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

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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); *see 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; *see 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; *see 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; *see 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.*