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International Insolvency and Environmental Obligations: A Preclude to Resolving the Conflicting Policies of a Clean Slate Versus a Clean Site in Transnational Bankruptcies

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INTERNATIONAL INSOLVENCY AND ENVIRONMENTAL OBLIGATIONS: A PRELUDE TO RESOLVING THE CONFLICTING POLICIES OF A CLEAN SLATE VERSUS A CLEAN SITE IN TRANSNATIONAL BANKRUPTCIES

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I. INTRODUCTION

An axiomatic feature of all modern States is the need for bankruptcy laws.[1] This recognition traces back to the earliest of civilized times, when it was first realized that the existence of commerce is inherently entwined with the inevitable failing of some enterprises.[2] Over the last two decades, with the expansion of worldwide trade resulting from improvements to modern

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1. *See* David C. Cook, *Prospects for a North American Bankruptcy Agreement; Les Prospects Pour Une Convention De La Faillite En Amerique Du Nord; Los Prospectos Para Un Convenio De Quiebra De Norte America*, 2 SW. J. L. & TRADE AM. 81, 81 (1995) (stating that the founding fathers of the United States recognized the need for bankruptcy laws and therefore granted Congress the right to enact bankruptcy legislation); *see also* James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory and Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 43 (1991) (stating that bankruptcy law is needed in an imperfect world).

2. *See* CARL FELSENFELD, BANKRUPTCY 1 (2d ed. 1997) (citing the Roman Twelve Tables); *see also* Cook, *supra* note 1, at 97–99 (tracing the bankruptcy regimes of the North American Free Trade Agreement members to the Babylonian Code of Hammurabi amongst other ancient bankruptcy codes).

technology and the opening of the former Soviet bloc, businesses have become multinational entities and their bankruptcies have consequently increased in both size and scope.[3] Additionally, the proliferation of regional trade agreements has expanded the stream of commerce across borders, allowing for the establishment of continental corporations.[4] Given that these new businesses are subject to the jurisdiction of all the countries in which they are incorporated, it is essential that an effective and efficient apparatus be instituted for handling the complexities of cross-border insolvency cases.[5] Harmonization of insolvency laws, or at a

3. *See* CARL FELSENFELD, FELSENFELD ON INTERNATIONAL INSOLVENCY 1–9 (2000) (arguing that increased globalization has caused "growth in both the number and size of international insolvencies."); Am. Law Inst., Transnational Insolvency Project: International Statement of Canadian Bankruptcy Law xxv-xxvi (Tentative Draft, 1997) [hereinafter ALI Canadian Statement]; Paula E. Garzon et al., *International Legal Developments in Review: 1998: Business Transactions and Disputes*, 33 INT'L LAW. 379, 379–81 (1999) (discussing the global impact that resulted from the Asian economic crisis of 1998 and which led to the realization of the interdependency of the world's commercial markets); Claudia Tobler, Note, *Managing Failure in the New Global Economy: The U.N.C.I.T.R.A.L. Model Law on Cross-Border Insolvency*, 22 B.C. INT'L & COMP. L. REV. 383, 383 (1999) (stating "[t]he recent crisis in the Asian economic markets, and the devaluation of the Brazilian currency, are but two examples of the potential terrors of the 'new economic order' in which transnational corporations operate and in which we now live.").

4. *See* North America Free Trade Agreement, Dec. 8, 1993, 1077 Stat. 2057, 32 I.L.M. 289 (1993) (establishing a free trade zone in North America); Treaty Establishing the European Community, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (establishing a custom's union among the various European countries).

5. Numerous non-governmental bodies have commenced attempts at such projects. For instance, the United Nations has adopted a Model Law on Cross Border Insolvency. *See* U.N. GAOR, 52d Sess., Annex 1, at 68–78, U.N. Doc. A/52/17 (1997) [hereinafter UN Adoption of Model Law on Cross Border Insolvency]; The International Bar Association's Cross-Border Insolvency Concordat, *reprinted in* John A. Barrett & Timothy E. Powers, *Proposal for Consultative Draft of Model International Insolvency Co-operation Act for Adoption by Domestic Legislation with or without Modification*, 17 INT'L BUS. LAW. 323 (1989); The European Union Convention on Insolvency Proceedings, 17 ZEITSCHRIFT FUR WITSCHAFTSRECHT [ZIP] 976, 35 I.L.M. 1223 (1996) [hereinafter EU Convention on Insolvency Proceedings]; The Am. Law Inst., Transnational Insolvency Project: Principles Of Cooperation In

minimum, increased cooperation among trading partners must be established to maintain the current trend towards globalization. Otherwise, fearing potential losses if a foreign business associate files for insolvency relief, entrepreneurs may stop investing internationally.[6] Recently, there has been an effort to establish international insolvency agreements. For example, the United Nations Commission on International Trade Law[7] as well as regional endeavors by the European Union[8] and the North American countries,[9] have made attempts to create such agreements.

Another issue related to the growth of international commerce, is the fear of potential increases in environmental contamination caused by multinational corporations.[10] This

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Transnational Cases Among the Members of the North American Free Trade Agreement (Tentative Draft, 2000) [hereinafter ALI Cooperative Agreement].

6. *See* Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 1 (1997) (arguing that inconsistency in regard to choice of law issues in the administration of cross-border insolvency proceedings is detrimental to social welfare and decreases efficiency).

7. *See* UN Adoption of Model Law on Cross Border Insolvency, *supra* note 5 (recommending nations to implement mechanisms for dealing with cases of cross-border insolvency).

8. *See* EU Convention on Insolvency Proceedings, *supra* note 5; *see also* Mike Perry, *Lining Up At the Border: Renewing the Call for a Canada-U.S. Insolvency Convention in the 21st Century*, 10 DUKE J. COMP. & INT'L L. 469, 483 (2000) (stating that the European Union Convention on Insolvency Proceedings combines the bankruptcy laws of individual member states with a universal proceeding).

9. *See* ALI Cooperative Agreement, *supra* note 5 (suggesting guidelines to enhance coordination and harmonization of cross border insolvency proceedings between the United States and Canada).

10. *See* Rick Monte Reznicsek, Note, *International Environmental Bankruptcy: An Overview of Environmental Bankruptcy Law, Including a State's Claims Against the Multinational Polluter*, 23 VAND. J. TRANSNAT'L L. 345, 346–47 (1990) (stating that the implementation of environmental legislation in the United States was precipitated by the influx of pollution produced by multinational corporations); Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of* Metalclad v. United Mexican States, 10 MINN. J. GLOBAL TRADE 209 (2001) (asserting that NAFTA's implementation opened the back door for international investors to attack environmental laws and regulations).

disquietude has been addressed by international agreements pertaining to environmental protection and by environmental activists utilizing political tactics to prevent pollutant activities.[11] Yet the mechanisms currently in place do not address the issues that may arise if a transnational entity files for insolvency relief with multiple States pursuing environmental claims against it.

The dilemma of environmental claims interacting with bankruptcy laws is not limited to the international realm, U.S. domestic law has, since the inception of environmental legislation, addressed the interplay between the two.[12] On the national level, a primary goal of insolvency laws is to allow a debtor to reenter society free from debt—to provide the debtor with a fresh start.[13] Underlying this goal is the belief that a rehabilitated debtor is more beneficial to society than having the entity remain debt ridden.[14] To accomplish this objective, a debtor is granted a stay or moratorium from all ongoing proceedings or from the commencement of new actions, and subsequently allowed to discharge pre-petition debts.[15] However, environmental laws may be inconsistent with bankruptcy's policy of attempting to clean a

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11. *See* North American Agreement on Environmental Cooperation, Sept. 8-14 1993, 32 I.L.M. 1480 [hereinafter Environmental Side Agreement]; Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 439 (1995) (stating that environmentalist groups pressured the Clinton administration to include environmental provisions within NAFTA).

12. *See infra* Part II.

13. *See* FELSENFELD, *supra* note 2, at 2; *see also* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1994) (stating that the fresh start objective is the primary principle for bankruptcy legislation and explained that the fresh start was in the "public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."); Williams v. United States Fidelity Ins. Guar. Co., 236 U.S. 549, 554–55 (1945) (creating the actual phrase "fresh start" originated by stating that the Bankruptcy Code allows a debtor to "start afresh free from the obligations and responsibilities consequent upon business misfortunes.").

14. *See* FELSENFELD, *supra* note 2, at 167.

15. *See infra* Part II.F.

debtor's slate.[16] Environmental legislation as a whole, seeks to protect the environment and preserve public health and safety through imposing full liability for hazardous waste clean up on potentially responsible parties ("PRP").[17] The imposition of liability in the environmental context is based upon the belief that commercial entities should bear the burden of protecting the external costs to society associated with their activities.[18] Thus, where environmental claims are asserted against a debtor in bankruptcy, which of the inconsistent policies underlying bankruptcy and environmental law should take precedence? Should the goal of granting the debtor a fresh start trump the policy that a polluter should pay for its actions or vice versa?

This Note will explore the issues raised when environmental claims arise during the course of international insolvencies. More specifically, it will provide an analysis of the treatment afforded to environmental claims of two nations being adjudicated in a single bankruptcy proceeding pursuant to the Model Law on International Insolvency that was adopted by the United Nations Commission on International Trade Law ("UNCITRAL")[19] and the Transnational Insolvency Project forwarded by the American Law Institute ("ALI").[20] The Note will conclude by arguing that currently proposed protocols, which are limited to procedural aspects of international insolvencies, must endeavor to include provisions addressing the intersection of non-bankruptcy law which will inevitably arise in transnational bankruptcies. Without a complete integration of all potential issues that can be encountered in a bankruptcy case, the inherent difficulties associated with multinational proceedings will nullify the utility of the protocols.

Part II of the Note will begin by discussing how the American judiciary has reconciled its Bankruptcy Code's fresh start objective

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16. *See infra* Part II.A.1.

17. *See infra* Part II.A.1.

18. *See infra* Part II.A.1.

19. *See* UN Adoption of Model Law on Cross Border Insolvency, *supra* note 5 (providing guidelines to coordinate cross-border insolvency proceedings).

20. *See* ALI Cooperative Agreement, *supra* note 5 (suggesting guidelines to enhance coordination and harmonization of cross-border insolvency proceedings between the United States and Canada).

and substantive provisions vis-à-vis the U.S. policy of strict environmental liability. Part III of the Note suggests a detailed hypothetical, which seeks to assess whether a Canadian environmental claim would be afforded treatment comparable to an American environmental claim if they were both brought in a single United States bankruptcy proceeding. The part will also provide an overview of the policies underlying international insolvency. Part IV applies the provisions of the UNCITRAL Model Rule on International Insolvency[21] to the hypothetical as well as providing an outline of the Model Law's structure. In a similar vein, Part V puts the principles articulated in the ALI Transnational Insolvency Project[22] into practice by applying them to the hypothetical, and summarizes the structure and goals of the project.

II. TREATMENT OF ENVIRONMENTAL CLAIMS IN A UNITED STATES BANKRUPTCY PROCEEDING

A. United States Legislation

1. Environmental Law

In the last few decades there has been a proliferation of both environmental legislation and litigation.[23] Recent legislation in the area reflects society's tremendous concern with these issues and

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21. *See* UN Adoption of Model Law on Cross Border Insolvency, *supra* note 5.

22. *See* ALI Cooperative Agreement, *supra* note 5.

23. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1998); Clean Water Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (1998); Clean Air Act §§ 109-371, 42 U.S.C. §§ 7401-7671 (1998); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1998); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-75 (1998) [hereinafter CERCLA]; *see also* Jeffrey S. Theuer, *Aligning Environmental Policy and Bankruptcy Protection: Who Pays for Environmental Claims Under the Bankruptcy Code?*, 13 T.M. COOLEY L. REV. 465, 477 n.79 (1996) (listing various other environmental laws that have been implemented).

has attempted to prevent future pollutant activities as well as provide remedies to alleviate existing environmental damage.[24] An example of this effort is the Comprehensive Environmental Response, Compensation, and Liability Act[25] ("CERCLA"), one of the most extensive environmental laws addressing release of hazardous substances. CERCLA provides that the Environmental Protection Agency ("EPA") "may dispose of hazardous waste or remediate contaminated property when there is an imminent or substantial danger to the public health or welfare."[26] If the EPA deems property to be a substantial risk to the public, it may either order the present owner of the contaminated land to clean up the property,[27] or the EPA may utilize resources from a "Superfund" established by Congress to abate and clean up the immediate danger.[28] Following the clean up, the government is permitted, pursuant to section 107 of CERCLA, to collect clean up costs from

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24. *See* Roy B. True, Comment, *Dishargeability of CERCLA Liability in Bankruptcy*, 61 UMKC L. REV. 329, 332–33 (1992) (explaining Congress's intent in enacting CERCLA); Deborah E. Parker, Comment, *Environmental Claims in Bankruptcy: It's a Question of Priorities*, 32 SAN DIEGO L. REV. 221, 222–23 (1995) (discussing the purpose for the implementation of environmental laws).

25. CERCLA, 42 U.S.C. §§ 9601-75.

26. Parker, *supra* note 24, at 224. Upon invocation of CERCLA, the EPA first identifies:

> [T]oxic land fills, which pose health hazards in need of immediate attention. These sites are [then] cleaned up without regard to liability, which is established after response costs have been incurred. CERCLA does not require government to identify responsible parties before addressing the health hazards posed by the site. The act provides the federal and state governments with authority to act quickly to remedy a dangerous situation without regard to liability issues.

See generally Elizabeth A. Glass, *Superfund & Sara: Are There Any Defenses Left?*, 12 HARV. ENVTL L. REV. 385, 386 (1988) (stating that CERCLA provides the federal government with the authority to clean up toxic waste sites).

27. *See* 42 U.S.C. § 9606(a).

28. *See id.* § 9604(a) (permitting the EPA to either perform a short-term and temporary removal action, or it can commence a remedial action to prevent or minimize the existence of present or future harm to public safety); *see also* Geoffrey Thompson, *Environmental Liability in Canada: The Risks for Lenders, Receivers and Trustees*, *in* ENVIRONMENTAL LIABILITY 113, 116 (Patricia Thomas ed. 1991) (outlining a concise review of EPA procedure involving environmentally contaminated property).

PRPs.[29] In addition to CERCLA, there are a number of other federal and state laws that impose liability for different types of environmental infractions.[30]

Unlike bankruptcy law, environmental legislation is a relatively recent phenomenon, and consequently, many of its core principles are in their formative stages.[31] Because "many important pieces of environmental legislation lack supporting legislative histories that might clarify issues or illuminate underlying policy issues,"[32] it is difficult to ascertain congressional preference in an instance where the Bankruptcy Code and environmental law intersect.[33]

2. Bankruptcy Law

In 1978, Congress established the Bankruptcy Code[34] to succeed the prior Bankruptcy Act.[35] The fundamental principles underlying the Act remain intact. The bankruptcy regime is intended to provide a debtor with the opportunity to free itself from debt and enable the equitable distribution of a debtor's assets

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29. Potential responsible parties for property in violation of environmental laws include: (1) current owners or operators of a contaminated site, (2) owners or operators of a site at the time of contamination, (3) person(s) who arranged for the disposal of the waste, and (4) the person who transported the waste. *See* 42 U.S.C. § 9604(a)(1).

30. *See* sources cited *supra* note 23.

31. *See* H. Hamner Hill, *Bankruptcy vs. Environmental Protection: A Case Study in Normative Conflict*, 11 CAN. J.L. & JURIS. 245, 251 (1998) (stating that unlike bankruptcy law, environmental protection laws are a recent development).

32. *Id.*

33. *See* Joseph S. Maniscalco, Note, *At the Crossroads of Environmental Laws and the Bankruptcy Code: Abandonment and Trustee Personal Liability*, 23 HOFSTRA L. REV. 879, 881–82 (1995) (articulating that the lack of legislative dialogue in environmental legislation fails to notify the judiciary and potential litigants the priority Congress wished to afford environmental laws in relation to other legal objectives).

34. 11 U.S.C. §§ 101–1330 (1988) (originally passed as the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Title I, § 101, 92 Stat. 2549) [hereinafter Bankruptcy Code].

35. Bankruptcy Act of 1898 (Nelson Act), 30 Stat. 544 (codified as amended at 11 U.S.C. §§ 1-1103 (1976)) (repealed 1978).

to all its creditors.[36] A bankruptcy proceeding can take two forms: (1) either a liquidation (2) or a reorganization. Chapter 7 of the Bankruptcy Code provides that upon the liquidation of a debtor's estate and the distribution of its assets in the manner proscribed by the Code, most pre-petition debts should be discharged.[37] Alternatively, a debtor may create and confirm a reorganization plan under Chapter 11 or 13, which enables the debtor to procure rebirth as a rehabilitated entity.[38]

B. Discharge of Environmental Claims in a United States Bankruptcy Case

A good place to begin an analysis of how environmental liabilities are handled in a bankruptcy case is by looking at the discharge of such debts.[39] A creditor's grievance can only be discharged in bankruptcy if it is considered a claim by the bankruptcy court.[40] Additionally, as a general rule with minor exceptions, only pre-petition debts can be discharged in bankruptcy.[41] Thus in order for an environmental obligation to be

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36. *See* FELSENFELD, *supra* note 2, at 9–10 (discussing the policies underlying bankruptcy law).

37. *See generally* 11 U.S.C. §§ 701-66 (providing definitions, rules and procedures governing certain bankruptcy liquidation proceedings).

38. *See generally* 11 U.S.C. §§ 1101–74, 1301–30 (providing definitions, rules and procedures governing bankruptcy reorganization proceedings).

39. *See* Stanley M. Spracker & James D. Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 BANKR. DEV. J. 85, 88–91 (1994) (describing the determination of whether environmental liabilities are claims in bankruptcy as the primary battleground in the competing policies between environmental laws and bankruptcy).

40. *See id.* at 88.

41. *See* 11 U.S.C. §§ 727(b), 1141(d)(1). *But see* 11 U.S.C. § 502(f)-(i). The statute allows for the discharge for certain actions taken by the trustee or debtor-in-possession after the initial order for relief has been filed, in instances where the debtor exercised its rights pursuant to claims that are deemed by the Code to have arisen prior thereto. *Id.* Examples of such claims are when a trustee or debtor-in-possession exercises its right to reject a contract with a third party under 11 U.S.C. section 365 or by utilizing its avoidance powers against a fraudulent transfer by the debtor to a third person pursuant to 11 U.S.C. section 548. Additionally, in a Chapter 11 proceeding, claims categorized as

discharged, it must also be determined whether such a claim arose prior to the commencement of the bankruptcy case or after its initiation.

1. Environmental Obligations As Allowable "Claims" as Per Section 101(5) of the United States Bankruptcy Code

The first issue involved with a debtor's environmental obligation is to determine whether an environmental liability constitutes a "claim" pursuant to Section 101(5) of the Bankruptcy Code. When drafting the Bankruptcy Code in 1978, Congress wanted to ensure that all creditors were included under the reorganization plan of a debtor's estate, regardless of the status of their claims.[42] This notion led Congress to broadly define the term "claim" to include any "right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[43]

Applying the definition of "claim" to an environmental obligation, it seems clear that actions brought by environmental agencies seeking reimbursement from a debtor for cleaning up a site, or civil penalties imposed as a consequence of CERCLA violations, fall within the purview of the Section 101(5) definition of "claim."[44]

The more difficult question concerning environmental liabilities is whether injunctions used by federal and state governments to enjoin environmental regulation offenders

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administrative claims under 11 U.S.C. section 503, which by definition arise subsequent to the onset of the bankruptcy case, are also discharged upon the confirmation of a repayment plan. *See* FELSENFELD, *supra* note 2, at 66.

42. *See* FELSENFELD, *supra* note 2, at 15; *see also* Spracker & Barnette, *supra* note 39, at 91 (stating that Congress took a broad view of what constitutes a "claim" to ensure that all creditors, including those with unmatured or unproven claims, are not excluded from recovery under the reorganization plan).

43. 11 U.S.C. § 101(5).

44. Spracker & Barnette, *supra* note 39, at 91–92. However, the authors note that environmental claims that are brought in the form of civil penalties, are only dischargeable against a reorganized debtor but not against an individual in bankruptcy. *Id.* (citing 11 U.S.C. §§ 523(a)(7), 1141(d)(1)-(2)).

constitute "claims" under the Bankruptcy Code.[45] In *Ohio v. Kovacs*,[46] the Supreme Court held that a state injunction ordering an individual owner of a site to clean up hazardous waste only became a claim when the injunction was transformed into a *right to payment*.[47] Under *Kovacs*, a prohibitory injunction that merely orders the debtor to discontinue certain activities does not give rise to a right to payment and would consequently pass through the bankruptcy to the rehabilitated debtor as a non-dischargeable claim.[48] However, a mandatory or affirmative injunction, requiring the debtor to expend resources, would satisfy the *Kovacs* requirement and would be subject to discharge.[49]

Case law subsequent to the *Kovacs* decision has limited its holding. In *United States v. LTV Corp. (In re Chateaugay Corp.)*,[50] the Second Circuit held that neither a prohibitory nor a mandatory injunction is a dischargeable claim for bankruptcy purposes.[51] Although seemingly contradicting *Kovacs* regarding mandatory injunctions, the court distinguished *Kovacs* on the grounds that its debtor was no longer in possession and a receiver was appointed to clean up the hazardous waste, whereas the debtor in *LTV* was in possession of the contaminated property.[52] The Second Circuit clearly stated that an injunction becomes a claim under the

45. *See id.* at 92. Injunctive claims can be structured, as either prohibitory or mandatory injunctions. Prohibitory injunctions occur when the government, acting under the authority granted to it by CERCLA or similar legislation, requires a debtor to cease and desist from all polluting activity. Mandatory or affirmative injunctions direct a debtor to clean up property or take other affirmative acts to comply with environmental obligations.

46. Ohio v. Kovacs, 469 U.S. 274 (1985).

47. *Id.* at 282–83 (emphasis added).

48. *See* Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1 (1995) (stating an injunction to cease polluting would not be a prepetition claim because it is directed at future operations).

49. *See generally Kovacs*, 469 U.S. at 279–83 (discussing what types of injunctions would be considered "claims" under bankruptcy law).

50. United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997 (2d Cir. 1991).

51. *Id.* at 1006–09.

52. *Id.* at 1008–09 (discussing the reasoning of the *Kovacs* Court).

Bankruptcy Code only if the debtor is not in possession and must pay someone else to comply with the injunction.[53] However, if the debtor is in possession, as in the *LTV* case, then the injunction is not a claim subject to discharge.[54]

Other courts have split over the question of whether injunctions qualify as claims. In *Torwico Electronics, Inc. v. New Jersey Department of Environmental Protection (In re Torwico Electronics, Inc.)*,[55] the Third Circuit held that a state-ordered clean up of contamination did not constitute a dischargeable claim where the Chapter 11 debtor was no longer in possession of the contaminated land.[56] The *Torwico* decision seems to be at odds with *Kovacs*; however, a petition for certiorari by the debtor to the Supreme Court was denied.[57] The Sixth Circuit went to the opposite extreme and found in *United States v. Whizco, Inc.*[58] that an affirmative injunction is a claim even though its debtor remained in possession of property of the estate and no trustee was appointed. In *Whizco*, despite a direct order requiring the debtor to comply with regulations and no obligation to pay a trustee, the court found there to be a dischargeable claim.[59]

2. When Do Environmental Claims Accrue in a United States Bankruptcy Case?

Determining whether environmental obligations fall within the purview of allowable claims addresses only half of the issue regarding the dischargeability of a claim. The second question is whether a claim arose prior to the onset of the bankruptcy case or

53. *See id.*

54. *See id* at 1009 (stating that "to the extent that an order is obtained under CERCLA or any other environmental statute that seeks to end or ameliorate pollution, we are satisfied that nothing in *Kovacs* permits a discharge of such obligation.").

55. Torwico Elecs., Inc. v. New Jersey Dep't of Envtl. Prot. (*In re* Torwico Elecs., Inc.), 8 F.3d 146 (3d Cir. 1993).

56. *Id.* at 151.

57. *Torwico, cert denied*, 511 U.S. 1046 (1994).

58. United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988).

59. *Id.* at 150–51.

thereafter.[60] In the former scenario, the claim could be discharged in bankruptcy, whereas in the latter circumstance the claim will generally, with only minor exceptions, not be discharged.[61] Further compounding the difficulty in classifying an environmental liability as pre-petition or post-petition is the fact that "pre-petition acts or occurrences frequently have post-petition consequences."[62] Environmental claims may accrue when the debtor first acts in violation of environmental laws, "when the hazardous waste is released, when the release is discovered, or when the cost of hazardous waste clean up is incurred." [63]

The EPA and debtors disagree, not only whether liability under CERCLA and similar legislation should be categorized as "claims" in bankruptcy, but also as to when environmental claims are considered to arise in an insolvency proceeding. Environmental agencies argue that the government's rights under CERCLA do not accrue until the government incurs costs to clean up a contaminated site, and thus it does not have a claim against the debtor's estate in bankruptcy unless and until the government expends resources prior to the petition.[64] As a consequence of the government's contention for a later trigger date, a debtor's liability for clean up of a potentially contaminated site does not accrue until after the bankruptcy case has begun. This would result in the reorganized debtor bearing responsibility for the clean up costs.[65]

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60. *See* Spracker & Barnette, *supra* note 39, at 90–91 (stating that only pre-confirmation claims are subject to discharge at the time of confirmation under Code section 1141(d)(1)).

61. *See supra* note 41 and accompanying text.

62. Parker, *supra* note 24, at 230 (analogizing the post-petition consequences of an environmental claim to the consequences of certain tortuous actions, which are the basis of a tort claim).

63. *Id.*

64. *See generally*, Spracker & Barnette, *supra* note 39, at 88–89 (discussing the EPA and debtor arguments regarding when a claim arises).

65. For a discussion regarding the dischargeability of prepetition debts, see *supra* note 41 and accompanying text. It should be noted that, although arguing for a later trigger date may be beneficial for the government in a Chapter 11 reorganization case, the converse would be true in a Chapter 7 liquidation proceeding. A liquidated debtor would presumably be unable to pay any of its debts that pass through the bankruptcy, and thus, in such an instance, it would be

In contrast to the EPA, debtors contend that environmental claims arise prior to the commencement of the bankruptcy case and should thus be discharged in all bankruptcy proceedings.[66]

a. The Debtor's Conduct Test

One of the tests used by bankruptcy courts to determine when environmental liabilities accrue is the debtor's conduct test. In *LTV Corp.*,[67] the Second Circuit first addressed this issue and ruled that, as with previous decisions regarding tort claims,[68] CERCLA claims accrue at the time the debtor's conduct gave rise to the claim.[69] The court held that the EPA's pre-petition response costs constituted a "claim" and were dischargeable "regardless of when such costs were incurred, so long as such costs concerned release or threatened release of hazardous waste that occurred before the debtor filed his Chapter 11 petition."[70]

The *LTV* court's decision to focus solely on the exact moment of the debtor's release or threat to release hazardous waste, as opposed to also considering the environmental agency's expenditure of clean up costs, as the time when a claim accrues is a further manifestation of the pro-debtor approach advocated by the Bankruptcy Code. Similar to the broad interpretation applied in determining what constitutes an allowable "claim" under the

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beneficial for the government to be a general unsecured creditor within the bankruptcy and at least recoup a percentage of its debts. It seems therefore, that in advocating for a later trigger date, the government is willing to sacrifice its ability to recover in liquidation cases for the benefit of recovering full costs from rehabilitated debtors. *See generally* Spracker & Barnette, *supra* note 39, at 99–100.

66. *See* Spracker & Barnette, *supra* note 39, at 89–90.

67. United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997 (2d Cir. 1991).

68. The dilemma in determining whether an environmental liability is prepetition or postpetition is not unique to environmental jurisprudence. For instance, tort claims may also be difficult to classify as prepetition or postpetition where the consequences of a debtor's tortuous act performed prior to the onset of the bankruptcy case are not discovered until after the petition.

69. *LTV Corp.*, 944 F.2d at 1002–06.

70. *Id.* at 997–98.

Bankruptcy Code, the underlying rationale of the debtor's conduct test is that an expansive understanding of the term should be applied in evaluating when a claim accrues.[71]

b. Fair Contemplation Test

Another test used by courts to determine when environmental claims arise in bankruptcy was introduced in *In re National Gypsum Co.*,[72] and later reiterated by the Court of Appeals for the Ninth Circuit in *California Department of Health Services v. Jensen (In re Jensen)*.[73] As with the debtor's conduct test, this analysis also demonstrates a growing acceptance of the bankruptcy perspective when dealing with the inconsistent policies of environmental or other laws in an insolvency proceeding. However, unlike the analysis suggested by the Second Circuit, the fair contemplation test requires that future response costs must have been "'fairly' contemplated by the parties"[74] prior to the case. If it has been fairly contemplated by the EPA or other governmental agency, it "need not have 'full information as to Debtors' existing or potential Superfund liabilities' . . . in order to include unliquidated contingent claims in its Proof of Claim subject to estimation."[75] The *National Gypsum* court identified a number of factors to help determine whether an environmental claim was fairly contemplated by the government or EPA pre-petition, including "knowledge by the parties of a site in which a PRP may be liable, NPL [National Priorities List] listing, notification by EPA of PRP liability, commencement of investigation and clean up activities, and incurrence of response costs."[76] Additionally, the court added "[i]t is immaterial for the purposes of bankruptcy, whether EPA's claims against the Debtors are ripe for adjudication under

71. *See* 2 COLLIER ON BANKRUPTCY ¶ 101.05[1] (Lawrence P. King ed., 15th ed. 1999).

72. *In re* Nat'l Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992).

73. California Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925 (9th Cir. 1993).

74. *Nat'l Gypsum*, 139 B.R. at 407–08.

75. *Id.* at 409.

76. *Id.* at 408.

CERCLA, as long as all the elements that can give rise to liability under CERCLA have occurred pre-petition."[77]

c. Legal Relationship Test

A third test, articulated primarily by the Third Circuit, embraces a more pro-creditor approach in resolving the bankruptcy/environmental dichotomy.[78] According to this rule, a liability can only be considered a claim subject to discharge at the time a legal relationship was established between the parties. In other words, the legal relationship test requires the creditor to have a legitimate cause of action against the debtor at the time of the petition for it to be a claim subject to discharge in bankruptcy.[79] Essentially, this test demonstrates an unwillingness to define "claim" as broadly as is seemingly necessitated by the literal language of section 101(5) of the Bankruptcy Code.[80] Rather it manifests a preference to utilize "nonbankruptcy substantive law [to] define[] when a particular relationship between a debtor and a third party amounts to a legal obligation reflecting a claim for bankruptcy purposes."[81] Application of the legal relationship

77. *Id.* at 405.

78. *See In re* Penn Cent. Transp. Co., 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) (finding that the appellants' cause of action came into existence after the final consummation order of apellee's bankruptcy was entered and the claims could not have been precluded by the bankruptcy proceedings); Schweitzer v. Consol. Rail Corp., 758 F.2d 936 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985) (holding the appellants, plaintiffs in asbestos-related personal injury actions who had no manifest injury prior to the consummation date of appellee employer's reorganization in bankruptcy, did not have dischargeable claims); Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

79. *See* Jennifer A. Pasquarella, Case Note, *In this Corner We Have the Bankruptcy Code's Discharge Provisions and in this Corner, CERCLA, a Strict Liability Statute: In re* Reading Company, 9 VILL. ENVTL. L.J. 561, 583–89 (summarizing the Third Circuit's utilization of the legal relationship test); *see also supra* note 78 (holding a legal relationship is a prerequisite for the existence of a claim under the legal relationship test).

80. For the definition of a claim in bankruptcy, see *supra* note 43 and accompanying text.

81. United States v. Union Scrap Iron & Metal, 123 B.R. 831, 835 (D. Minn.

analysis to environmental liabilities has the result of prohibiting pre-petition violations of CERCLA, or other environmental laws, unless the violation gave rise to a legal claim pursuant to the applicable environmental legislation pre-petition. A governmental agency that has yet to incur any response costs or otherwise expended resources in reaction to an environmental violation does not have a legal claim against the debtor and the resulting liability will not be discharged.[82] It is presumed that as long as the government does not incur clean up costs prior to the petition and thereby establish a legal relationship, it is unaware of its claim against the debtor's estate and discharging the liability would be unjust.[83]

C. Abandonment of Environmentally Contaminated Land Pursuant to Section 554 of the Bankruptcy Code

1. Scope of the Abandonment Power

Section 554 of the Bankruptcy Code provides that "after notice and hearing" the trustee of the bankruptcy estate may abandon any property "that is burdensome . . . or . . . of inconsequential value and benefit to the estate."[84] In

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1990).

82. *See* John P. Berkery, *The Dischargeability of CERCLA Cleanup Costs After Bankruptcy*, 9 BANKR. DEV. J. 417, 418 (1992) (stating that under CERCLA, the EPA has a cause of action against a polluter only after it incurs the costs of cleaning up the pollution, while the Bankruptcy Code attempts to release a debtor from all debts and liabilities that arose prior to the debtor's bankruptcy petition which creates a controversy). *See* Parker, *supra* note 24, at 232 (stating that in applying the legal relationship test criterion to environmental liability, the government has no cause of action against the debtor under CERCLA until it incurs response costs).

83. *See* Parker, *supra* note 24, at 239 (stating that contingent liability under CERCLA arises when the debtor's conduct results in the release or threatened release of a hazardous substance and that the property owner's liability is contingent only upon the EPA taking steps to remedy the environmental hazard).

84. 11 U.S.C. § 554(a) (1988).

reorganization cases, the debtor-in-possession is also permitted to exercise the right of abandonment.[85] Abandonment allows the trustee to save time and resources by disposing of property that is of no value or costly to the estate and/or its creditors.[86] Abandoned property reverts back to the person who holds the possessory interest (presumably the debtor) who is responsible for any liabilities related to the property; the creditors are immediately free to pursue collection of their claims against that person related to the land because once abandoned the automatic stay is lifted.[87]

Trustees' have attempted to utilize the right of abandonment on environmentally contaminated land or potential environmental powder kegs.[88] By abandoning such property, the trustee would rid the estate of liability that may arise from being associated with contaminated land during the bankruptcy case.

2. *The Midlantic Decision*

In 1986, the Supreme Court addressed whether abandonment powers are in any way limited when attempting to abandon environmentally contaminated property.[89] *Midlantic National Bank v. New Jersey Department of Environmental Protection*[90] involved a debtor in the business of processing waste oil. The New Jersey Department of Environmental Protection ordered the debtor to cease its operations because some of its waste oil contained a toxic carcinogen. After filing for bankruptcy, an additional 70,000 gallons of contaminated oil were found, so the trustee attempted to abandon the property and the bankruptcy

85. *See id.* § 1107(a) (granting a debtor-in-possession the rights of a trustee, subject to a few exceptions).

86. *See id.* § 554(b).

87. *Id.* § 554(c); *see also* Ohio v. Kovacs, 469 U.S. 274, 284 n.12 (1985); Maniscalco, *supra* note 33, at 891–93 (outlining history of abandonment powers).

88. *See infra* Part II.C.2. (listing various cases where a trustee or debtor-in-possession have attempted to abandon environmentally contaminated property pursuant to 11 U.S.C. § 554(a)).

89. *See* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494 (1986).

90. *See id.*

court allowed it to proceed.[91] On appeal, the Third Circuit reversed the lower court's decision,[92] not allowing the abandonment of the property. On certiorari, the Supreme Court held that although section 554(a) allows the trustee to abandon property, it might not do so "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identifiable hazards."[93] In carving this narrow exception to the trustees' right to abandon property, the Court relied upon rules of statutory construction to argue that Congress did not intend for section 554 to trump all state and local laws.[94] However, in elaborating on it's holding, the Court restricted this limitation on the trustees' abandonment powers by stating :

> This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from *imminent and identifiable harm.*[95]

As is often the case, courts have split over the question of abandonment of property in violation of environmental legislation subsequent to the *Midlantic* decision. The courts over time have developed two approaches to the question: those that adopt a broad interpretation of the *Midlantic* holding, and others that take a strict interpretive stance. *In re Franklin Signal Corp.*[96] is an influential decision, often cited by courts wishing to narrowly

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91. *Id.* at 497.

92. City of New York v. Quanta Res. Corp. (*In re* Quanta Res. Corp.), 739 F.2d 912 (3d Cir. 1984), *rev'd*, 739 F.2d 927 (3d Cir. 1984).

93. *Midlantic*, 474 U.S. at 507.

94. *See* Maniscalco, *supra* note 33, at 896–900. Prior to the Code, abandonment was a judicial power granted to the trustee that was subject to exceptions. Thus, upon codification, unless Congress specifically addressed an issue in non-bankruptcy law that should be an exclusion to the right of abandonment, a court may still find that a trustee does not have an unfettered right to abandon property which is cumbersome to the estate.

95. *Midlantic*, 474 U.S. at 507 n.9 (emphasis added).

96. *In re* Franklin Signal Corp., 65 B.R. 268 (Bankr. D. Minn. 1986).

interpret *Midlantic* and its "imminent and identifiable harm" standard.[97] *Franklin Signal* held that even though the property in question was in violation of state environmental protection laws, the land could be abandoned by the trustee because there was no evidence of imminent danger to the public, there was a small amount of waste, and there were insufficient funds in the estate to perform a clean up.[98] The *Franklin Signal* court also stated that, at a minimum, in order to allow a trustee to abandon contaminated property, the trustee must take adequate precautions to ensure that there is no imminent threat to the public heath.[99] This burden can be satisfied by investigating the type and degree of hazardous substances on the land along with informing the appropriate environmental agency of its findings.[100]

In contrast, other courts broadly interpret the "imminent and identifiable harm"[101] standard, holding that the trustee cannot abandon property and must comply with environmental statutes that are reasonably designed to protect the public health or safety.[102] On numerous occasions, the Sixth Circuit has prohibited abandonment that would lead to a violation of environmental

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97. *Id.* at 273 (suggesting the following five factors to be considered in balancing the inconsistent policies of environmental legislation and the Bankruptcy Code: (1) the imminence of danger to the public health and safety; (2) the extent of probable harm; (3) the amount and type of hazardous waste; (4) the cost to bring the property in compliance with environmental laws; and (5) the amount and type of funds available in the estate for clean up).

98. *Id.* at 274.

99. *Id.* at 272.

100. *See id.* at 273.

101. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 507 n.9 (1986).

102. *See, e.g., In re* Wall Tube & Metal Products Co., 831 F.2d 118 (6th Cir 1987) (holding trustee could not abandon property in contravention of a state statute or regulation designed to protect the public health or safety); *In re* 82 Milbar Blvd., Inc., 91 B.R. 213 (Bankr. E.D.N.Y. 1988) (holding that a court may not authorize abandonment of a hazardous waste site absent the formulation of conditions that will adequately protect the public health and safety); *In re* Stevens, 68 B.R. 774 (Bankr. D. Me. 1987); *In re* Mowbray Eng'g Co., 67 B.R. 34 (Bankr. M.D. Ala. 1986) (holding that a trustee could not abandon hazardous waste and under 28 U.S.C. section 959 (b) must comply with valid state laws affecting such property).

protection laws, particularly when there is no responsible party remaining to remedy the situation.[103] *In re Peerless Plating Co.*[104] is an example of a bankruptcy court declining to allow the trustee to abandon a hazardous waste site. The court in *Peerless Plating* declared that the only situations in which abandonment should be allowed, absent full compliance with environmental legislation, are when: (1) the environmental law is "so onerous as to interfere with the bankruptcy adjudication itself"; (2) the environmental law "is not reasonably designed to protect the public health or safety from identified hazards;" or (3) "the violation caused by abandonment merely be speculative or indeterminate."[105]

Parenthetically, commentators note that 28 U.S.C. section 959(b) requires a trustee or debtor-in-possession to conform to all applicable state and federal laws in administering the estate.[106] Applying this section to the abandonment question would seem to indicate that abandonment is prohibited if the result would be in violation of environmental legislation.

D. Bankruptcy Trustee Personal Liability for Environmental Violations

Related to the issue of a trustee's ability to abandon environmentally contaminated land is the question of a trustee's personal liability for environmental violations. Under numerous environmental laws, an owner or person in control of property is liable for clean up costs.[107] Hence, a trustee serving in its capacity has some of the attributes that may precipitate personal accountability for the clean up costs of post-petition and pre-

103. *See, e.g., Wall Tube*, 831 F.2d 118; *In re* Kent Holland Die Casting & Plating, Inc., 125 B.R. 493 (Bankr. W.D. Mich. 1991) (holding that plaintiff was entitled to expenses incurred by disposal of hazardous waste on property when defendant abandoned property with waste barrels from in factory).

104. *In re* Peerless Plating Co., 70 B.R. 943 (Bankr. W.D. Mich. 1987).

105. *Id.* at 947.

106. *See, e.g.*, Spracker & Barnette, *supra* note 39, at 107–09; Janette Brimmer, *Environmental Issues in Bankruptcy: An Overview*, 3 WIS. ENVTL. L.J. 159, 169 (1996).

107. *See supra* Part II.A.1 and accompanying text.

existing environmental contamination.

The Supreme Court in *Mosser v. Darrow*[108] enunciated the general standard for a bankruptcy trustee's personal liability outside the environmental context. In that case, the Court held a trustee personally liable for deliberately permitting his agents to profit from trading securities owned by the debtor's estate.[109] Although the *Mosser* decision initially gave rise to a split among the Courts of Appeal,[110] subsequent decisions have stated that a trustee can be held liable for acts deemed to be "willful and deliberate in violation of [its] duties"[111] as well as negligent violations of its obligations.[112] Applying these criteria to determine whether a trustee is personally liable for environmental infractions, it is evident that a trustee who continues to operate the debtor's business in violation of environmental laws should be individually responsible under an applicable environmental statute.[113] Additionally, the *Midlantic* decision, which on its face prohibits abandonment of property in conflict with environmental laws, would invariably force a trustee to continue operating a debtor's company in violation of environmental laws. If such a situation were to arise in an instance where the bankruptcy estate lacked the assets necessary to pay for clean up of the contaminated property, the trustee may be in the precarious position of being personally responsible for the clean up costs.[114]

In a decision by a bankruptcy court for the Eastern District of New York, the court did impose liability on the trustee for

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108. Mosser v. Darrow, 341 U.S. 267 (1951).

109. *Id.* at 271–75. The Court stated "equity tolerates in bankruptcy trustees no interest adverse to the trust." *Id.* at 271.

110. *Compare* Sherr v. Winkler, 552 F.2d 1367 (10th Cir. 1977) (holding that bankruptcy trustee is only personally liable for behavior that is determined to be willful and in deliberate violation of its duties), *with In re* Cochise College Park, Inc., 703 F.2d 1339 (9th Cir. 1983) (finding trustee liable for intentional and even negligent acts that are violations of duties imposed on trustee by operation of law).

111. *Sherr*, 552 F.2d at 1375.

112. *See In re* Center Teleproductions, 112 B.R. 567 (Bankr. S.D.N.Y. 1990).

113. *See* Maniscalco, *supra* note 33, at 904–06.

114. *See id.*

environmental violations.[115] However, concerned with the difficulty in securing trustees fearing potential liability, the court stated that estates containing polluted assets which "present an unreasonable risk of liability to the trustee pursuant to environmental legislation may constitute acceptable grounds for resignation of a trustee."[116] Further recognizing the quagmire a trustee confronts when courts are unwilling to allow it to abandon an environmentally contaminated asset, other courts have adopted a different approach.[117] Relying on 28 U.S.C. section 959(b), these courts have held that when trustee liability is in question, the bankruptcy case should be dismissed because "the trustee has an affirmative duty to clean up the site in compliance with state law,"[118] an obligation the trustee would be unable to comply with if administering an estate that has insufficient funds to subsidize a clean up.[119] A third method to the trustees' predicament was taken in *In re Microfab Inc.*[120] The *Microfab* court held that, because *Midlantic* precludes a trustee from abandoning land in contravention of environmental laws, it should also release the trustee from the obligation to expend estate assets to clean up a site when an estate lacks "sufficient resources to achieve appreciable results."[121]

E. Environmental Claims As an Administrative Expense Priority

In an ordinary bankruptcy case, the status of a creditor's claim is the decisive factor in determining the extent a creditor will be able to recover on its grievance against the debtor. Creditors in the most favorable position are those that hold secured claims in the bankruptcy, such as by holding liens or mortgages against assets of the debtor's estate at the time of the petition.[122] Under the

115. *See In re* 82 Milbar Blvd. Inc., 91 B.R. 213 (Bankr. E.D.N.Y. 1988).
116. *Id.* at 222.
117. *See In re* Commercial Oil Service, Inc., 88 B.R. 126 (N.D. Ohio 1987); *82 Milbar Boulevard, Inc.*, 91 B.R. at 213.
118. *In re* Mattice Indus., Inc., 76 B.R. 44, 47 (Bankr. E.D.N.Y. 1987).
119. *Id.* at 47–48.
120. *In re* Microfab Inc., 105 B.R. 161 (Bankr. D. Mass. 1989).
121. *Id.* at 166.
122. *See* 11 U.S.C. §§ 502, 507 (1988).

Bankruptcy Code, secured claimants are entitled to recover the full value of their collateral, or, where the collateral value exceeds the claim amount, the value of their claim.[123] Conversely, all pre-petition unsecured creditors generally recover only a share of the bankruptcy estate proportionate to their claim against the debtor from the remaining equity in the estate on a pro rata basis after secured and priority creditors have been paid their due.[124] As a result of this hierarchy, unsecured creditors commonly do not recover the full amount of their claim, if any at all.

The Bankruptcy Code provides that certain unsecured creditors receive priority in the distribution hierarchy of an estate's assets.[125] Priority claimants are entitled distributions from unencumbered property in the order delineated by section 507 of the Bankruptcy Code[126] before general unsecured creditors receive any distribution from the estate. Highest priority is given to administrative expense claimants,[127] which are defined as creditors that provide "actual, necessary costs and expenses of preserving the estate."[128] The existing body of case law on the area indicates that to be classified as an administrative expense, a creditor's claim must either have assisted in the administration of the estate's daily operations, or helped preserve or increase the value of the estate.[129]

Evaluating where an environmental claim fits within the distribution regime of a bankruptcy estate is an arduous task. To begin with, the federal government may have the rights of a secured creditor pursuant to CERCLA section 107(1), which permits the EPA to assert a lien against any property in violation of the statute to the extent of response costs incurred in connection

123. *Id.*

124. *See id.* §§ 507, 726, 1122–1123.

125. *Id.* §§ 507, 726.

126. *Id.* § 507.

127. *Id.* §§ 503(b), 507(a)(1)-(2), 1123 (a)(1), 1129(a)(9)(A).

128. *Id.* § 503(b)(1)(A).

129. *See id.* § 503(b); *see also* Reading v. Brown, 391 U.S. 471 (1968); *In re* Amarex, 853 F.2d 1526 (10th Cir. 1988); *In re* Wall Tube & Metal Prod., 831 F.2d 118 (6th Cir. 1987); Am. A. & B. Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119 (2nd Cir. 1960); *In re* Valley Concrete Corp., 118 B.R. 174 (Bankr. D. R.I. 1990). For a list of cases applying the administrative expense doctrine to bankruptcy cases involving environmental claims, see *infra* note 138.

with the clean up of the contaminated property.[130] The lien enables the government to recover payment to the extent of the property's value. Although this lien grants the EPA a right to recover priority payment in regard to the value of the property, the lien is junior to preexisting liens and mortgages on the property, as well as to the rights of a purchaser who buys the property before the government perfects the CERCLA lien.[131] Additionally, if it perfects the lien, the federal government has the rights of a secured creditor to the extent of the contaminated property's value.[132] If the clean up response costs were to exceed the worth of the property, the excess expenses would be treated as an ordinary unsecured claim.[133] Some states go farther and have enacted legislation in which violations of its local environmental laws evince a superlien on the debtor's property, which trumps existing secured creditors.[134]

Other environmental infractions involving property belonging to a bankruptcy estate, whether being asserted by a governmental or private entity, would seemingly have unsecured claim status; however, governmental administrative agencies may seek to raise its claims to an administrative expense priority and thereby receive payment prior to other unsecured creditors. There are two possible scenarios for conferring administrative expense priority on environmental claims. The first, and easier of the two, involves environmental claims arising after the filing of the bankruptcy petition. In these cases, where for instance hazardous substances are released onto property of the estate subsequent to the petition, courts have ruled that the response costs expended by the government to clean up the property may satisfy the criterion for an administrative expense.[135] Thus, to be an administrative expense

130. 42 U.S.C. § 9607(1) (1994).

131. *See id.* § 9607(1)(3).

132. *See* Spracker & Barnette, *supra* note 39, at 100.

133. *See* 11 U.S.C. §§ 502, 507.

134. *See* Spracker & Barnette, *supra* note 39, at 100–01.

135. *See infra* note 138. The seminal decision relied upon in this area is Reading Co. v. Brown, 391 U.S. 471, 483 (1968), in which the Supreme Court held that administrative expenses or "'actual and necessary costs' should include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible." *Id.* at 483.

priority, creditors need not expend funds that actually increase the value of the estate, but merely assist the estate in its daily operation, such as by paying its expenses that qualify as "actual and necessary costs."[136] The general obligation imposed by the Bankruptcy Code upon both a trustee and debtor-in-possession to abide by the law in administering the estate[137] would seemingly constitute the repayment of response costs for cleaning up contaminated property that arose from a violation of environmental laws as incident to the operation of an asset illegally. Consequently, although the debtor might not have preferred to expend its resources on the clean up, the legal requirement to do so has led courts to decide that the resulting governmental claim should be granted administrative expense status.[138]

Strongly implicated in the discussion of conferring administrative expense priority upon environmental claims are the various interpretive stances taken to the *Midlantic* decision's exception to a trustee's right to abandon environmentally contaminated property. Noting the interconnection between the two, one commentator states that "[c]ourts recognize that the real issue in abandonment is not disposing of the property but determining who is liable for environmental clean up."[139] Depending upon whether a court adopts a narrow or broad interpretive stance alters whether a claim is deemed to have administrative expense status. Permitting a trustee to abandon property absent the immediate existence of an extreme danger essentially has the effect of placing the burden and clean up costs on the government. Property abandoned under section 554 of the Bankruptcy Code reverts back to a lien holder or into the debtor's possession retroactively to the time of the petition,[140] with the

136. 11 U.S.C. § 503(b)(1)(A).

137. 28 U.S.C. § 959(b) (1988).

138. *See, e.g.*, Alabama Surface Mining Comm'n v. N.P. Mining Co. (*In re* N.P. Mining Co.), 963 F.2d 1449 (11th Cir. 1992); United States Dep't of Interior v. Elliot, 761 F.2d 168 (4th Cir. 1988); *In re* Smith-Douglass, Inc., 856 F.2d 12 (4th Cir. 1988).

139. Parker, *supra* note 24, at 258.

140. 11 U.S.C. § 554(c).

government thus left to shoulder the expense for the clean up.

Adopting a broad approach to the *Midlantic* decision has the opposite result. Many courts have embraced the latter route and prohibit a trustee from abandoning environmentally liable property in virtually all circumstances and have given the government's environmental claim administrative expense priority against the assets of the bankruptcy estate over other unsecured creditors.[141] The rationale is that if use or possession of an estate asset contravenes environmental laws, as is posited by the *Midlantic* court, then the priorities of the Bankruptcy Code become subservient to environmental laws.[142] As a consequence of this approach, if a trustee is prohibited from abandoning environmentally contaminated property, the cost of the government's resulting claim would invariably be an "actual and necessary"[143] administrative expense, since the estate can neither be maintained nor possessed without complying with environmental laws.

The more difficult question involves the government's contention to gain administrative expense status for pre-petition environmental claims. Unlike postpetition environmental infractions, pre-petition claims lack the qualification to be deemed ordinarily incident to operation[144] of the estate by the mere fact that they preceded the existence of the bankruptcy estate. The argument asserted by the government, however, is that the cleanup of prepetition releases should be treated as administrative

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141. *See supra* notes 101–106 and accompanying text.

142. *See* Parker, *supra* note 24, at 259–60 (discussing the "imminent and identifiable harm" exception).

143. *See* Joseph P. Cistulli, Comment, *Striking a Balance Between Competing Policies: The Administrative Claim As an Alternative to Enforce State Clean-Up Orders in Bankruptcy Proceedings*, 16 B.C. ENVTL. AFF. L. REV. 581, 596 (1989).

144. *See* Reading v. Brown, 391 U.S. 471, 483 (1968) (stating that claims arising from the operation of a business during an arrangement should take priority over claims brought by "those for whose benefit the business is carried on"); Cumerland Farms, Inc. v. Florida Dep't of Envtl. Prot., 116 F.3d 16, 20 (1st Cir. 1997) (explaining that priority is given to administrative expenses that are based on postpetition transactions and not prepetition transactions); 11 U.S.C. § 503(b)(1)(A) (providing for the payment of administrative expenses which included the "actual, necessary costs and expenses of preserving the estate").

expenses because the cleanup adds value to the property.[145] Courts are split on whether this is a viable proposition.[146] Courts that grant administrative expense status to these claims rely on the section 959(b) requirement that a debtor in possession of property comply with all valid state and federal laws, including environmental laws.[147] However, other courts disagree on the basis that under CERCLA there is no affirmative duty to cleanup past contamination absent a judicial or administrative order.[148] These courts consider it extremely difficult to assert, therefore, that repayments of prepetition response costs are "actual, necessary costs and expenses of preserving the estate"[149] that should be granted administrative expense priority. Even if a prepetition environmental violation is found to be an ordinary unsecured claim, it may still gain administrative expense status.[150] This can occur if the government, after the petition has been filed, imposes a fine or penalty on the debtor for a prepetition violation.[151]

F. Application of the Section 362 Automatic Stay Provision to Environmental Liabilities

Section 362(a) of the Bankruptcy Code provides that, upon the commencement of a bankruptcy case, a debtor is entitled to an

145. *See* Spracker & Barnette, *supra* note 39, at 103–04 and accompanying text (stating the government's assertion that since cleanup enhances the value of the property, the costs should receive administrative expense priority).

146. *See id.* (stating courts are divided on whether administrative status should be granted to postpetition costs of cleaning up prepetition contamination).

147. 28 U.S.C. § 959(b) (2002) (stating that a debtor who possesses property must comply with federal and state laws); *see also* Spracker & Barnette, *supra* note 39, at 103 n.119 (listing courts that have adopted this approach).

148. *See* Spracker & Barnette, *supra* note 39, at 103 n.123 (listing courts that have rejected the section 959(b) argument).

149. 11 U.S.C. § 503(b)(1)(A) (2002) (describing "actual, necessary costs and expenses" as administrative expenses).

150. *See* Spracker & Barnette, *supra* note 39, at 104 and accompanying text (stating that postpetition costs of cleaning up prepetition contamination does not have administrative expense status).

151. *Cf.* Spracker & Barnette, *supra* note 39, at 104 and accompanying text.

"automatic stay" from attempts by creditors to seize assets.[152] Violations of the stay are void or avoidable by the trustee even if an offending party is unaware of the bankruptcy filing,[153] and deliberate violations can result in sanctions against an offending party.[154] The automatic stay has two central purposes: (1) to enable the fair apportionment of the debtor's assets, and (2) to provide the debtor with immediate respite from creditor pressure.[155]

The automatic stay generally has been found inapplicable to a debtor in violation of environmental legislation.[156] Subsequent to the seminal decision in *Penn Terra Ltd. v. Department of Environmental Resources*,[157] courts routinely have concluded that environmental claims filed by the EPA or other federal and state governmental entities fall within the police or regulatory power exception and are thus exempt from the automatic stay.[158] It

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152. Specifically, section 362 imposes an automatic stay against:

> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case, or to recover a claim against the debtor that arose before the commencement of the case . . . ;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case . . . .

11 U.S.C. § 362(a) (2002).

153. *See* FELSENFELD, *supra* note 2, at 32–33.

154. *See* 11 U.S.C. § 362(h) (2002); *see also* FELSENFELD, *supra* note 2, at 41–42.

155. *See* FELSENFELD, *supra* note 2, at 32.

156. *See* Penn Terra Ltd. v. Dep't of Envtl. Res., 733 F.2d 267 (3d Cir. 1984) (holding that the automatic stay provision does not apply when a government entity is suing to stop violations of environmental protection).

157. *Id.* (holding that the automatic stay provision was inapplicable to an environmental claim).

158. Former subsection 362(b)(4) and subsection 362(b)(5) of the Bankruptcy Code mirrored sections 362(a)(1) and (2), respectively, and provided that when a governmental unit is acting to enforce its police or regulatory power, the automatic stay does not impede its ability to commence or continue a proceeding in pursuit of that goal, or to determine the debtor's liability, fix costs, penalties, or damages resulting from the environmental violation. In 1999, these two subsections were consolidated into the new section 362(b)(4), which provides:

> [U]nder paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police or regulatory power, including the enforcement of a judgment other than a money

follows that governmental actions to enforce environmental laws are permitted to continue regardless of a bankruptcy filing. The one governmental action that is not subject to the pervasive "police or regulatory power" exception is the enforcement or collection of a "money judgment."[159] Thus, although the government is permitted, even after a bankruptcy petition has been filed, to establish damages, penalties, and costs related to an environmental claim (as these actions are considered to be in pursuit of its police or regulatory powers), the enforcement of money judgments obtained in such proceedings is prohibited by the automatic stay.[160]

1. Equitable Stay

As an alternative means to pursue the benefits of a stay, given that a governmental entity seeking to enforce environmental laws will almost certainly not be curtailed in its endeavor through standard bankruptcy remedies, a debtor may be able to petition the

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judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4) (2002). Courts and commentators agree that the amended section does not alter the operation of the former two subsections, and the case law continues to refer to the former statutory divisions. *See In re* Eagle Const. Co., Inc., 283 B.R. 193, 198 n.5 (S.D. W. Va. 2002); *see also* NORTON BANKRUPTCY RULES PAMPHLET 282 (2002).

159. 11 U.S.C. § 362(b)(4) (money judgments are not included under the police or regulatory power exception to the automatic stay).

160. *See* United States v. Nicolet, 857 F.2d 202, 207–10 (3d Cir. 1988) (holding that government suit under CERCLA for recovery of costs of cleanup work and damages for past violations was properly allowed to proceed because the automatic stay provision does not apply to injunctions, the enforcement of injunctions, attempts to fix damages, or the "mere entry" of money judgments); *see also* Safety-Kleen, Inc. (Pinewood) v. Wyche, 274 F.3d 846, 865 (4th Cir. 2001) (stating that the section 362(b)(4) exception to the automatic stay provision applies where the primary purpose of the law that the state is attempting to enforce is to promote "public safety and welfare" or to "effectuate public policy," but not where the primary purpose is to protect the "government's pecuniary interest in the debtor's property" or to "adjudicate private rights."). *But see In re* Universal Life Church, Inc., 128 F.3d 1294, 1297 (9th Cir. 1997) (stating that the automatic stay should be imposed only where "the government action is pursued solely to advance a pecuniary interest of the governmental unit").

bankruptcy court for a discretionary stay.[161] Under section 105(a) of the Bankruptcy Code, the bankruptcy court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[162] This section is understood to grant the bankruptcy court discretion to use its equity powers in any manner it thinks appropriate.[163] It allows a court to enjoin other judicial or administrative proceedings in order to facilitate the purposes of the Bankruptcy Code or other court orders.[164] Included in the courts' discretionary powers is the ability to grant a discretionary injunction.[165] However, the standard that a debtor must satisfy before a court will issue a section 105 injunction is very onerous, and even if the standard were met, a court may be reluctant to exercise its equitable powers and grant an injunction that supersedes or contradicts environmental policies and the section 959(b) requirement that the debtor act in compliance with the law.[166]

III. HYPOTHETICAL INTERNATIONAL ENVIRONMENTAL CLAIM

Despite the incorporation of mechanisms into international trade agreements to curb potential environmental abuse,[167]

161. *See* Spracker & Barnette, *supra* note 39, at 118 (describing how a debtor can petition the court for a discretionary stay).

162. 11 U.S.C. § 105(a) (2002) (stating that no provision of the title prevents a court form issuing any "order, process, or judgment" they deem necessary to "prevent an abuse of process").

163. *See* Spracker & Barnette, *supra* note 39, at 118 (explaining that the court has a full range of equity powers).

164. *See id.* (stating that a court can enjoin other proceedings in the interests of protecting the assets of a bankruptcy estate).

165. *See id.* (stating that a court can issue any "order, process or judgment" that it deems necessary).

166. 28 U.S.C. § 959(b) (2002) (stating that during bankruptcy proceedings the management of property must in accordance with state law).

167. *See, e.g.*, Environmental Side Agreement, *supra* note 11 (stating that one of the objectives of the agreement is to "enhance compliance with, and enforcement of, environmental laws and regulations."). While numerous environmental organizations support NAFTA, such as the National Wildlife Federation, the World Wildlife Fund, the National Audubon Society, the Environmental Defense Fund, the Natural Resources Defense Council,

environmental provisions in trade treaties do not address the issues that may arise if an international enterprise files for insolvency relief but has multiple environmental claims being pursued against it by member States. As a device for exploring the international environmental/insolvency issue, this section will discuss the hypothetical situation of a debtor corporation with assets in countries that are party to the North American Free Trade Agreement ("NAFTA").[168] To provide context to the hypothetical, this section will begin with a discussion of the policies underlying international insolvency regimes.

A. International Insolvency: An Overview

The need for bankruptcy laws is coeval with the existence of business. "From the time that caveman Zog said to his friend Gub, 'I'm sorry, but I'm out of shells. May I pay you when I'm able?,' there was a need for bankruptcy law."[169] By the same logic, the current global stream of commerce necessitates a mechanism that can resolve disputes arising when a debtor's inability to pay its debts as they become due transcends national borders. However, attempts to establish such a mechanism have been fraught with difficulty.[170] In contrast to the ease with which domestic

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Conservation International, Defenders of Wildlife, and the Nature Conservancy, other environmental advocacy groups are opposed to its implementation. *See* Stenzel, *supra* note 11, at 427. Opposed organizations include: Sierra Club, Greenpeace, United States Public Interest Research Group, Citizens' Action, Public Citizen, the Clean Water Fund, Earth Island Institute, and the Student Environmental Action Coalition. *Id.*

168. *See infra* Part III.B. (providing a hypothetical involving parties to the North American Free Trade Agreement).

169. FELSENFELD, *supra* note 2, at 1. "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce and will prevent so many frauds . . . that the expediency of it seems not likely to be drawn into question." THE FEDERALIST NO. 42 (James Madison).

170. *See* Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570 (1996) (asserting that "[t]here has been remarkably little success in international conventions on the subject of bankruptcy, despite great interest in the subject since the Nineteenth Century."); Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64

bankruptcy laws can be implemented, numerous attempts over the years to accomplish multilateral solutions for dealing with cross-border insolvencies have been unsuccessful.[171] For the most part, this result has occurred either because the scope of issues addressed in treaties has been too narrow to cover all aspects of an insolvency proceeding[172] or because countries have been unwilling to relinquish the amount of sovereignty necessary for equitable distribution of a debtor's assets.[173] International agreements dealing with insolvency issues date back as far as 1204.[174] Early treaties were primarily bilateral arrangements dealing with the proper situs for a proceeding between member states.[175] With the

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FORDHAM L. REV. 2543, 2544 (1996) (discussing the failure to achieve international insolvency reform); Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307, 309 (1987) (stating that "few of the major trading countries have successfully concluded a treaty with their trading partners.").

171. *See* IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 221–22 (1999) (explaining how there have been few examples of international regulations that have been successful in addressing international insolvency).

172. Bilateral agreements usually dealt with forum issues and provided no guidance as far as choice of law questions. *See id.*; FELSENFELD, *supra* note 3, at 3-2 to 3-4, 3-14 (describing previous treaties that were limited in their scope).

173. *See* FELSENFELD, *supra* note 3, at 3-8 (indicating sovereignty as the primary cause for the failure of a United States/Canada treaty). The failure of a treaty between Canada and the United States is especially surprising given the social and economic ties between them. Nevertheless, despite the extensive bond between the two countries, a mutually beneficial cross-border insolvency agreement has yet to be achieved. *See* Perry, *supra* note 8, 485–88 (discussing the difficulties in attaining a Canada/United States insolvency treaty). The troubles in establishing cross-border insolvency agreements were anticipated early in United States history and in response to a question posed by James Madison concerning the possibility of a bankruptcy regime that would "recogniz[e] . . . and giv[e] effect to certain general and fixed principles, leaving the details . . . to each particular State," Henry Wheaton replied: "Such an international bankruptcy code would doubtless be beneficial; but I should think that the difficulties in establishing it by general consent would be found almost insuperable." Interview by Jabez Henry with Henry Wheaton (1827), *quoted in* Cook, *supra* note 1, at 81.

174. *See* Cook, *supra* note 1, at 85 (referring to treaty between Verona and Trent, which "provided for the transfer of a debtor's assets to the city conducting the liquidation proceedings.").

175. *See* FELSENFELD, *supra* note 3, at 3-2 to 3-4, 3-14 (discussing various

advent of modern technology and the globalization of commerce, the benefits of older agreements became limited and there was a call for multilateral treaties.[176] However, although the creditor protection and economic efficiency promised by international insolvency treaties have long been considered beneficial, achieving consensus and actually adopting treaties has proven difficult.[177] Until recently, other than the Bustamante Treaty[178] and the Nordic Treaty,[179] very few attempts succeeded.[180] Over the last decade, however, emphasis has been placed upon trying to establish multinational insolvency protocols, with the United Nations and the European Union leading the way.[181]

1. Universality vs. Territoriality

A key component in understanding the considerations underlying international insolvency in any one jurisdiction, and, in

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bilateral insolvency treaties).

176. *See* FLETCHER, *supra* note 171, at 221–22 (describing how limitations of bilateral agreements have led to a recognition of the need to develop multilateral arrangements).

177. *See* Cook, *supra* note 1, at 82 (stating "most people think such agreements are beneficial yet few think they are attainable.").

178. 86 LEAGUE OF NATIONS O.J. 246 (1929). The treaty was signed by the representatives of thirty-two North, South and Central American States, including the United States, and currently binds, in whole or in part, seventeen countries. *See* FELSENFELD, *supra* note 3, at 3-11 to 3-12.

179. Consolidated Treaty Series (1995 Supp.); General Secretariat, Organization of American States, *Inter-American Treaties and Conventions*, Treaty Series, No. 9, at A-31 (1993). The Nordic Convention has been in force since 1933 between Sweden, Norway, Denmark, Iceland, and Finland. *See* FELSENFELD, *supra* note 3, at 3-1 to 3-14. It provides for extraterritoriality for in bankruptcy cases and to a certain extent unifies the bankruptcy regimes of the treaty members. *See id.*

180. *See* Cook, *supra* note 1, at 86–90, 95–96 (discussing the many failed attempts to draft and implement cross-border treaties between the U.S. and Canada and members of the European Union).

181. *See* UN Adoption of Model Law on Cross Border Insolvency, *supra* note 5; EU Convention on Insolvency Proceedings, *supra* note 5; *see also* Perry, *supra* note 173, at 478–86 (outlining some of the advances achieved by the European Union through the International Bankruptcy Concordat).

turn, the possibility of a country being a signatory to an international insolvency treaty, is the dichotomy of universality and territoriality.[182]

In its most extreme form, a territorial approach to insolvency proceedings presumes that each country will seize the local assets of a debtor for the sole benefit of local creditors without regard to contemporaneous foreign proceedings involving that debtor.[183] If a debtor were to have assets in more than one country, then an insolvency proceeding in each country would be necessary.[184] This approach is known as the grab rule,[185] since the effects of a bankruptcy proceeding are limited to the territory of the state in which the proceeding was initiated, with local assets 'grabbed' for the benefit of local creditors.[186] Leaving one writer to succinctly state: "[t]he bankruptcy laws of the world . . . were written as if the drafting country were the only country in the world."[187]

On the other extreme of the spectrum is a purely universalistic approach, whereby all of a debtor's assets wherever they may be located worldwide are administered in one central proceeding that will be fully binding on other countries.[188] Under a universal philosophy, courts in affected countries will cooperate with the

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182. *See generally*, Andre J. Berendes, *The UNCITRAL Model Law On Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 313–14 (1998) (explaining that under the universality view "all the assets are to be administered in one insolvency proceeding, wherever they are located" and under the territoriality principle "effects of an insolvency proceeding do not reach further than the sovereignty of the state where the insolvency proceeding is opened.").

183. *See* ALI Cooperative Agreement, *supra* note 5, at 10–11 (stating that, under the territoriality view, countries will not consider other proceedings that may be taking place in other jurisdictions in their attempts to seize assets).

184. FELSENFELD, *supra* note 3, at 1-25 (stating that the "territorial approach, largely restricts the effects of law to the jurisdiction in which the law is imposed.").

185. *See* ALI Cooperative Agreement, *supra* note 5, at 10 (describing the association between territorialism and the "grab rule").

186. *See* Berendes, *supra* note 182, at 313 (explaining that under a territorial approach, the effects on insolvency proceedings are limited to the state where it is opened).

187. *See* FELSENFELD, *supra* note 3, at 1-6.

188. *See id.* at 1-25 to 1-26; *see also* Berendes, *supra* note 182, at 313–14.

main proceeding to help seize assets and otherwise assist the case.[189] Parenthetically, for a universal approach to have any effect, both the country of lex concurcus (country where bankruptcy case is opened) and countries where that same debtor has assets must yield to the universality philosophy.[190]

It can be argued that applying the universality principle may be more practical.[191] Creditors wishing to recover their indebtedness from a debtor holding assets located in numerous countries would have to incur the cost of being involved in various

189. *See* ALI Cooperative Agreement, *supra* note 5, at 11–14. In addition to the territoriality/universality dichotomy, there is another at times overlapping dichotomy between an ancillary and parallel proceeding. The latter debate addresses the divergent approaches taken when there is more than one proceeding occurring simultaneously in different countries. The proceeding in the debtor's home country will always be a full bankruptcy proceeding.

However, when a multinational corporation is a debtor in an international insolvency proceeding, there will invariably be a need for proceedings in the various countries in which it holds assets. The proceedings in the non-home country can either be conducted as a parallel or ancillary proceeding. Ancillary proceedings are those that are conducted with the view to assist the main proceeding properly administer the case, but ultimately to allow the main proceeding to adjudicate all of the debtor's assets worldwide. *See* ALI Cooperative Agreement, *supra* note 5, at 11–14. Other countries view their proceedings as a parallel proceeding, or, in other words, as another main proceeding. *Id.* A country's position in the parallel versus ancillary continuum can be an indication of where they fit in the territoriality/universality dichotomy. *Id.* Countries that utilize ancillary proceedings are said to be more universalistic while parallel proceedings indicate more of a territorial approach. *Id.*

190. *See* ALI Cooperative Agreement, *supra* note 5, at 14. A dispute may arise if there is more than one proceeding ongoing simultaneously, as to which of the two proceedings is considered the main proceeding. Under the UNCITRAL Model Law on Cross Border Insolvency, the European Union Regulation and the ALI Transnational Project, a main proceeding is determined by utilizing the "center of the debtor's main interest" test. *Id.* So, for example, in the case of a corporation in bankruptcy, the place of initial corporation is normally found to be its center of main interest. *Id.*

191. *See* Berendes, *supra* note 182, at 314 (stating that when it is necessary to file claims in more than one proceeding, large multinationals have an advantage over small creditors, for whom it may be too complicated and costly to file a claim abroad).

proceedings around the word if a territorial approach were taken.[192] In addition, critics of the territorial philosophy have articulated five major disadvantages associated with that approach.[193] Those advocating for a territorial approach argue that following a universalistic philosophy will unfairly result in foreign liquidators assuming control over domestic assets and distributing them internationally at the expense of local creditors.[194]

Given the degree of sovereignty that must be relinquished to comply with a universalistic approach and the impracticality of adhering to a strict territorial position, it is not surprising that domestic insolvency laws generally fall somewhere along the continuum between the antithetical philosophies.[195] Although

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192. *See id.*

193. *See* FELSENFELD, *supra* note 3, at 1-27. The disadvantages are:

1. Reorganization is difficult or impossible because each jurisdiction is looking for the maximum return to its own local creditors.
2. Even in a liquidation, assets may be sold at higher prices if they can be packaged to maximize returns without regard to national boundaries.
3. Territorialism may lead to inequitable returns to different creditors since different countries have different priority rules and, in addition, control over different assets.
4. Shrewd debtors can move assets among countries in order to favor certain creditors. Given the problems of creditors in entering other countries in order to protect their positions and given also the flexibility offered by new electronic communications, swift-moving debtors are difficult to control.
5. Foreign creditors often lose against domestic interests. This is due less to the demands of any system than it is to the tardiness of notice given internationally, and the difficulties in making one's presence known in foreign courts.

Id.; *see also* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post Universalist Approach*, 84 CORNELL. L. REV. 696, 706–08 (1999) (presenting five advantages associated with the universalistic approach).

194. *See* Berendes, *supra* note 182, at 314 (discussing the negative consequences of applying the universality principle without any restrictions).

195. *Id.* at 315. Berendes cites the Expert Committee's Report on Six Categories of Domestic Insolvency Law completed at the Toronto Colloquium for UNCITRAL and the International Association of Insolvency Practitioners, which listed six categories of countries on the territoriality/universality continuum:

(1) Countries with specific legislation for mandatory recognition of foreign insolvency proceedings opened in certain specified countries;

(2) Countries with express legislation providing for selective recognition or a

"modern academic and professional opinion has come down overwhelmingly on the side of universalism,"[196] its impracticality has led one leading scholar to state that universalism "is so far from contemporary reality that it is not really part of the working hypotheses of present scholars."[197] Thus, no country has yet to adopt universalism in its pure form, nor are they likely to do so in the future.[198] As an alternative, some have argued for a modified universalism, which is somewhat analogous to the position articulated by the U.S. Bankruptcy Code in section 304.[199] Under this position, the country conducting the main proceeding attempts to get its law to control the administration of the debtor's estate and petitions foreign courts to assist in the proceeding when necessary.[200] This approach is in accordance with the anti-territorial philosophy, but at the same time is cognizant of universalism's deficiencies. Essentially, "[m]odified universalism is universalism tempered by what is practical at the current stage of international legal development . . . ."[201] As a whole, current work in the area of international insolvency agreements tend to implement some form of the latter approach; they reject the

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practice for discretionary recognition;

(3) Countries that feature a practice of discretionary recognition;

(4) Countries that are signatories to multilateral treaties dealing with access and recognition;

(5) Countries with legislation based on the principle of strict territoriality but with differing practice;

(6) Countries that are wholly territorial.

Id. The colloquium participants also stated that countries in category one were in a good position while those in category six were not. *Id.*

196. ALI Cooperative Agreement, *supra* note 5, at 11.

197. Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27, 45 n.4 (1998) (discussing the two traditional views scholars have identified concerning the administration of a multinational insolvency).

198. *See* ALI Cooperative Agreement, *supra* note 5, at 11.

199. LoPucki, *supra* note 193, at 725 (citing Jay Lawrence Westbrook's characterization of the United States bankruptcy system); ALI Cooperative Agreement, *supra* note 5, at 11; *see also* FELSENFELD, *supra* note 3, at 1–38 to 1–44; Cook, *supra* note 1, at 15–17 (discussing the United States presumption against full universality).

200. *See* FELSENFELD, *supra* note 3, at 1-33 to 1-34.

201. *See* ALI Cooperative Agreement, *supra* note 5, at 11.

protectionist notion underlying territoriality, yet realistically hold back from attempting to gain full universality by working to reach agreement on choice of law and forum issues.[202]

B. Hypothetical

For purposes of clarity, the duration of this Note focuses on a hypothetical situation, which although it has yet to be adjudicated in practice, will inevitably ensue with the increase of trade worldwide, particularly in North America.

Assume a debtor in a United States liquidation case. The debtor is an American company named EGN Inc. headquartered in Seattle, Washington with operations in Toronto, Ontario and Minneapolis, Minnesota. It owes the equivalent of U.S. $3,000,000 to secured and unsecured U.S. creditors. In addition to the above claims, the debtor is being petitioned by both the United States and Canadian governments for the repayment of response costs incurred as a result of a clean up precipitated by violation of each country's respective environmental legislation. Each environmental claim is for the sum of U.S.$2,000,000. The debtor's assets are U.S.$7,000,000 in United States holdings with an additional U.S.$500,000 of Canadian owned property.[203]

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202. *See id.*; *see also* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 456 (1991) (arguing for the acceptance of some, but not all, characteristics of universalist reform); Jay Lawrence Westbrook, *Lessons of* Maxwell Communications, 64 FORDHAM L. REV. 2531, 2538 (1996) (discussing transnational insolvency problems which arose in Maxwell Communication Corp. (*In re* Maxwell Communications Corp.), 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995)); Tobler, *supra* note 3, at 390–95 (advocating the adoption of the UNCITRAL Model Law as the foundation for a universality-based legal regime).

203. Although Mexico is a member of NAFTA, it is not included in this hypothetical because it traditionally has been indifferent in enforcing its environmental laws. Thus, Mexican law on the insolvency/environmental interchange is negligible, and it would be highly unlikely for the Mexican government to petition a United States Bankruptcy Court to recoup an environmental indebtedness. *See, e.g.*, Joseph E. Sinnott, *The Classic Civil/Common Law Dichotomy and its Effects on the Functional Equivalence of*

IV. UNCITRAL AND ENVIRONMENTAL CLAIMS IN BANKRUPTCY[204]

A. UNCITRAL Model Law on International Insolvency

In 1966, the United Nations General Assembly established the United Nations Commission on International Trade Law.[205] UNCITRAL was established in response to the growing incidence of international trade as a means to help alleviate obstacles that necessarily result from transnational business, and in particular, to address the divergent stances taken by various member countries to deal with such matters.[206] To accomplish its goal, UNCITRAL has set out on a mission "to further the progressive harmonization and unification of the law of international trade."[207] UNCITRAL is unique from other United Nations activities; as opposed to the U.N.'s general public law agenda, UNCITRAL seeks to promote private law and commercial trade issues.[208] The UNCITRAL Commission is composed of 36 member states,[209] but non-member

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the Contemporary Environmental Law Enforcement Mechanisms of the United States and Mexico, 8 DICK. J. ENVTL. L. POL'Y. 273, 273–74 n.4. It is possible that with the burgeoning of trade between the NAFTA States and the inevitably resulting insolvencies, that transnational bankruptcy cases can be used as a medium to advance further environmental protection in Mexico.

204. Although 11 U.S.C. section 304 of the United States Bankruptcy Code is currently in force in regard to the U.S. position in multinational insolvency cases, there is a bill pending in the United States Congress to implement the Model Law as Chapter 15 of the Bankruptcy Code. *See* Bankruptcy Reform Act of 2001, S. 220, 107th Cong. (2001); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001). Consequently, this paper will consider the treatment of Canadian environmental claims pursuant to the Model Law as opposed to analyzing it under section 304 of the United States Bankruptcy Code.

205. United Nations General Assembly, United Nations Commission on International Trade Law, *at* http://www.uncitral.org/en-index.htm (last visited Apr. 20, 2003).

206. *Id.*

207. *Id.*

208. *See* FELSENFELD, *supra* note 3, at 5-20, 5-21.

209. As of June 1, 1998, the members of UNCITRAL, and the years when their memberships expire, were: Algeria (2001); Argentina (2004—alternating

states as well as interested international organizations are invited to attend sessions or working groups as observers.[210]

On UNCITRAL's 25th anniversary, a Congress was held under the theme "Uniform Commercial Law in the 21st Century."[211] At this gathering several participants suggested that, in light of the insurgence of international enterprises and the resulting increase in insolvencies and the apparent deficiency of any legal framework to properly handle the failure of multinational corporations, it would be appropriate for UNCITRAL to examine the disharmony of international insolvencies and consider possible solutions.[212] Soon thereafter a colloquium was held, wherein it was decided that although UNCITRAL could draft a unified set of insolvency laws, it would at that time be premature to do so.[213] Given that advanced commercial States probably would be unwilling to modify their bankruptcy codes, as well as the difficulties that would arise from trying to unify the divergent legal philosophies of UNCITRAL constituents,[214] it was determined that attempting to draft one

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annually with Uruguay, starting in 1998); Australia (2001); Austria (2004); Botswana (2001); Brazil (2001); Bulgaria (2001); Burkina Faso (2004); Cameroon (2001); China (2001); Colombia (2004); Egypt (2001); Fiji (2004); Finland (2001); France (2001); Germany (2001); Honduras (2004); Hungary (2004); India (2004); Iran (Islamic Republic of) (2004); Italy (2004); Japan (2001); Kenya (2004); Lithuania (2004); Mexico (2001); Nigeria (2001); Paraguay (2004); Romania (2004); Russian Federation (2001); Singapore (2001); Spain (2004); Sudan (2004); Thailand (2004); Uganda (2004); United Kingdom of Great Britain and Northern Ireland (2001); United States of America (2004); and Uruguay (2004—alternating annually with Argentina, starting in 1999). *See* United Nations General Assembly, United Nations Commission on International Trade Law, *at* http://www.uncitral.org/en-index.htm (last visited Apr. 20, 2003).

210. *Id.*

211. *Report of the United Nations Commission on International Trade Law on the Work of Its Thirtieth Session*, 52nd Sess., Supp. No. 17, Annex I, U.N. Doc. A/Res/52/158 (1998) [hereinafter *Model Law*].

212. *See* United Nations General Assembly, United Nations Commission on International Trade Law, *at* http://www.uncitral.org/en-index.htm (last visited Apr. 20, 2003); *see also* FELSENFELD, *supra* note 3, at 5-21.

213. *See* FELSENFELD, *supra* note 3, 5-22 to 5-23; *see also* Tobler, *supra* note 3, at 405–06 (discussing the creation of the UNCITRAL Working Group on Insolvency Law and the Model Law on Cross-Border Insolvency).

214. The United Nations consists of countries under both the civil and

cohesive bankruptcy regime would result in the entire process being a futile effort.[215]

Consequently, it was decided a modest undertaking was in order, and UNCITRAL limited the scope of its project to the procedural aspects of an insolvency case rather than proposing uniform substantive bankruptcy laws.[216] UNCITRAL focused its initial work on securing court access to foreign insolvency administrators, facilitating judicial cooperation between concurrent proceedings, and gaining recognition of foreign proceedings.[217] In 1995, an intergovernmental working group consisting of more than 30 member countries was appointed by UNCITRAL.[218] The Commission proposed a final draft of the Model Law and it was later adopted by the United Nations in May 1997.[219]

The Model Law is a recommendation that supplies a proposed legislative language to countries looking to promote a more universal insolvency regime.[220] It is written as model legislation,

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common law regimes.

215. *See* FELSENFELD, *supra* note 3, at 5-22 to 5-23; Tobler, *supra* note 3, at 405–06.

216. *See* FELSENFELD, *supra* note 3, at 5-22 to 5-23; Tobler, *supra* note 3, at 405–06. Incidentally, reading the language used in the Preamble to the Model Law seemingly indicates an intention to implement more substantive provisions. The Preamble states:

> The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
> (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
> (b) Greater legal certainty for trade and investment;
> (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
> (d) Protection and maximization of the value of the debtor's assets; and
> (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Model Law, *supra* note 211.

Nevertheless, the text of the Model Law only suggests procedural guidelines, indicating that the Preamble is more aspirational in nature and an indication of future work in the area.

217. *See* FELSENFELD, *supra* note 3, at 5-23 to 5-28.

218. *Id.* at 5-28 to 5-29.

219. *Id.* at 5-29.

220. *See* Berendes, *supra* note 182, at 320 (discussing the content of the Model

and, thus, a country can enact the Model Law as is, or it can add or delete provisions prior to implementing the Model Law.[221] Similar to the general principles articulated by the working group, the Model Law is based on nine general principles.[222] Since its inception, the Model Law has been enacted to a significant extent in the Mexican Bankruptcy Code amongst a very small group of other non-NAFTA members, and is currently being deliberated upon in the United States Congress.[223]

Law).

221. *See id.* (describing the character of the Model Law).

222. *See id.* at 321–23. The nine principles are:

(1) The court of an enacting State shall recognize only one foreign proceeding as a foreign main proceeding.

(2) The recognition of a foreign proceeding should not restrict the right to commence a local proceeding.

(3) A local proceeding shall prevail over the effects of a foreign proceeding and over relief granted to a foreign representative, regardless of whether the local proceeding was opened to prior or after the recognition of a foreign proceeding.

(4) When there are two or more proceedings, there shall be cooperation and coordination.

(5) A foreign proceeding shall be recognized as a foreign main proceeding if the foreign proceeding is opened in the state where the debtor maintains the center of his main interests. A foreign proceeding shall be recognized as a foreign non-main proceeding if the foreign proceeding is opened in a State where the debtor has an establishment.

(6) Upon recognition of a foreign proceeding as a foreign main proceeding, some types of relief will come into effect automatically. They will be in effect until modified or terminated by the court. Upon recognition of a foreign proceeding as a foreign main proceeding, the court may grant some other types of relief, but they will not come into effect automatically. Upon recognition of a foreign proceeding as a foreign no-main proceeding, relief can only come into effect if the court grants it.

(7) Coordination may include granting relief to the foreign representative. In granting relief to foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative.

(8) Creditors shall be allowed to file claims in any proceeding. Payment to creditors from multiple proceedings should be equalized.

(9) If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding.

Id.

223. *See* E. Bruce Leonard, *The International Scene: The International Year in Review*, 2001 AM. BANKR. INST. J., LEXIS 231, at 1-3 (indicating that Mexico,

B. Application of UNCITRAL to the Hypothetical Environmental Claims

A stated goal of the Model Law "is to provide effective mechanisms for dealing with cases of cross-border insolvency . . . ."[224] While the scope of the Model Law is limited to procedural protocols in transnational bankruptcy cases, some of its procedural provisions affect substantive issues in a bankruptcy case.[225] The hypothetical environmental claims represent this kind of case. A multinational corporation is in violation of both United States and Canadian environmental laws, and each government petitions to recover its clean-up costs in a U.S. bankruptcy case. The Canadian government, in so petitioning, is a "foreign creditor" participating in an "insolvency proceeding" under U.S. law.[226] The Model Law would therefore be applicable (to the extent enacted by Congress).[227]

A key advantage of the Model Law is "speed, speed, and more speed."[228] The Model Law is designed "[t]o avoid the dissipation of assets that may result from time-consuming procedures or considerations."[229] In petitioning a U.S. bankruptcy court, a Canadian "foreign representative"[230] is entitled, thus, to apply

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Japan and South Africa have enacted the Model Law in whole or in part); *see also* Bankruptcy Reform Act of 2001, S. 220, 107th Cong. (2001); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001) (including the proposed Chapter 15 to the U.S. Bankruptcy Code which proposes implementation of the Model Law).

224. *Model Law*, *supra* note 211.

225. *See Guide to Enactment of the UNICTRAL Model Law on Cross-Border Insolvency*, U.N. GAOR, 30th Sess., para. 3, U.N. Doc. A/CN.9/442 (1997) (stating that "[t]he Model Law . . . does not attempt a substantive unification of insolvency law," but rather "offers solutions that help in several modest but significant ways."); *see also* Berendes, *supra* note 182, at 321 (stating that the Model Law "has many substantive safeguards" and "provides for a system that enables quick action," but that "[it] does not modify the existing material rules concerning insolvency proceedings in the enacting State.").

226. *See Model Law*, *supra* note 211, art. 1, para. 1(d) & art. 2(b).

227. *Id.*

228. Berendes, *supra* note 182, at 321.

229. *Id.*

230. *Model Law*, *supra* note 211, art. 2(d) (defining a "foreign representative"

directly to the court rather than resort to diplomatic intermediaries or get permission to have standing.[231] From this application, two additional advantages accrue. First, upon the filing of an application for recognition of a foreign proceeding, the bankruptcy court may, at the Canadian representative's request, stay executions against the debtor's assets, if in the court's estimation "relief [were] urgently needed to protect the assets of the debtor or the interests of the creditors."[232] Upon recognizing the foreign proceeding, either as a main or non-main proceeding, the court must then provide automatic relief or "grant any appropriate relief," including "staying the commencement or continuation of individual actions or proceedings against the debtor's assets, rights, obligations or liabilities."[233] Second, at any time following the application for recognition, the court may "entrust[] the administration . . . of all or part of the debtor's assets located in the [United States] to the [Canadian] representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy."[234]

Because section 362(b)(5) of the U.S. Bankruptcy Code prohibits a Unites States environmental agency from enforcing money judgments,[235] securing the stay set forth in the Model Law would be helpful in ensuring the Canadian government of being

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as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.").

231. *Model Law*, *supra* note 211, art. 9. "A foreign representative is entitled to apply directly to a court in this State." *Id.* Article 11 provides that a foreign representative may apply to commence a proceeding under the enacting State's bankruptcy laws "if the conditions for commencing such a proceeding are otherwise met." *Id.* art. 11. Article 12 provides that a foreign representative "is entitled to participate" in a bankruptcy proceeding if the court has recognized a foreign proceeding. *Id.* art. 12.

232. *Model Law*, *supra* note 211, art. 19, para. 1(a).

233. *Compare id.* art. 20, para. 1, *with id.* art. 21, para. 1.

234. *Compare id.* art. 19, para. 1(b), *with id.* art. 21, para. 2.

235. 11 U.S.C. § 362(b)(5) (1988); *see also supra* Part II.F. (discussing the automatic stay's applicability to environmental claims in bankruptcies).

part of the bankruptcy proceeding.

One provision of the Model Law that may bear directly on environmental claims is Article 13.[236] Article 13 states, in brief, three rules:

> (1) In principle all [local and foreign] creditors have the same rights and their claims have the same ranking [priority];
>
> (2) As an exception to this principle, claims of foreign creditors may be ranked as general nonpreference claims, but no lower; and
>
> (3) As an exception to the exception, the claim of a foreign creditor may be ranked lower that a general nonpreference claim if the creditor has a claim of the same nature as a claim of a domestic creditor that is ranked lower than a general nonpreference claim.[237]

Although one commentator states that it is his hope legislators will not adopt the exceptions delineated in Article 13 because of the potential impact on international commerce,[238] adoption of the first exception may result in disparate treatment of a United States environmental claim vis-à-vis a similar Canadian

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236. *See Model Law*, *supra* note 211, art. 13. Article 13 reads in full:

Subject to paragraph 2 of this article, foreign creditors have the same rights regarding commencement of, and participation in, a proceeding under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.

Paragraph 1 of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference if an equivalent local claim (e.g. claim for penalty or deferred-payment claim) has a rank lower than the general non-preference claims].*

Id. (emphasis added).

237. Berendes, *supra* note 182, at 345 (discussing Article 13 of the Model Law).

238. *Id.* (stating that "wide use of the exceptions to article 13 would hamper international commerce" because only foreign creditors would be exposed to losing their security interest).

claim. Under this exception, the U.S. Bankruptcy Court could grant the United States government's environmental claim priority status, while treating the Canadian government's environmental claim as that of a general unsecured creditor.[239]

A more discernible distinction between the two governmental claims should arise if the footnote to Article 13(2) were implemented. In relevant part the footnote states:

> The enacting state may wish to consider the following alternative wording to replace paragraph 2 of Article 13(2):
>
> Paragraph 1 of this article [seeking to equal creditors' rights and claim ranking] does not affect the ranking of claims in a proceeding . . . or the exclusion of foreign tax social security claims from such a proceeding.[240]

Prior to discussing the repercussions to the status of the Canadian hypothetical environmental claim in a United States bankruptcy case,[241] it would be beneficial to provide a brief overview of the comity doctrine and its revenue rule exception.

1. Comity and the Revenue Rule Exception[242]

The Supreme Court in *Hilton v. Guyot*[243] first enunciated the modern view of comity requiring United States courts to enforce foreign judgments.[244] The concept of comity has its roots in the

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239. *See supra* Part II.E. (articulating that a United States environmental claim may be granted administrative expense priority).

240. *Model Law*, *supra* note 211, at n.2.

241. *See infra* notes 266–69 and accompanying text (discussing that the footnote to Article 13(2) is included in the current proposed legislation to reform the Bankruptcy Code).

242. *See* Jeremy Smith, Note, *Approaching Universality: The Role of Comity in International Bankruptcy Proceedings Litigated in America*, 17 B.U. INT'L L.J. 367 (1999) (comprehensively reviewing comity jurisprudence as it relates to United States bankruptcy proceedings and 11 U.S.C. section 304 (1988) of the Bankruptcy Code).

243. Hilton v. Guyot, 159 U.S. 113 (1895).

244. *Id.* at 159. The Court stated in dictum:

theory of reciprocity, which asserts that U.S. courts are obligated to hear a foreign claim only if a local claim "[could] be heard in the foreign jurisdiction on the same terms should a bankruptcy arise there."[245]

> [Comity] is not a rule of law, but one of practice convenience and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.[246]

In articulating a preference for universality, as well as respect for foreign proceedings, *Hilton* and its progeny do, however, delineate an important exception to the rule of comity.[247] If either the judgment or "the cause of action on which the judgment was based" is found "repugnant to the public policy of the United States," comity should not be extended.[248] Courts following *Hilton*

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court . . . , the judgment is prima facie evidence, at least, of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment . . . .

Id. The Court then held, in relation to the matter before it, that it "was not require[d] to give conclusive effect to the judgments of the courts of France" because of "the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries." *Id.* at 161.

245. *See* FELSENFELD, *supra* note 3, at 1-60 to 1-61 (arguing that comity is a distinct question of whether a U.S. court will give recognition to a foreign right, but conceding that the two doctrines—comity and reciprocity—may be inseparable).

246. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971).

247. *See Hilton*, 159 U.S. at 160 (stating that the judgment of a foreign court may be impeached "by showing . . . that by the principles of international law, and by the comity our own country, it should not be given full credit and effect."); *see also supra* notes 205–208 and accompanying text.

248. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482(2)(d) (1987) [hereinafter RESTATEMENT ON FOREIGN RELATIONS].

have continued to use the public policy exception to deny recognition and enforcement of foreign proceedings,[249] and courts have articulated various opinions about the degree of nonconformity with American mores necessary to disqualify a foreign judgment.[250] *Overseas Inns, S.A. P.A. v. United States*[251] is the only known case in U.S. jurisprudence of a debtor seeking to have a foreign bankruptcy ruling enforced in the United States.[252] The IRS, to whom Overseas, a Luxembourg corporation, owed unpaid taxes, was treated as a general creditor in a Luxembourg insolvency proceeding.[253] Overseas paid the IRS pursuant to the Luxembourg plan, but the IRS later levied against payments owed to Overseas by a U.S. corporation.[254] Overseas then brought suit contending that "the Luxembourg judgment was binding on the IRS and that it had satisfied its obligation to the United States by [making payment] in accordance with that judgment."[255] The district court rejected Overseas' argument and held that the IRS would not have received comparable treatment in similar

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249. *See, e.g.*, Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937-44 (D.C. Cir. 1984) (stating that "violation of public policy vitiating comity" occurred when English court's ruling encroached upon U.S. district court's rightful powers in adjudicating antitrust case).

250. *See, e.g.*, *Somportex*, 453 F.2d at 443 (extending comity because enforcement of English court's adjudication did not "[tend] clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine the sense of security for individual rights.") (citation omitted); Ackerman v. Levine, 788 F.2d 830, 842–43 (2d Cir. 1986) (extending comity on the grounds that a German judgment was not "repugnant to fundamental notions of what is decent and just") (citation omitted).

251. Overseas Inns, S.A. P.A. v. United States, 911 F.2d 1148 (5th Cir. 1990).

252. FELSENFELD, *supra* note 3, at 1-84 (stating that "[w]e are aware of only one case where a debtor who had been granted a bankruptcy decree . . . sought to have that decree enforced in the United States . . . .").

253. *Overseas*, 911 F.2d at 1147.

254. *Id.* At the time of the Luxembourg decision, Overseas owed the IRS $507.343.83 in taxes and $496,380.78 in interest. *Id.* Under the plan approved by the Luxembourg court, Overseas paid the IRS a total of $179,135.76. *Id.* The IRS then collected an additional $919,835.79 by levying payments owed to Overseas by a U.S. corporation. *Id.* at 1147-48.

255. *Overseas*, 911 F.2d at 1148.

proceedings in the United States.[256] On appeal, the circuit court held that comity should not be accorded the Luxembourg plan, on the ground that the foreign court's ruling was against American public policy "favor[ing] payment of lawfully owed federal income taxes."[257]

Application of the doctrine of comity to the hypothetical environmental claims would seemingly allow for equal recognition of the Canadian claims in a U.S. bankruptcy proceeding. The underlying objectives of Canadian environmental legislation are consistent with American notions of morality, as indicated by the close similarity of the two countries' environmental laws.[258] However, the public policy exception has been interpreted to extend beyond a mere determination of the prima facie morality of a foreign law.[259] The so-called revenue rule allows for the dismissal of foreign State claims, based on the reasoning that courts of one country do not enforce taxes, fines, penalties, or penal rules of another country absent reciprocity.[260] The rule that foreign governmental interests should not be enforced was introduced into American jurisprudence through *Her Majesty the Queen ex rel. British Columbia v. Gilbertson*.[261] In *Gilbertson*, the government of the Canadian province of British Columbia filed suit in a federal

256. *Id.* at 1148-50 (affirming that the IRS would have received priority status under U.S. bankruptcy law); *see also supra* notes 122–51 and accompanying text (discussing the priority doctrine in the environmental context).

257. *Overseas*, 911 F.2d at 1149. The court explained that "[c]omity does not reach so far as to allow one country to adversely affect another's tax revenues." *Id.*

258. *See* Michael I. Jeffery, *The Environmental Implications of NAFTA: A Canadian Perspective*, 26 URB. LAW. 31, 38, 41 (referring to the close similarity of U.S. and Canadian environmental law and enforcement practice).

259. *See infra* notes 260–63 and accompanying text.

260. *See* RESTATEMENT ON FOREIGN RELATIONS, *supra* note 248, § 483. "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other States." *Id. But see* William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265 (2000) (arguing for the overall revocation of the revenue rule).

261. Her Majesty the Queen *ex rel.* British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).

district court in Oregon seeking to enforce a tax judgment against residents of Oregon.[262] On appeal, the circuit court declined to enforce the claim on the ground that "recogniz[ing] the tax judgment from a foreign nation . . . would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do."[263]

Whether the Canadian environmental claim would be given the same treatment in a U.S. bankruptcy proceeding as the

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262. *Id.* at 1161–63.

263. *Id.* at 1165; *see also* United States v. Harden, [1963] D.L.R. 366 (Supreme Court of Canada, Affirming Court of Appeal for British Columbia); Alona E. Evans, *Judicial Decisions*, 74 AM. J. INT'L L. 184, 190–91 (1980) (suggesting that, under the theory of reciprocity, had British Columbia courts not previously declined to enforce the tax judgment of a U.S. court, *Gilbertson* would have been decided differently). *See generally* Kovatch, *supra* note 260, at 268–70. Kovatch notes that the Ninth Circuit affirmed the *Gilbertson* ruling based on the revenue rule, which the court traced back to two eighteenth century English cases decided by Lord Mansfield. *See id.* The first decision was *Holman v. Johnson*, 98 Eng. Rep. 1120 (1778), in which Mansfield stated, "[N]o country ever takes notice of the revenue laws of another." *Id.* at 1121. The second decision was *Planche v. Fletcher*, 99 Eng. Rep. 164 (1779), wherein Mansfield said again, "One nation does not take notice of the revenue laws of another." *Id.* at 165. The Ninth Circuit also relied on Learned Hand's opinion in *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., dissenting):

> While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor.

Id. The Ninth Circuit cited, in addition, Justice White's dissenting opinion in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448 (1964) (White, J., dissenting) ("[N]o country has an obligation to further the governmental interests of a foreign sovereign.").

American environmental claim depends, thus, on which version of article 13(2) the United States adopts, the first version that appears in the text or the second version contained in a footnote.[264] If the United States adopts the exception articulated in the text of article 13(2), then the Canadian environmental claim might receive less favorable treatment than a similar U.S. claim granted administrative expense priority.[265] However, under the present proposed legislation to amend the Bankruptcy Code, the footnote version stands to be instituted.[266] Should this indeed come to pass, Congress will have shown, with its articulation of the revenue rule, a reluctance to require U.S. courts to recognize an environmental claim made by a foreign government. Although the footnote itself lists only tax and social security obligations as items to be excluded from equal treatment,[267] the revenue rule as it has been delineated in the courts seemingly includes all foreign governmental proprietary claims.[268] Further, the bill itself incorporates the revenue rule exception.[269] Thus, if the proposed legislation is enacted, it should result in allowing an American court to exclude the hypothetical Canadian environmental claim.

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264. *Model Law*, *supra* note 211, art. 13(2).

265. *See supra* notes 122–51 and accompanying text (for a discussion of the administrative expense provisions application in the environmental context).

266. Bankruptcy Reform Act of 2001, S. 220, 107th Cong. (2001); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001). The footnote is listed as section 1513(b) in the Congressional bill. *See* Selinda A. Melnik, *2000-2001 Bankruptcy Legislation & Bankruptcy Rules*, 819 PLI/COMM 9, 174–192 (2001) (providing the full text proposed amendments).

267. *See Model Law*, *supra* note 211, at footnote to Article13(2).

268. *See supra* notes 260–63 and accompanying text.

269. Bankruptcy Reform Act of 2001, S. 220, 107th Cong. (2001); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001). The revenue rule exception is stated in section 1513 (b)(2)(A). *See* Melnik, *supra* note 266.

V. AMERICAN LAW INSTITUTE'S TRANSNATIONAL INSOLVENCY PROJECT AND ENVIRONMENTAL CLAIMS

A. American Law Institute Transnational Insolvency Project

With the passage of NAFTA and the expansion of free trade between the agreement's signatories, a predictable increase in the incidence of North American transnational insolvencies occurred.[270] Cognizant of the complexities associated with trying to harmonize or even coordinate a global international insolvency agreement, the American Law Institute felt that the creation of NAFTA "established a nearly ideal 'natural experiment' for discovering regional solutions that might be adaptable elsewhere."[271]

The marked contrasts that exist between the current bankruptcy/insolvency regimes of Canada, Mexico and the United States make it abundantly clear that absent some type of cooperation between them reference to present applicable law would not be able to satisfactorily resolve a cross-border insolvency case.[272] Thus, in 1994, one year after the implementation of NAFTA, the ALI launched the Transnational Insolvency Project intended to "produce a framework for close cooperation, and some integration, in the management of insolvencies having effects in more than one of the NAFTA countries."[273] It was felt

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270. FELSENFELD, *supra* note 3, at 1-9.

271. *See* ALI Cooperative Agreement, *supra* note 5, at 1.

272. FELSENFELD, *supra* note 3, at 5-17.

273. Jay Lawrence Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 BROOK. J. INT'L L. 7, 7 (1997).

It should be noted, that the recognition of the need for uniformity or cooperation of bankruptcy laws within North America existed even prior to NAFTA's implementation. *See* Perry, *supra* note 8, at 470–73 (discussing various petitions for a North American bankruptcy treaty). In the beginning of the twentieth century, Justice Nesbitt wrote:

> I think it is a very great pity that there should not be some legislation immediately regulating many questions of international law . . . between Canada and the United States. The growing interchange of business, owing to the geographical continuity, makes it very important that there should be well defined rules applicable to both countries . . . . Take for instance, bankruptcy, receivership and administrations.

that to attain this result, the project would be most successful if it focused on trying to achieve agreement between the three countries on various legal issues, and establishing protocols for international cooperation of proceedings short of actually harmonizing the insolvency regimes of NAFTA members.[274] As such, the ALI did not fully embrace an universalist approach, yet it clearly rejected the notion of territoriality and the grab rule.[275]

The ALI insolvency project is unique in the sense that it is the only ongoing attempt to resolve the difficulties in cross-border insolvency cases in the North American region. Although it is a non-governmental endeavor, the ALI hopes that since it is comprised of distinguished experts in each country "[t]he paradigm case of the project . . . [addressing the] bankruptcy of a company with headquarters in one of the NAFTA countries and with suppliers, lenders, operations, assets, employees, and stockholders in all three,"[276] will provide an effective resolution that can be implemented by the NAFTA members.[277]

The ALI project is split into two phases.[278] The first phase requires each of the three NAFTA countries to summarize its

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Justice Nesbitt, 1905 Universal Congress of Lawyers & Jurists 266, *reprinted in* DALHUSIEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY D–18 (6 [su'th'] ed. 1986); *see also* Kurt H. Nadlemann, *International Bankruptcy Law: Its Present Status*, 5 U. TORONTO L.J. 324 (1944) (advocating for a Canadian/American bankruptcy agreement). Furthermore, Canada and the United States concluded a bankruptcy treaty in 1976, but it was never signed by the parties and was not intended to be North American in scope. *See* United States of America—Canada Bankruptcy Treaty, Oct. 29, 1979, U.S.—Canada, *reprinted in* DALHUSIEN *supra* note 273, at App. D.

274. Westbrook & Ziegel, *supra* note 273, at 8; FELSENFELD, *supra* note 3, at 5–17.

275. *See* ALI Cooperative Agreement, *supra* note 5, at 31. General Principle I provides that "Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the debtor's worldwide assets and furthering the just administration of the proceeding." *Id*; *see also supra* part IV.B.1. (discussing the universality/territoriality dichotomy).

276. Westbrook & Ziegel, *supra* note 273, at 8.

277. *Id.* at 10–11.

278. Jay Lawrence Westbrook, *The Transnational Insolvency Project of the American Law Institute*, 17 CONN. J. INT'L L. 99, 99–105 (2001) (detailing the ALI project and its substantive provisions).

domestic bankruptcy regime with particular focus on its procedures in cross-border cases, so to engender a better understanding of its laws in all of the projects participants.[279] Following that, Phase II attempts to facilitate a system wherein creditors from all three countries can cross-file claims against a common debtor.[280] The project also suggested a procedure to enable the implementation of an automatic stay throughout North America upon the commencement of a case anywhere in the continent, and establish standing for insolvency trustees and administrators in foreign courts.[281] As is evident from the above-mentioned goals, the ALI is keenly aware of the limitations necessary to a successful project. Consequently, the Project did not attempt to *harmonize* the substantive bankruptcy laws of the countries, but merely to outline means by which the three sovereigns can *cooperate* their insolvency regimes in a multinational insolvency case without actually merging them.[282] Additionally, the difficulty in reaching consensus between the countries in regard to choice of law and priority questions, led the ALI to abandon resolution of these problems.[283] It was believed that doing so would help avoid the possibility of losing the project's pragmatic value and prolonging the amount of time it would take to finish the joint effort.[284] The Project was also limited to treating the insolvency of corporations and businesses engaged in commercial operations, rather than the bankruptcy of individuals, non-profit organizations, or financial institutions.[285]

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279. ALI Cooperative Agreement, *supra* note 5, at 2. The three individual statements are: Am. Law Inst., Transnational Insolvency Project: International Statement of United States Bankruptcy Law (Tentative Draft, 1997) [hereinafter ALI U.S. Statement]; ALI Canadian Statement, *supra* note 3; Am. Law Inst., Transnational Insolvency Project, International Statement of Mexican Bankruptcy Law (Tentative Draft, 1998) [hereinafter ALI Mexican Statement].

280. Westbrook & Ziegel, *supra* note 273, at 10.

281. *Id.*

282. ALI Cooperative Agreement, *supra* note 5, at 4.

283. Westbrook & Ziegel, *supra* note 273, at 10 (stating that, at the outset of the project, there was a goal to try and resolve choice of law issues).

284. ALI Cooperative Agreement, *supra* note 5, at 24–29.

285. *See* Westbrook & Ziegel, *supra* note 273, at 8 (discussing the purpose of the limitation to corporations). The authors comment, that the ALI avoided dealing with fundamental questions about personal exemptions, discharge,

The content of Phase II is split into three parts: General Principles, Procedural Principles, and Legislative Recommendations. The General Principles are intended to outline the "common values of the bankruptcy laws of the three countries as applied to multinational cases."[286] It is also intended to provide the policy bases for cooperation as a foundation for the Procedural Principle section, which then suggests "practical approaches to cooperation within the existing legal competence of the courts without new legislation or treaties."[287] It represents the existing or "best permitted practices"[288] under the current individual bankruptcy regimes of NAFTA members.[289] Lastly, as opposed to the Procedural Principles section, which lists proposals that can be instituted under current law, the Legislative Recommendations are more aspirational in nature.[290] The latter section suggests "[r]ecommendations for new legislation or international agreements that will go beyond current law to permit a substantially higher level of cooperation."[291] The ALI notes that many of the principles articulated in the projects first two sections bear resemblance to the UNCITRAL Model Law's provisions, but they are restated because the Model Law has yet to be adopted by any of the NAFTA members at the time the project was being

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domestic relations, and custody of children and rather focused on areas where only commercial interests are at stake. *Id.* Additionally, it steered away from discussing charitable institutions and highly regulated financial institutions for purposes of efficiency. *Id.*

286. ALI Cooperative Agreement, *supra* note 5, at 4.

287. *Id.*

288. Specifically:

> 'Best permitted practice' is a phrase reflecting the fact that the field of cross-border bankruptcy is just emerging in its modern form, so that existing and practice in a given country in some respects may be underdeveloped, unclear, or inconsistent. A Procedural Principle may be regarded in . . . [the project] as applicable in a given country if it is permitted under existing law, even though the current practice in that country may be underdeveloped, unclear, or inconsistent as to the subject matter of the Principle.

Id. at 43.

289. *Id.*

290. *Id.* at 5.

291. *Id.* at 4.

developed.[292] However, it suggests that the Recommendations "go considerably beyond the Model Law in recommending close and nearly invariable cooperation among the NAFTA courts and administrators in a variety of ways"[293] due to the proximity of their economic and political relationships.[294]

B. Application of the ALI Transnational Project to the Suggested Hypothetical

1. Stay/Moratorium

There are various provisions in the ALI Transnational Insolvency Project that would particularly affect the administration of a United States bankruptcy case in which the Canadian government has filed to recover on an environmental claim.[295] At the outset of a case, all of the NAFTA members provide for some sort of stay or moratorium in both liquidation and reorganization proceedings.[296] Although each of the country's stays have their own exceptions,[297] the project in Procedural Principle 4 suggests that in the event of a single proceeding in one NAFTA country, the other members should grant a stay preventing actions against the debtor by its local creditor's and restrain the debtor from expending estate

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292. *Id.* at 29–30. Currently, Mexico has incorporated a significant portion of the Model Law into its new Bankruptcy Code, and the United States Congress is currently deliberating instituting the Model Law as Chapter 15 to its Bankruptcy Code. *See supra* note 222 (discussing the nine principles behind the Model Law).

293. ALI Cooperative Agreement, *supra* note 5, at 29.

294. *Id.*

295. There are various provisions in the project that have relevance to environmental claims and the hypothetical suggested, but they will not be discussed in this paper given that they are general cross border issues and are not specific to environmental obligations. *See, e.g.*, ALI Cooperative Agreement, *supra* note 5, at 37; *Id.* at 87, 131 (suggesting that foreign creditors be given notice of proceedings outside their country).

296. ALI Cooperative Agreement, *supra* note 5, at 36 (General Principle III: Moratorium).

297. *See* ALI U.S. Statement, *supra* note 279, at 23–25, 67–73; ALI Canadian Statement, *supra* note 3, at 22–24, 51–53, 71–75, 110–113; ALI Mexican Statement, *supra* note 279, at 50–54, 101–102.

assets.[298] The so-called "recognition stay"[299] (stay in the country where the proceeding is not occurring) should be invoked under the recognizing country's bankruptcy law as opposed to applying the law of stays proscribed by the foreign country where the single main proceeding is pending.[300] "It [thus] follows that... [the recognition] stay will be subject to the same exceptions as under local law and to the same possibilities of limitation or termination as under local law."[301] An example given to illustrate this idea is if criminal proceedings were excepted from the stay under the bankruptcy law in the State that recognizes the foreign proceeding, the recognition stay would also not apply to criminal proceedings.[302] This may result in a stay being issued by the recognizing country that is narrower or broader than the stay applied in the main proceeding.[303]

Despite the fact that the recognition stay suggested by Principle 4 of the ALI project is recommended in a different situation than the hypothetical, the logic underlying the Principle makes it applicable to both. Principle 4 addresses the need to institute stays when a proceeding is initiated in any NAFTA country and consequently calls for a stay to be instituted in all other member States in accordance with each country's domestic law.[304] Moreover, Recommendation 2 of the project advocates for a continent-wide stay to be enacted *immediately* and *automatically* upon the filing of a case in any one country.[305] The rationale given for allowing each country to apply its domestic stay, rather than invoking the stay proscribed by the bankruptcy law where the main proceeding is occurring, is premised on the notion that it would be unfair to require the recognizing court to learn and apply the stays

298. *See* ALI Cooperative Agreement, *supra* note 5, at 56 (Procedural Principle 4: Stay Upon Recognition).
299. *Id.* at 58.
300. *See id.*
301. *Id.*
302. *See id.*
303. *Id.* at 59.
304. *Id.* at 56–61.
305. *Id.* at 129 (Recommendation 2: Automatic Stay).

implemented in a foreign state.[306] Arguably, it should follow that in a scenario where a foreign creditor files a claim in the main proceeding, the stay of the country where the single proceeding is occurring should govern so as to not require the court of main proceeding to learn and apply the law of stays of the creditor's country of origin.

A difficulty arises, however, when dealing with a type of claim that is excepted from the stay in the country of main proceeding.[307] If, as in the suggested hypothetical the Canadian government is filing an environmental claim, it is unclear if the exception to the American automatic stay provision[308] (applicable to United States environmental claims pursuant to the police power exception[309]) would also apply to foreign environmental claims. At first glance it would seem that an analogy can be drawn from foreign secured creditors who would be treated equal to a local secured creditor pursuant to the stay provision articulated in Principle 4,[310] so too should local and foreign environmental claims. However, the basis for excepting United States environmental claims is the premise that they are an exercise of the United States government's police power,[311] whereas Canadian environmental claims are not. Therefore, Canadian environmental claims, although similar in purpose to American environmental claims, lack the criterion of being an exercise of police power to be excepted from the United States automatic stay. The resulting distinction between American

306. *Id.* at 60.

307. *See* Westbrook & Ziegel, *supra* note 273, at 18–19 (posing a similar question about giving the same priority status to foreign tax claims).

308. 11 U.S.C. § 362 (a) (1988).

309. *See supra* notes 152–59 and accompanying text (discussing the applicability of the 11 U.S.C. section 362(b)(4) exception to the automatic stay when a governmental entity exercises its police power in the context of environmental claims). It should be noted that the exception to the stay only applies to commencing or continuing an action against the debtor to ascertain the viability or amount of the claim; however, enforcement of money judgments are prohibited under section 362(b)(5). *Id.*

310. *See* ALI Cooperative Agreement, *supra* note 5, at 59–58 n.82–83 (providing secured creditors as an example of a recognizing country implementing domestic law moratoriums).

311. *See supra* notes 152–59 and accompanying text.

and Canadian environmental claims as far as being subject to the stay would seem fair considering that under Canadian law local environmental claims are subject to the stay.[312]

2. Priorities

Notwithstanding the ALI's reluctance to address issues of priority in cross-border insolvencies, it focused on three issues that it felt would be helpful in administering transnational cases.[313] The first Procedural Principle on the topic of priorities suggests limits. According to this section: "A claim should never be given a priority in an international distribution beyond what it would enjoy in a strictly territorial system."[314] In other words, creditors in one country can only recover on their claims to the extent of the debtor's assets in their home country.[315] Applying this Principle to the hypothetical environmental claim, since the debtor only had U.S.$500,000 in Canadian assets then even though the Canadian government holds a "superlien" priority on the contaminated property and any property contiguous thereto[316] valued significantly higher than U.S.$500,000, the Canadian government can only collect a maximum of U.S.$500,000.[317] The remaining balance of the claim will be treated as an ordinary unsecured claim in a United States bankruptcy case.[318]

At the outset of the ALI project there was hope of unifying

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312. *See* Christopher W. Besant & Patrick Shea, *Environmental Responsibilities in the Insolvency Context: The Canadian Position*, ENVIRONMENTAL ISSUES IN INSOLVENCY PROCEEDINGS 29, 62–64 (John Barrett ed. 1998).

313. *See* ALI Cooperative Agreement, *supra* note 5, at 116.

314. *Id.*

315. *Id.* at 117.

316. *See* Besant & Shea, *supra* note 312, at 71 (stating that "[u]nder [section 14.06] subsection (7), [of the Canadian BIA] such claims are given a special charge ranking ahead of all charges on the contaminated property *and any property contiguous thereto and that is related to the activity causing the damage.* Thus, in respect of contaminated property and related adjoining land, the remediation costs come ahead of all other claims . . . .") (emphasis in original).

317. ALI Cooperative Agreement, *supra* note 5, at 117.

318. *Id.*

priorities among the three NAFTA countries;[319] however, this was left for a later date in fear that efforts to achieve this goal could threaten the overall project.[320] One of the larger concerns in aligning priority legislation among the parties was reaching a consensus on the preference that would be afforded foreign governmental claims.[321] Given that countries generally do not recognize and enforce the propriety interests of foreign governments, reaching an agreement that would entitle foreign governmental claims priority at the expense of local creditors was extremely difficult.[322] Nevertheless, the Legislative Recommendations were an ideal place to articulate the ALI's desire to reach uniformity of priority claims. As a result, Recommendation 4 states: "Each country should adopt parallel legislation granting national treatment with respect to priority claims under their respective priority systems. . . ."[323] Implementing this Recommendation would require foreign and domestic claims, that are otherwise equal, to be given equal priority.[324] The Recommendation, though cognizant of the improbability of reaching consensus regarding priority of foreign governmental claims in cross-border cases under the current state of the law, does declare an exception to its overall call for cross-border priorities.[325] After suggesting that like claims of foreign and local creditors be treated equally, it declares this be so "except that the treatment of tax claims and other *public-law* claims should be the subject of an international agreement."[326] Pursuant to this Recommendation, a

319. Westbrook & Ziegel, *supra* note 273, at 10, 15–19 (discussing the ALI's goal of unifying priorities between the three NAFTA countries and the possible difficulties that may arise in the process).

320. *See supra* note 173 and accompanying text.

321. *See* Westbrook & Ziegel, *supra* note 273, at 18–19.

322. *See id.*; *see also* ALI Cooperative Agreement, *supra* note 5, at 132–33.

323. ALI Cooperative Agreement, *supra* note 5, at 132.

324. *See id.*

325. *See id.* at 132–33.

326. *Id.* at 132 (emphasis added); *see also supra* notes 237–39 and accompanying text for the reason articulated in providing an exception for tax and public law claims. Additionally, it may be argued that the reason for the differentiation of priority treatment between governmental and other like claims is that in contrast to employee, secured creditor, or other claims which are

Canadian environmental claim (which should qualify as a public-law claim) would not be entitled to the same priority as a similar environmental claim asserted by a U.S. environmental entity.[327]

3. Binding Effect of Plan

Pursuant to the ALI Project, the distribution of assets in a U.S. bankruptcy case involving a Canadian environmental claim would be binding against the Canadian government in Canadian courts. Procedural Principle 26 articulates that when there is a main proceeding in one NAFTA country with no parallel proceeding pending elsewhere within North America, then the plan instituted by the court of main proceeding should be binding as to the debtor and any creditor that filed a claim, voted in the reorganization, and accepted money or property under the plan.[328] If the Canadian government meets all these criteria, then it would be bound to the reorganization plan and could not petition the Canadian bankruptcy court for a second attempt to recuperate its full claim.[329]

Another Procedural Principle articulates parameters to be met that can be binding on all unsecured creditors provided that the single main proceeding has jurisdiction over that creditor.[330] However, this Principle would not apply to the Canadian environmental claim because governmental claims "would not

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essentially equivalent regardless of their country of origin, governmental claims are inherently unique. Each country's claim incorporates specific attributes associated with its economic and political ramifications.

327. *See supra* Part II.E (discussing environmental claims vis-à-vis administrative expense priority); *see also* Part V.B.1.

328. *See* ALI Cooperative Agreement, *supra* note 5, at 121.

329. *See id.* at 121–23.

330. *See id.* at 123–24. Procedural Principle 7 states:

> Where a Plan of Reorganization is adopted in a main proceeding in any NAFTA country and there was no parallel proceeding within the NAFTA region, that Plan should also be final and binding as to the claims against the debtor of every unsecured creditor (a) who received adequate individual notice of the case and (b) who would be considered within the jurisdiction of the courts in ordinary commercial matters under the law of the country of the main proceeding, with respect to the types of claims asserted by the creditor.

Id.

ordinarily be subject to jurisdiction in another country."[331]

CONCLUSION

International insolvency law, as it is currently situated, can be divided into three categories. The first of these groups comprises procedural protocols to facilitate coordination of multiple bankruptcy proceedings that are simultaneously occurring in various States. Second, are traditional bankruptcy laws, such as the priority afforded to creditor claims vis-à-vis one another and preferential transfer doctrine. The intersection of non-bankruptcy principles within an insolvency proceeding constitutes the third and final group.

Until now, protocols intended to resolve the dilemmas arising where a debtor has numerous creditors situated in multiple countries have adopted the first approach.[332] Suggestions towards establishing procedural coordination in the administration of bankruptcy cases was deemed prudent, given the youth of the international insolvency movement and the resulting apprehension that States would be unwilling to relinquish full control over debtor assets.[333] In doing so, both the UNCITRAL Model Law and the ALI Transnational Project also indicate an intention to progressively increase multinational coordination in insolvencies to eventually include coordination in the substantive aspects of bankruptcies.

Upon further inspection, despite the fact that there is intimation of future work to address conventional bankruptcy issues in the multinational context, there is no discussion of an effort to alleviate the problems that arise when non-bankruptcy issues overlap into an insolvency proceeding. Environmental, tax, and employee benefit claims are but a few examples of the possible issues that can be encountered in cross-border proceedings as they are in domestic cases. For instance, the implementation of

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331. *Id.* at 127–28.

332. *See supra* Parts IV.A, V.A.

333. *See* FELSENFELD, *supra* note 3, at 5-17, 5-22 to 5-23; *see also* Tobler, *supra* note 3, at 405–06; Westbrook & Ziegel, *supra* note 273, at 8.

environmental legislation with its emphasis on imposing strict liability has caused chaos when confronted with a debtor seeking to shun environmental obligations through utilizing bankruptcy remedies.[334] This issue is only compounded when the environmental claim is being pursued by a State foreign to a bankruptcy proceeding.

Domestic insolvency regimes have attained compromises when the conflicting policies of bankruptcy and other legislation collide.[335] In the United States this was primarily accomplished through the judiciary, while in Canada by means of an amendment process.[336] Regardless, in advocating for coordinating cross-border insolvencies, it would only seem prudent that the more common non-bankruptcy claims be addressed in a fashion similar to other established substantive bankruptcy areas. The difficulties that may be encountered in reaching agreement on such provisions are necessary, for inevitably non-bankruptcy issues will be stumbling blocks necessary to be overcome to fully administer a cross-border insolvency.

334. *See supra* Part II.

335. *See supra* Part II.

336. Hill, *supra* note 31, at 245–49 (comparing the development of environmental jurisprudence within the insolvency context in the United States and Canada).