the high water mark of the influence and effectiveness of the doctrine. States whose citizens have been affected by what one Texas Supreme Court Justice in an earlier DBCP case referred to as "connivance to avoid corporate accountability,"[9] have been stung into taking retaliatory legislative action.

The *fons et origo* was the Bhopal Gas Leak Disaster (*Processing* of Claims) Act[10] ("Bhopal Act"), which entered into

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case. Subsequently, Mr. Siegel visited the Faculty of Law at U.W.I. and gave two very well received lectures on the DBCP litigation.

3. 890 F. Supp. 1324 (S.D. Tex. 1995).

4. *Id*. at 1335-36 (the plaintiffs were primarily from Costa Rica, Nicaragua and Panama).

5. *Id*.

6. *Id*. at 1355-75.

7. Anecdotal evidence suggests that on average each of the Caribbean claimants recovered less than $2,000. By contrast, the average award made to American victims of DBCP was in the vicinity of $500,000, and awards of over $1 million were not unheard of.

8. Winston Anderson, *Forum Non Conveniens Strikes Again: American Court Closes its Door to Eastern Caribbean Litigants*, 23 J.E. CARIB. STUD. 77, 77-87 (1998).

9. Dow Chem. Co v. Alfaro, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring).

10. Bhopal Gas Leak Disaster (Processing of Claims) Act [the Bhopal Act], Indian Parliament Act No. 21 of 1985, Gazette of India (Extroadinary) pt. 2, sec. 2, Mar. 29, 1985,

force upon assent by the President of India on March 29, 1985.[11] The Act responded to the December 3, 1984, industrial accident in which some 40 tons of the highly toxic methyl isocyanate gas from the India Union Carbide plant was released and spread over the city of Bhopal, India.[12] Over two thousand persons died and approximately 200,000 suffered injuries from the leak.[13] Union Carbide was a subsidiary of Union Carbide Corporation, U.S.A., and the most serious allegations of negligence related to the weaker safety and environmental standards in place in the India plant as compared with plants in the United States.[14] The Indian government and other individual plaintiffs filed more than 145 lawsuits in the United States, but both the Federal Court for the Southern District of New York and the Second Circuit Court of Appeals dismissed the claims on the basis of *forum non conveniens*.[15] Rejecting the opinion of the Indian government, the federal courts decided that the Indian courts would provide an adequate and appropriate forum for trial.[16] The Bhopal Act was therefore intended to confer certain powers on the central government of India, including the right to secure the claims arising out of the disaster and to ensure the matter was dealt with "speedily, effectively, equitably and to the best advantage of the claimants."[17]

II. LEGISLATIVE ALTERNATIVES

In the wake of Justice Lake's dismissal of the DBCP litigation, states in the developing world had to consider how to respond in

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available at http://www.zeenext.com/legal/laws/bareacts/b/bhopal_leak1985/bhopal_leak1985act.html.

11. The Bhopal Gas Leak Disaster Act repealed The Bhopal Gas Leak Disaster (Processing of Claims) Ordinance No. 1, *reprinted in* Lisa F. Butler, Comment, *Parens Patraiae Representation in Transnational Crises: The Bhopal Tragedy*, 17 CAL. W. INT'L L.J. 175, 200-04 (1987). However, the Act incorporated much of the Ordinance and section 12(2) of the Act deems anything done or any action taken under the Ordinance "to have been done or taken under the corresponding provisions of this Act."

12. For an overview of the Bhopal disaster and its lingering consequences see Joshua Karliner, *To Union Carbide, Life is Cheap: Bhopal – Ten Years Later*, THE NATION, Dec. 12, 1994, at 726.

13. Butler, *supra* note 11, at 175.

14. Karliner, *supra* note 12.

15. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y 1986), *aff'd*, 809 F.2d 195, 202 (2d Cir. 1987).

16. *Id.*

17. Bhopal Act, *supra* note 10, Preamble. Under pressure from the Indian and American governments, as well as from public opinion, Union Carbide agreed to an Indian Supreme Court approved global settlement of $470 million; this was significantly smaller than the award that could reasonably have been expected to be obtained in American proceedings. Karliner, *supra* note 12.

the best interests of their citizens and residents. Although passage of the Bhopal Act had been truly a watershed event, its limitation as precedent soon became obvious. The Act was geared exclusively to the Bhopal gas disaster. Its main terms provided for the granting of exclusive right to the central government to represent the claimants, giving the government the powers of a civil court in order to secure evidence of the accident and injuries alleged, and to frame a scheme for the registration and satisfaction of claims.[18] That was soon found to be unsuitable to the DBCP litigation. The view of many developing countries was that the nexus between the United States and the tortious conduct of the defendants was so great that the cases should be returned for trial in the United States.

Adoption of overly anti-*forum non conveniens* legislation, which would extinguish national jurisdiction once the plaintiff had elected to file suit in America so that an American judge would not be able to find the foreign courts open to the plaintiff, was actively deliberated by legislatures in Africa and Latin America.[19] Indeed, the Environmental Committee of the Latin American Parliament, PARLATINO, introduced a resolution to the Parliament which recommended that all Latin American and Caribbean countries adopt this type of legislation.[20]

The extinguishing of jurisdiction in national courts was not considered feasible in the Commonwealth Caribbean. Apart from the issue of the constitutional right of access, there was also the consideration that legislative abolition of jurisdiction may not have resulted in the intended objective of retention of jurisdiction by the American court. The legislation eventually adopted was designed to obtain the best of both worlds; it made provision for local trial but also enabled the local court to utilize the rules of evidence, liability, and award damages available to foreign courts.

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18. *See* Bi v. Union Carbide Chemicals & Plastics Co., Inc., 984 F.2d 582, 585-86 (2d Cir. 1993) (summarizing the Bhopal Act, its implementation and its objectives).

19. *See, e.g.*, Costa Rica: *Law in the Defense of Procedural Rights of Nationals and Residents* (a Bill which was pending before the Legislative Assembly on March 10, 1997); Ecuador: *Law of Defense of Procedural Rights of the Citizens and the Residents and for the Protection of the Environment* (debated before the National Congress of the Republic of Ecuador) [hereinafter Ecuador Debate]; Honduras: *Law for the Procedural Rights of Nationals and Residents* (debated in the National Congress of Honduras in 1996).

20. This Recommendation was made at the Rio + 5 Forum held in Rio de Janeiro on Mar. 19, 1997.

III. TRANSNATIONAL CAUSES OF ACTION (PRODUCT LIABILITY) ACT 1997

The proposed Transnational Causes of Action (Product Liability) Act was presented to the Cabinet of Saint Lucia on April 3, 1997.[21] The Cabinet was broadly supportive and agreed "in principle" to the introduction of the bill to Parliament, but the dislocation of the subsequent general elections resulted in the stymieing of the legislative effort in that country. Accordingly, attention was turned to securing Cabinet interest in Dominica, another Caribbean country severely affected by DBCP injuries. Preliminary discussions with the Attorney General were followed by several meetings with officials from the Parliamentary Drafting Office. On the motion of the Attorney General, seconded by the Minister of Finance, Industry and Planning, the bill was read for the first time in the Unicameral House of Assembly on Monday, December 15, 1997. Subsequently, the motion by the Attorney General that the bill be read a second time was seconded by the Minister of Foreign Affairs, Trade and Marketing, and the question was proposed. The Act was passed without dissent and entered into force upon assent by the President, on January 15, 1998.[22]

The statute is an outstanding and, to date, unique attempt to counteract the pernicious effects of *forum non conveniens.* As such, it deserves close examination.[23]

A. Objective and Application

The preamble provides that the Act is intended "to make provision for the expeditious and just trial in the Commonwealth of Dominica of transnational product liability actions where any such action was dismissed in a foreign forum on the basis of *forum non conveniens*, comity, or on a similar basis."[24] The statutory objective is therefore very limited; it addresses *Delgado*-type litigation through the establishment of a legal regime in Dominica that facilitates the equitable resolution of such

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21. Tom Hart, Leonard Riviere, and Winston Anderson, the present writer, made the presentation.

22. Transnational Causes of Action (Product Liability) Act, no. 16 of 1997, (Commonwealth of Dominica), [hereinafter Transnational Act].

23. The first attempt at critical examination was undertaken by my friend and colleague, Zanifa McDowell. Zanifa McDowell, *Forum Non Conveniens: The Caribbean and Its Response to Xenophobia in American Courts*, 49 INT'L & COMP. L.Q. 108, 115-30 (2000).

24. Transnational Act, *supra* note 22.

disputes. The provisions were crafted to deal specifically with this rather narrow objective and consequently the statute is unlikely to come into play very often. However, as indicated earlier, many countries consider the problem of providing juridical comfort against the abuse of the "convenience" doctrine well worth the legislative effort.

The precise situations in which the Act becomes applicable closely mirror the stated objective. In the words of section 3:

> This Act shall apply to all transnational causes of action brought against a foreign defendant where:
> (a) any such action was dismissed in a foreign forum on the basis of *forum non conveniens*; or
> (b) on the basis of comity or other similar basis to the effect that the Courts in Dominica provide a more convenient forum for trial of the action.

Section 3 restricts the Act to the narrow band of cases dismissed in foreign forums on the basis that the courts in Dominica would provide a more convenient forum for trial. Admittedly, the final format in which the provisions are presented leaves room for argument that section 3(a) and 3(b) could read disjunctively. This would lead to application of the Act to cases where the action is dismissed for *forum non conveniens* (section 3(a)), as well as to the Act's application where the case was not previously dismissed by a foreign court, but where the trial would be more convenient in Dominica (section 3(b)).[25]

In fact, the intention was the very opposite. The draftsman was concerned that if section 3(a) was left on its own, the Act could be rendered inapplicable simply because the foreign proceedings were technically dismissed on the grounds of comity or the like.[26] Thus, although the separation of section 3 into two paragraphs may be regarded as unfortunate, the intention is clear that the Act should apply only in situations where foreign proceedings are dismissed on the basis of convenience or appropriateness of place of trial. To some extent this intention is secured by the preambular statement of the objectives and several subsequent statutory provisions which contain language

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25. McDowell, *supra*, note 23, at 117-18 (discussing the effects of the independence of the sections).

26. This would have been especially important in circumstances where lawyers sought to argue for limited application of the statute. For example, in local proceedings, an argument could be made that the Act did not apply because the foreign action was dismissed in words that did not include *forum non conveniens*.

indicating the applicability of the statute to cases dismissed in a foreign forum "on the basis of *forum non conveniens*, comity, or any similar basis." [27]

It follows that the statutory intent is to afford an opportunity for cases, filed but dismissed in a foreign forum on a discretionary ground, to be heard and decided on the merits in Dominica. The Act does not apply to actions commenced locally, nor does it apply to actions taken in a foreign forum by one Dominican against another.[28] Admittedly, there could be a constitutional challenge by foreign defendants upon non-discrimination grounds, but this would be unlikely to succeed because Caribbean constitutions do allow for discrimination between protections awarded to citizens and foreigners.[29] Moreover, the provision was specifically tailored to the typical undertakings given by foreign defendants to the foreign court at the time of invocation of *forum non conveniens.* In a sense, therefore, the Act is simply geared to holding the defendants to their undertakings.

1. The DBCP Litigation

It may be reasonably postulated that the statute fills an important *lacuna.* It was clearly applicable to the facts of *Delgado* itself. There was no medical dispute that DBCP caused sterility or that it increased the risk of cancer.[30] Notwithstanding

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27. Transnational Act, *supra* note 22, § 4(1). It should be noted that the original draft prepared and sent to the Attorney General by the present writer did not contain a sub-division into paragraphs (a) and (b).

28. This restriction was necessary in order to assure local importers, distributors, and plantation owners that the Act would not create any right of action against them by banana workers affected by DBCP.

29. Francis Alexis, *When Is "An Existing Law" Saved*?, PUB. L. 256, 278 (1976).

30. Anderson, *Strikes Again*, *supra* note 8, at 78.

DBCP was known by the American government to be toxic to laboratory animals as early as 1961, but was nonetheless registered for use in the United States in that year. In 1961, Shell Oil and Dow Chemical, the major American manufacturers of DBCP, petitioned the Food and Drug Administration for the establishment of tolerances for residues on crops resulting from application of DBCP. The toxicology data submitted with this application revealed the hazards of oral, dermal, and vapor exposure to DBCP, and that testicular atrophy had occurred to laboratory animals after repeated exposure. Over the next 15 years evidence establishing the danger to humans exposed to the chemical mounted. In July of 1977, many workers at the Occidental Chemical Corporation plant in Lathrop, California, were diagnosed as sterile. In August of 1977, the California Department of Food and Agriculture announced a statewide suspension of all sales and use of DBCP. Later that month, three federal agencies formed a task force to determine a course of action with respect to DBCP. Dow and Shell halted production and issued recalls of their products. As a result of the revelation of the sterility problem, and the growing evidence of the cancer risk, the U.S. government suspended many uses of DBCP. In 1979, the United States Environmental Protection Agency concluded that the dangers associated with DBCP outweighed the potential benefits and unconditionally banned all sale or use in

its known dangers, and after its use was either banned or sharply restricted in the United States, the defendants continued to manufacture and export DBCP to developing countries. Senator Patrick Leahy presided over the United States Congressional hearings into the DBCP affair. The Senator found that the Environmental Protection Agency had "banned DBCP from nearly all domestic farm uses, but the companies then dumped their unused stocks overseas where it continued to be used. As a result, more banana workers in [developing countries] were sterilized. The tale of DBCP is an appalling one."[31]

April 1984 marked the commencement of the litigation saga on behalf of the "third world" victims of DBCP. In *Alfaro v. Dow Chemical Co.*,[32] some eighty-two Costa Rican banana workers and their wives sued Dow and Shell in a Texas court.[33] The defendants contested jurisdiction and in the alternative pleaded *forum non conveniens*.[34] Judge Smith of the Harris County District Court held jurisdiction was proper, but dismissed the claim for *forum non conveniens*.[35] On appeal, the Court of Appeals reversed, finding that section 71.031 of the Texas Civil Practice & Remedies Code[36] provided a foreign plaintiff with an

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the United States. American plaintiffs recovered seven figure sums for injuries sustained in relation to their contact with the chemical. *Id*. at 78-79.

31. *Circle of Poison: Impact of U.S. PesticIdes on Third World Workers: Hearing Before the Senate Comm. on Agric., Nutrition, and Forestry*, 102d Cong. 1-2 (1991). *See also* James H. Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States*, 13 UCLA J. ENVTL. L. & POL'Y 167 (1995).

32. 751 S.W.2d 208 (Tx. Ct. App 1988), *aff'd* Dow Chem. Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990).

33. *Id*. at 675.

34. *Id*.

35. *Id*.

36. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1997):

> (a) An Action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if :
>
> 1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> 2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
>
> 3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
>
> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

absolute right to maintain a death or personal injury cause of action in Texas. [37] Thus, such a suit could not be dismissed for convenience. This decision was upheld by the Supreme Court of Texas, albeit by the narrow majority of one vote.[38]

Following the favorable decision in *Alfaro,* all alleged victims of DBCP sought to have their cases remanded to various Texas State courts. The defendants, on the other hand, sought to maintain federal court jurisdiction because, beginning with *Gulf Oil Corp. v. Gilbert*,[39] federal courts have favored application of the convenience doctrine. The defendants' initial attempt to implead federal jurisdiction failed in 1993.[40] However, on February 14, 1994 a third-party petition was served impleading Dead Sea Bromine Co. Ltd. on the ground that Dead Sea manufactured and sold DBCP to which the plaintiffs may have been exposed.[41] Dead Sea, an Israeli company, was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act (FSIA), and therefore could invoke federal jurisdiction as of right.[42] Despite offers of indemnification from the plaintiffs' attorneys, Dead Sea immediately removed the action to the federal court in Houston, Texas, and waived its defenses of sovereign immunity and lack of *in personam* jurisdiction.[43] Justice Lake held that the defendants had not improperly created a right to remove by collusively joining Dead Sea;[44] had not waived their right to seek dismissal on discretionary grounds;[45] and the action should indeed be dismissed in favor of litigation in

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(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

37. *Alfaro*, 751 S.W.2d at 208.

38. Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 680 (Tex. 1990).

39. 330 U.S. 501 (1947).

40. Rodriquez v. Shell Oil Co., 818 F. Supp. 1013 (S.D. Tex. 1993) holding that even if the plaintiffs' claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), they did not present a removable federal jurisdiction question).

41. Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1336 (S.D. Tex. 1995).

42. *Id.* at 1336-37.

43. *Id.*

44. Justice Lake was not persuaded by the plaintiffs' argument since Dead Sea's status as a foreign sovereign had not been impugned; neither had it been argued that the defendants could never have stated a claim for contribution or indemnity against Dead Sea. The mere fact of the plaintiffs disclaiming any intention of seeking recovery for damages against Dead Sea could not establish that Dead Sea was collusively joined. The plaintiffs' arguments related to the merits of the third-party actions, not to any jurisdictional competence in Dead Sea to seek removal.

45. Whether by relying on TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1997) or 28 U.S.C. § 1404(a), initiating a declaratory judgment action in the United States District Court for the Northern District of Texas, or by participating in discovery.

the plaintiffs' home countries.[46] The critical factor was the availability of an adequate alternative forum. Justice Lake refused to accept the distinction (urged by the present writer) between the theoretical possibility of action in these plaintiffs' home countries and the pragmatic realities rendering these possibilities of virtually no practical value.[47]

An altogether more realistic view of the corporate strategy behind the invocation of *forum non conveniens* was taken by the Supreme Court of Texas in *Alfaro*, the earlier DBCP case.[48] The majority held the doctrine had been statutorily abolished in wrongful death and personal injury actions arising out of an accident in a foreign state or country, but Justice Doggett would have abolished it on wider grounds of public policy.[49] For him, the doctrine was obsolete in a world of global markets and heightened awareness of the delicate ecological balance of all life on earth.[50] It enabled corporations to evade legal control merely because they were transnational. Furthermore, the parochial perspective ignored the reality that actions by Texan corporations affecting those abroad would also affect Texans.[51] For Justice Doggett, refusal of a Texas corporation to confront a Texas judge

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46. On the ground that even if the standard of review to be employed was the deference owed to an American plaintiff, factors of the availability of an adequate alternative forum, private interest factors, and public interest considerations favored trial in the foreign forums.

47. The present writer urged this distinction upon the Justice through lead counsel for the plaintiffs, Mr. Charles Siegel. *Supra* note 2. The Justice's comment in relation to Dominica was typical:

> Defendants submit affidavits . . . stat[ing] that the Commonwealth of Dominica 'subscribes to and applies faithfully the English common law,' and that the English common law provides plaintiffs a tort cause of action that might lead to the recovery of damages for their injuries from any of the defendants found negligent and causally responsible for the injury. Plaintiffs' affiants on the law of Dominica do not question the accuracy of this statement. Accordingly, the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of the Commonwealth of Dominica. *Delgado*, 890 F.Supp at 1359.

The Court accepted this view even though Dominica had just one judge for its High Court and no history of litigating product liability on any scale comparable to the DBCP litigation. The suggestion that judicial proceedings would become mired in wrangling over procedural and evidential matters received rather short shrift, but subsequent efforts to instigate litigation became stymied upon just such matters.

48. *Dow Chem. Co*, 786 S.W.2d at 674.

49. *Id*. at 688-89 (Doggett, J. concurring).

50. *Id*. at 689.

51. The judge gave the example that although DBCP was banned from use within the United States, it and other similarly banned chemicals have been consumed by Texans eating foods imported from Costa Rica and elsewhere. *Id*. at 689.

and jury did not have to do with inconvenience but rather with "connivance to avoid corporate accountability."[52] The learned judge accepted empirical data that less than four percent of cases dismissed under the doctrine ever reach trial in a foreign court.[53] The bottom line, therefore, was that dismissal for lack of convenience meant an end to the litigation and corporate savings of billions of dollars properly owed to the victims of corporate wrongdoing.

Moreover, the Justice found that even the traditional balancing of factors favored trial in Texas. As far as public interest factors were concerned, Texas had an interest in asserting jurisdiction over defendants domiciled there.[54] Additionally, docket backlog was not caused by foreign litigation but by local disputes and judicial comity was not achieved when the United States allowed its multinational corporations to adhere to a double standard when operating abroad by refusing to hold them accountable for those actions.[55] According to Justice Doggett, private interest factors of the parties were "obsolete" in an era of modern transportation and communication.[56]

2. The OMAI Spill Litigation

A few months after the Transnational Causes of Action Act entered into force, another incident in the Caribbean illustrated the applicability of the statute to the regional activities of multinational corporations. *Recherches Internationales Quebec v. Cambior Inc.*, involving a gold mining spillage in Guyana, was

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52. *Id.* at 680.

53. *Id.* at 683; *see also* David W. Robertson, *Forum non conveniens in America and England: A Rather Fantastic Fiction*, 103 L.Q. REV. 398 (1987).

54. *Alfaro*, 786 S.W.2d at 684-86 (Doggett, J. concurring).

55. *Id.* at 686-87.

56. *Id.* at 683-84. The post-*Delgado* history of the DBCP saga revealed the ethical superiority of the judicial wisdom of Justice Doggett. Justice Lake's dismissal of the plaintiffs' American action led to fragmentation of the lawsuit. Thousands of suits were filed in hundreds of courts across the 23 different foreign countries affected. Immediately upon being sued locally, the defendants changed their posture. Allegations that the foreign courts' proceedings were in breach of the defendants' American due process rights were soon raised. Local judicial proceedings became mired in wrangling over procedural and evidential matters; across the Eastern Caribbean years passed after proceedings were commenced without the matter ever being set down for mention. There were allegations that the defendants threatened to appeal any unfavorable decision all the way up to the Privy Council, and then to embark on another round of constitutional motions. There were fears that any judgment given against the defendants would remain unsatisfied. The plaintiffs' American lawyers were hampered by the lack of an audience in local courts and frustrated by the mounting level of their own investment in a seemingly endless litigation. [This information came to the present writer during the course of his consultancy on the DBCP litigation. (*See* Declaration of interest, *supra*)].

judicially described as "one of the worst environmental catastrophes in gold mining history."[57] On August 18, 1995, the dam of the gold mine's effluent treatment plant began to rupture, spilling some 2.3 billion liters of liquid containing cyanide, heavy metals, and other pollutants into two rivers, one of which was the Essequibo.[58] Approximately 23,000 Guyanese victims of the spill instituted class action proceedings in Quebec, suing Cambior Inc. (a Quebec corporation owning 65% of Omai Gold Mines Ltd., the Guyanese corporation which owned the mine here) for $69 million.[59] The plaintiffs were represented by the Quebec company, Recherches Internationales Quebec (RIQ).

The report of the Commission of Inquiry, named by the government of Guyana shortly after the disaster, depicted the reaction of many citizens of Guyana, whose very existence depends on the integrity of the Essequibo River, as shock, fear, anger, and in some cases, panic and terror.[60] The Commission found that the cause of the discharge of effluent from the treatment plant was the erosion of the core of the dam due to faulty construction of the rock fill foundation on which the dam was built. It also found the Omai Gold Mine company responsible for the loss since the Company was the party who brought the cyanide, a noxious substance, onto its property.

However, the Quebec Court dismissed the claims on f*orum non conveniens* grounds. The Court found that Guyana was clearly the most natural and appropriate forum for the case to be tried.[61]

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57. Recherches Internationales Quebec v. Cambior Inc., unreported judgment of Aug. 14, 1998 (Canada Superior Court, Quebec, no. 500-06-000034-971).

58. *Id.* at p. 2.

59. *Id.* at p. 2.

60. The Court noted that the emotional response was heightened by the fact that the water of the Essequibo river now contained cyanide. Etched in the memories of many Guyanese was, no doubt, the 1978 macabre tragedy in Jonestown, Guyana, when over 900 cult followers committed suicide by ingesting lethal quantities of a cyanide laced brew.

61. In the words of the Court:

> [N]either the victims nor their action has any real connection with Quebec. The mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. The law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgment are located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It included the columinous documentary evidence relevant to the spill and its consequences. *Recherches*, unreported judgment no. 500-06-000034-971 at XX.

B. Juridication of the Dominican Courts

Section 4 deals with the jurisdiction of the Dominica courts over the kinds of transnational actions in issue and effects radical alterations in the common law. The section contains three subsections, each worthy of separate examination.

1. Section 4(1): abolition of forum non conveniens

Section 4(1) provides spectacular vindication of the view doubting the legitimacy of the convenience doctrine. It provides:

> Subject to subsection (3) where the High Court or Court of Appeals in Dominica has jurisdiction to hear a civil matter, the Court shall assume jurisdiction in all cases to which this Act applies and shall not dismiss or stay proceedings on the basis of *forum non conveniens*, comity or any similar basis.

The intent of this provision (subject to 4(3)) is to abolish the convenience doctrine in relation to actions where the plaintiff sues as of right.[62] This is a radical step, given the clear acceptance of the doctrine by the House of Lords in the leading case of *Spiliada Maritime Corp v. Cansulex Ltd.*;[63] an acceptance that was supposed to signal the rejection of xenophobic parochialism and an embrace of judicial comity.[64] In *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak*,[65] the Privy Council accepted "the law in *The Spiliada"* and in this way *forum non conveniens* became binding judicial precedent for countries, including Dominica, over which the Privy Council retains appellate jurisdiction.

Notwithstanding these judicial authorities, it was argued that the doctrine violated basic constitutional guarantees to citizens of unfettered access to superior courts for determination of their

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62. For example, pursuant to relevant common law and statutory rules granting jurisdiction on the basis of presence (Maharanee of Baroda v. Wildenstein [1972] 2 Q.B. 283 (Eng. C.A.)) or submission (*in re* Dulles Settlement (No. 2) [1951] ch. 842); Henry v. Geopresco Int'l Ltd. [1976] Q.B. 726 (Eng. C.A.)).

63. [1986] 1 App. Cas. 460 (Eng.).

64. For Lord Diplock, the English embrace of *forum non conveniens* meant that "judicial chauvinism had been replaced by judicial comity." The Abidin Daver [1984] 1 App. Cas. 398 (Eng.), [1984] 1 All E.R. 470.

65. [1987] 1 App. Cas. 871 (Eng. P.C.), [1987] 3 All E.R. 510.

civil rights and responsibilities.[66] In their own words, Caribbean constitutions provide that proceedings instituted by any person "for the determination of the existence or extent of any civil right or obligation …shall be given a fair hearing within a reasonable time."[67] Lord Diplock for the Privy Council in *Attorney General of Trinidad and Tobago v. McLeod*, said that "[a]ccess to a court of justice" was "*itself*, 'the protection of the law' to which all individuals are entitled."[68] Similarly, in *Hinds v. The Queen*, Lord Diplock, again speaking for the Privy Council, declared that the constitution gave the individual citizen the right "of having important questions affecting his civil ... responsibilities *determined* by" the Supreme Court.[69] These and other considerations suggested that the constitutions prohibit judicial abdication of jurisdiction.

In addition to the constitutions, there are specific examples of commonwealth statutory law designed to protect the right of access by litigants in transnational disputes. The Unfair Contract Terms Acts of the United Kingdom[70] and of Trinidad and Tobago[71] seek to regulate the kind of exemption clauses that might be inserted in certain consumer contracts. This regulation cannot be avoided by simply choosing a foreign law as the governing law of the contract.[72] Again, the parties' choice of a foreign forum will also be struck down if the practical effect is to allow the evasion of overriding local statutes guaranteeing, for example, consumer protection in insurance contracts.[73]

2. Section 4(2): abolition of forum conveniens

Section 4(2) progresses beyond the view doubting the legitimacy of the convenience theory where the plaintiff sues as of right. The subsection abolishes the doctrine even in instances where jurisdiction is based upon service of the *writ ex juris*, i.e., on the defendant in a foreign country, pursuant to the terms of Order 11. Section 4(2) provides as follows:

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66. *See* Anderson, *Caribbean Perspective*, *supra* note 1, at 58-84.
67. *Id.* at 61 (quoting BARB. CONST. ch. III. § 18(8),(9).
68. [1984] 1 All E.R. 694, 701 (Eng. P.C.) (emphasis added).
69. [1977] 1 App. Cas. 195, 221 (Eng. P.C.) (emphasis added).
70. Unfair Contract Terms Act, 1977, 50 (Eng.).
71. Unfair Contract Terms Act, 1985, no. 28 (Trin. & Tobago).
72. Unfair Contract Terms Act, 1977, 50, § 27(2) (Eng.); Unfair Contract Terms Act, 1985, no. 28, § 17(2) (Trin. & Tobago).
73. Akai Pty. Ltd. v. The People's Ins. Co. [1997] 141 A.L.R. 374 (Austl.). *See also* Winston Anderson, *Party Autonomy and Overriding Statutes in Private International Law: The High Court of Australia Takes the Lead*, 9 CARIB. L. REV. 16, 16-25 (1999) (discussing *Akai*).

> Where the Court has jurisdiction to effect service out of the jurisdiction under Order 11 of the Rules of the Supreme Court (Revision) 1970, such jurisdiction will apply where the plaintiff has established to the satisfaction of the Court that the proposed cause of action falls within one of the categories under the Order.

Traditionally, an applicant for leave to serve the writ *ex juris* under Order 11 was required to satisfy both a question of law (that the cause of action fell within one of the categories of the Order) and a question of discretion (that this was a proper case for the court to allow service out). These requirements are disjunctive in that the applicant may establish applicability of Order 11, but could then be refused leave because the local forum was not the most appropriate for trial.[74] *Spiliada*, itself a case on Order 11, confirmed the principle, found in a long line of cases, that the court would only exercise its discretion to allow extra-territorial service if the court itself is the forum conveniens.[75] That learning is now swept away by the Act. Henceforth, the requirement that the applicant satisfy the question of law is sufficient. There is no further requirement that a question of judicial discretion be satisfied.[76]

3. Section 4(3): lis alibi pendens

A very limited role is retained for *forum non conveniens* by section 4(3). Where relevant proceedings are pending in a foreign forum *other than* the forum in which the cause of action was stayed or dismissed, it is permissible "to suspend the local proceedings until the conclusion of those foreign proceedings or until such other time as the local court shall determine". This provision is based on the stream of law developed in *The Atlantic Star* case.[77] The intent is to give another foreign court the opportunity to "do the right thing" and deliver judgment on the

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74. Amin Rasheed Shipping Corp. v. Kuwait Ins. Co. [1983] 2 All E.R. 884.

75. [1986] 1 App. Cas. 460 (Eng.).

76. Accordingly, in *Delgado v. Shell Oil Co.*, the jurisdiction of the Dominica courts would have been established simply on the basis of the applicants' proof that the tort had been committed within Dominica, thereby requiring the courts to permit service out. 890 F. Supp. 1324 (S.D. Tex. 1995).

77. [1974] 1 App. Cas. 436, [1973] 2 All E.R. 175.

merits before the Dominican courts become obliged to bring the radical provisions of the Act into operation.

This is a worthy objective, although the provision could be criticized for being applicable only to section 4(1) actions (where the plaintiffs sue as of right) and not to actions falling under section 4(2) (where the applicant establishes jurisdiction under Order 11). This is an anomaly that does not further the objective just described. At all events, it should be noted that the judicial power is to "suspend" (rather than "dismiss" or "stay") local proceedings in the face of a *lis alibi pendens.* Furthermore, that power can only be exercised where it appears "just and convenient" to do so.

4. Conclusion

The abolition of *forum non conveniens* in Dominica does not merely ensure judicial fidelity to the constitutional rights of litigants, it also closes another loophole to unscrupulous transnational defendants. It is not beyond the realm of possibility that having successfully argued that the doctrine prohibited the hearing of their case in their home country, defendants could then also argue that it prohibited the hearing of the case in the plaintiffs home country as well.[78]

To be fair, in both *Delgado* and *Recherches,* the foreign forum, before dismissing, sought to ensure that trial could take place in the local forum. In *Delgado*, Justice Lake made his dismissal of the plaintiffs' action conditional "upon acceptance of jurisdiction by the foreign courts involved in [the] cases."[79] In the event that the highest court of any foreign country finally affirmed the dismissal for lack of jurisdiction, the action could be returned to the United States for resumption "as if the case had never been dismissed."[80] In *Recherches,* Justice Maughan found that the Guyana court had jurisdiction, and noted that "Cambior had undertaken not to invoke any ground based on *forum non conveniens* if the Court [dismissed the action] and the victims of the spill instituted suit in Guyana."[81] These comments are, respectfully, very apposite.

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78. This argument could succeed because different courts use different criteria to decide upon the convenient forum.

79. *Delgado*, 890 F. Supp. at 1357.

80. *Id*. at 1375.

81. Recherches Internationales Quebec v. Cambior Inc., unreported judgment of Aug. 14, 1998 (Canada Superior Court, Quebec, no. 500-06-000034-971).

The African and Latin American response to this conundrum was interesting. Active consideration was given to legislation that would deny local courts any jurisdiction to hear cases dismissed on discretionary grounds in foreign forums.[82] The objective was to ensure a return of the DBCP cases to the United States. If, despite Justice Lake's assurances, the United States refused to accept jurisdiction, the legislation would then make special provision for the hearing of the case locally.[83]

By contrast, section 4 of the Transnational Causes of Action Act of Dominica is concerned, first and foremost, with emphasizing a positive duty imposed upon the local court. This is the responsibility, abdicated by others, of determining transnational disputes in the interests of all the parties, in the interest of justice, and in the interest of bringing the matter to closure. The legislation is based upon the idea that the state, through its courts, has an obligation to protect citizens and residents from transnational wrongs and thus accords with similar views expressed in the Canadian case of *Moran v. Pyle.*[84]

C. Consolidation of Action

A major weakness of Caribbean rules governing the local prosecution of civil claims with respect to multi-jurisdictional torts is the real risk of fragmentation of the lawsuit. Fragmentation might occur by virtue of the claim being pursued in different countries and/or by the necessity to bring individual local actions and is normally the effect of dismissals in cases such as *Delgado.*[85]

1. Internal atomization

Section 6(1) attempts to deal with the prospect of internal atomization by empowering the court to allow the mass trial of actions. It provides that:

> When in a transnational cause of action under this Act it appears to the Court that common questions

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82. *See supra* note 20 and accompanying text.

83. These provisions included such matters as the posting of a bond; attorney's fees; presumption of ecological violation; tables of amounts payable for compensation in respect of harm suffered; retroactivity of the law; non-discrimination between nationals and foreigners; interpretation in favor of the plaintiffs; and preservation of penal action. *See, e.g.*, Ecuador Debate, *supra* note 19.

84. [1973] 43 D.L.R. 3d. 239, 250-51.

85. This effect, it should be noted, is a primary motivation behind the invocation of *forum non conveniens.*

> of law or fact or both are raised or are likely to be raised by more than one plaintiff with respect to the same action the Court shall allow for –
> (a) consolidation of the action;
> (b) representative action; or
> (c) class action.

Consolidation of actions, representative actions, and class actions are very well known devices in United States jurisprudence that facilitate expeditious resolution of complex litigation, particularly those involving product liability.[86] These techniques are less well known in the Caribbean although some provision is made for the use of consolidated actions in the Rules of the Supreme Court (RSC) in the broad context of civil litigation. Under the RSC, where two or more causes or matters pending in the same court relate to common questions of law or fact, rights, or claims arising out of the same transaction, the Court may take certain measures to save costs. The Court may order that:

> (a) the causes or matters be consolidated, i.e., treated as one action;
> (b) the actions be consolidated so far as the common issues are concerned but thereafter tried separately;
> (c) the actions be tried at the same time;
> (d) one action be tried first and that the remaining actions be stayed until the result of the test case is known; and
> (e) one action be tried immediately after another so that the judge hears the evidence in all actions, sometimes before giving judgment in any.

An example of the workings of consolidation is provided by the English case of *Healey v. A. Waddington & Sons.*[87] In that case, a colliery accident resulted in the death of six miners and serious injuries to two others.[88] The dependants of the deceased and the injured men brought separate actions in the tort of negligence against the owners of the mine.[89] However, the judge ordered

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86. *See, e.g.*, *Brits Adopt U.S.-Style Tort Litigation Methods*, NAT'L L.J., Jan. 13, 1997.

87. 1 W.L.R. 688 (1954). *See also* DAVID BARNARD & MARK HOUGHTON, THE NEW CIVIL COURT IN ACTION 52 (1993).

88. *Healey*, 1 W.L.R. at 688.

89. *Id.*

that one action be tried first as a test case on the issue of liability.[90] The defendants were dissatisfied with the notion of a test case because they felt that different questions on liability arose with respect to the different claims.[91] At the same time, it was obvious that six separate cases would cause significant expense, most of which would be unnecessarily incurred.[92] Accordingly, the Court of Appeal ordered that the actions be consolidated on the question of liability so that slightly different issues in respect of each action could be heard together and determined at one time.[93] However, the court directed that there should then be separate trials on the issues of quantum of damages.[94]

Representative actions are also familiar to Caribbean law books but have very rarely been used in practice. Under the RSC, a representative action may be ordered where there are so many people having an interest in the proceedings that it would be impractical to join all of them as co-plaintiffs or co-defendants.[95] In England, such representative actions (also known as "class actions") are based upon the fact that all persons represented have a common interest that is threatened, and that the relief claimed will benefit all of them.[96] A good example of the certification of such a representative action is provided by the "open" litigation in *Nash v. Eli Lilly & Co*.[97] However, it is clear that this kind of action, which is available to allow the plaintiffs to sue the defendants collectively, lacked the "procedural and evidentiary advantages [of] a class action."[98]

The Transnational Causes of Action Act uses the terms "consolidation of the action," "representative action," and "class action" in ways analogous to their usage in English and North American law.[99] Indeed, the three terms were employed instead of one in order to accommodate both the English and the American contexts in which the Act is likely to be utilized. So, following the *Delgado* dismissal, a representative action was filed in the High Court of Dominica, and a class action was also

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90. *Id*. at 689.
91. *Id*.
92. *Id*.
93. *Id*. at 689-90.
94. *Id*.
95. *See generally*, The Judicature (Civil Procedure Code), cap. 177 of Jamaica. Title 15, esp. at sections 89-92.
96. BARNARD & HOUGHTON, *supra* note 87.
97. 1 W.L.R. 782 (1993).
98. *Recherches*, unreported judgment no. 500-06-000034-971 at XX
99. Act no. 16 of 1997 (Commonwealth of Dominica), § 6(1).

initiated although the class was, at the time of settlement, still to be certified by the Court.[100]

2. External atomization

There is little that a Caribbean legislature or court could do to avoid external atomization apart from facilitating trial within its domestic legal system. Of course, there is always the possibility of issuing an anti-suit injunction restraining trial in the foreign forum, but the cases emphasize that the anti-suit injunctions should be issued sparingly and never in breach of the rules of comity.[101] Certainly, the injunction should not be issued if it would be ineffective because it was issued against a foreign defendant who was not a resident within the forum.[102] In these circumstances, the Act makes a simple plea for international cooperation to defeat external fragmentation, albeit in doing so, it potentially allows implementation of treaties without need for specific transforming legislation.[103] Section 6(2) of the Act provides: "to facilitate the expeditious and just settlement of the issues between the parties and to co-operate with other judicial authorities whether within the Caribbean or elsewhere, the Courts shall give recognition to any international convention existing between the States of the parties."[104]

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100. Note: the typical action was styled as follows:

> IGNUS DEGALLERIE of Portsmouth and JOSEPH George of Castle Bruce suing on behalf of themselves and on behalf of and as representing all other farmers and farm workers in Dominica affected adversely in their health by the use of the chemical DBCP in certain pesticides, namely, Nemagon and Fumazone, manufactured and/or supplied by the Defendants
>
> PLAINTIFFS
>
> and
>
> SHELL OIL COMPANY, DOW CHEMICAL COMPANY, OCCIDENTAL CHEMICAL CORPORATION, AMVAC CHEMICAL CORPORATION, DEAD SEA BROMIDE CO. LTD., AMERIBROM INC., & BROMINE COMPOUNDS LTD. DEFENDANTS

101. Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak [1987] AC 871; Airbus Indus. v. Patel [1998] 2 All E.R. 257.

102. *In re* North Carolina Estate Co., 5 T.L.R. 328 (Ch. 1889).

103. Winston Anderson, *Treaty Implementation in Caribbean Law and Practice*, 8 CARIB. L. REV. 182, 185-211 (1998).

104. Transnational Act, *supra* note 22, § 6(2).

D. Posting of Bond

The matter of the posting of a bond is dealt with in section 5 which provides that:

> (1) Subject to section 4 the Court shall order that any defendant who enters an appearance makes a deposit in the form of a bond in the amount of one hundred and forty percent per claimant of the amount proved by the plaintiff to have been awarded in similar foreign proceedings.
> (2) The terms and conditions for the posting and disposal of a bond under subsection (1) shall be determined by the Court.[105]

This provision is necessary if the transnational suit, validly filed before a foreign court but transferred to Dominica at the request of the defendant, is to result in a judgment that may be enforced. Normally, the defendant will not have its place of business or have any assets in Dominica. Consequently, any judgment given locally against it will not usually be satisfied by a simple lien on its property. Instead, such judgment is to be satisfied from the bond itself. In the absence of a bond, satisfaction of judgment would probably face another round of complex, tiresome, and frustrating litigation to secure recognition and enforcement abroad.[106] Specifically, if the defendant's assets are in a country with which Dominica does not have a Recognition and Enforcement of Foreign Judgments Agreement, the effort to make the Dominican judgment effective there might well be futile.

The figure of 140 percent of the total claim was enacted to take into consideration the satisfaction of an award of damages as well as the associated costs. In this regard, the Act simply adopted the precedent set in other developing countries grappling with similar problems. The Law of Defense of Procedural Rights of the Citizens and the Residents, considered by the Latin American legislatures, makes provision for the posting of a bond of 140 percent of the sum awarded in similar suits abroad to "take care" of any compensation awarded to the claimants' expense and

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105. *Id.* § 5.

106. *See, e.g.*, Anderson, *Strikes Again, supra* note 8, at 87 (stating that in the DBCP saga the defendants indicated the intention of using every available device to ensure that any judgment given in the plaintiffs' home country would remain unsatisfied).

procedural costs.[107] It is worth emphasizing that the plaintiff bears the burden of proving (a) the similarity of foreign proceedings, and (b) the amount awarded in those proceedings. Where the plaintiff does not discharge the burden of proof, the section simply does not apply. Where the section does apply, and the defendant fails to make good on the bond ordered, the defendant has committed a contempt of court and will susceptible to punishment in the usual way (i.e., by sanctions including reprimand, dismissal of defense, fine, or imprisonment).

Legislative empowerment of the court to require the posting of a bond gives rise to certain problems, the most important of which shares a similarity with the requirement for provision of security for costs. In *Smithfield Foods Ltd. v. Attorney-General of Barbados*,[108] the Privy Council acknowledged that the judicial staying of proceedings, until the applicant made a large deposit as security for costs, could amount to violation of the constitutional guarantee of protection of the law. On the other hand, section 5(1) is unlikely to be the subject of a successful challenge for several reasons. First, section 5(2) provides that the terms and conditions for the posting and disposal of the bond "shall be determined by the court."[109] A judicial tribunal therefore makes the ultimate decision concerning all matters concerning the bond. An influential factor may well be the strength of the plaintiff's case. For example, the court may require that the plaintiff prove that there is a substantial issue to be tried and that there is reasonable likelihood of success. This may roughly approximate the requirement for the plaintiff's proof of a *prima facie* case.

Second, a defendant who is unhappy with the court's decision has a right of appeal in the usual way. *Smithfield* itself went on appeal to the Privy Council, which eventually rejected the argument that the deposit, as security for costs, was unconstitutional.[110] Third, it is becoming commonplace for defendants, eager to avoid litigation in their own home country, to agree to the posting of a bond or to satisfy any final judgment rendered in favor of the plaintiffs by the foreign court.[111] In this way, the requirement for the posting of a bond merely codifies

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107. *See supra* notes 19 & 83.

108. 1 W.L.R. 197 (1992).

109. Transnational Act, *supra* note 22, § 5(2).

110. The Court held that a remedy other than a constitutional challenge was available to the applicant; specifically, the applicant should have appealed the judge's order. *See id.* at 201 (quoting BARB. CONST. ch. III, § 24(2)). Therefore, constitutional redress could not be granted by the court.

111. *See, e.g.*, Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1369 (S.D. Tex. 1995).

undertakings given in foreign judicial proceedings. Fourth, the award is made subject to section 4 where, as mentioned above, the court retains a discretion to suspend local proceedings in favor of pending proceedings in a foreign forum.

Whatever the legal niceties, the enactment of section 5 achieves the powerful indication of the intention to checkmate *forum non conveniens*. Read in conjunction with sections 9 and 12, it becomes obvious that the Act proposes to facilitate awards comparable to those that would be made in similar foreign proceedings. Avoidance of such awards is the single most important reason for the invocation of convenience doctrine. It therefore follows that the Act should serve to remove the main incentive for pleading that the defendant's home court (where the original action is likely to have been brought) is not the appropriate place for trial. The provision on the posting of bonds was therefore intended to make trial unattractive in the *plaintiff's* home country and thereby promote trial in the *defendant's* home court, in the first place.

E. Governing Law

Section 7 takes the opportunity presented by the DBCP litigation to effect a radical development of the common law rule concerning the governing law in transnational torts. The section provides as follows:

> (1) Without prejudice to subsection (2), the governing law of a transnational cause of action under this Act shall be determined in accordance with existing the rules whether statutory or common law.
> (2) Where an action is founded in tort or delict, the right and liabilities of the parties with respect to a particular issue or the whole cause of action shall be determined by the local law of the country which, as to the issue or cause of action, has the most significant relationship to the cause of action and the parties.
> (3) In determining the significance of the relationship the Court shall take into account all relevant circumstances, including the following factors:

> (a) the place where the injury occurred;
> (b) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
> (c) the place where the relationship, if any, between the parties is centered.[112]

Section 7(1) makes pellucidly clear that Dominica's law, as the *lex fori*, determines the identity of, but need not itself be, the governing law or *lex causae*. The identity of the *lex causae* is derived from section 7(2), which engineers a complete overhaul of the traditional rules as derived from *Phillips v. Eyre,*[113] and modified in *Boys v. Chaplin*[114] and *Red Sea Insurance Co. v. Bouygues SA*.[115]

The old law was complex and highly unsatisfactory. In order to establish a tortious claim in Dominica for a wrong alleged to have been committed abroad, the plaintiff had to establish two elements. First, that the wrong would have been actionable had it been committed in Dominica, and second, that the wrong was actionable as a tort by the law of the place where committed. The requirement that the plaintiff must satisfy both the *lex fori* and the *lex loci delicti commissi,* appropriately dubbed the "rule of double actionability," was subject to severe and cogent criticism.[116] Most obvious was its unique disadvantage to the plaintiff in having to establish his cause of action under two systems of law rather than one system, as per the normal requirement in private international law.

Boys did suggest, in 1971, that in exceptional circumstances, the rule of double actionability could be ignored with respect to an issue in controversy; the (single) system of law most closely related to that issue and the parties could be applied to determine liability.[117] This suggestion, acted upon in a series of first instance judgments,[118] led to the assertion that English courts had accepted Dr. Morris' proper law of torts.[119] In 1984 the

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112. Transnational Act, *supra* note 22, §7.

113. [1870] L.R. 6 Q.B. 1.

114. [1971] App. Cas. 356 (appeal taken from Eng.).

115. [1994] 3 All E.R. 749.

116. M'Elroy v. M'Allister [1949] S.L.T. 139; DAVID MCCLEAN, MORRIS: THE CONFLICT OF LAWS 353-77 (5th ed. 2000).

117. Boys v. Chaplin [1971] App. Cas. 356 (appeal taken from Eng.).

118. *See, e.g.*, Coupland v. Arabian Gulf Oil Co., 1 W.L.R. 1136 (C.A. 1980); Church of Scientology of Cal. v. Commissioner of Metro Police, 120 Sol. J. 690 (C.A. 1976).

119. *See* MCCLEAN, *supra* note 116; J.H.C.M., *Torts in the Conflict of Laws*, 12 MOD. L. REV. 248 (1949).

English Law Commission did indeed recommended legislative reform to provide for the adoption of the proper law,[120] and in 1994 the Privy Council's decision in *Red Sea Insurance Co. v. Bougues SA* confirmed the suggestion in *Boys v. Chaplin* that the proper law could be applied as an exception to double actionability.[121]

Section 7(2) moves significantly beyond *Red Sea.* First, *Red Sea* had merely provided for adoption of the "most significant relationship" test as an *exception* to the general rule requiring double actionability.[122] The most cogent criticism of the case was the lack of clarity as to when the exception would apply. By contrast, the Act of 1997 makes the proper law the rule for identifying the governing law and does not allow for any exceptions. Second, *Red Sea* suggested that the proper law could be the *lex loci delicti commissi* rather than the *lex fori*, which admittedly, clarifies one of the many questions left by *Boys*.[123] But the Act goes even further by opening up the distinct possibility that the *lex causae* could be the law of a third country. Third, the statutory provision gives the precise definition of the proper law offered by Morris in the *fons et origo* of the concept, and it keeps substantive faith with the description used in the American Restatement (Second) of the Law of Torts, Conflict of Laws, which is widely accepted as adopting the proper law concept.[124] The factors that the court must take into account in determining the significance of the relationship reproduces the considerations mentioned by both Morris and the American Restatement.

Any possibility of the application of the doctrine of *renvoi* is excluded by use of the "local" law of the country with the most significant relationship to the cause of action and the parties. It should also be borne in mind that the proper law test applies only to actions falling under the scope of the Act; other transnational torts remain governed by the common law rules as enshrined in Red Sea.[125]

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120. *But see* Jonathan Harris, *Choice of Law in Tort - Blending in with the Landscape of the Conflict of Laws*?, 61 MOD. L. REV. 33 (1998) (noting that the eventual statute, Private International Law (Miscellaneous Provisions) Act of 1995, part III (Eng.), adopts the law of the place where the tort was committed as a rule, as the governing law of the transnational tort).

121. *See* Red Sea Ins. Co. v. Bouygues SA [1994] 3 All E.R. 749.

122. *Id*.

123. *Id*.

124. *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279 (1963).

125. *See* Red Sea Ins. Co. 3 All E.R. at 749.

Finally, the provision applies only in relation to an action founded in "tort or delict." It does not apply to identification of the governing law in contract which continues to be governed by rules outside of the Act. Where an action in respect of a wrong is framed in tort but also gives rise to a contractual claim, the availability of a defense based upon the contractual terms would appear to depend initially upon the provision of the governing law of the contract and ultimately, upon any overriding rules of public policy in the forum. To put the matter squarely, if the Dominican courts were persuaded that the Act embodied overriding public policy considerations, the provisions would apply regardless of whether exculpatory claims in contract were valid under the governing law of the contract.[126]

F. Strict Liability

Where a transnational tort to which the Act applies is governed by the law of Dominica, there is no longer a requirement that the plaintiff establish that the defendant acted negligently.[127] Section 8(2) imposes strict liability upon any person who manufactures, produces, distributes or otherwise places any product or substance into the stream of commerce which results in harm or loss.[128] Harm or loss is covered whether it is caused by the use or consumption of the product or substance. Moreover, the regime of liability without fault exists whether the defendant is a national, a domiciliary or resident, or is otherwise incorporated or carrying on business in a foreign country. Whether contractual terms in agreements for sale for the product or substance could take precedence over the legislative protection given to tortious claims depends upon the considerations just discussed.[129]

G. Judicial Notice of Evidence in Foreign Proceedings

A fundamental rule in private international law is that the forum does not take judicial notice of foreign law. Consequently, foreign law must be pleaded and proved before it can be applied in

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126. Brodin v. A/R Seljan [1973] S.L.T 198. I am grateful to Diana Thomas, one of the students in my 2000/01 Private International Law class, for reminding me of this case in the context of contract defenses to tort claims.

127. The terms of negligence are expounded by Lord Atkin. Donohue v. Stevenson [1932] App. Cas. 562.

128. Transnational Act, *supra* note 22, § 8(2).

129. *See supra* text accompanying note 126. *See also* Sayers v. International Drilling 1 W.L.R. 1176 (C.A. 1971) (discussing the effect of a contractual exemption clause on a tort claim).

the forum. In the absence of such allegation and proof, the forum must apply its own law simply because there is no other law of which it can take notice.[130] This rule, which extends to evidence tended in foreign proceedings in order to establish the cause of action, has been modified by another innovative provision of the Act. Section 9 provides that Dominican courts "shall take judicial notice of evidence presented and accepted by foreign courts in similar proceedings involving the same or similar parties, or the same or similar causes of action."[131]

Section 9 was inserted to ensure access by the local courts to probative evidence adduced in foreign proceedings. In *Delgado*, for example, the defendants had stipulated to more than 100,000 documents in the United States. Judicial findings had been made concerning the toxic and carcinogenic effects of the chemical upon human beings and the environment. Jury awards in excess of $1 million had been returned. Without this evidence the court in the plaintiffs' home country would have to start from scratch. It would be forced to endure months of contentious evidence, hear conflicting opinions from expert witnesses, and decide afresh with the risk of coming to a contrary view to that adopted abroad in relation to the same issue. Contrary findings of fact in the hundreds of lawsuits scheduled to be heard in over 23 countries had the potential to bring the law into disrepute. Reinventing the wheel also carried the risk of gratuitous and unnecessary embarrassment to the plaintiffs.[132]

An important and salutary feature of section 9 is the wide margin of discretion left to the court. It is for the court to decide, for example, whether the foreign proceedings meet the test of similarity so as to allow the introduction of the evidence. The court also decides upon "the value and weight it shall attach to such evidence."[133]

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130. *See, e.g.*, Warner Bros. Pictures, Inc. v. Nelson [1937] 1 K.B. 209; Schneider v. Eisovitch [1960] 2 Q.B. 430. These cases are cited in Winston Anderson, *Conflict of Laws Points Arising from Belle v. Belle*, 17 COMMONWEALTH L. BULLETIN 1079, 1080 (1991).

131. Transnational Act, *supra* note 22, § 9.

132. Note the intention of the defendants, expressed in the DBCP saga, to explore all possible causes of infertility on the part of the plaintiffs other than their exposure to the chemical. It was also feared that this line of inquiry could cause significant tension in many families since doubts surrounded the paternity of some children originally thought to be fathered by the plaintiffs.

133. Transnational Act, *supra* note 22, § 9(2).

H. Court Orders Including Awards of Compensatory, Exemplary, and Punitive Damages

Sections 10, 11, and 12 empower the court to make a variety of orders where a transnational cause of action is established to its satisfaction. The court may order (a) that an apology be made by the defendant to the plaintiff, (b) publication of the facts about the defendant's product in newspapers, health magazines and journals in Dominica and abroad, (c) the placing of advertisements and warnings about the defendant's products, and (d) the publication of the health, environmental, and economic consequences of the wrongful act of the defendant.[134] These kinds of orders, which seek to bring home to the defendant the ethical and moral culpability of the wrongful act, have been possible in other regulatory contexts in Belize,[135] and have been used to good effect in Canada in environmental cases.[136]

1. Award of damages

The award of compensation is usually central to the superficial wrangling over forum non conveniens. The American system of jury awards in tort and delict is very attractive to persons allegedly injured by the actions of American corporations. American defendants, on the other hand, have the opposite incentive to keep the litigation out of American Courts. In circumstances where 26,000 plaintiffs alleged infliction of chemical castration and cancer caused by the deliberate, cynical, and contemptuous behavior by the defendants, it is not hard to imagine the financial damage that could be inflicted by the outrage of an American jury.[137] In practice, the frequent dismissals on the basis that foreign courts are more "convenient" for trial now commonly effect a windfall for corporate defendants.

2. Compensatory, punitive and exemplary damages

The Transnational Causes of Action Act "checkmates" the convenience stratagem in two ways. First, compensatory damages are always awarded upon proof of loss or harm caused

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134. *Id*. § 10(2).

135. Environmental Protection Act, no. 2 of 1992, §34 (Belize).

136. *See, e.g*., R. v. Northwest Territories Power Corp. [1990] 5 C.E.L.R. 67.

137. Note Justice Lake suggested that American juries would apply the measure of damages awarded in the plaintiffs home countries. Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995). This view runs counter to the well accepted principle that the quantum of damages is a matter for the law of the court hearing the case. Boys v. Chaplin [1971] App. Cas. 356 (appeal taken from Eng.).

by the culpable conduct of the defendant. Beyond this, section 11(1) provides that the court "shall" make an award of exemplary or punitive damages in particular circumstances.[138] Such awards may only be made where the court is satisfied that the defendant (a) acted in bad faith or in reckless disregard for the welfare of others, or (b) having knowledge of the likely harm, nevertheless persisted in the relevant action with a motive for making a profit. This reflects the common law rules as outlined in *Rookes v. Barnard*.[139] The Act then goes beyond the common law to specify some of the pertinent factors to be considered in a transnational product liability case, many of which fit hand-in-glove with the allegations against the defendants in *Delgado*. Thus, the Court must take into account the fact, if established:

> (a) that the defendant continued to produce or sell any product or substances after the product or substance was banned or its use restricted in the country of manufacture or in any other country in which it was used or consumed;
> (b) that the defendant failed to issue a warning to the Government of Dominica or to any other relevant person of the harmful effects of the product or substance;
> (c) that where a warning was issued under (b) the warning was inadequate; and
> (d) that the defendant had been guilty of relevant culpable past conduct.[140]

Second, the Act creates exciting history by linking the level of damages that may be awarded by the courts in Dominica to the damages awarded in the defendants' home country. Section 12 is therefore critical to the entire legislative regime. The court is obliged to take judicial notice of awards made in relevant foreign proceedings.[141] This obviates the need for the plaintiff to adduce evidence of awards though, as a matter of practice, Counsel would normally make sure that the court is fully cognisant of them. The effect of evidence of awards in analogous cases is detailed in section 12(1). In awarding damages, whether exemplary or punitive, the court "shall consider and be guided by" awards made

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138. Transnational Act, *supra* note 22, ¶ 11(1).
139. [1964] App. Cas. 1129 (Eng.).
140. Transnational Act, *supra* note 22, § 11(2).
141. *Id*. § 12(2).

in similar proceedings in other jurisdictions.[142] In particular, the court must be guided by "damages awarded in the Courts of the country with which the defendant has a strong connection whether through residence, domicile, the transaction of business or the like."[143]

Some important limitations placed on applicability of these provisions should be noted. First, punitive damages focus on the defendant and intend to punish outrageous conduct. The statute concedes that, in the case of multinational corporations, the objective of deterrence cannot be achieved by an award conditioned by local precedents. Accordingly, awards comparable to those given in foreign proceedings appear desirable. However, the Act does not bring an award of compensatory damages within the requirement for comparability with foreign awards. Compensation reflects the magnitude of loss or harm sustained, and common law rules establish that compensatory awards must reflect the economic circumstances of the victim and, by implication, the victim's environment. It was felt that these rules should not be disturbed.

Second, in order to obtain an award of exemplary damages, the plaintiff bears a heavy burden of proving contumacious conduct. Third, enforcement of an award of punitive damages could be problematic because there is room for debate concerning whether the amount to be posted for the bond refers to and reflects compensatory or exemplary damages. Foreign enforcement could also be troublesome because of the argument that a local award of punitive damages is penal, and therefore not enforceable abroad, although, it should be noted, Lord Denning was of the exact opposite view in *SA Consortium General Textiles v. Sun and Sand Agencies Ltd*.[144] In that case he asserted that exemplary damages which go to the individual litigant are not punitive, and therefore do not fall under the bar prohibiting enforcement of penal laws.[145]

It is conceded that, prima facie, there could be a difficulty in seeing how a Dominican court could award punitive damages in light of the fact that the choice of law rules under section 7 empower the Dominican court to apply the law of another country, which in relation to the cause of action, or a particular

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142. *Id*. § 12(1).
143. *Id*.
144. [1978] 1 Q.B. 279, 282.
145. *Id*. *See*, to similar effect, Huntington v. Attrill [1893] AC 150.

issue, has the most significant relationship.[146] However, fixation on this difficulty ignores the possibility that Dominican law could be the governing law of the tort. Moreover, even where a foreign law is relevant, under traditional common law rules as interpreted, for example, in *Boys v. Chaplin,* quantification of damages is a matter for the *lex fori*.[147] A fortiori, where legislation requires a court, when satisfied of the establishment of the transnational cause of action, albeit the latter by reference, possibly, to a foreign law, to make financial awards upon specific criteria.

I. Enforcement, Limitation Period, and Retroactivity

Section 13 encourages the enforcement of judgments given in transnational causes of action in member states of the Caribbean Community (CARICOM). Where such a judgment has been rendered, the courts in Dominica are required to promote its enforcement in Dominica and other CARICOM states. However, the court can only act in this way "in accordance with any applicable international convention and customary practice."[148] Accordingly, these provisions merely restate current private international law principles. The court may grant a *mareva* injunction where it is necessary and appropriate to do so.[149] For example, this power is likely to be used to prevent "asset-stripping," i.e., the removal of assets from the Dominican jurisdiction, which may otherwise frustrate judicial efforts to facilitate enforcement of a judgment given in a transnational dispute.[150]

Section 14 provides that the limitation period for bringing a transnational cause of action under the Act shall be six years.[151] The period of limitation runs from the date on which the cause of action arose, or, alternatively, from the time the plaintiff knew or ought to have known of the cause of action and the person against whom to proceed. Largely, this reproduces the current rules. An innovative element is introduced by section 14(2)(c) which provides, as another alternative commencement point for the limitation period, the date on which the transnational cause of

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146. McDowell, *supra* note 23, at 123-24.
147. [1971] App. Cas. 356.
148. Transnational Act, *supra* note 22, § 13(2).
149. *Id*.
150. *See* MCCLEAN, *supra* note 116, at 396-98.
151. Transnational Act, *supra* note 22, § 14(1).

action was "stayed or finally dismissed in a foreign forum."[152] For tactical reasons, Dominican plaintiffs arguing that a foreign court is the most appropriate forum for trial may be reluctant to file for action in Dominica until the jurisdictional issue is resolved in the foreign court. But foreign litigation over proper venue frequently takes upwards of a decade,[153] and is resolved long after the local limitation period has expired. The provision, which codifies undertakings normally given in DBCP or OMAI type litigation to waive defenses based on time-bars, ensures that the local court will not dismiss actions that would otherwise be considered "stale claims." Section 14(1)(c) makes clear that the various commencement points for the six-year period of limitation are disjunctive. Thus, the period begins to run from any of the three commencement points, whichever is "latest."[154] In the normal course of events, this would be the date on which the *forum non conveniens* issue is finally resolved in the foreign court.

Section 15 provides that the Act shall have retroactive effect on all actions that are pending at the date of its enactment. This ensures its application to the DBCP litigation, which was then pending.

IV. CONCLUSION

The 1997 Transnational Causes of Action Act of Dominica represents a significant Caribbean contribution to the jurisprudence of private international law. It does not contain all the protections sought by the local plaintiffs in transnational actions,[155] and it has been criticized for being excessively focussed

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152. *Id.* § 14(2)(c).

153. *See* Robertson, *supra* note 53. In *Delgado*, for example, the argument over the most appropriate forum began in 1984 and lasted until settlement in 1998. Moreover, litigants not accepting the settlement can expect to face further delay in finding the most appropriate venue for trial. Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995).

154. Transnational Act, *supra* note 22, § 14(1)(c).

155. The original draft of section 15 sought to encourage expeditious trial in Dominica by empowering the court to grant audience to foreign attorneys retained by the parties in the foreign action. Safeguards were suggested to ensure that the local court remained in control of the judicial process. Provision was made to ensure that participation by foreign attorneys did not lead to additional expense to the State, and that intervention by foreign attorneys did not have a negative impact on the local bar. It was argued that allowing an audience for foreign attorneys in the limited type of cases covered by the Act would have a salutary effect on the litigation process, and would lead to a more dynamic and specialized bar. However, such a provision had implications for Dominica's obligations under international treaties establishing the system of legal education and certification of Caribbean Attorneys, and thus was deleted from the bill before presentment to Parliament. *See* WINSTON ANDERSON, CARIBBEAN INSTRUMENTS ON INTERNATIONAL LAW 183 (Stone Publications, 1994).

on the need to remedy defects in one particular type of case.[156] Given the rather specialized area with which it deals, it is not expected that the Act will be used in everyday litigation. Further, the drafting of its provisions leaves large and important areas of discretion in the hands of local judges.

Nonetheless, the legislative effort of the Dominican House of Assembly and of the President of Dominica deserves the highest commendation. The Act is clearly a landmark development in "checkmating" the pernicious effects of *forum non conveniens*. The limited abolition of the doctrine does not in any way impinge upon the independence of the judiciary. Quite the contrary, it affirms the constitutionality of the right of access, and it is entirely consistent with the approach taken in virtually all civil law countries, as well as in countries within the European Union, and now, in the United Kingdom with respect to cases falling under the Brussels Convention.[157] Already, passage of the Act has had the salutary effect of facilitating a settlement of the long-running DBCP saga.

The statute speaks eloquently of the resolve of the legislature in the Commonwealth of Dominica to assert the rights of persons in that State against powerful corporate interests. The strength of that resolve is also illustrated by the fact that the Bill passed through the House of Assembly on a second reading without dissent. Unlike the attitude adopted elsewhere in the sub-region, the House was persuaded that there was no time to deliberate and arrive at consensus on "an OECS approach." In going it alone, Dominica has sent a clear and meaningful message to the international community in general and to other developing states in particular. That message is best articulated in the words of the Chief Justice of the Indian Supreme Court spoken in the context of upholding the constitutionality of broadly equivalent legislation enacted to protect the interests of victims of the *Bhopal Plant Gas Leak Disaster* against an American multinational corporation. The Chief Justice said:

> [W]hen citizens of a country are victims of a tragedy because of the negligence of a multi-national corporation, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievance and demands of the

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156. *See* McDowell, *supra* note 23.
157. *See* Anderson, *Caribbean Perspective, supra* note 1, at 51-102.

> victims, for which the conventional adversary system could be totally inadequate. The state in discharge of its sovereign obligation must come forward.[158]

158. Sahu v. Union of India, No. 258, 81-82.

CISG AND THE PROBLEM WITH COMMON LAW JURISDICTIONS

MONICA KILIAN*

Table of Contents

I. INTRODUCTION

Generally applauded as the most successful international trade treaty so far, The United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention")[1] is law in fifty-seven countries to date.[2] CISG is the culmination of

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1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. TREATY DOC. NO. 98-9 (1983); 19 I.L.M. 668-99 (1980); *see also Final Act of the United Nations Convention on Contracts for the International Sale of Goods*, Annex I, U.N. Doc. A/Conf.97/18 (1980), *in* Official Records, Conference on Contracts for the International Sale of Goods 178, U.N. Doc. A/Conf.97/19 (entered into force on Jan. 1, 1988) [hereinafter CISG].

2. CISG Database, *Participating Countries: Current Status, Trends*, *at* http://www.cisg.law.pace.edu/cisg/cisgintro.html (as of Apr. 30, 2000).

years of work spanning most of the 20th Century, representing compromises and solutions amenable to all legal systems whose representatives adopted the Convention.[3] The scope of the Convention is limited to contract formation and the rights and obligations of the buyer and seller.[4] The very fact that the drafters limited themselves to a narrow field of application within international trade suggests the difficulties inherent in formulating law that needs to be international in scope, application, and acceptance. It is no small triumph that CISG is law in all of the "contracting states" (i.e. countries that have ratified CISG), including the U.S., Australia, Singapore, and Canada – all of which share an English common law heritage.[5] Yet, there is very little case law concerning CISG in any of those countries. By contrast, civil law countries, particularly European Union members and newly democratized European countries, have reported a disproportionately large number of CISG cases.[6]

Out of the more than 600 CISG court cases documented in the CISG data base[7] (excluding International Chamber of Commerce (ICC) arbitrations and the Iran-U.S. Claims Tribunal), only twenty-one are from common law jurisdictions: one from Australia, two from Canada, and eighteen from the U.S.[8] Why is it that common law contracting states have not accepted CISG with the alacrity one might expect, given their prominent position in world trade? One of the more compelling answers is that courts of law in these particular countries remain acutely attuned to legal history (as the reverence for past legal tradition is peculiar to the common law). These courts appear to be loath to apply law that has not been created from within and, moreover, that may conflict with well-established domestic common law or

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3. *See id.* (62 states took part in the UN Diplomatic Conference in Vienna, which adopted CISG).

4. CISG, *supra* note 1, art. 4.

5. CISG Database, *Participating Countries: Current Status, Trends*, *at* http://www.cisg.law.pace.edu/cisg/cisgintro.html (the United Kingdom is, surprisingly, not a Contracting State).

6. *See* 1 UNILEX, International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods (Transnational Publishers, Inc.) (Sept. 2000) [hereinafter UNILEX] § C.

7. *See id.* (Arguably, it would be incorrect to draw conclusions based on the CISG database maintained by Pace University. Nevertheless, since the intent of CISG is to promote uniformity of application, CISG, *supra* note 1, art. 7, we can assume that courts who do decide on CISG would like their judgments to be known and accessible. After all, if international uniformity and harmonization is desired, there needs to be some way of communicating international decisions. To date, the CISG database seems to be the major central reference point, and for this reason, this paper will deal primarily with court cases reported on the CISG database).

8. *Id.*

codes[9] (such as the United States' Uniform Commercial Code (UCC)). U.S. court cases provide particularly glaring examples of how the U.S. legal system manages to ignore or even circumvent CISG.

Thus, this article turns to CISG cases decided in the U.S. and the reluctant acceptance of CISG in U.S. jurisdictions to show that statute law, such as CISG, does not best serve *lex mercatoria.* Furthermore, the rather arresting fact that the vast majority of CISG cases pertain to European jurisdictions appears to indicate a propensity towards regionalization, rather than the internationalization envisaged by CISG. This article concludes that a genuine l*ex mercatoria* is best housed in the realm of non-legally binding harmonizing agreements, such as the International Institute for the Unification of Private Law (UNIDROIT), and not in the comparatively intractable arena of statute law.

II. *LEX MERCATORIA* – THEORIES AND APPLICATIONS

A. Definitions of Lex Mercatoria

In its broad sense, the *lex mercatoria* refers to a body of law as well as trade practices and rules that international trading parties use to regulate their dealings.[10] In this article, l*ex mercatoria* is used in a general sense and conforms more or less to the definition offered by Berthold Goldman: "a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law."[11] For the purposes of this article, the definition is expanded to include some state law that is part of international law (such as CISG). This broad understanding of a *lex mercatoria* may not offer the kind of certainty afforded by a particular domestic law, but arguably serves international trade better, as it is able to take into account a continuously revolving set of rules whose validity is accepted by

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9. *But see* Roder Zelt-und Hallenkonstruktionen GmbH v. Rosedown Park, Pty. Ltd. (1995) 57 F.C.R. 216, http://www.cisgw3.law.pace.edu/cases/950428a2.html. Although the Australian court here accepted CISG, this is the only reported Australian CISG case and is thus statistically meaningless.

10. Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?*, *in* PACE DATABASE ON THE CISG AND INTERNATIONAL COMMERCIAL LAW (June 1998), *at* http://www.cisg.law.pace.edu/cisg/biblio/baron.html.

11. Berthold Goldman, *The Applicable Law: General Principles of Law – the Lex Mercatoria*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 116 (Julian D. M.. Lew ed., 1987).

the international commercial community, and may be enhanced, if the parties desire, by domestic law. It is precisely because a broad conception of *lex mercatoria* offers the possibility of including aspects of domestic laws that may be acceptable or normal to some trading partners, but not to others, that it is amenable to the international trading environment. International trade requires a greater flexibility and sensitivity to the legal and commercial backgrounds of each party than can be provided by domestic law, which by nature is biased towards its own legal tradition.

The concept of *lex mercatoria* stems from the medieval tradition originating in Europe, where special merchant courts came to decide disputes arising in transborder trade.[12] Gesa Baron lists five characteristics of the *lex mercatoria*, which distinguished it from any other kind of law:

> Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of the mercantile customs. Thirdly, it was not administered by professional judges but by merchants themselves . . . . Fourthly, its procedures were speedy and informal and finally fifthly, as overriding principles, it emphasized freedom of contract and decision of cases *ex aequo et bono*.[13]

The "new" *lex mercatoria* is modelled on much the same principles as the "old" one.[14] However, the romantic notion that the old *lex mercatoria* truly represented disinterested anationalism is, of course, a fallacy. There has never been a law that transcends domestic legal traditions, nor has there ever been a genuinely disinterested judiciary (or, in case of the medieval *lex mercatoria*, disinterested merchant judges). A judge cannot be genuinely independent of his or her own legal paradigm. Nevertheless, the myth - and utopia - of a *lex mercatoria* haunts legal scholars in search for harmonization of international law so that transborder trade may proceed without certainty and to the satisfaction and benefit of all trading parties. The *lex mercatoria*

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12. Baron, *supra* note 10.
13. *Id.*
14. *See id.*

is supposed to accomplish this with exclusive reference to a particular legal system.[15]

The *lex mercatoria* is therefore not a defined body of law, but consists mostly of general principles and trade practices, supplemented with the occasional piece of substantive law (such as CISG). Common complaints about the *lex mercatoria* are these: it is not a "real" law, there is no agreement about what forms part of it and what is excluded; it is vague and incoherent, and any decisions based on it will be arbitrary.[16] From this view, the *lex mercatoria* is an indefinable and mostly extra-legal set of principles based on ever-changing trade custom. As Keith Highet calls it, an "elusive and often frightening subject."[17] For this reason, it cannot be the law governing a contract, as it evaporates as a law as soon as a dispute arises and the question of applicable law is raised. The open notion of a *lex mercatoria* is strongly repudiated by commentators who are uncomfortable with the idea of a "floating" kind of transnational law that has no basis in an existing legal framework. Thus, Highet regards with horror the idea of a "state-free contract" which he believes is a contract without law[18] and, by implication, an unpredictable, anarchic creature that exists only in the minds and expectations of the parties. Such an informal arrangement between parties, he claims, is not a contract at all.[19] A stateless contract, is nothing but a mirage, as any enforcement or dispute resolution has to take place in a particular jurisdiction, and therefore the law of a particular domestic legal system need apply.[20] Despite the fact that Highet rashly equates a stateless contract with a lawless contract, he is quite right in asserting that a contract under *lex mercatoria* is best seen as a contract under *principia mercatoria*[21] (in the sense that there is no single, definable body of law called the *lex mercatoria*, which has equal legal authority, applicability and interpretation in every jurisdiction).

B. Lex Mercatoria as Law

Strangely, international trading partners occasionally stipulate that their contract is to be governed according to the *lex mercatoria*, although there is not such thing as a readily

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15. *See supra* text accompanying note 11.
16. *See id.*
17. Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 613 (1989).
18. *Id.* at 613-14.
19. *Id.* at 614.
20. *Id.* at 615.
21. *Id.* at 628.

identifiable *lex mercatoria*. It seems clear that the parties agree to be governed by a nonexistent law, because they believe that there is some sort of consensus in international trade to which reasonable commercial partners in a particular line of business would agree. In such contracts, onus is placed on whoever resolves the dispute (most likely an arbitrator), and the parties implicitly trust the adjudicator to take into consideration generally agreed principles of international trade law.

While probably not common practice, things like "natural justice," "general principles of trade," or the "*lex mercatoria*" occasionally govern the contract.[22] While contracting parties may believe that this is the most equitable way of dealing with potential disputes, in reality, applying such non-law is exceedingly difficult, even in arbitration. Some recent arbitral decisions have taken this opportunity to apply UNIDROIT Principles (which have no legal authority) as the law governing the contract, on the grounds that the UNIDROIT Principles "are today the most genuine expression of general rules and principles enjoying wide international consensus and as such should be applicable as the law governing the contracts in question."[23]

Nevertheless, most trading parties are not content to entrust an arbitrator to resolve their dispute by referring to something as nebulous as a *lex mercatoria*. Moreover, a court of law would most likely give short shrift to such a governing "law." Most courts would simply perform a conflict of laws analysis to determine which law to apply.

In contracts where there is no applicable law specified, arbitrators may be permitted to act as they see fit and to apply whichever rules of law they may decide are best (the idea of the arbitrator as *amiable compositeur).*[24] Of course, this occurs only with the permission of the parties, but relies, perhaps too much, on subjectivity. Although one of the major advantages of arbitration is flexibility, it is possible that this freedom can be taken too far. Being obliged to act as an *amiable compositeur* is doubtlessly stressful to the arbitrator, as the feuding parties may nevertheless suspect him of bias. There is no neutral yardstick against which his performance can be measured. Here is where the UNIDROIT Principles come into play. Indeed, in the absence

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22. Michael Joachim Bonell, *The UNIDROIT Principles on Practice – The Experience of the First Two Years,* 2 UNIFORM LAW REV. 34, 39 (1997), *available at* http://www.cisg.law.pace.edu /cisg/biblio/pr-exper.html.

23. *Id.* at 42.

24. Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 50, 70, *supra* note 11.

of a choice of law clause, the UNIDROIT Principles have been used as the law governing the contract in several arbitral decisions. For example, in Award No. 1795 of December 1, 1996 by the National and International Court of Arbitration of Milan, the parties agreed to settle the dispute 'in conformity with the UNIDROIT Principles tempered by recourse to equity.'[25] By being able to invoke the Principles to govern the contract, the arbitrator is in a sense relieved of having to act *ex aequo et bono* or as an *amiable compositeur*.[26]

Nevertheless, the notion that something like a *lex mercatoria*, which is no law at all, can be the chosen law governing the contract meets with considerable resistance in courts of law. How is it to be administered, interpreted, or enforced? How can a "law" floating in an extra-legal space (i.e. international space, which is a legal orphan) have the same binding force as properly legislated state law, or even common law? Considering *lex mercatoria as* a law is, in the words of Highet, "a logical impossibility and an intellectual solecism."[27] This may be true. However, contracting parties nevertheless continue to use clauses referring to rather vague things like "general principles of law" and "*lex mercatoria*." It would be presumptuous to infer that this choice of non-law as the applicable law implies that the parties are unaware of the importance of choice of law. To the contrary, the parties consciously reject domestic law because they do not want, or cannot agree, to be subjected to a particular legal system that one of the parties is unfamiliar with. Instead, they prefer to take any disputes to legally neutral grounds. This kind of choice of non-law, however, is better suited to arbitration than litigation. Courts of law will most likely apply domestic law rather than the UNIDROIT Principles, although the consensus is that the UNIDROIT Principles most closely reflect a *lex mercatoria*.

It is perhaps because the UNIDROIT Principles are seen as a convenient way of defining the *lex mercatoria* that some countries have used them in formulating their new commercial laws. The UNIDROIT Principles have "served as an important source of inspiration in some of the most recent codifications," including the Dutch Civil Code, the new Civil Code of Quebec and the new Civil Code of the Russian Federation.[28] Bonell also notes that Lithuania, Estonia, Czech Republic, Scotland, Tunisia, New

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25. Bonell, *supra* note 22, at 43.
26. Jarvin, *supra* note 24, at 70.
27. Highet, *supra* note 17, at 614.
28. Bonell, *supra* note 22, at 37.

Zealand, and fifteen states in Africa referenced the UNIDROIT Principles in new draft legislation.[29]

However, in using the provisions of the UNIDROIT Principles to codify national commercial laws, a two-fold danger exists. First, it undermines the flexibility due to the fact that the UNIDROIT Principles are just that, principles not law. Second, adoption of the UNIDROIT Principles as domestic law would likely detract from their very purpose of serving as a kind of independent *lex mercatoria*. The experience of CISG seems to suggest that an international agreement with legal authority is not easily accepted as law, even in the jurisdictions that have ratified it. The way CISG has fared in courts of law suggests that a *lex mercatoria* with legal authority is not as beneficial for the unification of international trade law as it may first appear.

C. CISG as Lex Mercatoria?

Like UNIDROIT, CISG has gained the status of a *lex mercatoria*, at least in arbitral proceedings. For example, the tribunal in ICC 7331/1994 held that in the absence of an applicable law clause, the contract was to be governed by "the general principles of international commercial practice and accepted trade usages, and as such by CISG, which reflects those principles and usages."[30] Indeed, arbitral tribunals apply CISG to international sale of goods contracts, regardless of whether either party to the dispute is a contracting state or has chosen CISG. Furthermore, tribunals may apply CISG whether or not arbitration takes place in a contracting state. In ICC Case No. 5713/1989, CISG was taken to govern the contract because the arbitrators saw it as the most appropriate law governing international transactions and had no qualms applying it to two parties from non-contracting states.[31]

However, unlike the UNIDROIT Principles, CISG was conceived as statute law from the start. The purpose of the document was to provide a legal framework that contracting states could adopt as their law governing the international sale of goods. CISG is built on the notion of freedom of contract, which means that parties can agree to contract out of CISG and any of its provisions: "The parties may exclude the application of this

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29. *Id.*

30. UNILEX, *supra* note 6, § D.1994-33 (citing ICC Case No. 7331/1994 (Yugo. v. Italy), 6-2 Int'l Comm. Arb. 73 (1994)).

31. *Id.* § D.1989-1 (citing ICC Case No. 5713/1989, XV Yearbook Comm. Arb. 70 (1989)).

Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."[32] In a sense, this "self-effacing character"[33] of CISG compromises its position as statute law. Conceivably, Article 6 could make CISG powerless – if the applicable law governing transnational contracts can simply be derogated, what is the point of the Convention? Essentially, the success of CISG depends largely on the goodwill of the parties to the contract to remain within the confines of an international legally valid framework.

CISG also allows contracting states to make a declaration under Article 95, whereby they may decide not to be bound by to Article 1(b).[34] In effect, this is simply another way in which contracting states can avoid CISG if one of the trading parties does not carry on business in a contracting state. One cannot help but suspect that the ability to contract out of CISG altogether does little to favor the harmonization of international trade law. Indeed, contracting out of CISG may well be the U.S. lawyer's initial reaction when faced with a contract that may fall under CISG.

Furthermore, the almost total freedom of contract does very little to protect disadvantaged parties, which may be forced to accede to the law of choice of their stronger and legally more sophisticated trading partner. It is impossible to combine the principle of freedom of contract with the notion that CISG ought to be used to facilitate trade among unequal parties, as the preamble states "considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States".[35]

Perhaps it is because freedom of contract is central to CISG that it has enjoyed such popularity (though not among courts of law). It is the ultimate international goodwill gesture – states can adopt it as statute law, while contracting parties can choose to contract out of CISG and therefore out of domestic statute law. However,the ability to mold the Convention as the parties see fit is part and parcel of an international convention that needs to appeal to all types of legal systems. It allows parties to walk a fine line between internationalism and parochialism. As Hartnell

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32. CISG, *supra* note 1, art. 6.

33. Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria, in* LEX MERCATORIA AND ARBITRATION 139, 174 (Thomas E. Carbonneay ed., 1990), *available at* http://www.cisg.law.pace.edu/cisg/biblio/audit.html.

34. CISG, *supra* note 1, art. 95.

35. CISG, *supra* note 1, preamble.

notes, "[t]he drafting history undeniably suggests that the drafters intended article 4(a) to serve as a loophole which could stretch to fit the needs of each domestic legal system."[36] On the one hand, the ability to reach compromises that reflect a party's familiar domestic law may be considered counterproductive to the international focus of the Convention. On the other hand, there is no point in adopting a convention that makes trading parties uncomfortable. The future of CISG as an effective and welcome international legal device rests in the hands of those who are using it: the business and legal communities.

III. INTERNATIONAL VERSUS DOMESTIC LAW - THE PURPOSE OF ARTICLE 7(1)

A vital provision of CISG – and arguably the heart of the Convention – is Article 7 (1): "in the interpretation of this Convention, regard is to be had *to its international character and to the need to promote uniformity in its application* and the observance of good faith in international trade."[37] Although Helen Elizabeth Hartnell believes that "article 7(1) requires at the very least that tribunals in one contracting state consider the opinions of tribunals in other contracting states,"[38] this is more wishful thinking than feasible reality where U.S. courts of law are concerned. Admittedly, the rather timid wording does little else but *encourage* adherence to the provision. The Article also leaves open the means by which uniformity of application is to be achieved. Nevertheless, given the fact that the Convention needs to take into account the sensibilities of a range of legal systems to avoid disharmony and discontent, it is a reasonably worded provision that offends no one. At the same time, however, adherence to it is patchy. As Michael Joachim Bonell and Fabio Liguori comment, "[v]ery rarely do decisions take into account the solutions adopted on the same point by courts in other countries."[39]

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36. Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 21 (1993), *available at* http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html.

37. CISG, *supra* note 1, art. 7(1) (emphasis added). Judging from scholarly commentary on 7(1) it appears that the issue of good faith has generated much heated debate – more than on the issue on uniform application. However, for the purpose of this paper, references to Article 7(1) will ignore the good faith debate.

38. Hartnell, *supra* note 36, at 7.

39. Michael Joachim Bonell & Fabio Liguori, *The U.N Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997*, 2 REVUE DE DROITE UNIFORME 385, *available at* http://www.cisg.law.pace.edu /cisg/biblio/libo1.html.

A. CISG in U.S. Courts

As both John E. Murray and John P. McMahon note, domestic (U.S.) legal practitioners (both lawyers and judges) are suspicious about and even afraid of CISG.[40] American lawyers frequently advise their clients to simply opt out of CISG, because of what Article 6 of CISG allows, "[T]he common wisdom among traders and their advisors has been that the C.I.S.G. is so new and so different from the U.C.C. and the ramifications of its provisions are so uncertain that it is sound practice to exercise the option to exclude it."[41] This has been used as a convenient escape route to the more familiar territory of domestic law. It is therefore not surprising that some U.S. courts seem to go out of their way to find that CISG does not apply.[42] Consequently, as of 1998, there were only three "significant"[43] U.S. court cases decided on CISG: *Delchi Carrier, S.p.A. v. Rotorex Corp.*,[44] *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*,[45] and *Filanto, S.p.A. v. Chilewich International Corp.*[46] In view of the fact that the U.S. conducts much of its trade with contracting states, and that, moreover, it was among the first states to adopt CISG as law (January 1988), this low figure is astonishing. Considering further that part of the purpose of CISG is to "give recognition to the rules born of commercial practice and to encourage municipal courts to apply them,"[47] the paucity of CISG cases in the U.S. is even more disturbing.

CISG's mission is to negotiate between international and domestic laws and ideally should accommodate both so as not to discourage potential states from joining or existing contracting states from modifying their position.[48] However, it appears that

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40. *See* John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365 (1998), *available at* http://www.cisg.law.pace.edu/cisg/biblio/murray1.html. *See also* John P. McMahon, *When the U.N. Sales Convention Applies and Some of the Reasons Why it Matters to You and Your Clients,* PACE DATABASE ON THE CISG AND INT'L COM. L. (1996), *at* http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html.

41. McMahon, *supra* note 40.

42. *See, e.g.*, Helen Kaminski Pty. Ltd. v. Mktg. Austl. Products, Inc., No. 96B46519, 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. July 21, 1997), *available at* http://cisgw3.law.pace.edu /cases/970721u.1.html.

43. Murray, *supra* note 40, at 368 n.17.

44. 71 F.3d 1024 (2d Cir. 1995), *available at* http://cisgw3.law.pace.edu /cases/951206u1.html.

45. 993 F.2d 1178 (5th Cir. 1993), *available at* http://cisgw3.law.pace.edu /cases/930615u1.html.

46. 789 F.Supp. 1229 (S.D.N.Y. 1992), *available at* http://cisgw3.law.pace.edu /cases/920414u1.html.

47. Audit, *supra* note 33, at 139.

48. Hartnell, *supra* note 36, at 3.

this balanced approach is not working particularly well in the U.S.[49] The main problem Murray perceives is that judges are not equipped to interpret the Convention in an international light.[50] Article 7(1) of CISG demands that in interpreting the Convention "regard is to be had to its international character."[51] How is a judge, schooled in his or her domestic legal tradition, supposed to do this? The problem here is that judges tend to interpret the Convention with reference to their domestic laws, "If a judge in Hungary, the United States or any other contracting state is to see the Convention through an international lens instead of a lifetime domestic lens, we now know that the typical judge may require assistance from an international legal ophthalmologist."[52] This is not meant to denigrate the ability of judges – merely to point out that a significant paradigm shift is required for which judges may see no pressing need. In this context, David Frisch remarks that a judge's "inertia of habit" – formed by his legal education and experience – leads to "intellectual stubbornness" that makes it difficult to accept a new kind of legal thinking.[53] Indeed, Frisch believes that most judges will not change their habits until forced to do so (i.e., until there is a new law).[54]

Although it is debatable whether CISG encourages recourse to domestic law in interpreting CISG provisions, U.S. courts have no qualms applying UCC to help fill the gaps in interpretation, without first consulting relevant international case law (as Article 7 would suggest).[55] Case law interpreting analogous provisions of Article 2 of the UCC may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC case law "is not per se applicable."[56] It is debatable whether the spirit of Article 7 of CISG would consider recourse to the UCC as an appropriate way of having regard to a provision's international character.

Adding to the difficulty in interpreting CISG is the fact that common law jurisdictions have specific methods for interpreting statutes, which generally require narrow interpretation.[57] Narrow interpretation, however, does not sit well with the

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49. *See* Murray, *supra* note 40.
50. *Id.* at 367.
51. CISG, *supra* note 1, art. 7(1).
52. Murray, *supra* note 40, at 367.
53. David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 522-23 (1999).
54. *Id.* at 524.
55. *See* CISG, *supra* note 1, art. 7.
56. Orbisphere Corp. v. United States, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989).
57. Audit, *supra* note 33, at 140.

international character of the Convention. Indeed, a narrow approach to interpreting CISG would be, as Bernard Audit comments, "inapposite."[58] Inappropriate or not, a study conducted by Michael P. Van Alstine suggests that U.S. courts do, more often than not, use narrow interpretative strategies for treaties, including CISG.[59] U.S. judges are not attuned to what Van Alstine believes is the implied "interpretative paradigm" of CISG, which encourages broad interpretation and welcomes and expects change, despite the fact that it is a piece of legislation and therefore notoriously difficult to change[60] (especially if one considers that any changes to the Convention must be made multilaterally). Van Alstine's view that the spirit of CISG is best served by broad rather than narrow interpretative strategies is shared by others, including Audit, who argues that "the purpose of the Vienna Convention is not only to create new, state-sanctioned law, but also to give recognition to the rules born of commercial practice and to encourage municipal courts to apply them."[61] In other words, legal scholars argue that CISG is more than mere legislation as interpreted in common law jurisdictions.

Harry M. Flechtner points out a rather surprising phenomenon: there are very few instances where CISG is applied to contracts between the U.S. and Canada – even though they are in the same economic bloc (NAFTA), are both contracting states, and the U.S. is Canada's largest trading partner.[62] Judging from the case example he gives (*GPL Treatment, Ltd. v. Louisiana-Pacific Corp*)[63] it appears that CISG is often used as an afterthought, in "as passing a fashion as possible,"[64] when all else fails and the party raising CISG would be advantaged by CISG provisions. In the *GPL Treatment* case, the Canadian plaintiff asserted that a contract existed without writing (as it would have under CISG), but not under Section 2-201 (1) of the U.C.C. (the Statute of Frauds provision, which applies to contracts for sale of goods for $500 and up).[65] Although CISG was not used to decide the issue, the plaintiff belatedly recognized the possible

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58. *Id.* at 153.

59. *See generally* Michael P. Van Alstine, *Dynamic Treaty Interpretation,* 146 U. PA. L. REV. 687 (1998).

60. *See id.*

61. Audit, *supra* note 33, at 139.

62. Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potentials for Regionalized Interpretations*, 15 J.L. & COM. 127, 130-33 (1995).

63. 894 P.2d 470 (Or. Ct. App. 1995).

64. Flechtner, *supra* note 62, at 127.

65. *See GPL Treatment*, 894 P.2d at 471.

advantages were CISG to govern the contract.[66] Given that there must be many disputes arising between Canadian and U.S. parties, the absence of the application of CISG may seem surprising. In theory, contracting states that are also large trading partners ought to pay attention to CISG, but in practice they do not; this undoubtedly stems from the two parties' familiarity with each other's legal system, customary trade usage, etc.

However, as *GPL Treatment* demonstrates, when one party wants to apply CISG (thereby taking the other by surprise), the outcome normally expected could be quite different – otherwise the party bringing up CISG would have no incentive to do so.[67] Thus, the choice between CISG and UCC can determine the outcome of the dispute. The most obvious contractual issues affected would be formation of contract, parol evidence, missing terms (such as an open price), and the obligations of seller and buyer.[68] Given that these are very important issues, it is not surprising that legal practitioners and judges are quite hesitant to apply unfamiliar rules. It emerges, then, that established trading patterns are unlikely to be disturbed by unfamiliar provisions of CISG, even though CISG is the domestic law governing international contracts for the sale of goods.

IV. COMMON LAW AND CISG RULES

A. CISG and UCC

For U.S. courts, a major hurdle in accepting CISG has been the fact that CISG has rules foreign to both the common law and, in particular, to the U.C.C. In John E. Murray's words, "[w]e are struck by a new world where there is no consideration, no statute of frauds, and no parol evidence rule, among other differences."[69] The parol evidence rule, in particular, seems very dear to the heart of U.S. legal practitioners (probably because it enshrines the meeting of minds concept of contract law, making contracts much easier, at least in theory).[70]

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66. *See id.* at 477 n.4 (Leeson, J., dissenting).

67. *See id.*

68. These are areas where CISG provisions differ notably from those in the UCC.

69. John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11-2 (1988).

70. Although barring parol evidence to change the terms of a contract can be unfair, this rule is mitigated by the doctrine of estoppel, which can apply in certain circumstances.

B. Parol Evidence Rule

The international consensus is that CISG eliminates the parol evidence rule.[71] Among other things, CISG's displacement of the parol evidence rule has a significant impact on the summary judgment rule, that is, where summary judgment can be made, provided there is material fact in dispute. Thus, the removal of the parol evidence rule puts this issue into a new light (and opens the door for prolonged litigation, which is a less felicitous result of CISG). The difference between common law rules and CISG rules on parol evidence is demonstrated in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostina,*[72] where one the of the issues concerned Article 8 of CISG:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by, and other conduct of, a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties.[73]

This means that U.S. law is not as inflexible on contractual terms as the parol evidence rule suggests.

71. *See* John P. McMahon, *Applying the CISG: Guides for Business Managers and Counsel*, *in* PACE DATABASE ON THE CISG AND INT'L COM. L. (Feb. 2001), *at* http://www.cisg.law.pace.edu/cisg/guides.html. ("It makes it possible to contradict and supersede the clear words of a signed written contract by testimony and other evidence showing that the written contract is not consistent with the real agreement between the seller and buyer.")

72. 144 F.3d 1384, 1387-92 (11th Cir. 1998), *available at* http://cisgw3.law.pace.edu /cases/980629u1.html.

73. CISG, *supra* note 1, art. 8.

In *MCC-Marble*, the buyer signed the standard contract, but not before he and the seller agreed that the standard terms did not apply in this case.[74] The buyer used the standard form contract to order several more batches of tiles.[75] In one particular delivery, the seller did not deliver the tiles the buyer ordered, and the buyer brought an action against the seller for breach of contract for non-delivery.[76] The seller subsequently brought a counterclaim for non-payment.[77] The buyer stated he did not pay because the tiles were non-conforming, whereupon the seller pointed to the contract, which said that the buyer had to bring all non-conforming items to the seller's attention within ten days.[78] The buyer told the court that it and the seller had agreed orally that the standard contract did not apply in their transaction.[79] The buyer managed to produce affidavits by some of the seller's company officers that the standard terms were indeed not agreed to.[80] This situation, where both parties agree that they did not intend to be bound by the written contract, is unusual. In this case, the appellate court overruled the decision by a district court that did not allow evidence admitted to alter the terms of the contract (as per the parol evidence rule).[81] The district court took the traditional view that the parol evidence rule could not alter the terms of a written contract, thereby contradicting *Beijing Metals*.[82] *Beijing Metals* held that the parol evidence rule applied to CISG, thereby treating CISG as a mere extension of the UCC.[83] In *Beijing Metals*, the court stated that it did not need to decide whether CISG or Texan law applied, because the parol evidence rule "applies regardless."[84] The court's interpretation of CISG's definition of parol evidence was clearly a matter of trying to fit the unfamiliar into a familiar legal pattern[85] – an interpretation that does nothing for the international scope of the Convention.

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74. *MCC-Marble,* 144 F.3d at 1385-86.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1386.
80. *Id.*
81. *Id.* at 1393.
82. *See id.* at 1389.
83. 993 F.2d 1178, 1182-83 (5th Cir. 1993).
84. *Id.* at 1183 n.9.
85. Ronald A. Brand and Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 251 (1993), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/brand920414u1.html.

As the decisions in both *MCC-Marble* and *Beijing Metals* suggest, CISG has the potential to dramatically alter U.S. law.

The *MCC-Marble* decision is also remarkable because of the court's reference to scholarly studies on this issue (a civil law rather than a common law practice). The scholarly authorities referenced by the court suggest that CISG eliminates the parol evidence rule.[86] *MCC-Marble* is now precedent for U.S. case law on CISG. The notion that CISG replaces the domestic parol evidence rule is reiterated in *Filanto* and in *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*.[87] In terms of the harmonizing effort of CISG, it is encouraging that the Supreme Court made the effort required by CISG to initiate uniform interpretation and application, and, further, that it took into account scholarly, rather than court authority, in formulating its decision.

C. The Importance of CISG Precedents

Why does it appear that common law contracting states are reluctant to apply CISG? Common law goes out of its way to exclude CISG, or at least, as in *Helen Kaminski Pty. Ltd. v. Marketing Australian Products*,[88] to dismiss discussing its applicability in any detail. Apart from the inertia of habit identified by Frisch,[89] the unwillingness of common law judges to apply CISG is due to the lack of precedence among common law jurisdictions applying CISG, simply because common law judges want to get their precedents in first. There is plenty of case law in non-common law jurisdictions, but it does not seem to carry much authority in common law courts. It is perhaps significant that the United Kingdom, the cradle of common law, is not a contracting state.[90] Can we therefore conclude that the international flavor of CISG may span state borders, but finds considerable reluctance among legal systems, and among common law systems in particular?

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86. *See MCC-Marble*, 144 F.3d 1384, 1390-91 (citing numerous prominent legal scholars, including John Honnold, Harry M. Flechtner, John E. Murray, Peter Winship). *See also* Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT'L & COMP. L. REV. 279, 281 (1997). ("Subjective intent is given primary consideration …[Article 8] … allows open-ended reliance on parol evidence.")

87. 789 F.Supp. 1229, 1237 (S.D.N.Y. 1992); 23 F. Supp. 2d 915, 920-21 (N.D. Ill. 1998).

88. No. 96B46519, 1997 U.S. Dist. LEXIS 10630, at *7 (S.D.N.Y. July 21, 1997).

89. Frisch, *supra* note 53, at 495.

90. *See supra* note 5 and accompanying text.

Given the dearth of U.S. CISG case law, as well as the fact that foreign case law is rarely, if ever, considered, it is little wonder, then, that John E. Murray fears that CISG may ultimately fail.[91] This may happen not because the Convention itself is flawed, but because cross-referencing to other CISG precedents is too difficult and thus the Convention is simply ignored by courts as well as legal practitioners.[92] Overcoming this difficulty would essentially require a re-education (or perhaps a specialization) among the judiciary.[93] However, judging from the number of cases (both arbitration and litigation) that apply CISG it would be premature to predict the demise of CISG, as Murray's gloomy forecast implies:[94]

> CISG is a monumental contribution because it evidences a willingness of Nation States throughout the world to seek uniformity in a critical commercial context. The success of CISG could spawn other and more sophisticated efforts at uniformity with critically important effects well beyond international trade. At this time, the paucity of case law and the discouraging reaction of courts that have applied CISG augur a dim future for this noble effort.[95]

Though Murray's analysis overestimates the importance of the U.S. for the future of CISG,[96] the reluctance of common law courts to apply CISG and look to other courts for precedence in accordance with Article 7 of the Convention is worrisome for the harmonization efforts of private international law. Perhaps this may lead to excluding common law jurisdictions, given the disinclination of some economically important common law countries, such as the United Kingdom and India, to even become contracting states (let alone apply CISG to their contracts). However, Michael Bonell's suggestion that a kind of CISG editorial board be set up under the umbrella of UNCITRAL[97] may

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91. Murray, *supra* note 40, at 371.
92. *See id.* at 369.
93. *See id.*
94. *See id.* at 373.
95. *Id.*
96. *See generally* Murray, *supra* note 40.
97. Michael Joachim Bonell, *A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention, in* INTERNATIONAL UNIFORM LAW IN PRACTICE, ACTS AND PROCEEDINGS OF THE 3RD CONGRESS ON PRIVATE LAW HELD BY THE

contribute greatly to the harmonization goals of CISG and the need for reliance on more certain and uniform law by international traders should it be implemented.

D. Attitude of U.S. Courts Towards International CISG Case Law

Some of the most misleading remarks from U.S. courts concern the availability of CISG case law. In *Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*,[98] the court said that "[t]he caselaw interpreting and applying the CISG is sparse,"[99] based on similar comments made in *Kaminski*[100] and *Filanto.*[101]

The courts' reluctance to look beyond the U.S. border for CISG case law does little to accelerate the unification of international trade law. Worse, courts do not seize the opportunity to expand at length about CISG (and thereby set the scene for future interpretations). This was the situation in *Kaminski.*[102] In that case, the Australian seller entered into a distribution agreement with the U.S. buyer in which the goods to be sold were identified.[103] The buyer then ordered more items, not identified in a separate agreement, from the seller.[104] The buyer failed to open a letter of credit for the new order, and the seller requested the buyer to pay within a specified time (as is set out in Article 63 of CISG).[105] The buyer did not pay, and the Australian party started an action in Australia to declare the contract terminated.[106] However, the buyer became insolvent, and the U.S. Bankruptcy Court gave the buyer additional time to cure and also ordered a stay on the Australian proceedings, applying the rules of the U.S. Bankruptcy Code.[107] The Australian party appealed (against the

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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT, ROME 241, 242 (Sep. 1987).

98. 1998 U.S. Dist. LEXIS 4586 (S.D.N.Y. Apr. 6, 1998), *available at* http://cisgw3.law.pace.edu/cases/980406ul.html.

99. *Id.* at *13.

100. Helen Kaminski Pty. Ltd. v. Mktg. Austl. Products, Inc., No. 96B46519, 1997 U.S. Dist. LEXIS 10630, at *8 (S.D.N.Y. July 21, 1997) (where the court made the somewhat breathtaking observation that there was "little to no case law on the CISG in general").

101. Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (here the court at least limited its comments to the lack of U.S. case law, not CISG case law per se).

102. 1997 U.S. Dist. LEXIS 10630.

103. *Id.* at *1.

104. *Id.* at *2.

105. *See* CISG, *supra* note 1, art. 28. *See also Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *2.

106. *Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *2.

107. *Id.* at *3.

stay), claiming that the contract was governed by CISG, which therefore superseded the Bankruptcy Code.[108] The court found that CISG did not govern this contract, as it was a distribution agreement, and not a sale of goods contract.[109] The court also concluded that in any case CISG would not apply, because the goods were not sufficiently identified as required in Article 14 of CISG.[110]

Given the fact that Articles 14 and 15 are problematic and in need of interpretation, it is regrettable that the court did not enter into an analysis of CISG. With reference to Article 14, the court declared that "the CISG requires an enforceable contract to have definite terms regarding quantity and price."[111] Article 14 (1) reads:

> A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.[112]

However, this provision directly contradicts Article 55, which states that a contract can be "validly concluded" without a price being fixed, either expressly or by implication:

> Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.[113]

Articles 14 and 55 are at odds, and interpreting them together creates confusion, as they seem to be affirming two opposing

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108. *Id.*
109. *Id.* at *8.
110. *Id.*
111. *Id.* at *7.
112. CISG, *supra* note 1, art. 14(1).
113. *Id.* at art. 55.

principles. In *Kaminski*, the court used CISG to find that CISG did not apply by referring to Article 14(1), rather than Article 55.[114] Inevitably, there are two different schools of interpretation regarding Articles 14 and 55, with one asserting that Articles 14 and 55 should not be read together, and the other asserting that there is no problem having them together. The first opinion, represented by E. Allan Farnsworth, is that Article 55 applies only if a contracting state has not made an Article 92 declaration that it will not be bound by Part II of the Convention (which concerns formation).[115] John Honnold, however, is of the view that Article 55 applies whenever there is a valid contract (whose formation may not be governed by CISG).[116] Under either article, the U.S. court's inference in *Kaminski* that CISG requires a clear and fixed price for an enforceable contract to exist is clearly erroneous.

Regarding the question of case law, the court in *Kaminski* noted that "there is little to no case law on the CISG in general, and none determining whether a distributor agreement falls within the ambit of the CISG."[117] This may be true for U.S. case law on CISG, but it is not true internationally. Although it would be an overstatement to declare that case law is abundant and precedent-compelling, two decisions in particular on the issue of distribution agreements have become precedent.[118] According to Bonell and Liguori, "recent judgments confirm the tendency not to apply CISG to the distribution agreement as such, where agency aspects prevail, but to consider each individual sales contract concluded under a distribution agreement to fall within the scope of the Convention."[119] This represents the currently accepted position of CISG with respect to distribution agreements.

It is noteworthy that the above-mentioned precedents were decided in a civil law jurisdiction (Germany). Given the navel gazing tendency of U.S. judges, it is quite possible that the U.S. court in *Kaminski* would have ignored the German cases, even if

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114. Admittedly, Article 55 talks about price only, not identification of the goods *See Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *6-8.

115. *See* E. Allan Farnsworth, *Formation of Contract*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 3-1, 3-5 to 3-18 (Nina M. Galston & Hans Smit, eds., 1984).

116. JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 325-27 (1982).

117. *Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *8.

118. *See* UNILEX, *supra* note 6, § D.1996-9 (citing OLG Düsseldorf, Recht der Internationalen Wirstschaft [RIW], (1996), 958); UNILEX, *supra* note 6, § D.1993-23 (citing OLG Koblenz, Recht der Wirstschaft [RIW], (1993), 934).

119. Bonell & Liguori, *supra* note 39, at 387.

it had bothered to look for them. The acceptance of CISG in U.S. courts (and possibly other common law jurisdictions) arguably would have accelerated had the court in *Kaminski* paid more attention to CISG and its burgeoning international case law when delivering the reasons for its decision. Judging from international case law and scholarly writing, the outcome would most likely have been the same had they considered CISG. Apart from dismissing it without in-depth analysis, the court was apparently pleased to get rid of CISG. Victoria M. Genys reached such a conclusion in her note on the case before, "In fact, the court exhibits an extreme ethnocentricity by preferring to cite no interpretive sources in its decision rather than cite to secondary sources or international cases on point."[120] The question remains whether the court's cursory reading of CISG is simply another attempt to ignore the Convention and to retreat to the familiar territory of local law.

V. INTERNATIONAL PRECEDENTS – SHOULD "BAD" DECISIONS BE ADOPTED?

"Very rarely do decisions take into account the solutions adopted on the same point by courts in other countries. Until now it would appear that there are only two decisions rendered by national judges in which express reference is made to foreign precedents."[121] Two of the judgments Bonell and Liguori refer to are Italian and French.[122] The apparent unwillingness of courts to coordinate with one another is somewhat disheartening, in view of the harmonizing intention of CISG and its goal to promote uniformity in its application, which can only be done by courts referring to each others' decisions.

However, some international precedents on specific CISG issues also leave something to be desired, not necessarily because of the decision itself (which inevitably clashes with a domestic law), but with the way the decision is explained. As Paul Amato points out, potentially important precedents need to show adequately the court's reasoning and provide an analysis of the issues decided on.[123] This would make a decision more palatable

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120. Victoria M. Genys, *Blazing a Trail in the "New Frontier" of CISG: Helen Kaminski Pty Ltd v. Marketing Australian Products, Inc.,* 17 J.L. & COM. 415, 426 (1998).

121. Bonell & Liguori, *supra* note 39, at 386.

122. Trib., sez. un., 31 Jan. 1996 (Italy), *in* UNILEX, *supra* note 6, § D.1996-3; and CA Grenoble, Oct. 23, 1996 (Fr.), *in* UNILEX, *supra* note 6, § D.1996-10.

123. Paul Amato, *U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian*

for that jurisdiction where a different decision would most likely result.

For example, in *Pratt & Whitney v. Malev Hungarian Airlines*, the Hungarian Supreme Court considered whether a proposal with an open price was a binding contract and found that it was not.[124] Here, the Court considered CISG Article 14 and, cursorily, Article 55 to say that the Court could not determine a market price.[125] Arguably, there was no need to consider Article 55 as the court found that there was no valid agreement because the price was not sufficiently indicated, as required by Article 14.[126] As mentioned above, the open price provision of CISG is confusing, and its interpretation by courts will no doubt be influenced by the local legal culture. Amato thus contends that a U.S. court would probably have reached a different decision and found that there was a valid agreement, despite the absence of a fixed price.[127] This is what would happen under UCC rules, "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract, and there is a reasonably certain basis for giving an appropriate remedy."[128] And further: "[t]he parties if they so intend can conclude a contract for sale of goods even though the price is not settled."[129]

Because Germany has similar provisions, Paul Amato concludes that a German court would also have found a valid sales agreement.[130] By contrast, he assumes that a French court would not.[131] Thus, "[s]ometimes CISG's provisions will align with a nation's legal traditions, and sometimes they will not."[132] If, as Amato suggests, an American court decided the case, a completely different precedent would have been set.[133] It remains to be seen what authority the *Malev* decision will have in other CISG cases involving open price issues, and, in particular, whether it would be followed in jurisdictions whose local legal

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Courts, 13 J.L. & COM. 1, 29 (1993), *available at* http://www.cisg.law.pace.edu/cisg/biblio/amato.html.

124. *See generally* Legfelsbb Bíróság, Gf.I.31, 349/1992/9 (Dr. László Szlávnits trans. 1992, *reprinted in* 13 J.L. & COM. 31-47 (1993)) [hereinafter *Malev*].

125. *See id.*

126. *See id.*

127. *See* Amato, *supra* note 123, at 18-19.

128. U.C.C. § 2-204 (3)(1998).

129. U.C.C. § 2-305 (1)(1998).

130. *See* Amato, *supra* note 123, at 19-20.

131. *See id.* at 20-21.

132. *Id.*

133. *See id.* at 18-19.

culture would suggest a different outcome. Amato suggests that U.S. courts, for one, would be "tempted to ignore it as authority in a similar case."[134]

Amato's analysis uncovers a major problem with CISG cases: the inability and unwillingness of various jurisdictions with different legal cultures to comply with CISG provision of uniformity of interpretation.[135] In a simplistic sense, precedence is established by a first come first serve principle, but no one wants a foreign court to establish authority on issues that the domestic court would instinctively decide differently. Establishing an authoritative precedence that may well fly in the face of some domestic law thus needs to be done with sufficient analysis to establish authority – this, Amato argues, was not accomplished in the *Malev* case.[136] By providing only a cursory analysis of the reasons for its decision, the court was doing itself (and CISG) a disservice.[137] Article 7 of CISG again seems like a wish list.[138]

VI. CURRENT TRENDS IN U.S. CASE LAW ON CISG

It appears now that the principles of CISG are gaining more momentum in the U.S., with the court in *MCC-Marble* recognizing that:

> [o]ne of the primary factors motivating the negotiation and adoption of CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply . . . Courts applying CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result.[139]

MCC-Marble not only admits evidence of facts that are not part of the signed contract, but also considers the parties'

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134. *Id.* at 27.
135. *See id.* at 21-28.
136. *Id.* at 27 ("At the least, *Malev* suffers from a dearth of analysis.").
137. *See id.* at 28.
138. *See* CISG, *supra* note 1, art. 7.
139. MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1391 (11th Cir. 1998).

subjective intent, where each party is aware of the other's intent (Article 8(1) CISG).[140] The affidavits submitted by the buyer suggested that the seller was aware of the terms agreed on orally.[141] The decision in *Beijing Metals* to apply the parol evidence rule has generally been rejected in subsequent U.S. decisions, to the point where it is no longer "persuasive."[142]

A recent case seems to herald a new awareness in U.S. courts regarding the authority of non-CISG case law. *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L.,* decided in May 1999, is significant because it is the first time that a U.S. court examined foreign CISG case law and considered it authoritative.[143] At the same time, however, this case clouds the issue of distribution agreements and CISG. Here, the court did not hesitate to apply CISG in what was essentially a framework agreement, as the dispute did not concern specific items.[144]

VII. CONCLUSION

Apart from the danger of being ignored even in contracting states where it is law, CISG is further compromised by the trend towards regional interpretation (in its broadest sense), as documented by Flechtner.[145] In view of the international aim of CISG, this is unfortunate, given that a large number of countries representing a variety of legal systems have adopted the Convention. On the other hand, it is still too early to judge where CISG is headed. The authority of precedents will be crucial in determining the direction of CISG. Given the fact that CISG decisions are likely to differ dramatically from one jurisdiction to the next because they stem from different legal cultures, courts are hesitant to consider foreign decisions authoritative.[146]

Does CISG provide for a more regulated arena for international trade? Will common law jurisdictions look to authorities in alien legal systems? These questions will require much more CISG case law before a definite trend can be

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140. *Id.* at 1385 (applying Article 8 of CISG).

141. *Id.*

142. *See, e.g.,* MCC-Marble, 144 F.3d at 1389; Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB, 23 F. Supp. 2d 915, 920 (N.D. Ill. 1998).

143. No. 99-0380, 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999).

144. Peter Schlechtriem, *Conformity of the Goods and Standards Established by Public Law Treatment of Foreign Court Decision as Precedent, in* PACE DATABASE ON THE CISG AND INTERNATIONAL COMMERCIAL LAW (Commentary of Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L., Andre Corterier, trans., 1999*), at* http: //www.cisg.law.pace.edu/cisg/wasi/db/cases2/990517u1.html.

145. Flechtner, *supra* note 62, at 127.

146. One only needs to consider the discontent arising from the *Malev* case.

predicted. However, the most recent U.S. cases give room for cautious optimism. International harmonization even within the relatively small confines of CISG is a difficult process that can be derailed by more persuasive forces than entrenched legal traditions. However, as harmonious international trade is doubtlessly an asset to harmonious relations between states, it is hoped that all contracting states will make an effort towards accelerating the harmonization of international trade law. CISG is an ideal platform to demonstrate the willingness to work towards unification of international trade law. As Van Alstine suggests, the Convention has its own magnetic pull, which he believes will eventually "dissipate the centrifugal force of domestic social and legal traditions."[147] Furthermore, with the growing number of contracting states, their increasing importance in world trade (e.g., Europe), and the corresponding threat this imposes on the U.S. as a preferred global trading partner, the parochial attitude of U.S. courts (and perhaps other common law courts) may be forced to change. The U.S. and other contracting states may have to reconsider the applicability of CISG.

The excuse that a court cannot be expected to take cognizance of foreign decisions because of linguistic barriers, time constraints, and access constraints should not be accepted. This is particularly the case in the (still) early years of CISG when it is crucial to develop a body of authoritative case law if CISG is truly to become the kind of international convention it aims to be. As Flechtner comments with an apt metaphor, "We are passing beyond the childhood of CISG jurisprudence and beginning to enter its adolescence – a period troubling and unsettling, but also exciting and crucial to the ultimate success of the venture."[148] A major problem with CISG is that it is, in a sense, international law applied locally. This inevitably puts a local tint on CISG interpretation. The fact that there is no international court that administers CISG is identified by Ronald A. Brand and Harry M. Flechtner as one of the most "serious obstacles to achieving the uniform international sales regime at which CISG aims."[149] The parochialism of domestic courts coupled with their suspicion of foreign judgments that may be differently decided at home is undoubtedly a major impediment to uniform application of CISG. Some of the cases touched on in this paper demonstrate that courts are bending over backwards to avoid having to take into

147. Van Alstine, *supra* note 59, at 790.
148. Flechtner, *supra* note 62, at 137-38.
149. Brand and Flechtner, *supra* note 85, at 239.

account foreign precedents in a not so subtle bid to ensure that authority regarding CISG is not established. Naturally, each jurisdiction would like to have its CISG judgments become authority, and, equally naturally, each "opposing" jurisdiction would like to prevent that.

Although case law on CISG is growing, it does so slowly and unevenly. In a sense, there is a vicious circle between CISG and courts of law: courts are nervous about the lack of case law, which in turn prohibits the development of case law. This is a little odd, considering how many transactions would be governed by CISG. However, things are completely different when it comes to arbitration, where CISG is not a strange and unfamiliar intruder, but rather fulfills a welcome harmonizing function. In the realm of arbitration, the harmonizing goal of CISG has found a better home than in courts of law. In fact, given that the number of states signatory to the New York Arbitral Convention is larger than the number of CISG contracting states,[150] there is increasing popularity to opt for arbitration rather than litigation in commercial disputes. Moreover, CISG is accepted in arbitration, and, as Brand and Flechtner point out, even in courts of law there is an increased willingness to find for, rather than against, arbitration when arbitration is a divisible portion.[151] This was the case in *Filanto*, where the court found that the issue of whether the dispute should go to arbitration was a matter for the courts to decide; only then would the court consider other issues.[152] In this case, the court decided that the dispute should be resolved by arbitration, thereby neatly getting out of ruling on CISG.[153] Thus, it appears that CISG has broader acceptance than one might imply judging from case law alone.

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150. There are 122 signatories to the New York Arbitral Convention (as of Dec. 14, 1999), while CISG currently lists 57 parties, but only 19 signatories.

151. Brand and Flechtner, *supra* note 85, at 260.

152. Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F.Supp. 1229, 1239-42 (S.D.N.Y. 1992).

153. *Id.*