

LINING-UP AT THE BORDER: RENEWING THE CALL FOR A CANADA-U.S. INSOLVENCY CONVENTION IN THE 21ST CENTURY*

*One must wonder why the goals of economic efficiency and creditor protection have not driven more nations to reach a workable bankruptcy treaty or convention.*¹

I. INTRODUCTION

A. The Need

When Bramalea Limited, a major Canadian-based real estate developer, encountered financial difficulties in the early 1990s, it was confronted with a myriad of international and procedural legal issues.² Since the corporation had assets and creditors in both Canada and the United States, Bramalea struggled to choose which country—or both—to file its initial assignment in bankruptcy in order to obtain stays of proceedings against its subsidiaries pending the company’s financial reorganization.³ Bramalea’s final decision involved extensive consultation with U.S. counsel and consideration of many diverse and complex financial options. Bramalea assessed the legal efficacy of each of the following: (1) commencing a single reorganization proceeding under Chapter 11 of the U.S. Bankruptcy Code (the “Code”);⁴ (2) filing separate proceedings for each subsidiary in its respective country; (3) abstaining from U.S. jurisdiction due to on-going

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1. David C. Cook, *Prospects for a North American Bankruptcy Agreement; Les Prospects pour une Convention de la Faillite en Amérique du Nord; Los Prospects para un Convenio de Quiebra de Norte America*, 2 SW. J. OF L. & TRADE AM. 81, 81 (1995).

2. For details of the insolvency of Bramalea Limited, see E. Bruce Leonard & R. Gordon Marantz, *Practical Strategies in Workouts and Insolvencies in Canada*, in DEALING WITH FOREIGN WORKOUTS AND INSOLVENCIES: 1993 PRACTICAL STRATEGIES FOR LENDERS AND INVESTORS, 291, 332-37 (Practising Law Institute, 1993); Cook, *supra* note 1, at 81-82.

3. See Cook, *supra* note 1.

4. 11 U.S.C. §§ 101-1501 (1994).

processes back in Canada;⁵ and (4) initiating a proceeding under section 304 of the Code⁶ to administer its bankruptcy in the United States as ancillary to a foreign proceeding. Any solution involving multiple, cross-border filings risked fragmenting Bramalea's financial reorganization and all of the company's options had severe negative ramifications due to the unique treatment of secured creditors under Canadian and U.S. bankruptcy law.⁷

While Bramalea Limited was ultimately restructured effectively,⁸ the procedural and international legal dilemmas it encountered discourage Canadian and U.S. cross-border investment and exemplify both the ambiguity for creditors and the disincentive to financial reorganization inherent in the variation of bankruptcy legislation in Canada and the United States. "The Bramalea reorganization [for example]. . . was perceived to involve an exercise of extraterritorial jurisdiction by the Canadian court in a manner inconsistent with U.S. bankruptcy policy . . ." ⁹ These distinctions in Canadian and U.S. bankruptcy law not only impede the realization of the potential of bilateral trade between the two nations but render the nature of insolvency in North America anomalous within the international economic order of the 21st century.¹⁰ The realization of an insolvency treaty between Canada and the United States is long overdue.

Uniformity of bankruptcy laws as a prerequisite for effective economic integration between states has been recognized in America since the time of the thirteen colonies.¹¹ The expansion of U.S. credit abroad and stimulation of foreign investment in the United States at the turn of the 19th Century have been attributed to producing the

5. *See id.* § 305(a)(2)(A) (permitting debtors to abstain from its application where equivalent foreign proceedings have been initiated).

6. *Id.* § 304. The availability of § 304 of the Code to Canadian debtors is uncertain. *See Leonard & Marantz, supra note 2, at 325-29.*

7. For example, "Canada has no 'cram-down' law similar to that in the United States. Secured creditors, rather than constituting a separate class, may be grouped together provided they have a 'commonality of interest' in the same class." *Leonard & Marantz, supra note 2, at 335.*

8. *See id.* at 345.

9. *Id.* at 347.

10. "International insolvencies are presently resolved through judicially supervised, ad hoc arrangements and various doctrines recognizing foreign judgments and representatives." *Cook, supra note 1, at 84.*

11. *See id.* at 83. "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), *quoted in Rhett Frimet, The Birth of Bankruptcy in the United States*, 96 *COM. L.J.* 160, 161 (1991).

passage of the original U.S. uniform *Bankruptcy Act*. The first *Bankruptcy Act* provided legislative assurances to international creditors that their interests would receive bankruptcy protection equal to creditors in the United States.¹² Similarly today, without a convention for bankruptcy between Canada and the United States, creditors in each jurisdiction may choose to refrain from cross-border investment rather than risk discriminatory treatment under the other's bankruptcy laws.¹³ "The pursuit of international business opportunities often involves the laws and citizens of many countries. When opportunities go awry, the courts of one or more of those countries may have to become involved in the litigation which follows."¹⁴

As bankruptcy is an inevitable reality of modern business, the harmonization of its principles between comparable trading nations is increasingly considered a hallmark of the efficiency and sophistication of nations' capacities to engage in international commerce.¹⁵ Given the extent of cross-border trade between Canada and the United States,¹⁶ the need is great for the advanced legislative and judicial coordination of insolvency matters in the form of a standardized, transnational framework designed to minimize the resultant legal complexities and potential economic harm of commercial endeavors that encounter financial difficulty.¹⁷ While Canada and the United States continue to adjust to the North American Free Trade Agreement ("NAFTA")¹⁸ market early this century, however, the economic wisdom prevalent at the time of the American commercial union appears not to have endured.

12. See 45 Cong. Rec. 2273 (1910), in Kurt H. Nadelmann, *Concurrent Bankruptcies and Creditor Equality in the Americas*, 96 U. PA. L. REV. 171, 185 (1948).

13. See *id.*

14. *GST Telecommunications, Inc. v. Provenzano*, Vancouver [Jan. 14, 2000] A992626 Carswell BC 355 (Can.).

15. See Anne Neilson et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533, 535-36 (1996).

16. For example, in 1998, Canada's exports to the United States totaled \$297.2B (80.7% of Canada's exports) and it imported \$266.2 billion from the United States (74.7% of Canada imports). See *CanadExport, Trade News Bulletin*. Canadian Trade Commissioner Service (Ottawa, 1999) (visited Feb. 14, 2000) <<http://www.dfait-maeci.gc.ca/english/news/newsltr/canex/menu.htm>>. Conversely, the United States' trade balance for exports, domestic and foreign, with Canada totaled over \$1.5T in 1997 and its trade balance for general imports with Canada was in excess of \$1.68T. See U.S. Dept. of Commerce, *Statistical Abstract of the United States*, 800-01 (1998).

17. See Neilson et al., *supra* note 15, at 536-37.

18. See North American Free Trade Agreement, Dec. 17, 1993, Can.-Mex.-U.S., 32 I.L.M. 296, 32 I.L.M. 605.

Despite long-time recognition by the courts in both Canada and the United States that “a framework of general privileges should be agreed upon to address . . . issues that are likely to arise in connection with cross-border insolvency proceedings,”¹⁹ the conclusion of a Canada-U.S. insolvency convention has proved illusive.²⁰ Canada and the United States have yet to initiate negotiations for a North American agreement on bankruptcy²¹ despite the advent of the new millennium and its potential for legal innovation and global economic renewal.²²

A Canada-U.S. bankruptcy treaty has been advocated for over fifty years,²³ however “most people think such agreements are beneficial . . . few think they are attainable.”²⁴ Defiant of contemporary governmental and popular ambivalence, the globalization of international capital and consumer markets—through the evolving influence of international economic law with the domestic financial policies of

19. Order Approving the Stipulation Regarding Cross-Border Insolvency Protocol, Everfresh, *infra* note 92; *see also* the prophetic advocacy of Justice Nesbitt in 1905:

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.

Justice Nesbitt, 1905 Universal Congress of Lawyers & Jurists 266, *reprinted in* DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY D-18 (6th ed. 1986). For later academic advocacy of the potential benefits of a bilateral bankruptcy treaty, *see* Kurt H. Nadelmann, *International Bankruptcy Law: Its Present Status*, 5 U. TORONTO L.J. 324, 351 (1944).

20. “The United States is not a party to any bilateral bankruptcy treaties.” Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT’L L. 1, 3 n.18 (1997).

21. *See* Cook, *supra* note 1, at 18. As recently as 1994, however, the American Law Institute did approve the development of a model agreement to govern the insolvencies of Canadian and U.S. cross-border commercial and financial institutions, *see id.*, and while a Canada-U.S. treaty on insolvency was ultimately concluded in 1976, *see* United States of America – Canada Bankruptcy Treaty, Oct. 29, 1979, U.S.-Canada, *reprinted in* DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY App. D (6th ed. 1986), the agreement was never signed nor intended to be North American in scope.

22. For a detailed elaboration of bankruptcy issues between Canada and the United States in the 1990s, *see* E. Bruce Leonard & R. Gordon Marantz, *Cross Border Issues Between the United States and Canada*, in INTERNATIONAL BANKRUPTCIES: DEVELOPING PRACTICAL STRATEGIES 439 (Practising Law Institute, 1992).

23. *See* Nadelmann, *supra* note 19.

24. Cook, *supra* note 1, at 82. For example, in response to a question on his opinion of a general bankruptcy code, that would recognize and give effect to general insolvency principles and leave the details of the proceedings each particular state, Henry Weaton stated that “[s]uch 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 with Henry Weaton, in Kurt H. Nadelmann, *An International Bankruptcy Code: New Thoughts on an Old Idea*, 10 INT’L & COMP. L.Q. 70, 74 (1961).

states²⁵ —will require the harmonization early this century of the *ad hoc*, inconsistent, wasteful,²⁶ and often prohibitively expensive²⁷ Canadian and U.S. cross-border insolvency reality.

B. The Possibility

International bankruptcy is a complex area of the law, which is “underdeveloped and inconsistent at best.”²⁸ While few in number,²⁹ contemporary cross-border insolvency treaties currently in force tend to be among states that share special regional characteristics. Like Canada and the United States, states currently bound by bankruptcy conventions are geographically proximate and possess commonalities in their legal traditions, cultural identities, linguistic compositions, and dominant political institutions.³⁰ The integration of the two nations’ trade infrastructures and their consistent collaboration in the economic realm demonstrate that the affinity of the elements of nationhood indicative of states’ amenability to bilateral cooperation on

25. See GATT Secretariat, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN/FA/Corr. 1 (Dec. 15, 1993) (“Final Act”). For example, the Final Act provides for the review of the domestic trade and economic policies of World Trade Organization member states through the Trade Policy Review Mechanism. See *id.* at MTN/FAII-A3. “[T]he review mechanism will enable the regular collective appreciation and evaluation by the Ministerial Conference of the full range of individual Members’ trade policies and practices and their impact on the functioning of the multilateral trading system.” *Id.* at §A(I).

26. See *In re Olympia & York Realty Corp.*, Nos. 92-B-42698, 92-42702 (Bankr. S.D.N.Y. 1992), cited in Neilson, *supra* note 15, at 536-37; see also Cook, *supra* note 1, at 82.

27. Only large corporations can afford the legal expertise necessary to negotiate and resolve transnational bankruptcies under the current Canada-U.S. regime. See Ian Fletcher, *Cross-Border Cooperation in Cases of International Insolvency: Some Recent Trends Compared*, 6-7 TUL. CIV. L.F. 171, 174 (1991-92).

28. *Overseas Inns v. United States*, 685 F. Supp. 968, 971 (N.D. Tex. 1988), *aff’d*, 911 F.2d 1146 (5th Cir. 1990) (quoting Stacey Allen Morales & Barbara Anne Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1575 (1984)).

29. The only modern multilateral bankruptcy treaties in force as of the mid-1990s are the Convention Between Denmark, Finland, Ireland, Norway and Sweden regarding Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 133 (“Nordic Convention of 1933”), the Treaties on Private International Law, 37 AM. J. INT’L L. SUPP. 95 (1943) (“Montevideo Treaties of 1889 and 1940”), the Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 246 (“Havana Convention of 1928”), the Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 246, 362 (“Bustamante Code”), and Council of Europe, European Convention on Certain International Aspects of Bankruptcy, June 5, 1990 (“Istanbul Convention”) reprinted in IAN F. FLETCHER, *CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS* 297-308 (1990); see also Ian F. Fletcher, *International Insolvency: A Case Study and Treatment* 27 Int’l Law 429, 437 (1993) [hereinafter Fletcher, *Case Study*]; Cook, *supra* note 1, at 85-93.

30. See Fletcher, *Case Study*, *supra* note 29.

insolvency characterize the relationship of Canada and the United States.³¹ While sharing the requisite socioeconomic features intrinsic to North American geography such as a common market system, legal tradition, and single, dominant language, the only effort toward a bankruptcy convention for Canada and the United States was undertaken more than 20 years ago.³²

Since this time, significant economic developments within and between Canada and the United States have emerged to renew the desirability—if not urgency—of uniform cross-border bankruptcy proceedings.³³ Canada has radically revised its domestic bankruptcy laws;³⁴ Canada and the United States have ratified the NAFTA treaty; and the annual number of bankruptcies in both jurisdictions is plentiful.³⁵ While the draft insolvency treaty attempted by Canada and the United States in 1970 may serve as a disheartening precedent due to its ultimate failure to be ratified, the existence of even this draft

31. See, e.g., Can.-U.S. Agreement on Great Lakes Water Quality, Apr. 15, 1972, 11 I.L.M. 694; Can.-U.S. Agreement on Reciprocal Fishing Privileges in Certain Areas Off Their Coasts, June 15, 1973, 916 U.N.T.S. 237; Can.-U.S. Free-Trade Agreement, 27 I.L.M. 281 (1998) (“FTA”); NAFTA, *supra* note 18. Given the level of cooperation and concession required by the two countries to conclude these complex and comprehensive conventions, it is curious that a bilateral insolvency treaty proves illusive. “Efforts to resolve the conflict through the treaty process have proven surprisingly difficult; even after NAFTA and successful GATT negotiations, Canada and the United States have been unable to come to a bankruptcy accord.” John K. Londot, *Notes & Comment: Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association’s Concordat*, 13 BANK. DEV. J. 163, 165 (1996).

32. There was a bona fide attempt at a bilateral insolvency treaty in the mid-1970s. See United States of America – Canada Bankruptcy Treaty, *supra* note 21.

33. For a description of the impact of the FTA on cross-border insolvency in Canada and the United States, see Jeffrey Davis, *Bankruptcy, Banking, Free Trade, and Canada’s Refusal to Modernize its Business Rescue Law*, 26 TEX. INT’L L.J. 253, 262-65 (1991).

34. In 1992, the Canadian Bankruptcy Act became the Bankruptcy and Insolvency Act. See Bankruptcy and Insolvency Act, R.S.C. ch. C-3 (1992) (Can.). For further analysis of the revisions Canada’s bankruptcy law contained in the B.I.A., see R. Gordon Marantz et al., *The Bankruptcy and Insolvency Act - The New Look After Forty Years*, 8 B.F.L.R. 195 (1993). The amendments of the transformation attempted to protect the rights of debtors and the investments of secured creditors and placed extensive emphasis on attempts at reorganization rather than liquidation of the debtor’s assets. See *id.*

35. Business bankruptcies in the United States:

1991	1992	1993	1994	1995	1996	1997
67,714	72,650	66,428	56,748	51,288	52,938	53,993

Source: U.S. Dept. of Commerce, *supra* note 16, at 555.

Business bankruptcies in Canada:

Jan. – Sept., 1997	Jan. – Sept., 1998
7,555	8,096

Source: Office of the Superintendent of Bankruptcy, *Business Bankruptcies* (Ottawa: Industry Canada, 1999) (visited Feb. 14, 2000) <<http://strategis.ic.gc.ca/SSG/br01104e.html>>.

model is instructive of the character that a new agreement could assume—or avoid—and demonstrates the feasibility of realizing a bilateral insolvency convention in the immediate future. To this end, a preliminary examination of the fundamental philosophical underpinnings of international insolvency is required.

C. The Difficulty: Assets, Universality, and Territorial Sovereignty

The illusory character of the principle of universality in cross-border insolvency proceedings has long plagued the development of a viable Canada-U.S. agreement. Regardless of the utility of a Canada-U.S. insolvency convention, the fact that the United States has a reputation for being the “least cooperative of the major trading states”³⁶ represents a pragmatic impediment of international political orientation resistant to the realization of a cross-border treaty. The United States advanced a more universal approach to bankruptcy administration in the late 1970s, however, with the passage of legislation that acknowledged and recognized foreign bankruptcy proceedings and representatives at U.S. law.

Section 304 of the U.S. Bankruptcy Code states:

- (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative . . .
- (c) In determining whether to grant relief . . . the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—
 - (1) just treatment of all holders of claims . . .
 - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - (3) prevention of preferential or fraudulent dispositions . . .
 - (4) distribution of proceeds . . . substantially in accordance with the order prescribed by this title; [and]
 - (5) comity . . .³⁷

The enactment of section 304 demonstrated a desire by the United States to foster bilateral mutuality in cross-border insolvency.³⁸ The complimentary and reciprocal spirit of section 304 must

36. Mary E. Knecht, *The ‘Drapery of Illusion’ of Section 304—What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code*, 13 U. PA. J. INT’L BUS. L. 287, 291 (1992).

37. Bankruptcy Reform Act of 1978, 11 U.S.C. § 304 (1994).

38. See Donald T. Trautman, *Foreign Creditors in American Bankruptcy Proceedings*, 29 HARV. INT’L L.J. 49, 50 (1988).

be resurrected and accentuated as indicative of U.S. initiative toward universality if a Canada-U.S. bankruptcy convention is to be concluded.³⁹ A fundamental source of uncertainty threatening the conclusion of a bilateral treaty from the outset is that while the United States has a relatively consistent legal regime governing the recognition of foreign bankruptcy proceedings under section 304 of the Code, Canada's statutory observance of international insolvency claims remains undefined.⁴⁰ Accordingly, the strict adherence of both nations to traditional principles of judicial sovereignty is the primary obstacle to the attainment of a Canada-U.S. insolvency treaty and must be abandoned, or at least reoriented if an agreement is ever to be reached.

As assets in bilateral insolvencies will invariably be situated in Canada, the United States, or both, cross-border competition between territorial sovereignty and asset administration in bankruptcy may be resolved in three ways:

- (i) the host country cedes jurisdiction to the bankruptcy laws of the bankrupt's home nation. American bankruptcy laws would govern American bankrupts in Canada and vice-versa;

39. The universal character of section 304 of the Code inspired the International Bar Association to draft the Model International Insolvency Cooperation Act in 1988, which assigned a considerable amount of administrative power over transnational insolvency proceedings to the national courts of each nation party. See Model International Insolvency Cooperation Act, 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, 323 (1989).

Enthusiasm for the potential of section 304 to provide a basis for increased bankruptcy harmonization between Canada and the United States must be tempered, however, as section 304 has been criticized for being territorialistic at best—and imperialistic at worst—in its approach to international bankruptcies. See Cook, *supra* note 1, at 112-13; Michael P. Bigelow, *Case Comment, Public Policy Concerns Prevent Application of Comity to Foreign Bankruptcy Proceedings That Discriminate Against Tax Obligations Owed to the United States Government: Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990), 24 VAND. J. TRANSNAT'L L. 571 (1991).

The section has also been applied in a manner adverse to the end of homogeneity of transnational bankruptcy proceedings in that Canadian bankruptcy judgments have recently been deferred under section 304, subordinated to the doctrine of comity. See *Clarkson Co. Ltd. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976) (U.S. court refused to allow a collateral attack on a Canadian bankruptcy judgment); *Caddel v. Clairton Corp.*, 105 B.R. 366 (N.D. Tex. 1989) (U.S. suit was dismissed against a Canadian bank being liquidated in Canada); *Rivendell Forest Prods., Ltd., v. Canadian Forest Prods., Ltd.*, 810 F.Supp 1116 (D. Colo. 1993) (U.S. court refused to exercise jurisdiction over a Sherman Act claim brought against Canadian defendants as the foreign interests were overwhelming).

40. See Cook, *supra* note 1, at 119.

- (ii) the host country retains its jurisdiction over the foreign bankrupt. American bankrupts in Canada would be subject to Canadian bankruptcy laws and vice-versa;⁴¹ or
- (iii) both countries adopt harmonized bankruptcy proceedings.⁴²

From nationalist and historic perspectives, it is highly unlikely that Canada and the United States will administer their bankruptcy regimes reciprocally or subject their bankrupt nationals to the other's insolvency laws given that states generally loathe to cede sovereignty.⁴³ Since both Canada and the United States have major corporate enterprises that are situated in both countries and cross-border insolvencies remain unregulated, the primary location of a bankrupt does not automatically resolve conflict of law dilemmas. The first two elements of the above matrix, while initially appealing in their simplicity, do not portray the complexity of the contemporary administration of cross-border bankruptcies in Canada and the United States. The third option of well-defined uniform insolvency proceedings provides the only solution that can reconcile the international legal dysfunction inherent in the coexistence of bankruptcy laws unique to Canada and the United States with the doctrine of jurisdictional sovereignty.

The economic benefits of effective and efficient transnational bankruptcy laws are realizable only through a formalized system of mutual administration that is attentive to the distinct interests of the effective administration of foreign-located assets and the maintenance of state sovereignty that compete in cross-border insolvencies. This daunting enterprise is not predisposed to failure. The obstacle of sovereign determinism may indeed be surmountable as the rigid abidance of each country to strict notions of jurisdictional autonomy in the context of transnational insolvency is primarily rhetorical, if not now illusory; both Canada and the United States compromise their sovereignty on a regular basis toward the resolution of bi-national

41. *But see In re Olympia & York Realty Corp.*, Nos. 92-B-42698, 92-42702 (Bankr. S.D.N.Y. 1992), *cited in* Neilson, *supra* note 15, at 536-37 (U.S. court authorized the debtor to take certain actions in Canada pursuant to the Code).

42. Ideally, harmonization would occur under a bilateral bankruptcy convention creating a single administrative and adjudicative forum sensitive to the distinct legal traditions and insolvency entitlements of both nations. *See* Neilson et al., *supra* note 15.

43. *See* DAVID J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 227 (5th ed. 1989).

economic disputes.⁴⁴ Surrendering exclusive jurisdiction for the settlement of past economic disputes in this context provides a beneficial precedent for undertaking a bilateral bankruptcy convention. A reconciliation of the competing interests of bankruptcy and sovereignty in unified insolvency proceedings is available in the concept of “modified universality.”⁴⁵

D. Modified Universality

A tangible application of the principle of modified universality would include the establishment of a single and central determinative forum for the administration and adjudication of Canadian and U.S. cross-border insolvency proceedings. Any potential for legal hegemony or intolerable losses of jurisdictional sovereignty would be remedied by the retention by each nation of its legal jurisdiction over insolvency matters deemed ancillary to individual claims. The modified universality approach to a harmonized insolvency regime “represents a realistic solution to the conflict inherent in the principles of universality and territoriality. [The concept]. . . combines both principles, maximizing the advantages and minimizing the disadvantages of both.”⁴⁶ The compromise between universality in bankruptcy law and national sovereignty inherent in the concept of modified universality recently provided the basis for the conclusion of an international bankruptcy concordat instructive to Canada and the United States.

II. EXISTING ADVANCEMENTS

There have been formal bankruptcy treaties and attempts at formal bankruptcy treaties dating back almost eight hundred years.⁴⁷ International endeavors at bankruptcy treaty-making over the past few decades, however, offer the most valuable lessons and bear the

44. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter F.A.A.], ratified by both Canada and the United States, obliges its parties to “recognize arbitral awards as binding and to enforce them according to legal rules . . . applicable to enforcement of domestic arbitral awards.” Jay L. Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy* 67 MINN. L. REV. 595, 597 (1986). For recent examples of Canadian and U.S. potential for compromise towards the conclusion of complex agreements on major, bilateral issues, see Fletcher, *Case Study*, *supra* note 27.

45. For a well-developed thesis on the competition between universal bankruptcy law and sovereignty, culminating in the concept of modified universality, see Mike Sigal et al., *The Law and Practice of International Insolvencies, Including a Draft Cross-Boarder Insolvency Concordat*, ANN. SURV. BANKR. L. 1 (1994-95).

46. Neilson et al., *supra* note 15, at 534.

47. See Cook, *supra* note 1, at 85.

most significant consequences for the evolution of standardized insolvency relations between Canada and the United States.

A. The European Community⁴⁸ Experience

The European Community ("EC") has produced three draft bankruptcy treaties over the past thirty years, none of which have been ratified. Despite the fact that the member states of the EC have been authorized to harmonize their laws since 1957, attempts at a multilateral convention in 1970 failed because they produced an insolvency agreement too universal in substance.⁴⁹

The EC's draft *Convention on Bankruptcy and Winding Up* ("Draft")⁵⁰ established a forum court with exclusive jurisdiction in the country where the debtor had commenced the bankruptcy proceedings, and the EC's member's national courts were required to recognize the forum courts' orders unconditionally.⁵¹ Despite an amendment to the Draft in 1980 to comprise a more modified approach to its universality⁵² and provide for Denmark, Ireland, and the United Kingdom ("U.K.") to enter the agreement, the 1980 Draft ultimately failed to be concluded.⁵³ Finally in 1990, a new, scaled-down draft was prepared that applied only to liquidations and not corporate arrangements, compositions, or reorganizations.⁵⁴

Although the Draft in its present form is unlikely to be accepted by the EC and, if it is, will be of little value and application, the Draft and the process of its development are significant. The legislatures of many EC member states have enacted various provisions of the Draft

48. See Treaty Establishing the European Community, Mar. 25, 1957, 298 U.N.T.S. 11.

49. See *id.*, art. 220, at 8; see also Muir Hunter, *The Draft Bankruptcy Convention of the European Economic Communities*, 21 INT'L & COMP. L.Q. 682, 693 (1972).

50. See generally John H. Farrar, *The EEC Draft Convention on Bankruptcy and Winding Up*, J. BUS. L. 320 (1977).

51. The 1970 Draft was also predestined to fail as it contained many inconsistencies and was the product of poor planning and inferior construction. See *id.* at 336.

52. The 1980 Draft replaced the requirement that each member adopt uniform voiding power laws with specific conflict of laws provisions, and national courts were permitted to apply their state's laws when determining priorities of preferential and secured claims against property located in the state. See Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW 307, 312-13 (1987).

53. "No clear reason has emerged as to why the 1980 Draft failed," Cook, *supra* note 1, at 88 n.41, despite the fact that it "presented a more 'cautious' approach to international bankruptcy than the 1970 Draft." *Id.* at 88; see also Chin Kim & Jimmy C. Smith, *International Insolvencies: An English-American Comparison With an Analysis of Proposed Solutions*, 26 GEO. WASH. J. INT'L L. & ECON. 1, 25 (1992).

54. See Cook, *supra* note 1, at 89.

into their national legal systems to the extent that the Draft has achieved a degree of harmony in the European bankruptcy reality. The adaptation of these draft-treaty provisions into the domestic laws of states has profound implications for international law. Another key feature of the Draft process is that its ultimate failure inspired the cautious conclusion of the Council of Europe's⁵⁵ *Convention on Certain International Aspects of Bankruptcy* ("Istanbul Convention").⁵⁶ As only seven states had signed the Istanbul Convention and none had submitted it for ratification as of 1993,⁵⁷ the International Bar Association ("IBA") intensified its on-going efforts to draft a Concordat on multinational insolvency.

B. The International Bankruptcy Concordat

In response to particularly multifarious—and excessively public—bi-national bankruptcy proceedings,⁵⁸ which included an order from a U.S. court permitting a bankrupt to take specified action in Canada pursuant to the Code,⁵⁹ and due to the ultimate undesirability of the American Bar Association's previous draft Model International Insolvency Cooperation Act⁶⁰ ("MIICA"), the ABA under-

55. The Council of Europe is comprised of over 24 member states, including all of the 12 members of the EC. See Fletcher, *Case Study*, *supra* note 29, at 437.

56. See Istanbul Convention, *supra* note 29.

57. See *id.*, art. 34, at 305. Three nations were required to ratify the Istanbul Convention before it could even be considered binding among its accepting states. In addition, the U.K. had given no indication of its intent to sign. See *id.*

58. See, e.g., *Maxwell Communication Corp. v. Barclays Bank*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y.), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

59. See *In re Olympia & York Realty Corp.*, Nos. 92-B-42698, 92-42702 (Bankr. S.D.N.Y. 1992), *cited in* Neilson, *supra* note 15, at 536-37.

60. See Model International Insolvency Cooperation Act, *supra* note 39.

The MIICA did not address the key issues of which country under the Act would retain primary jurisdiction over the bankruptcy's administration, how to determine whether foreign courts were granting substantially similar treatment as national courts to bankrupts and whether they would grant preferences to local credit priorities. See Cook, *supra* note 1, at 94-95. Ultimately, the rejection of the MIICA was contradictory, for as it was considered by some observers to be too universal to overcome concerns of state sovereignty in bankruptcy proceedings, other commentators felt that the Act only paid lip service to the bankruptcy laws of other nations. See Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 485 (1991).

For further analysis of the MIICA, see Elizabeth K. Somers, *The Model International Insolvency Cooperation Act: An International Proposal for Domestic Legislation*, 6 AM. U.J. INT'L L. & POL'Y 677, 688 (1991); Timothy E. Powers, *The Model International Insolvency Cooperation Act: A 21st Century Proposal for International Insolvency Cooperation*, reprinted in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 687-700 (Jacob S. Ziegel ed., 1994); Cook, *supra* note 1, at 93-95.

took to draft a Concordat on international bankruptcy (“Concordat”).⁶¹ The contractual language of the Concordat responded to the hesitancy of nations had to transfer sovereignty in the form of domestic bankruptcy jurisdiction by articulating the concept of modified universality. The universality of centralized bilateral bankruptcy proceedings, characteristic of failed predecessor agreements—yet required to implement a cooperative regime—was respected by the Concordat in its adoption of a centralized forum for the administration of insolvencies. The Concordat’s single forum, however, would either harmonize the plenary bankruptcy proceedings of the contracting party states such as the filing of claims, liquidation of debt, and distribution of assets to creditors, or operate in conjunction with the ancillary proceedings of the individual states party to the Concordat.

As an international instrument, the Concordat’s principles of insolvency may be adapted toward the harmonization of transnational bankruptcy proceedings regardless of the bankruptcy traditions of the participating states. The Concordat initially appears to have prescribed universality in creating a single administrative forum with primary responsibility for the coordination of all insolvency matters of bankrupts with transnational ramifications⁶² and delegating administrative functions to the main forum to which conflicts with national bankruptcy proceedings are deferred. Authority over filings and asset distributions, collection of non-local assets for payment of common creditors after the payment of secured and privileged claims, and the granting of discharges subject to universal recognition is also prescribed to the main forum under the Concordat.⁶³ The universality of its approach to transnational insolvency administration is modified significantly, however, as the Concordat prohibits discrimination

61. For a more detailed legislative history of the drafting of the Concordat, see generally, the Resolution of the Council of the International Bar Association, adopted in the occasion of its meeting in Madrid, June 1, 1996, *cited in* Neilson et al., *supra* note 15, at 537 n.20; *id.* at 538. *See generally* Report on the Committee J Cross-Border Insolvency Concordat, *cited in id.* at 537 n.16 [hereinafter Report on the Concordat]; Londot, *supra* note 31.

A 1993 Draft Concordat was presented to the International Insolvency and Creditors’ Rights Conference in 1994 country teams from 18 nations, including Canada and the United States, were formed to propose revisions. The contributions from the country teams and subsequent discussion culminated in the 1995 Second Revised Concordat, which was approved by the Section on Business Law of the International Bar Association in 1995. The Association formally approved the Concordat on June 1, 1996. *See id.*

62. *See* Neilson et al., *supra* note 15, at 537-38.

63. *See id.*

against non-local creditors⁶⁴ and acknowledges the jurisdiction of secondary proceedings in granting local courts power to receive the filings for claims, liquidate debt and distribute assets to creditors, determine secured and privileged claims,⁶⁵ and reconsider the orders of the main forum upon request of the official representatives of creditors from other jurisdictions.⁶⁶

While the Concordat is instructive to Canada and the United States on the manifestation of the legalistic concept of modified universality vital to sustainable bankruptcy treaty-making, the *European Union Convention On Insolvency Proceedings*⁶⁷ (“EU Convention”) is perhaps the document most relevant by analogy—and in terms of its relative success—to the current Canada-U.S. insolvency experience.

C. The EU Convention

Although conducting business on another continent, the European Union’s (“EU”)⁶⁸ economically detrimental lack of harmonized rules for transnational insolvencies is similar to the Canada-U.S. situation. The EU, like the FTA and NAFTA, was created primarily to establish an internal market with the free movement of goods, persons, services, and capital.⁶⁹ Although the EU has adopted many multinational economic laws, it has yet to establish a protocol on transnational insolvency.⁷⁰ Just as this void in bankruptcy administration is widely considered an imperfection in the EU’s effort at economic integration,⁷¹ the lack of a bilateral insolvency convention is likewise perceived as a fatality to the realization of the full potential of the contemporary economic and commercial relationship between Canada and the United States. The conclusion of a Canada-U.S. insol-

64. *See id.*

65. *See id.*, princ. 2(B), at 545-46. This power is more cursory as often there will be no assets remaining for common creditors after the local courts’ determination of secured and privileged interests in the bankrupt’s estates. *See id.* at 546.

66. *See id.*, princ. 3(B), at 546-47.

67. *See* European Union Convention on Insolvency Proceedings, *opened for signature* Nov. 23, 1995 17 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 976, 35 I.L.M. 1223 (1996).

68. *See* Maastricht Treaty on European Union and Final Act, Belg.-Den.-Fr.-F.R.G.-Ir.-Italy-Lux.-Neth.-Port.-Spain.-U.K., Feb. 7, 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty].

69. *See id.*, art. B.

70. *See* Neilson, *supra* note 15, at 539.

71. “The absence of a Convention on insolvency proceedings with the framework of the Community is viewed as a short-coming in the completion of the internal market.” Explanatory Report to the European Union on Insolvency Proceedings (1996) 1 [hereinafter Explanatory Report]; *see also* Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 494-528 (1996).

vency treaty depends upon the modification of transnational insolvency laws to allow for diverse national processes. As is evident in an analysis of the EU's transnational insolvency history.

The EU's member states have been striving for harmony in the area of bankruptcy law for more than forty years⁷² and have a distinct history of difficulty in reaching international bankruptcy agreements due to their prioritization of political philosophy over international economic harmony.⁷³ The first proposal, finally introduced in 1980, was universality-oriented. In other words, it offered a single bankruptcy proceeding with no allowance for diverse national processes. The proposal failed due to the "discriminatory effect of some of its provisions on parties located outside the EC's borders" and its resultant inability to respect the fundamental bankruptcy principle of equality of creditors.⁷⁴ Despite its initial failure, the EU adopted a revised convention on transnational insolvency in 1989,⁷⁵ which tempered its universality by recognizing the domestic bankruptcy interests of member states and the distinct principles of their respective legal systems.

The EU Convention is

a combined model [that] has been adopted which permits local proceedings governed by their own *lex fori concursus* (law applicable in the place of insolvency) to coexist with the main universal proceedings. Single universal proceedings are always possible within the EC but the Convention does not exclude the opening of local proceedings, controlled and governed by its rules, to protect those local interests.⁷⁶

In other words, there are two sets of crucial proceedings in the EU Convention;⁷⁷ the main proceeding, which is instituted in the member state where the bankrupt's center of interest is located,⁷⁸ and the secondary proceedings, which are commenced in member states where the bankrupt has other assets.⁷⁹

72. Experts began to meet in 1963 for the purposes of drafting a European convention on bankruptcy. See Explanatory Report, *supra* note 71.

73. See Cook, *supra* note 1, at 89.

74. Fletcher, *Case Study*, *supra* note 29, at 437; see also Explanatory Report, *supra* note 71.

75. See "Member States Initial Bankruptcy Convention" Reuter's News Reports (1 November 1995).

76. Explanatory Report, *supra* note 71, at 6.

77. See Maastricht Treaty, *supra* note 68, arts. 3(1), 27.

78. See *id.*

79. See *id.*

The EU Convention's reconciliation of sovereignty and bankruptcy provides a workable model for Canada and the United States. The fact that the EU Convention was initialed by eighty percent of the EU member states as recently as 1995 provides additional motivation for the adoption of a Canada-U.S. agreement.⁸⁰ The possibility that both Canada and the United States may be disadvantaged by bankruptcy laws that are not harmonized for economic efficiency and mobility within the two primary nations of the NAFTA trading bloc should provide additional motivation to the two parties.⁸¹ The EU Convention's provisions could be applicable indirectly—though not necessarily less authoritatively—to the bankruptcy proceedings of non-member states⁸² as codified principles of customary international insolvency law, even though the EU Convention has not yet been ratified.⁸³ Accordingly, Canadian and U.S. bankruptcy law may be influenced—or ultimately determined by—rules of insolvency that neither country have drafted or approved.⁸⁴ Canadian and U.S. national courts could apply the EU's rules where there is no applicable Canada-U.S. agreement.⁸⁵ The international jurisprudential weight of the EU Convention is evident in the recent incorporation of some of its provisions into a draft model of insolvency rules considered by the United Nations Commission on International Trade Law⁸⁶ (“UNCITL”). Principles of transnational insolvency are emerging at customary international law without Canadian or U.S. involvement. Despite their lack of status as ratified treaties, the EC Draft, Concor-

80. The EU Convention was initialed by 80 percent of the EU member states on September 25, 1995. See “1909th Council Meeting - Justice and Home Affairs, Brussels, 19 and 20 March 1996” Reuter EU (EU) Briefing (12 April 1996).

81. The Convention was not signed by three of the 15 EU member states, including the U.K. See *id.* The EU Convention is not expected to be ratified for several years. See Explanatory Report, *supra* note 71. But see Cook, *supra* note 1, at 89; Fin. Times, (20 February 1991) 20, reviewing Fletcher, *Case Study*, *supra* note 29. The main reason the Convention is not currently ratified is that the United Kingdom refused to sign it due to the controversy surrounding its beef exports at the time. See “Beef Row Thwarts Insolvency Convention” Reuter EU Briefing (U.K.) (30 May 1996).

82. Treaty provisions can be regarded as codification of principles of customary international law and thereby influence—if not bind—non-party states to treaty obligations. See North Sea Continental Shelf cases, I.C.J. Rep. 1969.

83. See *id.*

84. The principles of customary international law are regarded as part of the U.S. Federal law and receive the benefits of the Supremacy Clause. See *Respublica v. DeLongchamps*, 1 U.S. 111 (1784); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); see also Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450 (1989).

85. See *id.*

86. See Nielson et al., *supra* note 15, at 541.

dat, and EU Convention provide sufficient sources of international insolvency custom to instruct and motivate the adoption of a Canada-U.S. bankruptcy convention.

III. PRACTICALITIES AND POSSIBILITIES

The impetus for Canada and the United States to adopt a bilateral convention on insolvency may stem from symbolic, pragmatic and prospective considerations as well.

A. Motivations: Sovereignty, Custom, and Judicial Review

Canada and the United States are resistant to cede the degree of sovereignty necessary to conclude a bankruptcy convention. Given this hesitancy, the fact that the two nations may have to adopt a bilateral treaty to protect against a more fundamental loss of autonomy due to the developments in international insolvency law in Europe is ironic.⁸⁷ Emerging rules of international custom may be imputed to the provisions of the EC Draft, Concordat, and EU Convention, which are not reflective of the Canada-U.S. economic experience. The opportunity for Canada and the United States to create a cross-border bankruptcy instrument of their own devise is substantially pressing and not prohibitively daunting.

The influence of the Concordat on international insolvency law is evident. Even though the Concordat was not intended as a surrogate international bankruptcy treaty, the document may be considered an authoritative source of guidance and effective interim provision for the harmonization of transnational insolvencies.⁸⁸ The Concordat's drafters have conceded that its provisions are amenable to implementation by national courts.⁸⁹ Demonstrative of its significance as an instrument of international insolvency law, the Concordat was applied judicially prior to its adoption by the IBA.⁹⁰ More significantly, it has already been applied in cross-border insolvency litigation between Canada and the United States.

87. Given the social, political and cultural similarities between the two countries, a loss of sovereignty by one to the other may be regarded—rightly or wrongly—as less of a significant cessation of sovereign integrity than the influence of Canada and the United States' domestic insolvency regimes by the law and public policy decision of western European nations.

88. See Report on the Concordat, *supra* note 61, at 2.

89. See *id.*

90. See *In re Hackett*, 184 B.R. 656 (S.D.N.Y. 1995). The Court cited the Concordat as an initiative "serving to give guidance for the treatment of cross-border [insolvency] problems." *Id.* at 659. The Court's conclusions were "supported by the facts and law. . . [and] the outcome was consistent with the principles developed in the Concordat." *Id.*

The case of *In re Everfresh Beverages, Inc.* (“*Everfresh Beverages*”) involved a bankrupt U.S. corporation with operations in both the United States and Canada.⁹¹ The corporation, Everfresh, encountered financial difficulties and filed reorganization proceedings concurrently under Chapter 11 of the U.S. Bankruptcy Code and pursuant to the B.I.A. in Canada. During the proceedings, both the Ontario Court of Justice and the United States Bankruptcy Court for the Southern District of New York issued orders approving a stipulation of the cross-border insolvency protocol to govern the bankrupt’s administration.⁹² The stipulation was consistent with—and almost identical to—many of the provisions of the Concordat.⁹³

The application of the Concordat to Canada-U.S. bankruptcies demonstrates its influence in Canadian and U.S. law, despite the acquiescence of both countries toward the Concordat as a source of international law. The result in *Everfresh Beverages* challenges the role of national courts in international law and raises questions about the applicability of unsigned, unratified international legal conventions to domestic litigation, and the legitimacy of what was arguably de facto ratification of a non-ratified treaty by a national judiciary. Issues of judicial review subordinate concerns of sovereignty in this context and provide further motivation for a Canada-U.S. bankruptcy convention.⁹⁴

91. Court File No. 32-077879 (Ont. Ct. Gen. Div. 1995).

92. See Order Approving the Stipulation Regarding Cross-Border Insolvency Protocol, *In re Everfresh Beverages, Inc.*, No. 95-B-4545-06 (Bankr. S.D.N.Y. 1995) [hereinafter U.S. Stipulation]; Order Approving Cross-Border Insolvency Protocol, *In re Everfresh Beverages, Inc.*, Court File No. 32-077978 (Ont. Ct. Gen. Div. 1995) [hereinafter Canadian Stipulation].

The stipulation essentially created two plenary proceedings to administer jointly Everfresh’s assets in Canada and the United States, consistent with the practice specifically envisioned in Principle 4 of the Concordat. See Report on the Concordat *supra* note 61, at 11. In issuing the order that approved the stipulation, the Court expressed its intent “to protect the interests of all creditors of Everfresh (in a situation where there is more than one plenary forum and no main forum as provided for in Principle 4 of the Concordat) wherever located and to protect the integrity of the process by which the Chapter 11 case and the Canadian processing is administered.” Canadian Stipulation; U.S. Stipulation, *supra*, at 6.

93. The stipulation was consistent with—if not strikingly similar to—Principles 3(A), (C) and (D), 4(A),(B), (C), (D), (E) and (F), 5, 7, 8, 14(A), of the Concordat. See Report on the Concordat, *supra* note 61.

94. The stipulation was extensive and detailed, prescribing substantive aspects of the insolvency procedure to be used by the parties. The order, *inter alia*, determined the legal jurisdiction of the process to be used in administering the insolvency, conferred the rights of the parties to appear at specified stages in the procedure, and compelled the parties to issue notices and adhere to approval mechanism for financial transactions. See Canadian Stipulation, *supra* note 92; U.S. Stipulation, *supra* note 92.

The domestic laws of many European nations have adopted the EC Draft, which is evidence of the state practice and *opinio juris* sufficient to fashion international law at custom.⁹⁵ Moreover, international treaties such as the Concordat and the EU Convention exist at varying stages of ratification, so the terms of these agreements may also be regarded as principles of customary international law. Not only may custom as codified in treaties be applied universally—and therefore bind states even though they may not be parties to treaties—but, more directly, customary international law is considered the equivalent of U.S. federal law in North America.⁹⁶ Bankruptcy in both Canada and the United States is a matter of federal jurisdiction. Accordingly, the principles of international insolvency law may already bind Canada and the United States, a state of affairs that necessitates that a convention be concluded if sovereignty in cross-border bankruptcy is to be maintained. Express domestic legislation and positive bilateral treaty provisions can insulate states from the rules of customary international law.⁹⁷

A bilateral agreement would be self-contained at law and insulated from customary international rules, scrutiny of foreign standards developed abroad, and adjudication under multinational treaty obligations such as the Foreign Awards Arbitration (“FAA”) panel.⁹⁸ A well-delineated, uniquely Canada-U.S. bankruptcy instrument would minimize concerns of sovereignty by eliminating the adjudication of Canadian and U.S. bankruptcy by general, multinational dispute-settlement mechanisms. The adoption of a highly refined, bilateral insolvency convention created specifically for the Canada-U.S. situation would undermine the multinational FAA as a potential, or even legitimate, forum for the resolution of Canadian and U.S. insol-

95. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10; *North Sea cases*, *supra* note 81.

96. See generally cases, *supra* note 83.

97. See *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 2 L.Ed. 208 (1804).

98. See *F.A.A.*, *supra* note 44.

Canadian and U.S. bankruptcy cases have been adjudicated under the F.A.A. and its decisions have been enforced domestically by the courts of both countries. For analysis of foreign arbitral awards under the U.S. bankruptcy law, see Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under the Bankruptcy Code*, 65 AM. BANKR. L.J. 525 (1991); Melinda J. Massoff, *Authority of United States Bankruptcy Courts to Stay International Arbitral Proceedings*, 11 FORDHAM INT'L L.J. 148 (1987); Hakan Berglin, *The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 4 DICK. J. INT'L L. 167 (1986).

vency cases.⁹⁹ Such a bilateral insolvency convention would render the FAA a redundant and prohibitively general arbitration mechanism. Conflict of laws issues and propriety of forum choices that currently arise from the multiplicity of fora for the resolution of Canadian and U.S. insolvencies would be eliminated because insolvency disputes would be governed bilaterally and would be removed from the initial purview of international law.¹⁰⁰

The FAA, NAFTA, and the General Agreement on Tariffs and Trade (“GATT”) all provide alternatives to filing bankruptcy proceedings in Canadian or U.S. domestic courts.¹⁰¹ The FAA, NAFTA, and the GATT each contain refined dispute-settlement mechanisms theoretically amenable to binding insolvency administration,¹⁰² however, the potential use of these institutions, coupled with states’ preference for the private resolution of disputes, should encourage the establishment of a Canada-U.S. convention that would privately and autonomously administer bankruptcies under law agreed upon by both countries.¹⁰³ The availability of precedents for bilateral bankruptcy, the clear motivation for Canada and the United States to conclude an agreement, and the amenability of the legal, geographic and cultural circumstances requisite to an effective harmonization of insolvency provisions are factors that make a Canada-U.S. insolvency treaty attainable.

B. Practicalities, Similarities, and Realities

Given the great overall similarity between Canadian bankruptcy law and the the [sic.] U.S. Bankruptcy Code, a difference in priority for garnishor/judgment creditors as prescribed by Canadian bank-

99. For example, are arbitrations under the F.A.A. stayed pending reorganization under the U.S. Code as is the commencement of court proceedings? Authority is split. *See Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2nd Cir. 1975), *aff’d* 377 F.Supp. 26 (E.D.N.Y. 1974) (bankruptcy courts’ stays of arbitration proceedings cannot be effective without personal jurisdiction over creditors); *but see In re Springer-Penguin*, 74 B.R. 879 (S.D.N.Y. 1987) (movant’s application for stay pending arbitration granted; respondent’s dismissal on basis of res judicata or collateral estoppel denied).

100. *See id.*

101. *See* General Agreement of Tariffs and Trade, 61 Stat. 814, 55 U.N.T.S. 187 [hereinafter GATT]. A complainant state may initiate the resolution of a dispute over a matter of general trade by the GATT Council, which can issue a ruling binding upon the disputing nations. *See* Jeffery P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT’L LAW 603, 604-5 (1993).

102. The practical availability of these fora is diminished, however, by the fact that no private actions may be brought under the GATT or NAFTA. *See* Bialos & Siegel, *supra* note 100, at 615-19.

103. *See* Cook, *supra* note 1, at 119.

ruptcy law certainly does not appear to be fundamentally unfair or 'repugnant' to U.S. notions of justice.¹⁰⁴

The distinctions between Canadian and U.S. bankruptcy laws have meant that judicially improvised solutions have traditionally remedied cross-border corporations' insolvencies.¹⁰⁵ While Canadian and U.S. judiciaries have distinguished their insolvency laws on a case-by-case basis as a way to prevent individual bankruptcy agreements that they oppose, the two nations' legal regimes are complementary to the extent that their bankruptcies and representatives enjoy mutual recognition.¹⁰⁶ American courts have deemed that U.S. creditors would not endure any inconvenience if forced to litigate their claims in Canada and receive just treatments of their claims as both Canadian and U.S. bankruptcy laws provide financial renewal for debtors following discharge, as well as equality of distribution of the assets of debtors among their creditors.¹⁰⁷ The mutual recognition of initial proceedings is founded upon the inherent similarities of both the procedural and substantive aspects of Canadian and U.S. insolvency law, and demonstrates the amenability of the two systems' reconciliation in the form of a joint bankruptcy convention. The inherent likeness of Canadian and U.S. bankruptcy principles is evident in the particulars of the more significant provisions of their domestic insolvency laws.

1. *Initial Proceedings and Voluntariness.* In both Canada and the United States, voluntary insolvency proceedings are commenced by filing a petition for bankruptcy with the court of competent jurisdiction. The filing of a Canadian 'proposal' under the BIA is akin to submitting a 'plan for reorganization' under Chapter 11 of the U.S. Bankruptcy Code.¹⁰⁸ While under Canadian jurisdiction creditors must demonstrate that debtors have committed one—or

104. Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135, 188 (1992).

105. See Cook, *supra* note 1, at 109. The lack of discernible precedents makes cross-border insolvency law unclear, which causes economic and legal instability as corporations cannot adequately plan for the contingency of bankruptcy. See *id.*

106. See *id.*

107. See United States of America – Canada Bankruptcy Treaty, *infra* note 21. Ironically, the Court in *Toga*, see *infra* note 143, proceeded to deny the trustee's petition on the territorial basis that in the United States a creditor would have a secured interest by virtue of the perfected judgment whereas in Canada the creditor would be an 'ordinary' creditor.

108. See Davis, *supra* note 33, at 259.

several—enumerated ‘act(s) of bankruptcy.’¹⁰⁹ On the other hand, the Code does not require creditors to fulfill certain conditions in order for creditors to commence involuntary proceedings.¹¹⁰ Both countries grant secured creditors top priority in the division of the assets of their debtors’ estates.¹¹¹

Harmonization of the two nations’ involuntary bankruptcy laws would not be a fatal impediment to a bilateral convention because the filing of a reorganization proposal in Canada stays involuntary liquidation proceedings, and also because the Code permits a bankrupt governed by Chapter 7 debtor to become a Chapter 11 debtor.¹¹² Any differences in procedural technicalities, such as the number of claimants required to file a petition, the amount of their claims, or the conduct of the debtor apparent in the initial proceedings of Canadian and U.S. bankruptcy law, are reconciled by the similarity in the more important provisions of debtor reorganization. For instance, both countries’ laws permit conversion of a bankruptcy’s consequences from liquidation to reorganization.¹¹³

2. *Reorganization.* Both Canadian and U.S. bankruptcy laws permit the officers of debtors’ corporations to retain their capacities as managers and to preside over reorganizations. While U.S. law permits debtor-management of reorganizations until a trustee may be appointed,¹¹⁴ however Canada’s BIA assumes corporate asset management by debtors, dictating that trustees be appointed “when necessary in the interests of the estate.”¹¹⁵ This contrast may contribute to the complexity and conflict in contemporary cross-border bankruptcy as debtors seek the jurisdiction in which they will retain access to their assets while creditors vie for effective control and protection of their investments.

109. Acts of bankruptcy for the purposes of involuntary proceedings include ceasing to meet liabilities as they become due, making fraudulent conveyances or preferences, departing the jurisdiction with the intent of defeating creditors, giving notice of the intent to withhold payments, and defaulting under any provision of a proposal. *See* Bankruptcy and Insolvency Act § 42(1) (Can.).

110. *See id.* at § 43(1).

111. *See* Bankruptcy and Insolvency Act (Can.); 11 U.S.C. §§ 101-1501 (1994).

112. *Compare* Bankruptcy and Insolvency Act § 50.4 (Can.) *with* 11 U.S.C. § 706(a) (1994).

113. *See* Cook, *supra* note 1, at 103.

114. *See* 11 U.S.C. §§ 1104, 1107 (1994). Trustees may be appointed at anytime after the commencement of a case, but this appointment must come before confirmation of a plan and can only be ordered upon a showing of misconduct on the part of the debtor’s managers. *See id.* at § 1104.

115. Bankruptcy and Insolvency Act, R.S.C., ch. C-3 § 30(1)(c) (1992) (Can.).

Insufficient data exist to determine whether debtors and creditors enjoy tangible advantages under each country's respective reorganization provisions.¹¹⁶ The standardization of the status of debtors in the corporate reorganization process would ameliorate greatly the divisive calculus required to determine the optimum venue which may be a contributing factor to the conflict of current Canada-U.S. bankruptcy proceedings.

3. *Stays.* That filing for bankruptcy stays alternative collection proceedings by creditors is a principle varied only marginally by Canada and the United States.¹¹⁷ Stays of proceedings in both countries preclude creditors from seizing inventories or collecting on receivables but allow debtors to continue to dispose of inventory and collect on receivables in the courses of reorganizations.¹¹⁸

The primary distinction of stays between the two countries is that Canadian debtors may use cash collateral without judicial approval,¹¹⁹ whereas the U.S. Code confers superiority to creditors when debtors' protections of assets prove inadequate;¹²⁰ debtors and/or trustees must obtain judicial consent prior to cash financial transactions.¹²¹ This variation in the Canadian and U.S. law of stays in bankruptcy proceedings does not prevent a bilateral insolvency convention since such procedural variations may be retained in ancillary processes.

4. *Proposals.* Both Canada and the United States require creditor and judicial approval of corporate reorganizations and each country empowers creditors and debtors to participate in the proposal-drafting process. The United States permits the exclusive filing of proposals by debtors only within the first 120 days of bankruptcy, but after the expiration of this time period, creditors are

116. See Cook, *supra* note 1, at 104.

117. Compare Bankruptcy and Insolvency Act § 69 (Can.) with 11 U.S.C. § 362(a) (1994). For more background on stays of proceedings in bankruptcy cases in Canada and the United States, see generally Cook, *supra* note 1, at 104. While Crown claims are expressly and absolutely exempted from being stayed, see Bankruptcy and Insolvency Act § 69 (Can.), U.S. government claims are only exempt in certain circumstances, see 11 U.S.C. § 362(a); cf. 11 U.S.C. § 362(b) (1994). See also Cook, *supra* note 1, at 104, 106. Common legal ground is the fact that stays of proceeding are subject to judicial review. Compare Bankruptcy and Insolvency Act § 69.5 (Can.) with 11 U.S.C. §§ 361, 362(d) (1994).

118. See Cook, *supra* note 1, at 105, 106.

119. See *id.* at 105.

120. See 11 U.S.C. §§ 362(d), 507(b) (1994).

121. See Cook, *supra* note 1, at 106.

able to file proposals independently.¹²² In contrast, Canada permits creditors only to approve or reject negotiated reorganizations¹²³ but similar to U.S. law, receivers, trustees, and liquidators may submit proposals in Canada.¹²⁴ Although the plurality required to approve reorganization proposals differs numerically in each country,¹²⁵ both Canadian and U.S. insolvency legislation mandate that creditors approve of proposals by vote and specify the technical requirements for them to be duly authorized. Creditors may be separated into classes for voting purposes in both jurisdictions.¹²⁶

In terms of authority, the U.S. Bankruptcy Code provides a method by which proposals may be approved despite their rejection by a class of creditors.¹²⁷ While Canadian bankruptcy legislation is void of parallel “cram down” procedures, a similar principle does exist in Canada at common law.¹²⁸ Classes of secured creditors who reject proposals or who are not addressed in the proposal’s provisions are not stayed from recovery of their collateral from debtors.¹²⁹

“The law regarding approval of a reorganization plan will likely present the largest obstacle to reaching a [bilateral treaty]. . .because Canada. . .and the United States have five reorganization provisions. . .fraught with technical and substantive differences.”¹³⁰ Despite the predominant consistency of ideologies, approaches and purposes—if not always in the specific statutory formation—of Canadian and U.S. insolvency law, the similarities in bankruptcy law as the basis

122. See 11 U.S.C. § 1121(b), (c) (1994).

123. See *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, §§ 4, 5.

124. See Bankruptcy and Insolvency Act, R.S.C., ch. C-3 § 50(1) (1992) (Can.).

125. Compare Bankruptcy and Insolvency Act § 54 (Can.) with 11 U.S.C. § 1126(c) (1994). The United States requires that more than half of the creditors in each class, representing at least two-thirds of the total value of the claims, accept the plan, see 11 U.S.C. § 1126(c) (1994), while Canada requires acceptance of a proposal by a majority of the claimants representing only two-thirds of the value of the claims in each class, see Bankruptcy and Insolvency Act § 54 (Can.).

126. Compare Bankruptcy and Insolvency Act § 50(1.4) (Can.) with 11 U.S.C. § 1122(a) (1994). Canada uses a “commonality of debt interests” to define voting classes, and the United States employs a test of substantial similarity of claim. See *id.*

127. See 11 U.S.C. § 1129(b) (1994).

128. Canadian courts have been willing to allow a debtor under the BIA to redistribute dissenting creditors into larger classes of similar claims in order to reduce their influence over approval of the plan. See Leonard & Marantz, *supra* note 2, at 309-314; E. Bruce Leonard & Fasken C. Godfrey, *Commercial Reorganizations Under the Bankruptcy and Insolvency Act – Canada*, A.B.A. INST. ON MULTINATIONAL COM. INSOLVENCY F-1, F-8 (1993).

129. See Bankruptcy and Insolvency Act, R.S.C., ch. C-3 § 69.1 (1992) (Can.), amended by Bankruptcy and Insolvency Act, R.S.C., ch. 26, § 8 (1994) (Can.).

130. Cook, *supra* note 1, at 109.

for a future bilateral convention are undermined by the contemporary reality of each national system's inherent mal-administration, misapplication and non-enforcement.

C. Current Problems and Past Solutions

Despite the increasingly universal approach to bilateral insolvency reflecting the consistencies in Canadian and U.S. law that has been identified in recent decisions of the U.S. courts,¹³¹ territorial considerations continue to determine most treatments of contemporary transnational insolvency proceedings.¹³² The rules of application of bankruptcy law in Canada and the United States remain vague and inconsistent, with the majority of contemporary insolvency settlement agreements containing both universal and territorial concepts approved by a territoriality-oriented judiciary.¹³³ While possibly an impediment to the eventual establishment of a Canada-U.S. insolvency convention, the contemporary disarray of bankruptcy affairs between Canada and the United States demonstrates the necessity of a formal, bilateral insolvency agreement. The two countries have been cognizant of this unseemly state of insolvency affairs between them, because in 1979 a bilateral agreement on cross-border insolvency—as alluded to previously—was drafted to promote reform.¹³⁴ Response to the proposed Canada-U.S. treaty, however, has been negative and it remains unratified to this day.

The Canada-U.S. treaty proposed a single, transnational administration of insolvency proceedings under the law of the nation in which the bankrupt retained the greater value of its assets at the time of the filing.¹³⁵ The courts of the administering country would apply national law to all aspects of the proceeding, including matters over which the courts of the opposite nation would normally exercise jurisdiction;¹³⁶ national courts in the other country would have jurisdiction ancillary to the main proceedings in order to aid the court in the administering country.¹³⁷ The draft Canada-U.S. treaty implemented an automatic stay of proceedings in both countries upon the bank-

131. See Booth, *supra* note 104, at 186-87.

132. See Kim & Smith, *supra* note 53, at 4-5.

133. See Cook, *supra* note 1, at 116.

134. See generally United States of America – Canada Bankruptcy Treaty, *supra* note 21.

135. See *id.* art. 6(1).

136. See *id.* art. 15(1).

137. See *id.* art. 14(3).

rupt's filing a petition in either jurisdiction¹³⁸ and the powers of trustees and debtors-in-possession in both the main and ancillary proceedings were to be determined by the laws of the nation of main forum.¹³⁹

Antagonism toward the adoption of the bilateral treaty surrounded its prohibitions on the application of local law in ancillary proceedings and on its inability to ensure the stability of the proceedings generally.¹⁴⁰ Other criticisms addressed restrictions preventing courts from applying national law and the flexibility of the "location of assets" test that forces creditors to gamble on which country has jurisdiction over bankruptcy proceedings.¹⁴¹ Neither Canada nor the United States have ratified the Canada-U.S. treaty,¹⁴² the treaty was concluded prior to Canada's most recent reformation of its bankruptcy laws and was dismissed by the U.S. courts without explanation in its first instance of judicial consideration.¹⁴³ As a result, the draft Canada-U.S. treaty has been dubbed a negative model for future agreements.¹⁴⁴ Despite this indictment, the common ground found in the formation of the Canada-U.S. treaty may be emphasized to push for renewing a cross-border insolvency regime this century.

D. A Possible Preliminary Model

Toward a Canada-U.S. insolvency convention, a modified universal jurisdiction akin to that embodied in the Concordat would be not only necessary given the lessons of the past and the primacy of jurisdictional sovereignty but also desirable for expediency. Most Ca-

138. *See id.* art. 13(1).

139. *See id.* arts. 3, 15(2).

140. Creditors could not predict with certainty which country would assume jurisdiction in each case due to the flexibility and indeterminacy of the "location of assets" test. *See Somers, supra* note 60, at 677, 699 n.154 (1991). For a more detailed critique of the Canada-U.S. Treaty, *see Kurt H. Nadelmann, A Reflection on Bankruptcy Jurisdiction: News from the European Common Market, the United States and Canada*, 27 MCGILL L.J. 541, 550 (1982).

141. *See Cook, supra* note 1, at 96.

142. *See id.*, at 95.

143. The draft agreement was rejected without explanation in its one instance of judicial consideration. *See in re Toga Mfg. Ltd.*, 28 B.R. 165, 169-70 (Bankr. E.D. Mich.) (1983). In this case, the trustee of a Canadian bankrupt company subject to bankruptcy proceedings in Canada petitioned the state court under section 304 of the Code, for a stay of proceedings by a U.S. creditor attempting to enforce its judgment in Michigan. The Court rejected the provisions of the Canada-U.S. bankruptcy treaty which provided for automatic and universal stays of proceedings against corporations that have filed for bankruptcy and held that, despite the Treaty's provision, comity warranted the rejection of the Canadian trustee's petition for a stay of proceedings. *See id.*

144. *See Cook, supra* note 1, at 95-96.

nadian and U.S. corporations maintain an identifiable headquarters and many of their assets in one country, and the assignment of a primary jurisdiction would enhance control of assets, increase business values, and ensure the fair treatment of creditors.¹⁴⁵ The unpredictable “location of assets” test for the determination of the jurisdiction of the main forum, fatally proposed in the Canada-U.S. treaty, would be abandoned in favor of a functional approach.¹⁴⁶ The EU and Istanbul Conventions assign jurisdiction by means of a rebuttable presumption that jurisdiction over the main bankruptcy proceeding vests with the state that hosts the bankrupt’s registered office.¹⁴⁷ Is this method of juridical advantage equitable given that a legal fiction would be created, for example, in every instance that a significant proportion of a Canadian company’s assets remain in Canada while its official headquarters are registered in the United States?

In this circumstance, the United States would obtain jurisdiction over the bankruptcy proceeding, and the creditors closest geographically and legally to the company’s assets would be required to submit to a foreign—albeit standardized—judicial body for the main proceeding. Given this result, the criticisms of the current state of bankruptcy relations between Canada and the United States—inconvenience, excessive costs, and suspicions of bias—would again resurface. On balance, however, the propriety of the Concordat model is affirmed, because its retention of national, ancillary proceedings counteracts the hazards to ratification of universal proceedings inherent in the single forum model.¹⁴⁸

145. See Report on the Concordat, *supra* note 61, at 3.

146. The location of assets is a pivotal issue in the negotiation of a Canada-U.S. Insolvency Convention apart from its being a test for jurisdiction of proceedings. Canada must always be vigilant as to its comparative disadvantage in the greater volume and diversification of the assets of U.S. corporations relative to the holdings of Canadian businesses. While many Canadian firms have the majority of their assets in the United States, U.S. companies with substantial assets in Canada are more likely than Canadian businesses to have equally substantial assets abroad, inaccessible to Canadian creditors under a bilateral convention. Perhaps a Canada-U.S. convention would be restricted to govern corporations doing business and retaining assets exclusively in the two countries, but given the increasing globalization of commerce, how many companies would be governed by the convention in the next decade? How would a Canada-U.S. convention deal with an American company with offices and substantial assets in Canada, but also with creditors abroad? Would this not require multilateralism in any treaty on insolvency between Canada and the United States? Increasingly significant substantive and conceptually difficult issues of international and insolvency law arise when the details of an actual bilateral bankruptcy convention are explored.

147. See Maastricht Treaty, *supra* note 68, art. 2(1); Istanbul Convention, *supra* note 29, art. 4(1).

148. See Report on the Concordat, *supra* note 61, princ. 1.

In addition to the Concordat, the MIICA is also a valuable resource for an insolvency convention between Canada and the United States for it embodies many of the features a Canada-U.S. instrument should seek to avoid. When the MIICA was first proposed, Canada was concerned that it contained terms from the U.S. Code that were without equivalent in Canada's B.I.A.¹⁴⁹ Other Canadian difficulties with the MIICA included its provisions on reorganization,¹⁵⁰ treatment of foreign revenue, and inclusion of a bilateral treaty alternative. Due to the MIICA's universal approach, Canada also had reservations about the status and priority of local creditors, the degree of discretion it delegated to local courts, the effect of variations of the MIICA's provisions under local adaptations, and its dichotomous treatment of common and civil law traditions.¹⁵¹ The MIICA's provisions on foreign recognition did not reflect those in the U.S. Code sufficiently for its acceptance by the United States.¹⁵² While a modified universality approach would alleviate the concerns over the treatment of local creditors, which doomed the MIICA, a bilateral convention would not encounter duplicity in legal traditions or variation under local conditions given the cultural and demographic consistency of Canada and the United States. Despite this consistency, matters of judicial discretion and preference to local creditors, however, remain barriers to a bilateral agreement.¹⁵³

Just as judicial discretion has been identified as a source of the dysfunction of contemporary Canada-U.S. bankruptcy relations, ironically, delegation of ancillary jurisdiction to national courts under a modified universal cross-border treaty would return judicial discretion to a position of influence. Weariness of judicial preferences given to local creditors by courts that either fail to enforce insolvency agreements or create exceptions in applying the agreements has been an eternal barrier to the conclusion of international insolvency con-

149. See generally Somers, *supra* note 60, at 695.

150. Canada's Bankruptcy and Insolvency Act is centered on progressive and effective reorganization provisions. See Leonard & Marantz, *supra* note 2, at 300, 304. "An increasing number of small and moderate-sized corporate debtors are taking advantage of the new liberalized Bankruptcy and Insolvency Act procedures." *Id.* at 304.

151. See Somers, *supra* note 60, at 695.

152. Canada was concerned that the MIICA contained terms from the Code that had no meaning in Canada and did not sufficiently address difficulties with reorganizations, reconcile the dichotomy of common and civil law concepts or clearly defeat a bilateral treaty alternative, see Somers, *supra* note 60, at 695, while the United States was predicted to reject the MIICA for not copying section 304 of the Code, see Powers, *supra* note 60, at 697; Westbrook, *supra* note 60, at 485.

153. See Booth, *supra* note 104, at 135.

ventions.¹⁵⁴ Canadian and U.S. judges that would enforce a bankruptcy treaty between the two countries should therefore participate in its drafting in order to strike an enforceable balance between uniform, bilateral cooperation and the protection of both countries' local creditors.¹⁵⁵ This judicial participation would create a treaty readily applicable in a fair and equitable manner by the countries' judiciaries.

While none of the provisions of a Canada-U.S. treaty would be beyond criticism, the inclusion of an automatic stay of proceedings would be as close to an innocuous feature as any capable of being presented. A universal stay of proceeding as characteristic of any Canada-U.S. insolvency convention would avoid Canadian and U.S. creditors from dismantling businesses upon their filing for bankruptcy, and creditors would not be required to line up at the border for access to foreign courts to protect their claims. Stays would not be indefinite but would depend upon the bankrupt's good faith in the negotiation of its financial restructuring, which is how stays exist under Canadian and U.S. national bankruptcy law. The stay of proceedings would be a workable inclusion in a bilateral insolvency convention as neither Canada nor the United States would have an advantage over the other country.¹⁵⁶

In terms of resolving the disputes bound to arise regarding the interpretation and implementation of the terms of a Canada-U.S. insolvency convention, the dispute settlement mechanism contained within the NAFTA accord could be invoked with the automatic stay of proceedings preserved pending determination of the dispute under NAFTA's provisions.¹⁵⁷ While this model would be fast and impartial as neither Canada nor the United States would determine the outcomes of the disputes, its availability as an avenue of redress is ultimately dependent upon an agreement between Canada and United States to respect the dispute panels' decisions.¹⁵⁸ Given the success of dispute resolution under the NAFTA accord¹⁵⁹ and the obligation of

154. See Cook, *supra* note 1, at 91-93. Evidence of the problems inherent in enacting bankruptcy agreements due to concern over judicial preferences exists in the histories of the Montevideo Treaty and Bustamente Code. See *id.*

155. See *id.* at 93.

156. See *id.* at 121.

157. Section 11 of NAFTA provides a mechanism for the resolution of investment disputes while § 14 is designed to resolve disputes involving financial matters. See NAFTA, *supra* note 18, at §§ 11, 14.

158. Canada and the United States have been historically willing to submit treaty disputes to panels following failed attempts at private resolution. See *id.* at 121.

159. See Bialos & Siegel, *supra* note 101, at 604-12.

Canada and the United States to honor their resolutions to follow this agreement, treaty disputes arising from a bilateral bankruptcy convention could be resolved by this pre-existing North American institution,¹⁶⁰ precluding the need for a dispute settlement mechanism within a concluded Canada-U.S. convention.

IV. CONCLUSION

Advocacy of an insolvency convention between Canada and the United States is tense with fundamental inconsistencies. While the differences in the bankruptcy laws of the two countries indicate the need for a harmonized, bilateral regime, they also indicate that a common approach at treaty law may prove ultimately unsuccessful. The degree of similarity between Canadian and U.S. bankruptcy laws invites optimism toward a cross-border agreement but simultaneously suggests a lack of need for an insolvency convention if the two countries' laws are indeed so similar. The necessity of a bilateral treaty is further undermined by the reality that Canada and the United States may already be subject to the principles of international customary bankruptcy law without the existence of a convention. Furthermore, judicial activism has been portrayed both as a detriment to the contemporary arrangements of cross-border insolvency between Canada and the United States due to the seemingly ad hoc approach of justices and as an asset for preserving jurisdictional sovereignty in an otherwise universal process. The perception of bankruptcy judges as intolerably preferential to local creditors or guardians is a function of ideology. Perhaps much of the incompatibility of bankruptcy proceedings in Canada and the United States has to do with judicial activism more than substantive variance in legal regimes,¹⁶¹ and what is really required is standardization of cross-border approaches to insolvency adjudication rather than the harmonization of substantive bankruptcy laws.

Accordingly, why not simply amend already similar domestic laws and implement proactive measures that promote judicial coordination within the current provisions? Do not the similarities of Canadian and U.S. bankruptcy law outweigh the superficial distinction sufficient to demonstrate a lack of need for a convention regardless of its feasibility? Why put forth the extensive international legal effort

160. See Cook, *supra* note 1, at 118 (Canada-US convention would be most effective following the dispute settlement mechanisms of the FAA, GATT, and NAFTA).

161. See *id.* at 109 (implying a degree of judicial responsibility in transnational bankruptcy conflicts).

for a bilateral convention, given the plagued history of bilateral insolvency agreements?¹⁶² Perhaps the similarities of law and the emerging trend toward modified universality at customary international law are sufficient to preclude the necessity of a treaty. In fact, a cross-border insolvency accord may be less desirable in many ways due to the conceptual and procedural difficulties inherent in bankruptcy treaties, and, perhaps, a concerted bilateral effort aimed merely at fine-tuning the law and its modes of judicial application via minor adjustments is warranted. These issues are valid questions and the fundamental contradictions in the Canada-U.S. context will ensure that any renewed negotiations toward a cross-border accord will be a cautious, narrow, and inherently contestable—if not ultimately imperfect—endeavor.

The general utility of NAFTA for promoting insolvency collusion between Canada and the United States cannot be underestimated. The overall success of NAFTA, in contrast to the general failure of conventional bankruptcy agreements, may indicate that a Canada-U.S. bankruptcy convention would be more susceptible to success were it to follow the dispute resolution trend and spirit of bilateralism characteristic of the FAA, GATT, and NAFTA. Whatever the approach preferred to pursue the harmonization of Canadian and U.S. bankruptcy laws for cross-border purposes and the degree to which collusion is sought, the need is current and the model of a bilateral convention valid.

Meaningful transnational insolvency conventions are exceedingly difficult to conclude. The few instruments currently in force tend to give undue preferences to local creditors, and although Canada and the United States have recently expanded their bankruptcy laws within their parallel legal traditions, issues of territoriality and failures to capitalize on the inherent similarities of their processes present formidable challenges to the drafters of a Canada-U.S. insolvency convention. From these foundational difficulties, a bankruptcy convention between Canada and the United States must be pursued. The time is now to bring order to the cross-border insolvency chaos that currently exists and that contrasts to the highly ordered and increasingly harmonized financial arrangements which otherwise characterize Canada-U.S. economic relations at the beginning of the 21st century.

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162. See Fletcher, *Case Study*, *supra* note 29, at 437.