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# The Hedgehog, The Fox, and Kozolychyk: The Practical and Philosophical Foundations of Best Practices in Legal Harmonization for Economic Development

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**THE HEDGEHOG, THE FOX, AND KOZOLCHYK:  
THE PRACTICAL AND PHILOSOPHICAL FOUNDATIONS OF  
BEST PRACTICES IN LEGAL HARMONIZATION  
FOR ECONOMIC DEVELOPMENT**

Antonio F. Perez\*

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As Archilochus<sup>1</sup> famously said, “[t]he fox knows many things, but the hedgehog knows one big thing.”<sup>2</sup> British philosopher Isaiah Berlin popularized this maxim in modern times, applying the ancient fable to his study of Tolstoy’s theory of history. In his essay “The Hedgehog and the Fox,” he drew attention to Tolstoy’s powers of observation—so astonishing that they enabled the Russian author to bring to life the many stories encompassed by the larger tale of Russia’s struggle against Napoleonic France, which in turn forged Russia’s national

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\* Professor of Law, The Columbus School of Law, at The Catholic University of America. I should disclose that, in the context of my work between 2005 and 2009 as a member of the Inter-American Juridical Committee of the Organization of American States, and in other related work thereafter, I found Professor Kozolchyk’s scholarship and counsel of inestimable value. This review seeks to explain why his approach to legal harmonization in relation to economic development, as fully developed in this volume, deserves wider circulation and attention.

<sup>1</sup> Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy’s View of History*, in *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* 436 (1998).

<sup>2</sup> *Id.* (citation omitted). In Berlin’s understanding, hedgehogs subject “everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel—a single, universal organising principle in terms of which alone all that they are and say has significance.” Foxes, by contrast, “pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way, for some psychological or physiological cause, related to no moral or aesthetic principles. These last lead lives, perform acts and entertain ideas that are centrifugal rather than centripetal; their thought is scattered or diffused, moving on many levels, seizing upon the essence of a vast variety of experiences and objects for that are in themselves, without, consciously or unconsciously, seeking to fit them into, or exclude them from, any one unchanging, all-embracing, sometimes self-contradictory and incomplete, at times fanatical, unitary inner vision.” *Id.* at 436–37.

identity. Yet Berlin also acknowledged Tolstoy's abject failure in producing a grand theory of history to give synthetic meaning to these events: for Tolstoy was a fox failing miserably in an attempt to become a hedgehog.<sup>3</sup> Boris Kozolchik's *Comparative Commercial Contracts: Law, Culture and Economic Development* (CCC)<sup>4</sup> also has Tolstoyan aspirations. But in my view, Kozolchik's *magnum opus* is indeed a work that would appeal both to foxes and to hedgehogs without deeply dissatisfying either.

On one hand, Kozolchik dips into autobiography, anthropology, evolutionary biology, economics, sociology, philosophy, comparative religion, legal history, and comparative law, to name only a few. His book sits on a pedestal of vast learning, enticing the foxes of the world to enjoy its various parts; thus, it is part treatise, part casebook, and part conversation with the reader. It is therefore many books in one, written for multiple audiences. One can dip into its various parts for provisional enrichment. Admittedly, it is not beyond criticism in its assessment of each of these elements. Yet, in so many ways, it is an intellectual feast of varied delicacies. Like a fox, Kozolchik presents multiple sharp and distinct images of reality, analyzing in remarkable detail the various contexts in which different commercial law regimes have arisen, explaining the underlying material contexts and mentalities upon which different legal regimes have stood. Indeed, CCC's various parts and even individual chapters could, with only modest expansion, serve as coherent books themselves.

But CCC is more than that: it can be read as one sustained argument, integrating its parts into a greater whole that places all the details the fox sees in a central truth grasped by the hedgehog. It articulates a vision for which any hedgehog would be proud—a sustained examination of the conditions necessary for a law of commercial contracts to enable and empower all persons (but especially the poor and other excluded groups) to enjoy the benefits of development, both materially and in the expression of their basic human freedom to develop their creative faculties. At the risk of oversimplifying, Kozolchik argues that it is through access to the credit necessary for small and medium sized enterprises to take entrepreneurial risks—in a way that simultaneously protects third parties and reflects the customary moral intuitions of the most respected

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<sup>3</sup> *Id.* at 498. For Berlin, “Tolstoy’s sense of reality was until the end too devastating to be compatible with any moral ideal which he was able to construct out of the fragments into which his intellect shivered the world, and he dedicated all his vast strength of mind and will to the lifelong denial of this fact.” *Id.*

<sup>4</sup> BORIS KOZOLCHYK, *COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT* (2014) [hereinafter KOZOLCHYK, CCC]. One point of concern for this reader is the number of editorial errors, which although understandable in a 1,200 plus page volume, perhaps also evidences the general decline of text editing services in the current legal publishing environment. *See also* Boris Kozolchik, *The Modernization and Harmonization of Commercial Law in the Trans-Pacific Region in the Twenty-First Century: The Need for a New Research and Drafting Methodology*, 33 ARIZ. J. INT’L & COMP. L. 25 (2016) [hereinafter Kozolchik, *Trans-Pacific*] (offering a useful, but not nearly as rich, summary of Kozolchik’s central insights as a prelude to discussing a strategy for future progress).

practices in particular social settings, arguably understood as the best merchants' understanding of good faith—that these goals can be achieved. It is, moreover, an approach Kozolchik finds best suited to the requirements of our age of globalization.

Part I of this essay will explain the various parts of Kozolchik's achievement, detailing the structure of the volume, its various contributions and connections to various fields of scholarship, and its key insights as to each of its subjects. Part II will unravel the moral and philosophical—indeed, religious—elements of Kozolchik's conceptual achievement, both in its constituent element of the archetypal merchant as a *bonus vir* (a good man or person) and the conception of justice as fairness and reasonableness it is meant to serve. This part will show that Kozolchik joins a longstanding debate about the morality of market society,<sup>5</sup> one that has been given new salience as protectionist forces now enjoy a resurgence in response to dislocations brought about by the most recent wave of globalization.<sup>6</sup> Part III will argue that Kozolchik's success as both hedgehog and fox, and the power of his contribution to the debate about the moral qualities of market life, can be explained by the origins of his *magnum opus*: a career of engaged practical scholarship, in part as Director of The National Law Center for Inter-American Free Trade (NLCIFT), affiliated with The University of Arizona James E. Rogers College of Law. As Director, he has played a central role in developing practical instruments for legal harmonization in the Western Hemisphere, especially between the United States and the Caribbean Basin countries. This part will track the increasing influence of Kozolchik's vision in legal developments in the Western hemisphere through his influence on developments under the North American Free Trade Agreement (NAFTA) and in the Specialized Conference on Private International Law (CIDIP),<sup>7</sup> which operates under the auspices of the Organization of American States (OAS). Finally, Part IV of this essay, drawing in part on suggestions in CCC but more significantly on literature concerning the creation and erosion of the social norms supporting trust in economic life, will identify challenges that trade with China may pose for commercial law reasoning and practices based on Kozolchik's understanding of the *bonus vir*. In light of this concern, it concludes that CCC will serve as an inestimable resource for those interested in the evolution of Western hemispheric

<sup>5</sup> See Albert O. Hirschman, *Rival Views of Market Society*, in RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 105 (1986) (detailing the two strands of orientation of the moral effects of market life: one—the so-called “doux-commerce” thesis—under which market life instills personal virtue; the other—the so-called “self-destruction” thesis—under which market life is corrosive of private virtue and ultimately erodes the moral foundations of private life necessary for its survival).

<sup>6</sup> See generally Mark Blyth, *Capitalism in Crisis: What Went Wrong and What Comes Next*, 95 FOREIGN AFF. 172 (2016) (reviewing several books offering competing views on the sustainability of modern capitalism).

<sup>7</sup> The CIDIP's abbreviation follows its Spanish title, “Conferencia Especializada para el Derecho Internacional Privado.” ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, [https://www.oas.org/dil/esp/derecho\\_internacional\\_privado\\_desarrollo.htm](https://www.oas.org/dil/esp/derecho_internacional_privado_desarrollo.htm) (last visited Sept. 29, 2016).

and East Asian Trade under the proposed Trans-Pacific Partnership (TTP), providing another generation of scholars and practitioners with a welcoming launch pad for their own efforts to unite theory with practice as faithfully as Kozolchik's exemplary effort in this volume, perhaps serving as a legacy even greater than CCC itself.

### I. THE FOX'S MANY INSIGHTS

Kozolchik's book is divided into five parts and totals thirty chapters, beginning with a theoretical framework and practical vocabulary founded on Roman law, moving to the medieval structure of guilds and notaries to restrain trade, exploring the emergence of Western European codes law in the ashes of medievalism, then showing counter-examples where less progress was made in Latin America, the Soviet Union and China, and finally reaching the apotheosis of commercial law in Anglo-American invention. Reading CCC from beginning to end takes the reader through a wonderful journey in legal history, sociology, politics, and economics through many lands, a large number of which will be foreign territory to readers who have specialized only in particular disciplines. Yet Kozolchik is a superb guide.

Part I outlines the book's basic themes, exploring what Kozolchik calls the "logic of the reasonable," particularly as expressed in the insightful opinions of the giants of the common law, Lord Mansfield and Judges Friendly and Cardozo.<sup>8</sup> Part I then lays the foundation for a history of comparative law by explaining through an anthropological lens the role executory promises play in facilitating the provision of credit to enable production and exchange in the shift from agricultural to commercial society.<sup>9</sup> But the real payoff in these chapters comes in detailed case studies: one concerning the cultural context for competition;<sup>10</sup> the other, an illustrative case study of Kozolchik's own effort in the OAS Model Law on Secured Transactions to adapt modern commercial understandings to the Latin American cultural context.<sup>11</sup> These case studies (presented in the form of appendices to introductory chapters) immediately allow the reader to apprehend the specific factual contexts in which Kozolchik's

<sup>8</sup> See KOZOLCHIK, CCC, *supra* note 4, at 54–65.

<sup>9</sup> See *id.* at 81–102.

<sup>10</sup> See *id.* at 22–34 (discussing erroneous assumptions about Japanese business culture that might have misled the U.S. Supreme Court in the predatory pricing decision, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)) (citations omitted).

<sup>11</sup> See *id.* at 66–79. See Organization of American States, *Model Inter-American Law on Secured Transactions*, <http://www.oas.org/dil/uniform%20law%20review.pdf> (2002) [hereinafter OAS, *Model Secured Transactions*]. This Model Law was in turn based on 12 principles produced by a drafting conference composed of Western hemispheric experts meeting under the auspices of the NLCIFT. See *Meeting of OAS-CIDIP VI Drafting Committee on Secured Transactions Conference Transcript*, 18 ARIZ. J. INT'L COMP. L. 334 (2001).

methodology can be employed. Yet, as a prelude to his discussion of the OAS Model Law on Secured Transactions, Kozolchyk also plants the seeds of the volume's central message with an account of Emperor Constantine's repeal of the *Pactum Commissorium*. This traditional Roman right permitted creditors to repossess or foreclose on collateral, thus facilitating the flow of credit. Constantine, in Kozolchyk's telling, judged it more important to enforce a prohibition against usury inspired by Christian theology and to protect impoverished Christian debtors from rapacious creditors.<sup>12</sup> Part I thus concludes with an exquisite introduction to Roman law as the foundation for the evolution of commercial systems in medieval and modern Europe, which, while complete in itself, also forms the legal-factual matrix for all further Western discussion of commercial law. Here, Kozolchyk introduces the concept of Ulpian's *bonus vir* as a legal standard and, with a series of excerpted opinions from the *Corpus Juris Civilis*, brings to life that Roman concept, which might have served as an alternative to Constantine's blunt rejection of all creditor rights.<sup>13</sup>

Part II of CCC takes the reader through a detailed study of medieval commercial practices, bringing to life the practical limitations imposed on commerce and market access by guilds, agency rules, and notaries. Here, Kozolchyk makes clear that the combination of these rules limited commerce—particularly through their failure to protect those relying on the apparent authority of commercial agents. This was in part because the conceptual problem based on the Roman theory of typification of contracts, under which a kind of *numerus clausus* (closed number) principle limited the kinds of contractual exchanges that might be enforced, thereby excluding theories of unilateral contract or reliance-based reasoning.<sup>14</sup> This theoretical prison served only to reduce protection for third parties and thereby to obstruct the flow of credit. Perhaps more importantly, it gave rise to a perception that commerce was ignoble or corrupt; for example, the paradigm of the “Picaresque” or shifty tradesman in Spanish medieval culture assumed that such a merchant would pass on bad debts in a kind of habitual Ponzi scheme.<sup>15</sup> (Much later in the volume, in one charming dialogue with a Mexican law professor about Mexican cultural attitudes, Kozolchyk's Mexican interlocutor refers to the “natural or God-given right to smuggle.”<sup>16</sup>) Indeed, high levels of corruption prompted high levels of regulation and authentication, thus engendering the rise of guilds and notaries, which (despite their intention to prevent corruption) in effect foreclosed competition and facilitated the extraction of bribes and other side payments.<sup>17</sup> Yet Kozolchyk also shows that formalistic rules promising legal certainty and barring the enforcement of unilateral promises or rights based on reasonable reliance induced market exchanges through circumvention (what he calls a “simulation” of a real exchange based on unilateral

<sup>12</sup> See KOZOLCHYK, CCC, *supra* note 4, at 70.

<sup>13</sup> See *id.* at 128–35.

<sup>14</sup> See *id.* at 150–51.

<sup>15</sup> See *id.* at 143–45.

<sup>16</sup> *Id.* at 538.

<sup>17</sup> See KOZOLCHYK, CCC, *supra* note 4, at 191–242.

promises or reliance through the legal form of a false bilateral exchange).<sup>18</sup> But these fraudulent (albeit practical) instruments came at the price of initially higher transactional costs from requiring unnecessary false formalities, offered less value than fully-legal transactions (since the possibility they could later be deemed fraudulent forced market participants to discount the price they would be willing to pay to accept that legal risk), and further damaged the reputation of merchants for honesty and reliability, with effects well into modernity.<sup>19</sup> Most critically, Kozolchik shows that the principal vehicle for circumvention of the dogmatic rules against usury, unilateral commitments, and reliance-based reasoning came primarily from the religiously-inspired practices of the medieval Jewish brotherhood of merchants, who served as reliable intermediaries willing to enforce unilateral commitments upon which contract parties could reasonably rely.<sup>20</sup> As discussed in Part II of this essay, this insight becomes the root premise in the hedgehog's understanding of the foundations for commerce.<sup>21</sup>

Parts III and IV of CCC form a pair, though they can be studied separately. Part III addresses the emergence of modern Western European codes and the varying degrees of progress they have made in freeing themselves from the chains of medieval dogmatism. In exploring post-Enlightenment European codification efforts, Kozolchik crucially differentiates between the French and German experience. French influence peaked in the immediate aftermath of Latin American independence following the Napoleonic Wars, as Latin American codification efforts were crucially influenced by the French model. Rationalism and deductive logic,<sup>22</sup> coupled with the French Revolutionary (as well as Napoleon's own personal) prejudice against merchants and in favor of debtor small-landholding bourgeoisie,<sup>23</sup> resulted in a Code Civil that was dominated by the amorphous concept of *causa*. Briefly, this concept can be understood to sanction only specific kinds of contracts; thus, it prevented the natural evolution of commercial instruments to create new forms of contracts, or soften the requirements for enforcement of existing contractual forms, to meet changing social and economic needs.<sup>24</sup> French law thus evidenced tortured decisional reasoning in concrete cases as the gap between the Code Civil and the Code de

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<sup>18</sup> *Id.* at 150–52 (quoting Raymond de Roover's description of the typical "simulation" of an exchange transaction of foreign currency, coupled with a commission, to disguise the charging of interest on a loan). *Id.* at 510–13 (discussing the Mexican practice of fraudulent or disguised transactions, "simulations," designed to circumvent legal prohibitions) (citations omitted).

<sup>19</sup> *See id.* at 145–48.

<sup>20</sup> *See id.* at 153–63. Kozolchik acknowledges that the recorded practices of English wool merchants may also have played a role in circumventing medieval Canonical restrictions on the advance of credit to facilitate production and exchange and the special influence of Henry VIII's 1545 Statute of Usury, which regulated rather than prohibited the charging of interest. KOZOLCHYK, CCC, *supra* note 4, at 156.

<sup>21</sup> *See infra* Part II.

<sup>22</sup> *See* KOZOLCHYK, CCC, *supra* note 4, at 245–68.

<sup>23</sup> *See id.* at 268–80.

<sup>24</sup> *See id.* at 280–96.

Commerce of 1807, on one hand, and commercial realities in which they were applied on the other, became insurmountable during the explosive growth of industry and enterprise in the 19th and 20th centuries. Unlike German law, French law to this day limits reliance-based reasoning and provides excessive protection to familial interests in property, thus frustrating the protection of third-party interests and thereby limiting the development of robust markets protecting creditors and enabling the supply of credit.<sup>25</sup> In a wonderful case study of the Mexican Civil Code (which is based on French law) Kozolchyk shows the barriers this French inheritance raised for even the simplest real estate transactions, given the absence of reliable mechanisms to ensure the transfer of title pursuant to agreement or even to structure enforceable escrow agreements that could overcome the lack of trust between strangers in commercial transactions.<sup>26</sup>

In contrast, the German Codes—both the German Commercial Code of 1897 (HGB), and the German Civil Code of 1900 (BGB)—drew on a century of practice rather than abstract theory. Thus, the needs of emerging German industry, agriculture, commerce, and especially finance set the context for more open-textured legal language that in a sense ratified emerging German practice.<sup>27</sup> These Codes did not employ a *causa*-inspired *numerus clausus* approach to the validity of contracts, thus opening the door to the negotiation and enforcement of unilateral merchant promises, such as bills of exchange by *bona fide* purchasers for value, and approving the emerging commercial instruments for supplying credit. Moreover, unlike French law's reliance on strict rules, the German Codes relied on principles of good faith—both as a general duty in the performance, execution and even the negotiation of contracts and as the basis for allowing courts to adjust the meaning of contracts to meet new circumstances.<sup>28</sup> Kozolchyk here observes that German doctrinal writing and codification practice were immensely consequential in the United States through their influence on Karl Llewellyn, the chief draftsman of the Uniform Commercial Code,<sup>29</sup> thus reinforcing the different trajectories of the United States and Latin America in the development of their respective commercial laws and foreshadowing Kozolchyk's detailed analysis of the characteristics of Anglo-American commercial law in Part V of CCC.<sup>30</sup>

Good teachers teach by counter-example, just as good first-year contracts teachers sometimes teach the common law of contract by contrasting it with UCC solutions; and Part IV reveals that Kozolchyk, whatever else he may be (economist, anthropologist, historian, or philosopher), is a fabulous teacher. It provides a detailed analysis of the three cases of Latin America, the former Soviet Union, and China, in which various factors—colonial heritage, what Kozolchyk

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<sup>25</sup> See *id.* at 297–373.

<sup>26</sup> See *id.* at 373–76.

<sup>27</sup> See KOZOLCHYK, CCC, *supra* note 4, at 381–96 (discussing German commercial practice and the role of scholarship).

<sup>28</sup> See *id.* at 413–38.

<sup>29</sup> See *id.* at 440–49.

<sup>30</sup> See *infra* text accompanying note 35.



calls the “invertebrate” character of a legal system, and a dysfunctional cultural commitment to preferring family members to strangers—frustrated the emergence of commercial legal systems. For this reader, these are the most enriching studies in CCC. Kozolchik reveals in excruciating detail the many limitations caused by “familism” in Latin America, which unduly privileges family interests at the expense of innocent third parties.<sup>31</sup> Similarly, he shows that reasonable third parties could find no protection from authoritarian-legalism in the former Soviet Union, as well perhaps as in Russia today,<sup>32</sup> under what he calls an “invertebrate” system of commercial law—a law

whose factual and normative components were so imprecise that they enlarged the power (and all too often filled the pockets) of government officials, starting with the policeman who waived a fine or prohibition in exchange for a bribe, and extending to the directors of state enterprises and planners of the USSR’s economy.<sup>33</sup>

The combination of familism and authoritarian-legalism potentially at work in modern China posed obvious challenges for the development of global commercial law and will be the subject of the final part of this essay.<sup>34</sup>

Part V is the culmination of CCC, for it analyzes in detail the mechanisms through which modern English and American commercial law facilitate economic exchange. These chapters serve as a mini-course in the law of international business transactions, as well as comparative modern commercial law, and as a superb introduction for “civilians” (i.e., those trained in the civil law tradition) to the sources and methods of Anglo-American law and the socio-economic contexts in which the British and US systems arose.<sup>35</sup>

For the purposes of acquiring a firm grasp of the hedgehog’s vision underlying CCC, which is the subject of Part II of this essay, one should give a close reading to Kozolchik’s masterful recital of the emergence of the modern law validating commercial and standby letters of credit (LOC). This detailed case study focuses on the practices of merchant bankers and the private codification of their best practices through multiple versions of the Uniform Customs and Practices for Documentary Credits (UCP) promulgated by the International Chamber of Commerce.<sup>36</sup> The UCP’s terms became the law of the contracts in this specialized context and set the basic expectations of the parties in modern

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<sup>31</sup> See KOZOLCHYK, CCC, *supra* note 4, at 475–543.

<sup>32</sup> See *id.* at 545–621.

<sup>33</sup> *Id.* at 546.

<sup>34</sup> See *infra* text accompanying note 109.

<sup>35</sup> See generally KOZOLCHYK, CCC, *supra* note 4, at 749–858.

<sup>36</sup> See George L. Ridgeway, MERCHANTS OF PEACE: THE HISTORY OF THE INTERNATIONAL CHAMBER OF COMMERCE (1959), *cited in* KOZOLCHYK, CCC, *supra* note 4, at 1058 n.114 (detailing the history of the ICC, including its role in the development of the UCP).

LOC practice, which for decades has facilitated international exchange by providing a secure means of payment, enforceable notwithstanding breach or other infirmities in their related buyer-seller goods and shipment contracts. By assuring payment based on the presentation of documents of title alone, which thereby gives banks an enforceable collection mechanism against collateral, the provision of credit and payment are assured. Thus, like possession of a negotiable instrument in the hands of a *bona fide* purchaser for value, the beneficiary of an LOC can enforce, subject to very limited exceptions, the instrument notwithstanding underlying defects in the exchange between the parties originating the instrument. With certainty of enforceability, moreover, these instruments can serve also as a form of credit (since beneficiaries of LOCs, for an appropriate discount reflecting the parties' different needs for immediate funds, can transfer their collection rights to purchasers for value, who then may enforce their rights to collection); and, much like accounts receivables in Anglo-American jurisprudence, they can serve as a form of collateral for the extension of credit.<sup>37</sup> In short, LOCs not only overcome the legal risk of nonpayment endemic in international trade, but they also facilitate the flow of credit to those seeking to enter global markets. While this brief and imprecise summary cannot do justice to Kozolchyk's fox-like description of the legal advances in LOC law in the last century, it does provide a segue for addressing Kozolchyk's hedgehog-like overall thesis explaining how instruments of such global importance as LOCs emerged, in fact, out of legal nothingness.

Kozolchyk proceeds to show that it was only when bankers made what one might call a "leap of faith" that LOCs emerged. Less metaphorically, Kozolchyk notes that relatively equal bankers, who sometimes are issuing banks and sometimes are collecting banks (and therefore had an interest in respecting the interests of other parties because the shoe, so to speak, may soon be on the other foot), initiated the practice of commercial letters of credit through an unenforceable act of generosity. The bank issuing the LOC would give "something of value to the beneficiary (the authorization to draw) without receiving an immediate equivalent from him."<sup>38</sup> That the "issuing bank gained the trust of the beneficiary and of subsequent participants in the transaction, including its correspondent banks, for the issuing bank was sufficient consideration."<sup>39</sup> But here the word "consideration" is used in a non-technical legal sense, since it is at odds with the general understanding that past consideration does not constitute a bargained-for exchange. Rather, it is a gift that seeks to induce reciprocal altruism.

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<sup>37</sup> See KOZOLCHYK, CCC, *supra* note 4, at 1049–51.

<sup>38</sup> *Id.* at 1053.

<sup>39</sup> See *id.* at 1053, 1075–80 (summarizing these developments and expressing concern that the effort to maximize bank shareholder value is causing the proliferation of unethical practices inconsistent with ethically sound customs that gave rise to the modern LOC).

## II. THE HEDGEHOG'S GREAT TRUTH

Because Kozolchik's central insight regarding the gift-giving origins of even such a sophisticated and globalized transaction as the modern LOC comes at the end of the book, one could also read CCC backwards, as if unpeeling the layers of an onion or, as might an archeologist, uncovering the layers of foundations of an important site until one reaches the earliest forms of civilization. This thought-experiment might help a reader to develop a clearer understanding of the hedgehog's vision.

Thus, modern Anglo-American commercial law that facilitates enforcement of unbargained-for offers in specific contexts,<sup>40</sup> relies on sectoral customary practices as a critical measure of good faith,<sup>41</sup> and effectively protects third parties acting in good faith through judicially-authorized specific performance and self-help remedies, such as providing secured parties an immediate right to take possession of the collateral after default.<sup>42</sup> This current synthesis could be viewed as building on the advances made by German code drafters through a somewhat amorphous conception of good faith,<sup>43</sup> although the BGB and HGB provided more legal clarity and third-party protection than French and Latin American Codes,<sup>44</sup> not to mention the more primitive conceptions of so-called invertebrate and authoritarian law. But these modern systems all found their sources in the central dilemma posed by Roman and medieval law's search for commercial law principles only through deductive reasoning from initial premises grounded in an Aristotelian pursuit of the "essential" elements of commutative justice in a fair exchange, including a prohibition of interest, a theory that fatally ignored social facts.<sup>45</sup> Yet the genius of Roman law during the Republican *praetorian* period was precisely to enable the system of *praetors* as promulgators of legal formulas, *iudices* as triers of fact, and *jurisconsults* as external experts, working together, to adapt Roman law to changing facts—both to soften the rigors of the civil law with a *ius honorarium*, much like the English Chancellor's invention of equitable remedies; and to adapt the Roman civil law to form a *ius gentium* for Romans and non-Romans alike.

In sum, for wisdom on how to proceed in the modern world trading system's attempt to harmonize now globally multiple legal systems in the story, Kozolchik returns to the first phases of globalization in antiquity and that first effort to construct a living *ius gentium*.<sup>46</sup> Viewed this way, CCC itself reads like Euclid's elements, which have influenced so many political thinkers (Abraham

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<sup>40</sup> See *id.* at 908–14 (especially the so-called "merchant's firm offer").

<sup>41</sup> See *id.* at 972–77.

<sup>42</sup> See KOZOLCHYK, CCC, *supra* note 4, at 1162–63, 1184–88, 1211.

<sup>43</sup> See *id.* at 437–38 (the requirement of "*Treu und Glauben*").

<sup>44</sup> See *id.* at 435–36 (providing an extremely useful chart comparing the differences).

<sup>45</sup> See *id.* at 149–51 (citations omitted).

<sup>46</sup> See *id.* at 105–25.

Lincoln<sup>47</sup> and Thomas Hobbes<sup>48</sup> among them) to believe that agreement on foundational assumptions is at the core of reasoned discourse, even in political economy. It may be ironic, however, that the gist of Kozolchyk's argument—namely, that deductive systems of commercial law impede the development of commerce—is presented in the form of a series of deductive inferences from a set of foundational postulates.

At its root, however, Kozolchyk's chain of argument is premised on a particular conception of human nature. Significantly, he closes the volume with an attack on the Law & Economics movement, which he believes is based on a flawed understanding of human motivation as entirely selfish. Law grounded on that premise, he argues, fails to recognize the socio-biologist's "eusociality," or an anthropologist's "reciprocal altruism," in our natures. It fails to perceive that the best practices of the most honorable merchant (Ulpian's *bonus vir*) are the true and therefore most effective measure for law and its adjudication in a way that serves the common good.<sup>49</sup> In this sense, while rejecting Aristotle's essentialism as a logical system, he reclaims another part of Aristotelian thought—namely, the belief that moral virtue lies in the habitual pursuit of excellence.<sup>50</sup>

Indeed, one could go further, for Kozolchyk's conception of human nature arguably is grounded—not just on sociobiology, anthropology and abstract moral philosophy—but perhaps more deeply on a religiously-inspired insight as to commercial morality and morality more generally: namely, Rabbi Hillel's understanding that selfishness and altruism must find a reasonable accommodation in human life, for "if I am not for myself, who will be for me, and if I am [only] for myself, what am I."<sup>51</sup> In Part III, while discussing and criticizing the formalistic conception of virtue in medieval fair courts as part of the process of European codification, he alludes also to Talmudic thought's Fable of the Evil Impulse. This thirteen-century old poem warns that any attempt to destroy all "evil desire" will only bring about "passion, avarice and greed," which must then entail the recognition that in human life, "[t]here will be good in evil, as

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<sup>47</sup> See generally Antonio F. Perez, *Lincoln's Legacy for American International Law*, 28 EMORY INT'L L. REV. 167, 225–26 (2014) (discussing Lincoln's encounter with Euclid in the late 1840s and the role it played in helping Lincoln to view the Declaration's commitment to equality, rather than the Constitution's rotten compromise, as the foundational axiom for political discussion of the question of slavery).

<sup>48</sup> See generally Hardy Grant, *Geometry and Politics: Mathematics in the Thought of Thomas Hobbes*, 63 MATHEMATICS MAG. 147 (1990) (discussing Hobbes' effort in LEVIATHAN to move from foundational premises to a theory of politics).

<sup>49</sup> See KOZOLCHYK, CCC, *supra* note 4, at 1233–45.

<sup>50</sup> See Aristotle, *Ethica Nicomachea (Nicomachean Ethics)*, in THE BASIC WORKS OF ARISTOTLE 952–59 (Richard McKeon ed., 1941); see also ST. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S NICHOMACHEAN ETHICS 103–06 (C.J. Litzinger trans., Dumb Ox Books rev. ed. 1993).

<sup>51</sup> See KOZOLCHYK, CCC, *supra* note 4, at 169 n.142 (citations omitted). This moderate altruism or "eusociality" finds its roots, for Kozolchyk, also in the Behavioral Darwinist theories of E.O. Wilson. See *id.* at 8–10 (citations omitted).

there is evil in good.”<sup>52</sup> This ethic characterized the Jewish communities of medieval traders<sup>53</sup> and could be observed even more clearly in the life story of Baron von Rothschild, who exemplified the “brotherly” and moderately altruistic values Kozolchyk deems characteristic of the archetypal, or most respected, merchant.<sup>54</sup> In short, the religiously inspired values of the medieval and modern

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<sup>52</sup> *Id.* at 317 n.120. It is impossible to pass on this thought without recognizing its potentially Machiavellian implications. For a Catholic, this Talmudic thought could be interpreted to challenge the traditional Catholic teaching that one ought not to do evil so that good may come of it. See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1749–61, [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s1c1a4.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c1a4.htm) (last visited Oct. 20, 2016). But that principle is qualified by the principle of “double effect,” namely, that mere awareness that an act motivated by a good purpose may have evil or harmful effects does not necessarily make the act wrongful, but an understanding that significant harms outweighing the benefit are likely would call into question otherwise well-motivated acts. See *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA PHIL. (Sept. 23, 2014), <http://plato.stanford.edu/entries/double-effect/>. Here, the thought of German sociologist Max Weber becomes helpful in situating Kozolchyk’s position. Weber, in a seminal lecture and essay that helped to shape public discourse in post-WWI Germany, distinguished in politics between an “ethic of ultimate ends” where one pursues an absolutist agenda and an “ethic of responsibility” under which one takes account of the consequences of one’s high-minded goals. See Max Weber, *Politics as a Vocation*, reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H.H. Gerth & C. Wright Mills eds. trans., 1946). Kozolchyk’s analysis, properly understood, embodies an “ethic of responsibility,” under which “normative charity focuses not only on the beneficence of an act, but on its empowering effects” too. See KOZOLCHYK, CCC, *supra* note 4, at 318. Thus, if commercial rules unrealistically grounded on behavioral assumptions of pure normative charity result in poverty, the principle of double effect in tandem with an ethic of responsibility would allow one to judge that rules based on normative charity alone must be modified.

<sup>53</sup> See KOZOLCHYK, CCC, *supra* note 4, at 153–63 (drawing attention to the role of Maimonides’ teachings) (citations omitted). See also Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990) (discussing an economic model on the role of private judges in medieval fairs).

<sup>54</sup> See KOZOLCHYK, CCC, *supra* note 4, at 397–407 (relying heavily on acclaimed biography NIALL FERGUSON, HOUSE OF ROTHSCHILD (1999)) (citation omitted). That said, it is possible that Kozolchyk’s argument is subject to counter-examples showing that trust networks thrive only in oligopolized markets, where the sanction of exclusion from a close knit community substitutes for legal enforcement mechanisms. As Barak Richman argues, the network of largely Jewish diamond dealers in New York City’s diamond district has unraveled precisely because its privileged position has dissolved, reducing the benefits of membership and the opportunity cost of exclusion. See generally Barak D. Richman, *An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange* (Apr. 13, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2764470](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764470). With the rise of alternative channels of diamond supply—new Australian production mediated by South Asian merchants—coupled with De Beers’ new strategy of vertical integration in place of using New York intermediaries, Jewish merchants in New York no longer perceive the benefits of observing the norms that made them indispensable intermediaries in facilitating credit sales in the market for a product, such as diamonds, that can easily evade formal, legal collection mechanisms. See *id.*

communities of Jewish traders and financiers serve as the practical exemplars of Kozolchyk's theory.

Fleshing out this theory, the archetypal merchant, living a practical morality of moderate altruism, becomes the root premise for commercial development. Here, the *bon mot* (or clever phrase) becomes the *mot juste* (or exact phrase) in Kozolchyk's discourse, as he employs the term "nuclear" elements of the exchange to argue that the original or "nuclear" parties to a transaction, such as the original creditor and debtor, must give third parties the same treatment in good faith they give each other, even though these third parties are strangers and are not part of the "nuclear" or original parties to the exchange.<sup>55</sup> Thus, the *bon mot*, "nuclear"—an apparent analogy to nuclear physics and the constituent parties of all matter—may also, perhaps in an unintended pun, serve as the *mot juste* that reflects Kozolchyk's core idea that enhanced good faith morality of the archetypal merchant gives to third parties equality of treatment as if they were initial parties to the exchange, as if they were the members of the very same "nuclear" families or kinship groups. This line of thought is consistent with Kozolchyk's belief that the modern trade concept of "national treatment," which has become central to the WTO, GATT, NAFTA, and CAFTA, to name only a few trade agreements, is connected to the medieval idea of the so-called "peace of the market."<sup>56</sup> For Kozolchyk, these successful commercial practices, such as both national treatment and the medieval peace of the market, are manifestations of the behavioral regularity, custom, or ethical or philosophical principle (depending on the disciplinary focus one may employ) that strangers ought to be treated as "brothers" or "neighbors." Thus, in the case of credit systems, it is only through a rich understanding of the interaction between selfishness and altruism, and a firm grasp of the particular factual nuclear elements of a commercial practice, that comparative legal reform can enable law and lawyers to become a vehicle for doing well by doing good.<sup>57</sup> In CCC's Epilogue, Kozolchyk returns to this foundational thesis, observing that globalization, growing interaction, and the accumulation of experience may facilitate the emergence of the best practices of the archetypal global merchant.<sup>58</sup> One can extrapolate the beneficial consequences for global economic development if Kozolchyk's vision, as hedgehog, can be universalized.

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<sup>55</sup> See KOZOLCHYK, CCC, *supra* note 4, at 1034–38.

<sup>56</sup> See *id.* at 304–05 (the medieval institution of the so-called "peace of the market," which provided for safe conducts immunizing traders and their goods from capture under letters of marque and reprisal).

<sup>57</sup> See *id.* at 1038–39.

<sup>58</sup> See *id.* at 1247–48.

For Latin Americans, however, living under a pervasively Catholic culture and an Aristotelian intellectual tradition, Kozolchik's rejection of Aristotelian "essentialism" and its "static" conception of contractual relations and appeal to Talmudic principles may well pose a challenge.<sup>59</sup> Indeed, Kozolchik even wants to make clear that Christian charity "as a form of doing business and judicial decision-making suffers from inherently crippling limitations."<sup>60</sup> Yet, despite Kozolchik's frank appraisal that dogmatic medieval Catholic legal thought's misunderstanding of the role of money and interest (with its pre-Marxist distrust of capital as such), it seems that his understanding of archetypal merchant conduct arguably overlaps with Christian moral teaching. Like Kozolchik, Catholic thought sees virtue as habitual practice.<sup>61</sup> Moreover, central to Catholic social teaching, which informs Catholic understanding of economic life as well, is the protection of the stranger; for, in response to the question "Who is my neighbor?"—by a lawyer who seeks to know how to interpret Jesus's instruction to love not only God but also one's neighbor—Jesus tells the Parable of the Good Samaritan.<sup>62</sup> Latin American Catholics would acknowledge that Talmudic teachings that are consistent with Catholic intuitions might serve as a basis for legal reform, and surely they would acknowledge that the Roman Church's medieval misunderstanding of the role of credit has been transcended by the modern Church's acceptance of the potential virtues of private property and market life.<sup>63</sup> If so, an interfaith dialogue between the Talmudic insights

<sup>59</sup> See *id.* at 150.

<sup>60</sup> KOZOLCHYK, CCC, *supra* note 4, at 317 (purporting to disagree with Amalia D. Kessler, *Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court*, 22 L. & HIST. REV. 71 (2004)).

<sup>61</sup> See AQUINAS, *supra* note 50 ("Lecture VI: Virtue, a Kind of Habit").

<sup>62</sup> See Luke 10:25–37 (Jerusalem).

<sup>63</sup> See, e.g., Pope John Paul II, Encyclical Letter *Centesimus Annus* ¶ 42 (May, 1991), [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_01\\_051991\\_centesimus-annus.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01_051991_centesimus-annus.html) [hereinafter *Centesimus Annus*] (giving qualified acceptance to capitalism). See also Michael Novak, *Capitalism Rightly Understood: The View of Christian Humanism*, ETERNAL WORLD TELEVISION NETWORK, <http://www.ewtn.com/library/business/fr91401.htm> (last visited Oct. 20, 2016) (providing a sophisticated account of the balance John Paul II struck between the virtues embedded in capitalism and the necessary elements of a reform agenda). Indeed, John Paul II recognized, like the Talmudists, that "where self-interest is violently suppressed, it is replaced by a burdensome system of bureaucratic control which dries up the wellsprings of initiative and creativity." *Centesimus Annus*, *supra*, ¶ 25. See also MICHAEL NOVAK, *THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM* (1993). It should be acknowledged, however, that the Church continues to struggle in its understanding of the nature of economic life. Most recently, Pope Francis opined: "In fact, if the market is governed solely by the principle of the equivalence in value of exchanged goods, it cannot produce the social cohesion that it requires in order to function well." Pope Benedict XVI, Encyclical Letter *Caritas in Veritate* ¶ 35 (June 29, 2009), [http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate.html](http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html). See also Pope Francis, Apostolic Exhortation *Evangelii Gaudium* (Nov. 24, 2013), [http://w2.vatican.va/content/francesco/en/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124](http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124)

Kozolchik brings to bear and a modern Catholic understanding of the role of the market and free trade in eliminating global poverty would be in order. In promoting this foundational dialogue, which could extend to other faiths and secular traditions, Kozolchik's work thus serves far deeper purposes than even he may realize.

Indeed, Kozolchik's central Talmudic insights can also be located in a tension, not just between different faith traditions, but also found among those who reason from non-Judeo-Christian or wholly secular perspectives. This debate, or tension, is also a longstanding dialectic in the market's encounter with morality. In a recent formulation, political economist and intellectual historian Albert Hirschman famously distinguished between the so-called sweet or "*doux-commerce*" thesis and the so-called "self-destruction" thesis. Under the former—long associated with the thought of Montesquieu, David Hume, and Adam Smith—market society is conducive to good manners, opposition to violence, frugality, punctuality, and probity.<sup>64</sup> So-called "scientific" socialists, such as Marx, advancing the self-destruction thesis argued that the internal logic of capitalism would bring about "an ever-more numerous and more class-conscious and combative proletariat."<sup>65</sup> Meanwhile, conservatives, such as Bolingbroke, feared that "all social bonds were dissolved through money."<sup>66</sup>

But for Hirschman, rather than empirical questions, these competing theses evidence merely the cycling of ideas, since the so-called *doux-commerce* thesis prompted the self-destruction thesis, each of which continued to be reformulated again and again within various disciplines. In the 20th century, Horkheimer's Frankfurt School's neo-Marxism argued, like Bolingbroke, that Western civilization was destroying the intellectual and cultural basis for that civilization's existence.<sup>67</sup> Meanwhile, conservative self-destruction theories were reformulated in rationalist terms—such as Schumpeter "creative destruction" of existing markets through technological advance, leaving incumbent workers and businesses behind with enormous adjustment costs;<sup>68</sup> as the game-theoretic account of the prevalence of self-interested behavior in strategic interactions popularized by the Prisoners' Dilemma;<sup>69</sup> or, as Kozolchik might add, the "Law & Economics" movement.<sup>70</sup> And, in a work that would be of particular interest to Kozolchik, Hirschman refers to German sociologist Simmel's observation that

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[\\_evangelii-gaudium.html](#). Sadly, this is based on a fundamental misconception, since market exchanges are based precisely on the different perception that market participants have about the value of exchanged goods, thereby giving rise to an exchange under which both sides believe their positions have improved, which in turn furthers social cohesion by bringing the parties together in a mutually-satisfying exchange.

<sup>64</sup> See Hirschman, *supra* note 5, at 107–09.

<sup>65</sup> *Id.* at 112.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 115–16 (citations omitted).

<sup>68</sup> *Id.* at 114–15 (citations omitted).

<sup>69</sup> Hirschman, *supra* note 5, at 117 (citations omitted).

<sup>70</sup> See *supra* text accompanying note 49.



“the advanced division of labor in modern society, and the importance of credit for the functioning of the economy, rest on, and promote, a high degree of truthfulness in social relations.”<sup>71</sup> Hirschman even recognized that the *doux-commerce* thesis seemed to have the greatest resiliency against the self-destruction thesis in the context of studies of international trade, for “[o]nly with regard to international trade was it still asserted from time to time, usually as an afterthought, that expanding transactions would bring, not only mutual material gains, but also some fine by-products in the cultural and moral realms, such as intellectual cross-fertilization and mutual understanding and peace.”<sup>72</sup>

It goes without saying that, in the context of this longstanding debate over the degree to which market society inculcates, destroys, or ultimately must depend on virtue among market participants, Kozolchik’s work is a welcome theoretical—but more importantly, empirical—contribution. Indeed, the logic of the reasonable is not for merchants alone. Kozolchik’s message to transactional lawyers in the emerging global environment is that, in addition to understanding the best practices of any setting, they must take on the responsibility of becoming the “guardians” of the good faith of the individual transaction.<sup>73</sup> For lawyers and lawyer-students of the Talmud or the New Testament, as well as other faiths and secular religions, there could not be a more inspirational note upon which to end so rich and stimulating a volume as CCC.

### III. THE OAS AND CIDIP: THEORY ROOTED IN EXPERIENCE

For those looking for inspiration in practice rather than theory, Kozolchik’s role in the Inter-American process of legal cooperation provides numerous examples of how his methodology can produce results. Indeed, it is the wealth of experience that has given rise to CCC that is perhaps the best possible explanation for the quality of Kozolchik’s theoretical contribution to the process of legal harmonization in the Western Hemisphere. That process, as this Part will also show, provides examples of the consequences for failing to follow Kozolchik’s precepts, providing additional evidence for the need to take CCC seriously.

It is necessary to begin with the observation that Kozolchik’s work on comparative law and economic development grows out of his personal history, beginning in Cuba under the constraints the civil law tradition imposed on his own father’s activities as a merchant. These life experiences return throughout CCC in various forms and delightfully inform the reader of the man behind the manuscript.<sup>74</sup> But the intellectual journey of these beginnings launched

<sup>71</sup> Hirschman, *supra* note 5, at 121 (citations omitted).

<sup>72</sup> *Id.* at 118.

<sup>73</sup> KOZOLCHYK, CCC, *supra* note 4, at 1247.

<sup>74</sup> Kozolchik discloses that his mother’s entire family, it turns out, was exterminated by the Nazis. *See id.* at 377. And he recounts the medieval atrocities of the Frankfort Ghetto, which nonetheless eventually became the launching point for the

Kozolchyk on a voyage through Latin American, European, and American legal scholarship, sent him to field research in Central America and Mexico, and finally brought him to port at The University of Arizona and the NCLFT.<sup>75</sup> Under Kozolchyk's stewardship, the NCLFT became a forum for technical cooperation among commercial practitioners in the NAFTA countries in a number of areas: among others, the development of codes of conduct that would facilitate the development of common standards for activities as mundane as cross-border check clearing, the checking of letter of credit documents for technical compliance with required elements, and the effective transfer of truckers bills of lading.<sup>76</sup> In these efforts, Kozolchyk, perhaps like a religious convert from a childhood civil law education to an adult faith in common-law methodology, followed a common law lawyer's practice of fully understanding all the material—as he would say, “nuclear” facts; only such understanding would yield a basis for finding the critical elements that would need to be reformed to ensure the durable success of these exchanges by means of realizing the reciprocally-altruistic behavioral standards of the archetypal merchant.<sup>77</sup> In the case of developing a “roadmap” for effective truck bills of lading, for example, this required NLCIFT researchers to be “present during the issuances of truck bills of lading in Canada, the United States, and Mexico” and “when cargo shipped from Canada or the United States was delivered to the consignee/buyers in Mexico.”<sup>78</sup> In the case of developing common standards for the examination of letter of credit documents before their acceptance for payment, in implementation of new UCP rules, this entailed working with bankers associations in the United States and Mexico to conduct a document-by-document, objection-by-objection review of each group's practices,

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Rothschilds, whose role in the development of European commerce plays a central part in Kozolchyk's story. *See id.* at 397–99; *see also supra* text accompanying note 54. But he also tells the far more heart-warming story of his introduction to business as a part-time silk cloth salesman in his father's store in Cuba, where he learned the importance of credibility and trust in market life. *See KOZOLCHYK, CCC, supra* note 4, at 489–90. He had, in fact, replaced a much taller salesman, and the usual measure of length of the cloth, and therefore the price of the quantity to be sold, in terms of the length of the salesman's arm needed to be adjusted to take into account his somewhat shorter stature, a limitation with which no doubt many of us can empathize. *See id.*

<sup>75</sup> *See* Staff Members, NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE (NLCIFT), <http://natlaw.com/staff/dr-boris-kozolchkybk> (last visited Oct. 20, 2016) (providing a concise account of Dr. Kozolchyk's academic career and role at the NLCIFT). Dr. Kozolchyk, despite his retirement as Executive Director, will continue as a member of the Board of Directors and Director of Research. *See* Leah Sandwell-Weiss, *Arizona Law Welcomes Don De Amicis as Executive Director of NatLaw*, U. ARIZ. JAMES E. ROGERS C. L. (Sept. 16, 2015), <https://law.arizona.edu/arizona-law-welcomes-don-de-amicis-executive-director-natlaw>.

<sup>76</sup> *See* Kozolchyk, *Trans-Pacific, supra* note 4, at 44–49.

<sup>77</sup> *Id.* at 49.

<sup>78</sup> *Id.* at 48.

with detailed explanations of the reasons for objections, in an effort to identify the true “reasons for their disparate practices.”<sup>79</sup>

Yet Kozolchik’s most important achievement, and perhaps the polar star for CCC, is the OAS Model Law on Secured Transactions.<sup>80</sup> Here too the emergence of agreed principles was made possible only through detailed study of relevant sectoral practices. In Mexico, for example, this included, among other things: the role of national identity cards in determining the legal status of debtors; the typical reliance of poor farmers on usurious lenders in Mexican agriculture; the lack of a reliable system for cattle identification; and the practice of not producing reliable records to identify the value of potential collateral because doing so would undercut efforts to avoid tax collection.<sup>81</sup> It should be noted that the Model Law on Secured Transactions is one of the chief accomplishments of the CIDIP process under the OAS, with, unlike so many other products of the CIDIP process, increasing prospects for implementation throughout the Western Hemisphere.<sup>82</sup>

In all of these efforts, grounded on a deep understanding of the facts, Kozolchik’s approach then called upon the parties to employ what Kozolchik calls the “logic of the reasonable.”<sup>83</sup> Sometimes this entailed asking parties to set aside their prejudices, including the claim of “cultural imperialism,” under which it was asked ““Why is it that Mexico must import its trade and commercial laws from Canada and the United States and the same is not true the other way around?””<sup>84</sup> It is not the logic of the rational or mere deductive logic. It is, rather, “inseparably linked to transaction facts and sectoral facts,” and the success of these efforts demonstrated that “commercial lawyers who are trained as comparative and contextual analyst are the best equipped to determine who should be treated fairly, i.e., as equals or better, and who should not.”<sup>85</sup> For Kozolchik, when theory and practice meet, progress becomes possible—a somewhat ironic legacy for a refugee, like Kozolchik, who left behind a political system in Cuba ostensibly committed to the Marxist belief in the so-called unity of theory and practice.<sup>86</sup> Since Kozolchik and Marx no doubt do not share common ground in

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<sup>79</sup> *Id.* at 47.

<sup>80</sup> See OAS, *Model Secured Transactions*, *supra* note 11.

<sup>81</sup> See KOZOLCHYK, CCC, *supra* note 4, at 75–79. See also Boris Kozolchik & Dale Furnish, *The OAS Model Law on Secured Transactions: A Comparative Analysis*, 12 SW. J. L. & TRADE AM. 235 (2006); Boris Kozolchik & John M. Wilson, *The Organization of American States: The New Model Inter-American Law on Secured Transactions* 7 UNIF. L. REV. 69 (2002) (providing a more detailed exposition of the drafting process and the elements of the OAS Model Law on Secured Transactions).

<sup>82</sup> See Boris Kozolchik, *Implementation of the OAS Model Law in Latin America: Current Status*, 28 ARIZ. J. INT’L & COMP. L. 1 (2011) (reporting on developments and adoptions in the first decade of the Model Law’s availability).

<sup>83</sup> See Kozolchik, *Trans-Pacific*, *supra* note 4, at 55.

<sup>84</sup> KOZOLCHYK, CCC, *supra* note 4, at 73.

<sup>85</sup> Kozolchik, *Trans-Pacific*, *supra* note 4, at 55.

<sup>86</sup> See Karl Marx, *Theses on Feuerbach*, in THE MARX-ENGELS READER 107, 109 (Robert C. Tucker ed., 1972) (stating in Thesis XI: “The philosophers have only *interpreted*

what this means, it might be better to say that his methods realize the vision of the hedgehog with the skills of the fox.

By contrast, in this author's experience as a member of the OAS Inter-American Juridical Committee (IJC) from 2005 to 2008, failed CIDIP exercises are characterized by approaches that fail to unify theory and practice. To evaluate this claim, however, one needs to understand the historical context for the role of the IJC and the CIDIP process as vehicles for private international law cooperation in the Western Hemisphere, which can in fact be traced to the beginnings of the Inter-American legal community at the end of the 19th century.<sup>87</sup> For Latin Americans, much of the mythology of private international law cooperation is based on the signal achievement in the early 20th century of the promulgation of the so-called Bustamante Code (in honor of its chief draftsman, the Cuban professor Antonio Sánchez de Bustamante y Sirvén) at the Sixth International Conference of American States at Havana in 1928.<sup>88</sup> Drawing on earlier work of the civilian countries in the region, the Code was in fact a set of choice-of-law rules, rather than a set of substantive principles for private law harmonization.<sup>89</sup>

When, after a series of procedural and institutional transformations, the IJC as the chief legal advisory organ of the OAS emerged as the successor to the committee responsible for the Bustamante Code, it seemed natural for the IJC, whose members are elected by the General Assembly of the OAS,<sup>90</sup> to take up the task of harmonizing the civilian-inspired choice-of-law rules adopted at the pre-war Havana Conference with the choice-of-law rules of the United States. But as luck and fate would have it, the attempt at choice-of-law harmonization was doomed from the start: first, federalist concerns prevented US negotiators from accepting the possibility that choice-of-law rules could be the subject of a federal treaty harmonizing US rules with civilian methods; and second, at precisely that moment, US courts were beginning to fashion a choice-of-law revolution that began to displace largely territorialist, choice-of-law rules, inspired by civil law,

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the world, in various way; the point, however, is to *change it*" (emphasis added)). For the full-blown explication of this view, see Karl Marx, *The German Ideology, Part I*, in THE MARX-ENGELS READER, *supra* at 110.

<sup>87</sup> See Antonio F. Perez, *The Inter-American Juridical Committee and Private International Law in the Americas (or a Roadmap for Making the Best the Enemy of the Good)*, in EL COMITÉ JURÍDICO INTERAMERICANO: UN SIGLO DE APORTES AL DERECHO INTERNACIONAL 299, 300–05 (2007) [hereinafter Perez, *IAJC*] (discussing the pre-history of the OAS and IJC in the Montevideo Conferences of 1888–89 and 1939–40); see also Antonio Perez, *Consumer Protection in the Americas: A Second Wave of American Revolutions?*, 5 ST. THOMAS L. J. 698 (2008) [hereinafter Perez, *Second Wave*] (providing an economic analysis, taking into account national and regional market differences, of the need for greater consumer protection, also as a vehicle for greater empowerment of disadvantaged groups of consumers and producers).

<sup>88</sup> See Perez, *IAJC*, *supra* note 87, at 305 n.28 (citation omitted).

<sup>89</sup> See *id.* at 310–11.

<sup>90</sup> See Charter of the Organization of American States art. 101, Apr. 30, 1948, 119 U.N.T.S. 3.

with so-called governmental interest and other methodologies. The retreat from civilian-inspired territorialism in US conflicts doctrine thus reduced the likelihood of agreement on a common theoretical approach. Indeed, the US choice-of-law “revolution” included even methods that were variants on ancient attempts to find the “best” or at least “better” law in multi-state transactions, much as the *praetor peregrinus* through edicts governing disputes between Romans and non-Romans in antiquity fashioned the so-called *jus gentium*.<sup>91</sup> Looking at the content of the law and its quality was as far away as one could imagine from the traditional civilian method of choosing the law of a jurisdiction without regard to that law’s content or quality.

However, the IJC’s persistence in seeking to resurrect the Bustamante Code in effect marginalized it, as the OAS member states voted to create an alternative process involving representatives of the member states and private sector representatives, the CIDIP, which might prove more productive.<sup>92</sup> The new CIDIP process disdained efforts to resurrect the Bustamante Code and pursued a more pragmatic agenda. It lowered its sights even in pursuing private international law conventions; rather than embarking on wholly new projects, it merely adapted some of the instruments produced at the universal Hague Conference on Private International Law to serve Latin American needs.<sup>93</sup> More importantly, by the mid-1990s, the CIDIP began to focus on the possibility of substantive law harmonization—with the breakthrough coming in 1996 in the aftermath of the eruption of free trade instruments during that period, when the OAS General Assembly specifically approved the promotion of instruments to promote free trade. With this new impetus, the CIDIP produced Model Laws that could serve to harmonize substantive private law rules and help to create a level playing field for market participants throughout the Americas. It was in this context that the CIDIP, with the able assistance of Kozolchuk and the NLCIFT, were able to produce the Model Law on Secured Transactions and its successor projects.<sup>94</sup>

Tragically, it was only in the aftermath of the failed effort to produce a free trade agreement for the whole hemisphere that the issue of consumer protection emerged as a priority topic in the CIDIP agenda.<sup>95</sup> The effort might have been a bridge too far to begin with; for, unlike prior CIDIP topics, the consumer protection problem could be viewed from the lens of overall distributive justice and the special role of the state in protecting the community from mass tort.<sup>96</sup> But as it turned out, the issue simply became a vehicle for replaying the struggles of the past between those who would pursue efforts to allocate sovereignty through choice-of-law rules on one hand and, on the other, those who

<sup>91</sup> See Perez, *IJC*, *supra* note 87, at 310–17 (citations omitted).

<sup>92</sup> See *id.* at 317–24 (citations omitted).

<sup>93</sup> See *id.* at 324–27 (citations omitted).

<sup>94</sup> See *id.* at 327–28 n.129.

<sup>95</sup> See MICHAEL REID, *THE FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA’S SOUL* 309 (2007).

<sup>96</sup> See Perez, *Second Wave*, *supra* note 87, at 701.

wished to focus on the substantive contract rules that (taking into account the need of all stakeholders for fair and reasonable protection of their interests) might afford consumers effective protection.

The United States, Canada, and Brazil each submitted proposals for instruments. Brazil, recalling the methods of the Bustamante Code, proposed a choice-of-law treaty with a wrinkle. Under Brazil's proposal the law of the consumer's home would govern, except that when the contract contained a choice-of-law clause the "law most favorable to the consumer" would then govern. Nothing in the proposal made clear the criteria that would be used to determine which country's law was "most favorable" or even what constituted the relevant "law" on the question.<sup>97</sup> The Canadian treaty proposal, informed by civil law thought but practically directed primarily at electronic commerce, purported to regulate jurisdiction, enabling consumers to sue anywhere a seller or producer's assets could be found; yet the proposal, like the Brazilian proposal, included choice-of-law rules applying the consumer's home forum law, also ignoring the parties' choice of law (albeit not when "the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing" in the consumer's home state).<sup>98</sup> The US proposal, by contrast, included a set of model laws and legislative guides taking account of the public law dimension of consumer protection, including: draft models laws for strengthening governmental consumer protection authorities; simplified tribunals for small consumer claims; collective or representational dispute resolution and redress for common injuries to consumers; and electronic arbitration of small claims. The US proposal thus focused on mechanisms to generate effective remedies in private adjudication and, when small claims could not be cost-effectively pursued in ordinary adjudication, instead through governmental or collective (such as class action) mechanisms. The US proposal was a harmonization scheme targeting the law of remedies, designed to ensure that innocent consumers—like *bona fide* purchasers for value who can negotiate or collect on instruments in their possession or innocent creditors able to enforce their rights through self-help in taking possession of collateral without a breach of the peace—are protected through effective remedial mechanisms.<sup>99</sup>

It should be noted that these disagreements were replicated at the level of the IJC, where multiple reporters reflecting these competing views were unable to forge a common position to enable the IJC to participate effectively in the CIDIP process as counselor or intermediary.<sup>100</sup> Given the incommensurability of these

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<sup>97</sup> See *id.* at 702–03 (citations omitted).

<sup>98</sup> *Id.* at 703.

<sup>99</sup> See *id.*

<sup>100</sup> See Organization of American States, *Annual Report of the Inter-American Juridical Committee to the General Assembly 2006*, OEA/Ser.Q/VI.37 CJI/doc 237/06 (Aug. 7–25, 2006), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2006.ING.pdf>. One might compare the different analytical approaches of the members assigned to monitor CIDIP developments for the IJC. This author, who was then a member of the IJC, submitted an individual report reflecting a pragmatic, common law orientation. See *id.* at

approaches, it should not be surprising that no progress has been made in either forum. Indeed, because of the impasse, the General Assembly of the OAS ultimately removed the issue from the CIDIP agenda and, as reported to the IJC by the OAS Secretariat's Legal Director Dante Negro, "the topic was sent back to the Committee on Juridical and Political Affairs via the Permanent Council"<sup>101</sup>—thus bringing to an end a misbegotten effort to impose abstract choice-of-law treaty solutions in the absence of the kind of factual knowledge and practical inquiry that preceded the success of the Model Law on Secured Transactions. Adding insult to injury, he "used the opportunity to urge the Committee to present new topics or proposals that might be of interest for future contributions."<sup>102</sup>

The message was clear: neither the IJC nor CIDIP could make progress on consumer protection issues while they remained deadlocked on fundamental questions of methodology. And the IJC seemed to get the message. In a search for new issues that would enable it to "contribute to these issues without falling prey to the paralysis of the last CIDIP," the IJC added to its agenda the study of "a uniform law governing customs receipts relating to the transportation of agricultural products."<sup>103</sup> While mundane, this decision signaled a return to the course that produced the Model Law on Secured Transactions. Although progress remains glacial, it should be noted that the IJC's work is being slowed, not by theoretical concerns, but rather by resource limitations in convening the substantive experts whose knowledge is essential to producing an instrument that

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76–78. The Salvadoran member, Dr. Ana Elizabeth Villalta Vizcarra, submitted a report drawing on the civil law tradition that favored the Brazilian proposal. *See id.* at 66–71. Interestingly, however, a third reporter, the Brazilian member of the committee, despite his civil law orientation, joined the US reporter to express concern about the legal uncertainty that would be generated by the Brazilian proposal for a choice-of-law treaty. *See id.* at 78–79. These tensions continue to characterize the IJC's deliberations, with even more extensive and divergent reports as the parallel CIDIP process also could not bridge its differences. *See* Organization of American States, *Annual Report of the Inter-American Juridical Committee to the General Assembly 2007*, OEA/Ser.Q/VII.38 CJI/doc.286/07 (Aug. 10, 2007), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2007.ING.pdf>; Organization of American States, *Annual Report of the Inter-American Juridical Committee to the General Assembly 2008*, OEA/Ser.Q/VI.39 CJI/doc.316/08 (Aug. 14, 2008), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2008.ENG.pdf>. Finally, Dr. Villalta and the author's successor at the IJC, David Stewart, reported to the IJC that the CIDIP process on consumer protection issues had come to an "impasse" and, in Stewart's words, "the current situation does not give much room for any action by the Juridical Committee" and the IJC "would have to await the outcome of the negotiations of the countries" before it "could resume the active role it had been playing in the process for codification of private international law." Organization of American States, *Annual Report of the Inter-American Juridical Committee to the General Assembly 2009*, OEA/Ser.Q/XIX.40 CJI/doc.425/12 (Aug. 14, 2009), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2009.ENG.pdf> [hereinafter OAS, *2009 Annual Report*].

<sup>101</sup> OAS, *2009 Annual Report*, *supra* note 100.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 129 (selecting the US member, David Stewart, as the IJC's reporter for this new project).

could have the desired practical effects.<sup>104</sup> This kind of glacial progress is best, for “it makes haste slowly.”<sup>105</sup>

Comparing the effects of Dr. Kozolchik’s participation in the CIDIP process with the failed efforts to address the problem of consumer protection as a spur to trade, one might generalize, following the work of Friedrich Jeunger, the noted comparativist and conflict of laws scholar, that choice of law methods of various forms have failed to achieve anything of permanent value and should be discarded and replaced with an honest pursuit of the best law that should govern multi-state transactions.<sup>106</sup> As shown by Kozolchik’s successful work and the failed counter-example of the IJC and CIDIP’s effort to improve cooperation on consumer protection, abstract choice-of-law theorizing distracts states from developing effective mechanisms for consumer protection that take into account the diversity of settings and interests of the countries involved. It appears, rather, that the *sine qua non* for progress at the IJC and CIDIP is to follow Kozolchik’s methodology: grasp fully the facts on the ground through conversation with all interested stakeholders, and seek to reach agreement on the basis of the best practices of the archetypal merchant or market-participant, Ulpian’s *bonus vir*.

Indeed, that learning process may have already begun. The failed consumer protection effort, coupled with the well-received Model Law on Secured Transactions, seem to have prompted the OAS and its CIDIP process to move in a direction suggest by Kozolchik’s CCC. Now, with an effort to produce a new Model Law for Warehouse Receipts for Agricultural Products, the IJC’s membership seems to recognize the relationship between legal harmonization, especially with respect to documents covering goods, and the flow of commerce and credit, especially for small- and medium-sized enterprises;<sup>107</sup> and that

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<sup>104</sup> See Organization of American States, *Annual Report of the Inter-American Juridical Committee to the General Assembly 2015*, at 42, OEA/Ser.Q CJI/doc.495/15 (Sept. 8, 2015), <http://scm.oas.org/pdfs/2016/CP35451EREPORTCJI.pdf> [hereinafter OAS, 2015 Annual Report]. See also Organization of American States, *Annual Report of the Inter-American Juridical Committee to the Forty-Fourth Regular Session of the General Assembly*, at 104–112, OEA/Ser.G CP/doc.4956/14 (Jan. 24, 2014), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2013.ENG.pdf> (providing a useful study by the IJC reporter drawing on Kozolchik’s methodology in order to construct a set of principles to govern warehouse receipts, akin to Kozolchik’s principles for a model law on Model Law on Secured Transactions).

<sup>105</sup> The phrase, “*festina lente*,” is attributed to Augustus Caesar and is deemed a reflection of his wisdom. See *Festina Lente*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Festina\\_lente](https://en.wikipedia.org/wiki/Festina_lente) (last visited Oct 21, 2016).

<sup>106</sup> See generally FRIEDRICH JEUNGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993) (calling, in effect, for a return to the methods of the Roman *praetor peregrinus*, whose edicts governing cases between Romans and non-Romans gave rise to the so-called *jus gentium*).

<sup>107</sup> See OAS, 2015 Annual Report, *supra* note 104, at 36 (stressing “the positive effects that developments in electronic warehouse receipts for agricultural products could have on the economics of the countries, particularly on small-scale agricultural goods producing companies”).



recognition may now benefit from the fertile ground that may now be emerging with pro-market political and economic reform in the region.<sup>108</sup> In short, if Latin Americans are to realize fully their potential for economic and human development, Kozolchik's insight that reciprocal altruism and the protection of strangers (including consumers and small businesses seeking entry in foreign markets) rather than excessive preferences for insiders (such as kin and even nationals) must become the organizing principle for commercial law in the Americas.

#### IV. NEW CHALLENGES IN GLOBAL PRO-DEVELOPMENT PRIVATE LAW HARMONIZATION

Even if Kozolchik's methodology is a *sine qua non* for progress in private law harmonization, it may not be a sufficient condition. Cultural change may be necessary, especially in the case of the Latin and Asian cultures, which Kozolchik shows are permeated by familism. After describing the impediments familism creates in Latin America for the acceptance of legal rules that protect third parties, and the encouragement it gives to simulated practices to conceal illegality or other forms of corruption in order to privilege kin and other insiders,<sup>109</sup> CCC includes three full chapters on the roots and nature of the Chinese commercial legal system, drawing attention to the fact that Chinese commercial law, like Latin American law,<sup>110</sup> has been culturally constrained in its protection of third-parties.<sup>111</sup>

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<sup>108</sup> See Shannon K. O'Neil, *Argentina and Brazil Grow Together*, COUNCIL ON FOREIGN REL.: LATIN AMERICA'S MOMENT (July 15, 2016), <http://blogs.cfr.org/oneil/2016/07/15/argentina-and-brazil-grow-together/> (discussing recent political and economic changes in Brazil and Argentina).

<sup>109</sup> See KOZOLCHYK, CCC, *supra* note 4, at 475–543.

<sup>110</sup> *Id.* at 476. Kozolchik notes: “Surprisingly, especially to someone born and raised in Latin America, the early legal cultures of Latin America and China had important elements in common. In addition to the not-very-dissimilar versions of familism and legalism, including a tendency to monopolize commerce and to treat contracting parties who are members of the extended family better than non-members, pre-colonial and colonial Latin America and Chinese ‘commoners’ shared another important attitude: their respect for and obedience to those who were their social, political and military hierarchical superiors. In the case of the family, the obedience was to the patrilineal hierarchy, and where legalism was concerned, the obedience to the chieftain (*caudillo*) warlord or emperor was strengthened by their being equated by the governed to heads of their family households.” *Id.* For Kozolchik, familism in these contexts means “a legal culture whose institutions are designed to protect the best interests of the family as an economic unit, including actual and ‘fictive’ kin members (such as the Mexican *compadre* or the Chinese *Guanxi*) and economic dependents, at the expense of the ‘strangers’ or ‘third parties.’” Legalism means “the method of enacting and enforcing laws by authoritative rulers accompanied by an appearance of having observed lawful procedures. It is only an *appearance* because these rulers do not reflect the consent of the governed any more than they are the product of the wisdom or higher morality of the ruler. At their most basic,

But Kozolchik also makes an important allusion to the tensions that are being created in the world economy's efforts to integrate China in his discussion of the emergence of the modern LOC. Because of disputes concerning charges for a "negotiation commission" to "beneficiaries" by negotiating, issuing and confirming banks, so simple a term as "negotiation" was in urgent need of clarification. Kozolchik observed that "[s]ince the claims of fraudulent tender of documents multiplied during the 1980s, especially with the large volume of shipments to and from China, this legal clarification was of considerable commercial and economic significance."<sup>112</sup> Implicitly, if not explicitly, this account draws attention to the question of the implications of traditional patterns of Chinese culture and economy for global legal harmonization.

This review concludes, therefore, with a discussion of the key causes for concern about Chinese culture and law in the context of the requirements for effectiveness set forth in CCC. It then locates Kozolchik's concerns in a larger literature (which is of relevance both to Latin America and China) about the transformation of traditional kinship patterns of trust into alternative models that provide greater cultural acceptance for the protection of strangers or could, alternatively, erode the progress that has been made in building the cultural habits underlying laws that protect strangers. A capsule summary of chapters 17 through 19 of CCC in no way does justice to the complexities of Chinese history, law, and culture. But for those without a prior background in this subject, these chapters are essential reading, for they reveal core concerns about the future that are implicit in Kozolchik's account of how the rise of China destabilized modern LOC practices. Those concerns may even include the possible threat China could pose to the Western cultural habits that have given rise to the creditor-protecting instruments that are now key vehicles for the reduction of global poverty.

Kozolchik's three chapters lay the foundations of Chinese commercial law in historic Chinese culture, then discuss imperial and Maoist law, and then culminate with an analysis of current Chinese law of commercial contracts. The first—and perhaps most important—point Kozolchik uncovers is that the father of Chinese thought, Confucius, placed merchants at the bottom of China's intensely hierarchical social order, for "all they cared about was their 'gain' or profit-making."<sup>113</sup> The intensity of familism in defiance of public norms, like Mexico's *compadrazgo* and every Mexican's "natural right to smuggle," while traditional Chinese culture justifies the refusal of a son, as an "upright" man, to turn his own father in to the authorities even when the father had committed a crime.<sup>114</sup>

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these legalistic rules reflect the coercive power and pleasure of the sovereign or ruler." *Id.* at 475. Not surprisingly, when familism and legalism combine, the basic legitimacy of formally-enacted law is perilous at best.

<sup>111</sup> *See id.* at 623–746.

<sup>112</sup> KOZOLCHYK, CCC, *supra* note 4, at 1067.

<sup>113</sup> *Id.* at 635 n.61 (citing leading Chinese historians JOHN FAIRBANK & MERLE GOLDMAN, A NEW HISTORY 108 (2006)).

<sup>114</sup> *Id.* at 640 (quoting the teachings in writings attributed to CONFUCIUS, THE ANALECTS (c. 500 B.C.E)) (citations omitted).

Merchants lacked autonomy, moreover, as they became adjuncts of the imperial bureaucracy's monopolization of the sale and distribution of scarce commodities and the metallic coin that served as the medium of exchange.<sup>115</sup> Even when merchants achieved limited autonomy, exclusive dealing arrangements between the state and merchants continued to reinforce patterns of patronage, ultimately forging, "after a longstanding relationship of reciprocal services and duties had been established between the parties to this relationship," a "living law" that "was, and still is, known as *Guanxi*."<sup>116</sup>

The practical effects of this cultural background in commercial law development in China are myriad, and a detailed summary is beyond the scope of this review. But suffice it to say that, as in Latin America, third-party rights were subordinated to familial interests.<sup>117</sup> Not surprisingly, notwithstanding the Maoist effort to revolutionize society and even human nature, habitual indifference to third-party interests continued; but now the interests of collective farms substituted for privileged interests of families and their extended *Guanxi* networks.<sup>118</sup> For Kozolchik, notwithstanding Deng Xiaoping's pragmatism,<sup>119</sup> the legacy of Chinese familism and authoritarian-legalism continues today. Critically, law remains imprecise and therefore "invertebrate,"<sup>120</sup> so much so that ill-defined property rights make it impossible for secured creditors to have confidence in the enforceability of their rights to collateral (not title, given the abolition of private property in land, but long-term leaseholds) in real property,<sup>121</sup> much less movable property or intangibles such as accounts receivables.<sup>122</sup> Thus, the weakness of commercial law continues to facilitate commerce through *Guanxi*, even as the PRC seeks to join the world economy. It is, therefore, not surprising that Kozolchik drew special attention to the role of *Guanxi* in de-stabilizing LOC practices as global trade with China expanded.<sup>123</sup> Kozolchik's account seems to suggest that these cultural legacies, as in Latin America, might set an upper-bound to the PRC's efforts to modernize.<sup>124</sup> Could it even be argued that trade with China on Chinese cultural terms will de-stabilize the cultural inheritance of non-Chinese participants in Chinese commerce?

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<sup>115</sup> *Id.* at 547.

<sup>116</sup> *Id.* at 662 (citations omitted).

<sup>117</sup> KOZOLCHYK, CCC, *supra* note 4, at 665–84.

<sup>118</sup> *Id.* at 685–94 (citations omitted).

<sup>119</sup> *Id.* at 696 (quoting Deng's famous aphorism: "It doesn't matter whether or not a cat is black or white, as long as it catches mice.") (citations omitted).

<sup>120</sup> *Id.* at 700–07.

<sup>121</sup> *Id.* at 707–37.

<sup>122</sup> KOZOLCHYK, CCC, *supra* note 4, at 737–46.

<sup>123</sup> See *supra* text accompanying notes 110–11.

<sup>124</sup> But see Amira Fellner, Role of Culture in Economic Development: Case study of China and Latin America (Apr. 11, 2008) (unpublished M.A. thesis, University of Southern Florida), <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1235&context=etd> (arguing that Chinese family networks facilitate cooperation with neighboring Chinese communities in East Asia, promoting foreign investment and free trade, while Latin American family networks fail to promote development).

Francis Fukuyama, in a work that might have informed Kozolchyk's CCC, presciently argued that "social trust" is a critical variable in economic development. He posited that when cultures evidence a high degree of trust among social groups beyond the family, even business enterprises can trust each other, business costs are thereby reduced, and a comparative advantage in economic development arises.<sup>125</sup> Drawing on the work of Max Weber, Fukuyama argued that "there are ethical habits, such as the ability to associate spontaneously, that are crucial to organization innovation and therefore to the creation of wealth. Different types of ethical habits are conducive to alternative forms of economic organization and lead to large variation in economic structure."<sup>126</sup> But, he argues, at a minimum the decline of trust serves as a tax on the economy, even if some partial substitution of its benefits can be achieved through vertical integration of economic activities rather than relying on contract parties for goods and services. Fukuyama notes that "[w]ithout trust, there will be a strong incentive to bring these activities in-house and restore the old hierarchies."<sup>127</sup> He also seeks to correct what he considers a common misconception about the United States and Japan; these are, in his view, historically high-trust societies, which have been populated with many intermediate groups between the family and the state, thus facilitating low-cost business cooperation and thus, even without state support, the creation of large business organizations.<sup>128</sup> By contrast, he argues, the "nature of Chinese Confucianism . . . may mean that China may never be able to duplicate Japan's development path."<sup>129</sup> It goes without saying, however, that Fukuyama's conjecture concerning China's capacity for development and technological development remains a highly contested question.<sup>130</sup>

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<sup>125</sup> See FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES & THE CREATION OF PROSPERITY 34 (1995) [hereinafter FUKUYAMA, TRUST].

<sup>126</sup> *Id.* at 37 (citing MAX WEBER, PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1905), which attributed the emergence of the social "capital" of spontaneous sociability to shared participation in religious activities). Kozolchyk's discussion of the rise of German-Jewish merchants as trusted intermediaries in medieval and modern commerce is an insight that would fit nicely into Weber's framework. See KOZOLCHYK, CCC, *supra* note 4, at 153–63, 397–407.

<sup>127</sup> FUKUYAMA, TRUST, *supra* note 125, at 25; see also Richman, *supra* note 54 (observing that the decline of trust in the New York City diamond dealers' market was accompanied by the rise of vertical integration, thus eliminating the dealers as intermediaries between diamond producers and consumers, in the diamond industry as a whole).

<sup>128</sup> FUKUYAMA, TRUST, *supra* note 125, at 28.

<sup>129</sup> *Id.* at 31, 57. For an assessment paralleling the commonality Kozolchyk finds between China and Latin America, which Fukuyama extends to, among others, France and portions of Italy, see *id.* at 5–56.

<sup>130</sup> See Emily Rauhala, *Behind the Firewall: How China Tamed the Internet—America Wants to Believe China Can't Innovate. Tech Tells a Different Story*, WASH. POST (July 19, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/america-wants-to-believe-china-cant-innovate-tech-tells-a-different-story/2016/07/19/c17cbea9-6ee6-479c-81fa-54051df598c5\\_story.html](https://www.washingtonpost.com/world/asia_pacific/america-wants-to-believe-china-cant-innovate-tech-tells-a-different-story/2016/07/19/c17cbea9-6ee6-479c-81fa-54051df598c5_story.html).

More important for Kozolchik's vision for improving global commercial law, however, is Fukuyama's central thesis: that is, the potential for the dissolution of trust. Along with what later became a chorus of commentators, Fukuyama observed that US society is witnessing the erosion of the social capital he considered the well-spring of economic growth.<sup>131</sup> If anything, the tendencies Fukuyama described twenty years ago have accelerated.<sup>132</sup> Moreover, if the literature concerning the decline of spontaneous sociability in the United States is correct in its assessments,<sup>133</sup> there is no reason to believe that the decline in this social capital will not have implications for the character of US merchants, their lawyers, and ultimately the kind of corporate and commercial law that is sustainable in the United States. Perhaps the popular belief in the rise of "crony capitalism" in so many sectors of our economy is connected to this putative cultural erosion?<sup>134</sup> Moreover, it would be hard to imagine that the ethical habits of US merchants and their lawyers would not erode as well when they must habitually operate in contexts dominated by familism or authoritarian-legalist methods.

In sum, if commercial law is built on culture, and culture is the transmission of ethical habits,<sup>135</sup> then, as Fukuyama has observed, cultural habits can unravel in the same way that they can be formed. Is there a law of nature guaranteeing that the cultural habits Kozolchik deems essential to effective commercial law will survive as globalization proceeds? Of course not. These values and habits may well recede in the next century, just as they receded in the

<sup>131</sup> FUKUYAMA, TRUST, *supra* note 125, at 269–321.

<sup>132</sup> See ROBERT PUTNAM, *BOWLING ALONE* (2000) (detailing the disintegration of social structures in the U.S., yielding reduced sociability); CHARLES MURRAY, *COMING APART* (2012) (analyzing the increasing separation between American elite and working classes); ROBERT PUTNAM, *OUR KIDS* (2015) (critiquing the increasing divergence of life prospects between children of the wealthy and children of poverty); YUVAL LEVIN, *THE FRACTURED REPUBLIC: RENEWING AMERICA'S SOCIAL CONTRACT IN THE AGE OF INDIVIDUALISM* (2016) (calling for the revival of institutions, such as churches, unions, and charities, to intermedicate between the family and the state). The cumulative theme in these volumes, as foreseen by Fukuyama, is concern for an increasing alienation and declining sociability across all segments of American society, thereby reducing social capital understood as solidarity and trust.

<sup>133</sup> The study of social networks is receiving extensive empirical and theoretical attention in a range of disciplines, giving rise to the hope that a better understanding of how social capital evolves or devolves may soon become available. See, e.g., DAVID EASLEY & JON KLEINBERG, *NETWORKS, CROWDS, AND MARKETS: REASONING ABOUT A HIGHLY CONNECTED WORLD* (2010) (describing a mathematical approach to the study of networks, utilizing, *inter alia*, graph theory, game theory, and information theory).

<sup>134</sup> See STEVEN BRILL, *AMERICA'S BITTER PILL: MONEY, POLITICS, BACKROOM DEALS, AND THE FIGHT TO FIX OUR BROKEN HEALTHCARE SYSTEM* 194 (2015) (detailing the interest groups politics and corruption entailed in the enactment of Obamacare); and MICHAEL LEWIS, *THE BIG SHORT* (2010) (detailing the fraudulent practices in the mortgage-backed securities and derivatives markets leading to the financial crisis).

<sup>135</sup> See FUKUYAMA, TRUST, *supra* note 125, at 34 ("culture is *inherited ethical habit*").

past. For, perhaps, it was declining spontaneous sociability—depriving Christian peasants of protection from rapacious landowners who provided credit only on usurious terms—that prompted Emperor Constantine’s repeal of the *Pactum Commissorium*.<sup>136</sup> If so, a decline in cultural capital at the end of antiquity may have been the root cause of the reduced flow of credit and access to a means for escaping poverty and dependency. Yet, if global commercial culture does indeed devolve in the next century, as it may have in the past, it will not be because Boris Kozolchyk failed to do his duty as teacher, scholar, practitioner, and inspiration to the next generation of commercial lawyers.

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<sup>136</sup> See KOZOLCHYK, CCC, *supra* note 4, at 70; Kozolchyk, *Trans-Pacific*, *supra* note 4, at 51.

