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Why Won't the Leaders Lead? The Need for National Governments to Replace Academics and Practitioners In the Effort to Reform the Muddled World of International Insolvency

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ARTICLE

WHY WON'T THE LEADERS LEAD? THE NEED FOR NATIONAL GOVERNMENTS TO REPLACE ACADEMICS AND PRACTITIONERS IN THE EFFORT TO REFORM THE MUDDLED WORLD OF INTERNATIONAL INSOLVENCY

PETER J. MURPHY*

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“[N]either harmonization of the insolvency laws of [Mexico, Canada and the United States] nor adoption of a comprehensive treaty concerning insolvency is likely to be achievable in the near future.”¹

I. INTRODUCTION

Recent technological developments in the fields of communication, travel, and e-commerce have greatly increased the ability of businesses to stretch their corporate structures, assets, and transactions across a multitude of borders. In response, national governments have increasingly sought to cooperate with other governments on harmonizing the laws and regulations that govern cross-border transactions. On issues as diverse as taxes, security, and the free movement of goods and labor, both multilateral and bilateral treaties have become the preferred method of cooperation between national governments.² However, efforts to utilize treaties in the field of international insolvency have significantly lagged behind efforts seen in other fields and it remains a field filled with divergent national laws and inefficient solutions to cross-border insolvencies. This is problematic because “by its very nature bankruptcy law must be symmetrical with the market. If the market is becoming more global, bankruptcy law must become global as well.”³ As the recent bankruptcy filings of Enron, Global Crossing, and WorldCom demonstrate, there is no doubt that cross-border insolvencies are becoming larger, more global in scope, and, unfortunately, more frequent. Treaties provide companies with excellent guidelines and opportunities for expanding their operations into foreign markets. Yet, when a company does not achieve its anticipated success and is forced into bankruptcy, there is no corresponding insolvency treaty to guide it through the process of reorganization or dissolution.

While national governments have been slow to address this

1. AMERICAN LAW INSTITUTE, INTERNATIONAL PRACTICE: ALI INTERNATIONAL LAW PUBLICATIONS, OVERVIEW OF THE TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENTS OF CANADIAN, MEXICAN AND UNITED STATES BANKRUPTCY LAW, at <http://www.ali.org> (last visited April 25, 2002) (identifying the quoted language as one of the premises upon which their Transnational Insolvency Project was based).

2. For an example of how the United States uses treaties to promote and protect cross-border transactions, see the Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 2000 U.S.T. 160.

3. Jay Lawrence Westbrook, *Global Development: The Transnational Insolvency Project of the American Law Institute*, 17 CONN. J. INT'L L. 99, 100 (2001).

problem, practitioners and academics have taken the lead in advocating change and proposing private sector solutions.⁴ Although notable as first steps in the drive for an effective overhaul of the international insolvency system, their efforts still leave a tremendous amount of work to be done. As one commentator aptly noted in 1994, “[b]ankruptcy law has become so important to the national economy that reform no longer can be left to a few academics and insolvency practitioners.”⁵ Recent events have made that statement all the more true, and national governments must act swiftly to bring their bankruptcy laws back in symmetry with the bankruptcy market. The most effective way to do this is through the development of a comprehensive international insolvency treaty.⁶

Unfortunately, as the introductory quotation demonstrates, many commentators believe that a treaty is an impractical or ineffective method for reforming the laws and procedures governing cross-border insolvencies. This article refutes the introductory quotation and argues that those who dismiss the ability of a treaty to lead to the creation of harmonized insolvency laws and more efficient resolutions of cross-border insolvencies are overlooking the success treaties have had in other areas of the law, the certainty they will bring to the commercial market place, and the relative ease with which they can be implemented.⁷ While an

4. The legislators of the major trading countries have shown a distinct and consistent disinclination to become involved on a country-to-country basis in insolvency treaties or agreements. E. BRUCE LEONARD & CHRISTOPHER W. BESANT, *CURRENT ISSUES IN CROSS BORDER INSOLVENCY AND REORGANIZATIONS* vii (1994). As noted, however, the private sector has been much more active in the push for a more cooperative approach to cross-border insolvencies. See, e.g., Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 *TEX. INTL. L.J.* 587, 589 (1998) (stating that “[i]n the absence of a formal [international insolvency] treaty, practitioners and courts have created what are essentially case-specific, private international insolvency treaties.”).

5. Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 *WASH. U. L.Q.* 931, 935 (1994).

6. The term international insolvency has been defined as “an insolvency which is affected by the laws of two or more countries.” CARL FELSENFELD, *A TREATISE ON THE LAW OF INTERNATIONAL INSOLVENCY* 1-5 (2000) [hereinafter *INSOLVENCY TREATISE*]; Evan Flaschen & Leo Plank, *The Foreign Representative: A New Approach to Coordinating the Bankruptcy of a Multinational Enterprise*, 10 *AM. BANKR. INST. L. REV.* 111, 112 (2002). Throughout this article, “international insolvency” and “cross-border insolvency” will be used interchangeably. For an example of the complex factual pattern that can emerge from a cross-border insolvency, see *In re Maxwell Commun. Corp.*, 93 F.3d 1036, 1040 (2d Cir. 1996).

7. This article assumes that increased harmonization and cooperation is a proper goal for all involved in the international insolvency practice. Others, however, may argue that there is no need for harmonized legislation and that the current system

insolvency treaty could be developed for an unlimited combination of countries, this article will focus solely on the creation of a treaty between the United States, Canada and Mexico.⁸ These three countries are natural partners for an insolvency treaty given the substantial volume of trade that occurs between them and their proximity to each other. In addition, with the European Union (EU) recently issuing a cross-border insolvency regulation for their member states, now is the time for the countries of the North Atlantic Free Trade Association⁹ (NAFTA) to develop a common

works fine on its own - with each country determining on its own how to apply its insolvency laws. It can be argued that corporations bring cross-border insolvencies upon themselves by creating massive, complicated, multi-national corporate structures that conduct trade across numerous borders. When companies choose to do business in these foreign countries, whether through a subsidiary or through their main corporate body, they open themselves up to the insolvency proceedings of the host country. As the Supreme Court once noted,

[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government . . . as the known and established policy of that government authorizes He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them.

Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 537 (1883). There is no doubt that companies utilize the host country's laws to the fullest extent possible when it is their best interest - i.e., American companies utilizing the minimum wage laws of the host country rather than the minimum wage laws of the United States. However, if that same company has to file for bankruptcy, they will look towards the United States bankruptcy law for protection due to its debtor-friendly provisions. Insolvency laws and proceedings are varied across each country and it can be argued these differences should be respected. This territorial approach has been succinctly described as "each nation conduct[ing] its own insolvency proceeding with respect to the assets located within its jurisdiction and disregard[ing] any parallel proceedings in a foreign nation." SAMUEL BUFFORD & LOUISE DECARL ADLER ET AL., INT'L INSOLVENCY 3 (2001) [hereinafter INT'L INSOLVENCY]. Despite the existence of this argument, as previously stated, this article subscribes to the Universalist assumption that "without the coordination of laws and courts of different jurisdictions in transnational cases, the optimal use and distribution of assets cannot be accomplished, and waste and turmoil are certain to result." *Id.* at 4.

8. There are several commentators that have called for the creation of a treaty between the United States and Canada, yet fail to include Mexico. See Sean Dargan, *The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law*, 17 CONN. J. INT'L L. 107, 108 (2001) (proposing another look at a U.S.-Canada insolvency treaty); 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, 494-98 (2000) (outlining a preliminary model for a Canada-U.S. insolvency convention). Given the importance of Mexico to both Canada and the United States, and the increasing numbers of companies operating in all three of the countries, any insolvency treaty the United States seeks to enter should include both Mexico and Canada.

9. Mexico, Canada, and the United States signed the North American Free Trade Agreement in 1992 in order to, among other things, "STRENGTHEN the special

cross-border insolvency policy as well. After being implemented among the NAFTA countries, the treaty could later be expanded to include other countries, or could serve as a model for separate treaties with other countries.

Part II of this article will briefly review the efforts already underway to encourage harmonization and cooperation in international insolvency law, and explain that while they are a good starting point, national governments need to move beyond them. In particular, this article will review and critique harmonization efforts such as the UNCITRAL Model Law on Cross-Border Insolvency, the American Law Institute's Transnational Insolvency Project, and the INSOL Lender's Group statement on international insolvencies. Part III will examine the recent insolvency regulation implemented by the EU and evaluate it as a model for a treaty involving the NAFTA countries. Part IV will examine other treaties that the United States has signed and discuss how they can serve as a model for the development of an insolvency treaty for the NAFTA countries—including the tax treaties in existence between the United States and Canada, and the United States and Mexico. In addition, it will discuss the lessons that can be learned from the failed U.S.-Canada bankruptcy treaty from the mid-1970s. Part V will review the post-NAFTA relationship between the signatory countries and demonstrate how an insolvency treaty is a necessary and natural extension of the main NAFTA treaty.

II. NON-TREATY TRENDS TOWARDS HARMONIZATION

As the introductory quote demonstrates, the majority of scholars are of the opinion that an international insolvency treaty is not likely to be achievable in the near future. People of this school of thought believe, among other things, that countries are reluctant to surrender their sovereignty over economic issues, the differences found in national bankruptcy codes are insurmountable, and past attempts at creating insolvency treaties have fared

bonds of friendship and cooperation among nations; CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; CREATE an expanded and secure market for the goods and services produced in their territories" North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 298 [hereinafter NAFTA].

poorly.¹⁰ Despite their views on the impracticality of a treaty,¹¹ most commentators would agree that there is a trend underway which focuses on increased cooperation and harmonization in the field of international insolvency. This is demonstrated by the increased level of cooperation between bankruptcy judges in cross-border insolvencies, as well as with the recent development of model insolvency codes and procedures by major private sector groups.¹² Notwithstanding this trend, substantial movement towards harmonization and cooperation in the field of interna-

10. See, e.g., Faye Knowles, *Insolvency in a Global Economy: Bring Me Your Tired, Your Poor, Your Troubled Companies Yearning to Reorganize* (Mar. 2001), at http://www.fredlaw.com/articles/international/intl_0103_fk.html (last visited April 25, 2002) (analyzing methods for addressing cross-border insolvencies). Ms. Knowles states that:

There are a number of ways countries could reach agreement on how to handle multinational insolvency. Historically, the most reliable is a multinational treaty or convention, but currently there is no such treaty and limited attempts, notably in Europe, have proved unworkable. Bilateral treaties could provide some answers, but very few exist; they are difficult to achieve because of governments' sovereignty and national interest concerns. (The U.S., for example, has no such treaty with Canada and Mexico, its NAFTA business partners.)

Id.

11. When talking about the probability of the creation of an insolvency treaty, the author is referring solely to a treaty between the United States, Canada and Mexico. However, the author fully supports, and expects, that the creation of a successful treaty amongst the NAFTA countries would encourage the United States to enter into additional insolvency treaties - both with individual countries and with groups such as the European Union.

12. Cooperation seems to mean three things in the international insolvency arena. First, it means that judges should respect decisions made in other countries, and enforce them in their own country - a full faith and credit type argument. Second, it means that courts should recognize and work with bankruptcy courts in other countries that are handling simultaneous insolvency proceedings involving the same company. This type of cooperation has received some attention here in the United States. See, e.g., *Maxwell Commun. Corp. v. Barclays Bank (In re Maxwell Commun. Corp.)*, 170 B.R. 800, 803-06 (Bankr. S.D.N.Y. 1994) (utilizing foreign representatives as a means of achieving a higher level of cross-border cooperation between simultaneous insolvency proceedings). Third, it can also mean that there should be one main proceeding, and that any ancillary proceedings in separate countries should defer or transfer their action to that main proceeding. This option is the ultimate goal in terms of fairness and ease for all parties involved. This was first noted as far back as 1888 when one commentator stated:

It is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.

tional insolvency is still a distant goal, as “[i]nsolvency regimes differ widely around the world, some can be described as highly developed and sophisticated . . . [yet] there are many jurisdictions where the evolution of insolvency systems [are] much less advanced”¹³ Thus, while the commentators are correct in noting that this new atmosphere of cooperation will reduce some of the problems encountered in cross-border insolvency proceedings, they should not be satisfied with the developments to date. Instead, by helping to foster an atmosphere of cooperation, these new measures should be viewed as the natural first step towards the creation of an insolvency treaty among the NAFTA countries. It is now necessary to briefly review the efforts that have led to this increased level of cooperation in the field of international insolvency.

A. *The UNCITRAL Model Law*

In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Cross Border Insolvency.¹⁴ The stated goal of the Model Law is to:

[P]rovide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of: (a) Cooperation . . . (b) Greater legal certainty . . . (c) Fair and efficient administration of cross-border insolvencies . . . (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.¹⁵

The Model Law was not intended to create new substantive laws for countries to implement; rather, it “provides a mechanism for the smooth interdependent operation of various local laws, courts, and court appointees.”¹⁶ While intended to apply to all of a country’s insolvency proceedings, the Model Law allows countries

John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888).

13. Terry Bond, *Global Development: A Global Approach for Multi-Creditor Out-Of-Court Restructurings - A New Initiative and the Wider Issues*, 17 CONN. J. INT’L L. 41, 41 (2001).

14. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, Annex (1997) [hereinafter MODEL LAW]. UNCITRAL is the “core legal body within the United Nations system in the field of international trade law” and its task is to “further the progressive harmonization and unification of the law of international trade” *Id.*

15. *Id.* at Pmbl.

16. Evan D. Flaschen, Anthony Smits & Leo Plank, *Foreign Representatives in*

to exclude from its application “any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in the [adopting state].”¹⁷ The Model Law emphasizes that courts in separate insolvency proceedings should communicate with one another, and provides guidelines and procedures for communication. It states that courts “shall cooperate to the maximum extent possible with foreign courts or foreign representatives” and that “[t]he court is entitled to communicate directly with . . . foreign courts or foreign representatives.”¹⁸ Therefore, the Model Law can be summarized as a sound series of suggestions that countries can adopt to instruct their bankruptcy courts on how they should work with foreign bankruptcy courts and proceedings, yet it does little to address the substantive differences in national insolvency laws and procedures.¹⁹

While the drafters of the Model Law envision it as a significant movement towards harmonization and cooperation, at this time, only three developed countries have adopted the Model Law into their national insolvency laws. In 2000, Mexico became the first major economy to do so.²⁰ Soon thereafter, the South African government followed suit and adopted a very similar version of the Model Law into their national insolvency law.²¹ Most recently, Japan enacted international insolvency legislation based on the Model Law that significantly redirected Japan’s insolvency system from an internal-looking approach to a multi-national, cooperative approach.²² It remains unclear as to whether the adoption of the Model Law by these countries will “provide an impetus to other countries who are currently studying its adoption.”²³ The successful implementation by those countries has not provided any impe-

U.S. Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies, 17 CONN. J. INT’L L. 13, 18 (2001).

17. MODEL LAW, *supra* note 14, at Chapter I, art. 1 § 2.

18. *Id.* at Chap. IV, art. 25 §§ 1-2.

19. The Model Law, however, does contain some substantive elements. For example, Chapter III, art. 20 § 1 provides, among other things, that “[u]pon recognition of a foreign proceeding that is a foreign main proceeding, (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets . . . is stayed.” *Id.* at Chap. III, art. 20 § 1.

20. INT’L INSOLVENCY INSTITUTE, 2000 CONFERENCE PAPER, INT’L INSOLVENCY IN THE NEW MILLENNIUM: COORDINATING CROSS-BORDER INSOLVENCY CASES 12 (Bruce Leonard ed., 2000) [hereinafter INT’L INSOLVENCY IN THE NEW MILLENNIUM].

21. *Id.* (noting that the South African law was slightly different because of a provision which made it applicable only to “officially designated” countries).

22. E. Bruce Leonard, *The International Year in Review*, AM. BANKR. INST. J., Dec. 2001, at 34.

23. *Id.*

tus to the United States government, as their efforts to implement the Model Law have stalled.²⁴ Given the importance of the United States bankruptcy code to the field of international insolvency, its adoption of the Model Code may provide the charge necessary to trigger its large-scale adoption into national bankruptcy codes. Yet, with the United States not close to adoption, and the major economies in Europe now signed on to their own internal insolvency regulation, a widespread movement for adoption of the Model Law seems unlikely.

In addition, while the Model Law does provide for increased cooperation between countries, its drafters recognized that it is subordinate to a treaty by stating that “[t]o the extent that this Law conflicts with an obligation of this State arising out of *any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.*”²⁵ This is a recognition that the Model Law can serve a useful purpose in cases which involve two countries with little interaction or economic ties, yet countries — for example, the

24. Despite the fact that the Model Law was passed by the UN in 1997, its adoption by Congress has run into numerous obstacles and delays. See Shannon D. Murray, *As Cross-Border Bankruptcies Proliferate, So Does the Need to Coordinate How Multiple Courts Will Adjudicate Them*, THE DAILY DEAL, Oct. 24, 2001, at A3, available at <http://www.TheDeal.com> (last visited April 22, 2002) (reporting that “The Model Law would become Chapter 15 of the U.S. Bankruptcy Code if President Bush signs it into law. That’s not likely soon. The proposed Chapter 15 is imbedded in bankruptcy reform legislation that has been mired in delays Congressional interest in the bill . . . is also beginning to wane because of the sickly state of the economy and other priorities.”); see also Michael E. Foreman & Maryse S. Selit, *Proposal Enhances Protections to Foreign Debtors*, N.Y. LAW JOURNAL, Aug. 26, 2002, at 11 (reporting that “[a]n ongoing dispute over the rights of anti-abortion activists to seek bankruptcy protection from judgments and fines imposed in connection with their clinic protests has forced the House to postpone a final vote” on the bankruptcy bill that would, among other things, adopt Chapter 15). Other countries said to be contemplating the adoption of the Model Law include Australia, New Zealand, and the United Kingdom. E. Bruce Leonard, *The International Year in Review*, AM. BANKR. INST. J., Dec. 2000, at 24 [hereinafter Leonard, *Year in Review*, 2000]. While Canada has not adopted the Model Law into their code, they did enact legislation concerning solvent Canadian companies involved in U.S. Chapter 11 cases that was inspired by the Model Law. INT’L INSOLVENCY, *supra* note 7, at 56.

Since Chapter 15 would become the dominant section of the Code for dealing with cross-border insolvencies, this article will not review the current section relied on by United States Bankruptcy courts in dealing with foreign proceedings and foreign representatives, 11 U.S.C. § 304 (2000). See *In re Allan Gee*, 53 B.R. 891, 896 (Bankr. S.D.N.Y. 1985) (stating that “a [§] 304 case is a limited one, designed to function in aid of a proceeding pending in a foreign court”) (citations omitted). For a more thorough review of 11 U.S.C. § 304 and its use in cross-border insolvencies, see INT’L INSOLVENCY, *supra* note 7, at 25-52.

25. MODEL LAW, *supra* note 14, at Chapter I, art. 3 (emphasis added).

NAFTA countries — that are engaged in a more symbiotic relationship would establish their own insolvency treaty. In addition, the Model Law contains an article entitled “Public Policy Exception,” which states that nothing “prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.”²⁶ While “manifestly contrary to . . . public policy” seems like a tough standard to meet, it remains unclear how often and to what extent courts would utilize this escape hatch to retain control of a case or fail to abide by the terms of the Model Law. Lastly, while the Model Law contains provisions for recognizing foreign proceedings and representatives, it lacks a formal reciprocity agreement. If Mexican courts decide to recognize insolvency proceedings in Japan, there is no guarantee that the Japanese bankruptcy courts will show the same respect in a later case. This makes the Model Law a very weak option when compared to an insolvency treaty that mandates reciprocity between the courts and establishes firm policies and procedures for the courts to follow.

B. The American Law Institute

Another key factor in the move towards cooperation has been the American Law Institute’s (ALI’s) Transnational Insolvency Project (TIP), which was “unveiled” in May of 2000.²⁷ The TIP contains a review of the insolvency systems of Mexico, Canada, and the United States; and, more importantly, a review of the Principles of Cooperation (The Principles), which are designed to “promote cooperation, reduce duplication, and diminish the issues in controversy between the parties involved in cross-border insolvency cases.”²⁸ The Principles gain credence as a means for cooperation because of the circumstances underlying its creation. As Professor Westbrook noted, the American Law Institute is a highly regarded organization that has trained its sights on law reform in other domestic areas in the past, and thus it carried some significance that they ventured into the international insol-

26. *Id.* at art. 6. In fact, some commentators have questioned whether Chapter 15, as it is currently drafted, is too full of escape hatches to be an effective means for moving bankruptcy courts towards a more Universalist approach to cross-border insolvencies. See, e.g., Brian Devling, *The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency*, 70 UMKC L. REV. 435, 450-51 (2001).

27. Westbrook, *supra* note 3, at 99.

28. MARGARITA T.B. COALE, BANKRUPTCY BULLETIN: RECENT ADVANCES IN COURT-TO-COURT COMMUNICATIONS IN CROSS-BORDER CASES, Feb. 2002, available at <http://www.weil.com>. (last visited April 15, 2002).

vency arena with the TIP.²⁹ The actual working group that drafted the TIP was comprised of distinguished bankruptcy practitioners, judges, and scholars from Canada, Mexico, and the United States.³⁰ However the TIP was undertaken without the official support of the governments of Mexico, Canada, or the United States, and thus represents a belief of its drafters that “a private-sector initiative might be more fruitful as a next step within the NAFTA.”³¹

The TIP is very similar to the Model Code in what it does and does not accomplish.³² The TIP's central feature is the creation of The Principles, which recognize that “one of the most essential elements of co-operation in cross-border cases is communication among the administering authorities of the countries involved.”³³ However, while encouraging cross-border communications, the TIP also acknowledges that The Principles do not supplant “local procedures and local ethical requirements,” nor do they “constitute a substantive determination of any matter in controversy before the Court.”³⁴ Unlike the Model Law, which national governments adopt into their insolvency laws, The Principles are designed to be adopted by the bankruptcy courts themselves, “following notice to the parties and counsel as would be given under local procedures”³⁵ This provides The Principles with more

29. Westbrook, *supra* note 3, at 99. According to a statement on their home page, the ALI was formed to “promote the clarification and simplification of the law and better its adaptation to social needs [and] to secure the better administration of justice.” The American Law Institute, at <http://www.ali.org> (last visited April 28, 2002).

30. Westbrook, *supra* note 3, at 99.

31. *Id.* at 101. This is a common theme with many of the commentators that have previously written about this subject. See, e.g., INT'L INSOLVENCY IN THE NEW MILLENNIUM, *supra* note 20, at 23 (stating that “[r]ecent experience with international workouts and insolvencies shows, however, that the courts and the insolvency community can achieve considerable progress without the need for legislative action.”).

32. The similarities in the goals and recommendations of UNCITRAL and the ALI can be explained in part by the fact that they were staffed by many of the same people. For example, one widely cited commentator in the field of international insolvency, Jay Lawrence Westbrook, was the United States Reporter for the American Law Institute's TIP, as well as a co-leader of the United States delegation to the UNCITRAL Conference on International Insolvency. Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 563 (2000).

33. INT'L INSOLVENCY IN THE NEW MILLENNIUM, *supra* note 20, at 18.

34. AMERICAN LAW INSTITUTE, TRANSNATIONAL INSOLVENCY PROJECT: PRINCIPLES OF COOPERATION IN INTERNATIONAL INSOLVENCY CASES AMONG MEMBERS OF THE NORTH ATLANTIC FREE TRADE ASSOCIATION 17 (Tentative Draft 2000).

35. INT'L INSOLVENCY IN THE NEW MILLENNIUM, *supra* note 20, at 19. According to the International Insolvency Institute web site, there have been nineteen protocols

flexibility, as they can be adopted and utilized in the manner called for by any given case.³⁶ While that flexibility can be a positive feature in some situations, it does little to provide companies with firm guidance for planning and engaging in cross-border transactions - as the firm guidelines of a treaty would do.

In addition to its comments on cooperation and communication between courts in cross-border cases, the TIP is also very important in that it presents a thorough and accurate comparison of the bankruptcy laws and practices in Mexico, Canada and the United States.³⁷ These statements will be very helpful to international insolvency practitioners in the future, and considering that they were the product of a five-year effort by a distinguished group of drafters, they should be more accurate than previous sources of information. Additionally, the statements provide an opportunity to substantiate the differences that would need to be addressed in the creation of a NAFTA insolvency treaty.

C. *INSOL Lender's Group*

A third important actor in the movement towards cooperation and harmonization is the INSOL Lender's Group, a professional organization comprised of insolvency practitioners; including legal, accounting, and lending professionals.³⁸ Their statement of principles calling for more cooperation in the lending process is unique in that it focuses on getting creditors to work together during large cross-border insolvency cases. For example, the fourth principle of their statement asserts that "[t]he interests of relevant creditors are best served by co-ordinating their response to a debtor in financial difficulty."³⁹ These principles are highly voluntary though, and are not designed for adoption by the bankruptcy

issued between United States and Canadian bankruptcy courts. INTERNATIONAL INSOLVENCY INSTITUTE, CROSS-BORDER INSOLVENCY ORDERS AND PROTOCOLS, available at <http://www.iiiglobal.org/international/protocols.htm> (last visited April 24, 2002).

36. INT'L INSOLVENCY IN THE NEW MILLENNIUM, *supra* note 20, at 12.

37. Thomas M. Gaa & Paula E. Garzon, *International Creditors' Rights and Bankruptcy*, 31 INT'L LAWYER 273, 283 (1997) ("However, although the statements of the domestic laws of all three NAFTA countries are intended to be used by lawyers and businesspersons from other countries, they do not presuppose 'familiarity with the basic domestic *corpus juris* and with the political and cultural presuppositions on which each country's laws and procedures rest."); see also Geoffrey C. Hazard Jr., *Foreword to AMERICAN LAW INSTITUTE, TRANSNATIONAL INSOLVENCY PROJECT, INT'L STATEMENT OF U.S. BANKR. LAW (Tentative Draft 1997)*.

38. INT'L INSOLVENCY IN THE NEW MILLENNIUM, *supra* note 20, at 13.

39. *INSOL Lender's Group Statement of Principles for a Global Approach to Multicreditor Workouts*, U.N. Comm'n on Int'l Trade Law 8, 10 (2000).

courts or the legislatures of the NAFTA countries. Since the United States has many measures designed to help debtors reorganize and work with creditors, one could imagine a situation where the Mexican creditors, for one reason or another, proceed against the debtors assets, while the creditors in the United States are constrained by an automatic stay. Since the INSOL statement is a voluntary agreement, there is nothing preventing the Mexican creditors from proceeding as if there was a treaty in place with a common automatic stay provision. Despite these problems, the INSOL principles deserve recognition for contributing to the increased level of cooperation now found in cross-border insolvency proceedings by getting creditors more involved in the cooperative atmosphere. In the future, creditors can be a driving force behind the creation of an insolvency treaty, as creditors do not like to see creditors in another country receive better treatment - i.e., collection of their assets - just because they are stationed in another country. An insolvency treaty can serve to make all creditors similarly situated, and reduce the rush for judgment often found in current cross-border insolvencies.

D. Problems Inherent in the Current Modes of Cooperation

The more bankruptcy courts communicate and cooperate with bankruptcy courts in other countries, the more debtors and creditors in cross-border insolvencies stand to benefit. While the methods described above certainly will push the international insolvency field towards a more cooperative and congenial atmosphere, there remain many problems that will limit their impact. Though some of these problems have been addressed within the text already, they will be more fully developed in this section.

From a problematic standpoint, the first thing that should be examined is the lack of firm, binding substantive principles in all of the efforts previously addressed. Those efforts are only guiding principles, primarily focused on increasing cooperation and communication among the various parties and court systems. The efforts do nothing to address the substantive differences in the laws of the NAFTA countries, nor do they provide a firm guideline for companies to follow when planning and executing cross-border transactions. As the amount of trade and activity amongst the NAFTA countries continues to increase, companies will face an increasing amount of cross-border insolvency situations, with both their assets and their creditors spread throughout more than one

of the countries. In cross-border insolvencies, the more defined cross-border insolvency laws and procedures are, the better off debtors and creditors are going to be. The Model Law and the TIP both leave too much discretion in the hands of judges, and fail to provide enough predictability for the business community. Voluntary creditor agreements, while creative and admirable, lack the authority and binding nature to make them effective; especially in cross-border insolvency situations. Companies and creditors will be better served by substantive measures codified in a treaty.

A second problem with these efforts is that, even if they are adopted by the legislatures (as with the Model Law), the courts (as with the TIP) or the creditors themselves (as with INSOL), they contain too many escape hatches to make them effective. As already mentioned, even if the Model Law is adopted into a country's bankruptcy code, courts can opt out of its provisions during a case through the public policy exception.⁴⁰ In addition the adopting country is free to modify the Model Law as they see fit before they adopt it. Taken to its extreme, this could lead us to the exact situation we are in now - each country adopting the Model Law in a different form, thus preventing the goal of harmonization. This can be seen with the case of South Africa, which made a substantial change in the Model Law by declaring that the legislation was applicable only to "officially designated" countries.⁴¹ Getting a foreign country so designated, or getting their designation revoked, is "not as routine as it may appear because both types of notices [of designation] must be approved by the South African Parliament before they become official."⁴² In effect, by not making the Model Law automatically applicable to all cross-border insolvency proceedings, the South African parliament retained its ability to negotiate individual designation treaties or agreements with other countries. There is some evidence that this clause was inserted to combat the lack of reciprocity in the Model Law and to guarantee that South African companies operating in foreign countries would be extended the same protections as foreign companies and representatives would be extended in South Africa.⁴³

40. See discussion *supra* Part II A.

41. INT'L INSOLVENCY IN THE NEW MILLENNIUM, *supra* note 20, at 12.

42. *Id.*

43. BASIL COUTSODIS, UNCITRAL, UNICITRAL INSTRUMENTS IN SOUTH AFRICA 1 (1999), at <http://www.law-online.co.za/IntTradeLaw/UNCITRAL%20Instruments.htm> (last visited May 4, 2002) (describing the legal instruments discussed at a UNCITRAL conference held at Rand Afrikaans University in May of 1999). Mr. Coutsoodis noted that:

This is just one example of how, with the implementation of the Model Law, countries can bypass the cooperative intent of the drafters and adjust the scope of the laws in a manner more closely aligned with their own national insolvency laws and interests.

A third problem is to whom each of the efforts is addressed. The Model Law is addressed to the legislatures of any and all countries. Thus, the provisions contained within are aimed at insolvency proceedings involving any country in the world. While this may make the provisions ideal for application in insolvencies involving two countries that have limited interaction, they are not practical for situations involving countries that do a great deal of business with each other; for example, the NAFTA countries. This is evidenced by the European Union's recent adoption of their own regulation to cover inter-union cross-border insolvencies, rather than leaving it up to the individual member states to enact the Model Law.⁴⁴ As Professor Westbrook stated, "although the Model Law represents an important first step in international cooperation, it is necessarily limited in its scope by its global intentions."⁴⁵ While the Model Law is aimed too broadly, the TIP suffers from the opposite problem - it is aimed at too narrow a target. The TIP correctly identifies that the NAFTA countries, due to their increasing dependence on and trade with one another, are in a position to establish a more cooperative approach for addressing cross-border insolvencies. However, by focusing on a private-sector initiative and depending on courts for implementation of the guidelines, the TIP cuts out the legislatures of the NAFTA countries. The INSOL principles suffer from being overbroad, in that

Both the committee of the Society of Advocates of Natal, and the Society of Advocates of South Africa (Witwatersrand Division) have expressed concern . . . that [the Model Law] does not provide for reciprocity prior to requiring a mandatory recognition of foreign insolvency proceedings This is clearly a valid concern, which needs to be urgently addressed prior to the adoption of the Model Law. It is suggested that a degree of reciprocity be required, prior to compelling South African Courts to recognise foreign proceedings.

Id. at 4. These concerns would seem to have been addressed by the manner in which the South African parliament enacted the Model Law - requiring separate agreements with "officially designated" countries. At this time, the author was unable to determine whether or not the United States has become an "officially designated" country with respect to the application of South Africa's insolvency laws. For an in-depth review of how the Model Law will impact South Africa, see Alastir Smith & Andre Boraine, *Crossing Borders into South African Insolvency Law: From the Roman Dutch Jurists to the UNCITRAL Model Law*, 10 AM. BANKR. INST. L. REV. 135 (2002).

44. See discussion *infra* Part III.

45. Westbrook, *supra* note 3, at 100.

they are aimed at situations all around the world, and from being too narrow, in that they are aimed only at creditors. Compounding these problems is the fact that the INSOL principles do not require adoption by any governmental agency, the legislature (as with the Model Law), or the courts (as with TIP). They are completely devoid of any legal form and thus are completely unreliable from both the debtor and creditor perspective.

Another problem arises when we view international insolvency principles from a policy standpoint. Who should be leading the charge towards harmonized laws and procedures - the private sector or the United States government? Past governmental efforts at harmonization and cooperation have admittedly been poor, as "[b]ankruptcy has traditionally been among the most parochial of legal fields, with each country grabbing and distributing assets within its grasp with little attention to foreign courts and foreign laws."⁴⁶ In the past few years, however, we have seen the number and the sheer size (monetarily speaking) of cross-border insolvencies rise at a tremendous rate. As these numbers continue to climb, governments are going to be forced to turn their attention towards this area and make tough decisions about how they want their insolvency laws to interact with the insolvency laws of other countries. In the Singer Corporation's recent insolvency case, had the foreign creditors not cooperated in the manner that they did, and had instead forced the liquidation of the company and its assets, this might have provoked a hostile reaction from Congress.⁴⁷ As one commentator aptly stated, "[b]ankruptcy law has become so important to the national economy that reform no longer can be left to a few academics and insolvency practitioners."⁴⁸ Nor can the United States government sit by and watch as

46. *Id.* at 99.

47. See Flaschen, *supra* note 16, at 15 (detailing how a "global meltdown" of Singer at the hands of creditors all around the world was able to be avoided). While in the Singer case the spirit of cooperation triumphed, there is no reason to believe that the same result can be achieved in future cross-border insolvencies. With a treaty in place, many of the problems faced in the Singer case could have been avoided, and a "global meltdown" would have been less of a worry. However, as with the Singer case, there may be assets and creditors in countries other than the United States, Mexico and Canada, and thus outside any insolvency treaty between those countries. In that situation, under the insolvency regime proposed by this article, courts would utilize the provisions of the NAFTA insolvency treaty first, and then utilize the Model Law and other cooperation procedures in their interaction with other countries. In this role, the Model Law serves as a secondary measure, from which to fill in any gaps from the NAFTA treaty, and in dealing with non-signatory countries.

48. Boshkoff, *supra* note 5, at 935.

other countries negotiate and ratify their own insolvency treaties and agreements; as the EU recently did. Each new agreement signed without the participation of the United States government, whether they are directly binding on the United States or will bring their effects to our shores indirectly through American companies operating overseas, will establish new rules and policies without taking into account American interests. While neither minimizing the accomplishments of groups such as the ALI and UNCITRAL, nor the importance of the private sector in helping to push governments into action, the growing import and frequency of cross-border insolvencies calls for substantial government intervention in the form of a treaty.

Fortunately, other countries have recognized the need for reform, and their actions can provide important examples to the United States as it moves toward the enactment of an international insolvency treaty. The next part of this article will examine how the EU has acted to harmonize their cross-border insolvency laws and procedures.

III. THE EUROPEAN UNION'S APPROACH TO INSOLVENCY

In May of 2000, the European Union passed an insolvency regulation in order to ensure the effective and efficient operation of their internal market.⁴⁹ Similar to the argument for government intervention made in the previous section, the EU believed that insolvencies were having "more and more cross-border effects" and therefore there was "a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets."⁵⁰ Furthermore, the EU was of the opinion that the objectives behind this regulation "cannot be achieved to a sufficient degree at [the] national level"⁵¹

It is important to first note the form in which the EU acted. By placing the insolvency guidelines in a regulation, as opposed to

49. EUROPEAN COMMUNITY, COUNCIL REGULATION (EC) No. 1346/2000 OF 29 MAY 2000 ON INSOLVENCY PROCEEDINGS, pmbl., para. 2, at <http://europa.eu.int/en/index.html> (last viewed April 20, 2002) [hereinafter COUNCIL REGULATION]. This regulation represents a long-time effort by the European countries to come to an agreement on insolvency proceedings and policies. Previous attempts included the 1982 European Community Draft Bankruptcy Convention, the 1990 Council of Europe Convention on Certain International Aspects of Bankruptcy, and the 1995 European Union Convention on Insolvency Proceedings. Colloquim, *Harmonization of Int'l Bankr. Law: A U.S. Perspective*, 64 FORDHAM L. REV. 2543, 2555 (1996).

50. COUNCIL REGULATION, *supra* note 49, at para. 3.

51. *Id.* at para. 4.

a directive, the EU ensured that they would take direct effect in the member states, thereby eliminating the need for domestic-enabling legislation.⁵² In addition, this regulation replaces many pieces of domestic legislation and treaties that the member states had in force already; including the Nordic Convention as it relates to Finland and Sweden, and nine other bilateral conventions that were in place between various member states.⁵³ This unique supranational application of law onto the insolvency laws of sovereign nations can serve as a model for a treaty between the NAFTA countries. This is true despite the fact that while NAFTA and the EU were both created out of treaties signed by their member states, the NAFTA treaty did not create a supranational governing body like the EU treaty. Therefore, any further insolvency treaty would have to be created by the governments of the NAFTA countries and either be added to the original treaty, or be contained in a separate treaty.⁵⁴

The new EU regulation could be a subject for a separate article, and this paper will address only some of its most important aspects. The most important aspect of the EU regulation is how it addresses the question of jurisdiction for insolvency proceedings in separate countries. Under the regulation, the insolvency proceedings shall be opened in the “courts of the Member State within the territory of which the centre of a debtor’s main interests is situated”⁵⁵ Any subsequent insolvency proceedings that are opened in another member state will be “restricted to the assets situated in [that member state]” and will be considered

52. Leonard, *Year in Review*, 2000, *supra* note 24, at 24. For an explanation of the differences between regulations, directives, and other types of legislative action the EU can take, see EUROPEAN UNION, *THE ABC OF COMMUNITY LAW, THE COMMUNITY’S RANGE OF TOOLS*, at http://www.europa.eu.int/eur-lex/en/about/abc/abc_20.html (last visited May 4, 2002).

53. INT’L INSOLVENCY, *supra* note 7, at 77; COUNCIL REGULATION, *supra* note 49, at art. 44.

54. For a thorough review of the structural differences between NAFTA and the EU, see James M. Boyers, *Globalization and the United States Constitution: How Much Can it Accommodate*, 5 IND. J. GLOBAL LEG. STUD. 583, 588-99 (1998) (distinguishing NAFTA from the European Union).

55. COUNCIL REGULATION, *supra* note 49, at art. 2-3, para. 1. The “centre of main interests” is presumed to be the place of the registered office in the absence of proof to the contrary. *Id.* There is uncertainty about how courts will define and apply this term, so it remains to be seen if it will have a broader scope that was intended. See FRESHFIELDS BRUCKHAUS DERINGER, *THE EU REGULATION ON INSOLVENCY PROCEEDINGS 6*, Dec. 2000, [hereinafter EU REGULATION] available at <http://www.freshfields.com/practice/finance/publication/pdfs/2845.pdf> (last visited April 20, 2002) (speculating on reaction to the insolvency regulation).

“secondary proceedings.”⁵⁶ This seems to serve two purposes: first, to protect the interests of the creditors situated in that state, and second, to assist the main proceeding in circumstances where the debtor’s estate is too complex or diverse to administer as a whole.⁵⁷ The main proceeding is not without any control over the secondary proceeding though, as the court handling the secondary proceeding “shall” grant a stay to the liquidator from the main proceeding if so requested, unless the secondary proceeding is “manifestly of no interest to the creditors in the main proceedings.”⁵⁸

Choice of law is another area that is important, as the laws of the member state where the main proceeding is situated will, except where the regulation provides otherwise, apply to all procedural and substantive matters.⁵⁹ Clearly, the insolvency laws of the EU member states contain differences similar to those that exist between the insolvency laws of the NAFTA countries.⁶⁰ Instead of trying to come to a consensus and develop a common set of laws, the EU chose to remain more focused on the procedural aspects and the facilitation of insolvency cases. This approach could provide an appropriate model for a NAFTA treaty to those parties that worry about American companies being subjected to the insolvency laws of another treaty member. Under the “centre of main interests” approach taken by the EU regulation, companies that were incorporated and based in the United States would continue to apply for bankruptcy in the U.S. system and be subjected to the decisions of U.S. courts. While some assets in other countries would be subject to secondary proceedings, these proceedings could be stayed through a system as described above, and thus they would not lose total control of them as well. To create harmonized law is an admittedly difficult task, and so the EU approach offers a clear model for a NAFTA treaty that would create set, fixed policies and procedures, yet leave room for the differences in the substantive law of the three countries. It would offer debtors and creditors a clear understanding on how the bankruptcy courts of one of the NAFTA countries would view proceed-

56. COUNCIL REGULATION, *supra* note 49, at art. 3, para. 2-3.

57. EU REGULATION, *supra* note 55, at 7.

58. COUNCIL REGULATION, *supra* note 49, at art. 33, para. 1.

59. *Id.* at art 4; EU REGULATION, *supra* note 55, at 7.

60. For example, “[t]he French put great emphasis on protecting the rights of the workforce, and trying to save their jobs. [Whereas Germany maintains] deeply entrenched preferential rights which make almost all cases completely academic for the ordinary trade creditor.” Boshkoff, *supra* note 5, at 936.

ings in the other countries, how those proceedings would relate to one another, and what law would be applied to all of their assets. More importantly, unlike the Model Law, the EU approach ensures that there will be reciprocity among the courts of the member states, thus reducing the types of concerns seen in the adoption of a modified Model Law by the South African parliament.

This regulation, with its definitive cross-border insolvency rules and procedures, entered into force on May 31, 2002.⁶¹ Seeing how it is viewed is a "major step forward in international insolvency cooperation," how European courts and companies react to it will be "watched with great interest by insolvency professionals and those involved in the international credit area."⁶²

IV. OTHER TREATIES THE UNITED STATES HAS ENTERED INTO AND THE PRECEDENT THEY CAN PROVIDE FOR AN INSOLVENCY TREATY

Since the very origins of the United States, the government has used treaties in a wide variety of legal areas, including the social, criminal and commercial contexts.⁶³ Likewise, within the dealings of the United States with Mexico and Canada, there are numerous examples of successful implementation of treaties. For purposes of this paper, I will be drawing on the experience of a limited number of treaties, including the failed U.S.-Canada insolvency treaty, and the tax treaties between the United States and Canada and the United States and Mexico.

A. *General Information on Treaties*

There has always been a love-hate relationship between the United States and treaties. On one hand, there is a movement that pushes for international treaties as a means of solidifying our relationships with foreign countries, establishing set laws and policies, and opening up more markets for American products. On the other hand, the United States has always been fiercely indepen-

61. INT'L INSOLVENCY, *supra* note 7, at 75.

62. Leonard, *Year in Review*, 2000, *supra* note 24, at 24.

63. *See, e.g.*, Agreement Between the United States of America and Canada Regarding Mutual Assistance and Co-operation Between Their Customs Administrations, June 20, 1984, U.S.-Can., 1984 U.S.T. LEXIS 109; Extradition Treaty Between the Gov. of the United States and the Gov. of Belize, Mar. 30, 2000, U.S.-Belize, 2000 U.S.T. LEXIS 59; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 2000 U.S.T. LEXIS 160.

dent, and many groups consistently worry about the United States losing its sovereignty through treaties and other international agreements. This can put us at odds with the rest of the world, as evidenced by our recent failure to ratify the Rome treaty that created the world's first permanent war crimes tribunal.⁶⁴ Although then-President Clinton originally signed the treaty, the United States Congress has refused to ratify it because of fears that "its citizens would be subject to frivolous or politically motivated prosecutions."⁶⁵ There is evidence that the United States is slipping behind other countries in the negotiation of free trade agreements as well.⁶⁶ Therefore, in the negotiation and drafting of an insolvency treaty between the NAFTA countries, these types of fears must be kept in mind and addressed in order to ensure ratification. Unlike the Rome treaty, an insolvency treaty would not deal with issues of national security and prosecution of public and military authorities - things that rate very high on the government's list of sovereign rights. An insolvency treaty is a commercial treaty, and thus it may receive less scrutiny from Congress. In

64. *New Era in War Crimes Justice*, N.Y. TIMES, May 4, 2002, at A12. See also, Barbara Crossette, *Washington is Criticized for Growing Reluctance to Sign Treaties*, N.Y. TIMES, Apr. 4, 2002, at A5 (highlighting the problems being created in the rest of the world by the current administration's reluctance to sign treaties).

65. *New Era in War Crimes Justice*, *supra* note 64, at A12. Just recently, the Bush administration "unsigned" the Rome treaty, effectively removing President Clinton's signature from the treaty and stated that the "new International Criminal court should expect no cooperation from the United States . . ." Neil A. Lewis, *U.S. Rejects All Support For New Court on Atrocities*, N.Y. TIMES, May 6, 2002, at A11. This administration has also recently rejected American ratification of the Kyoto Protocol, which dealt with environmental policies and the reduction of greenhouse gases. Andrew C. Revkin, *Bush Offers Plan for Voluntary Measures to Limit Gas Emissions*, N.Y. TIMES, Feb. 15, 2002, at A6. Given these recent moves, the creation of a cross-border insolvency treaty could face opposition from this administration. It must also be noted, however, that unlike the International Criminal Court, the purposes of an insolvency treaty are to protect American interests abroad, and not extend jurisdiction over them to a supranational body. American companies are already operating all over the world, and especially within Canada and Mexico. Without a treaty in place, insolvent American companies are at risk of detrimental treatment from foreign court systems and creditors. Therefore, a treaty would help to protect American interests in foreign court proceedings that they are already exposed to, and not create any new risks - hopefully reducing this administration's anti-treaty feelings.

66. See Robert B. Zoellick, *Falling Behind on Free Trade*, N.Y. TIMES, Apr. 14, 2002, at Sec. 4, pg. 13 (stating that there are 150 regional free-trade and customs agreements, and the United States is party to only three of them). Mr. Zoellick, the United States Trade Representative in the George W. Bush administration, further noted that the EU has twenty-nine free trade agreements, and is negotiating with twelve more countries, while Mexico recently negotiated nine free trade agreements with twenty-nine countries. *Id.*

addition, an insolvency treaty may draw less opposition due to the preeminence of U.S. bankruptcy law in the field of international insolvency.⁶⁷ Many companies, both domestic and foreign, regularly seek the protection of U.S. law due to its debtor friendly provisions, advanced procedures and provisions, and the familiarity of U.S. bankruptcy courts with large cross-border insolvency cases. As one commentator stated:

An emerging trend is for a multinational group of companies to file in a U.S. bankruptcy court and request that the U.S. court exercise its jurisdiction over all of the affiliated debtor's assets and creditors, regardless of location. . . . [A] successful filing here has huge potential rewards because U.S. bankruptcy laws offer broad opportunity for reorganization.⁶⁸

Thus, there is a good chance that the United States may be successful in negotiating an insolvency treaty with terms that are very favorable to American interests, represent the codification of portions of U.S. bankruptcy law, and attract little opposition from members of Congress or the current administration.

B. The Failed U.S. and Canada Insolvency Treaty

While the previous section detailed some general issues surrounding treaties, an analysis of the efforts of the United States in past treaties can also prove beneficial. One specific instance, which is perfectly on point for a modern insolvency treaty, is the previous effort of the United States and Canada to develop an insolvency treaty. Started in 1973, the efforts of U.S. and Canadian representatives to come to an agreement on an insolvency treaty were ultimately halted in 1982 at the request of Canada,

67. See DR. CHRISTOPH G. PAULUS, *Some Thoughts on an Insolvency Procedure for Countries*, Part B.I at <http://iiglobal.org/international/resources.html> (stating that "[t]he ideal of a 'fresh start' which is obvious in the USA . . . is also being adopted in other countries and [this] is reflected linguistically by the application of the word 'insolvency' instead of 'bankruptcy'. . . . This implies a change in values because insolvency . . . is considered a part of the economic ups and downs and is treated accordingly.").

68. Knowles, *supra* note 10, at 2. As Ms. Knowles points out, cases such as these raise "issues of how a U.S. court can tell creditors and courts in other countries what they can and cannot do with assets and claims in those other countries - and for these reasons such a case filed here *might* be dismissed." *Id.* (emphasis in original). The simple answer to Ms. Knowles' question is a treaty - as this would provide courts with specific instructions to follow when addressing proceedings in other countries. If they were in a country with which the United States did not have a treaty, then the courts and the parties could fall back on cooperation measures such as the Model Law or the TIP.

and never resumed by either party.⁶⁹ There are various rationales for why these attempts at a treaty ultimately failed. Some suggest that the treaty failed because “it was politically unpopular [due to] its underlying and basic concept: ‘there shall be a single administration of the estate of the debtor.’”⁷⁰ Others view its failure as rooted in the differences that existed between U.S. and Canadian bankruptcy laws at the time, and the domestic effort Canada was then undertaking to reform and update their bankruptcy laws.⁷¹ In addition, this view believes that when Canada’s reforms were finished, the actors who had been concerned with the bilateral treaty in the past had already shifted their attention to universal efforts such as the UNCITRAL Model Law.⁷² One of the participants in the treaty negotiations even “opined that the major cause of the failure of the negotiation was the opposition of the United States Internal Revenue Service over a perceived loss of priority in bankruptcy as a result of the draft treaty.”⁷³ Whatever the reason for failure was, it is important to review the terms of that proposed treaty and to determine if in this new cooperative climate, they could be included in a modern treaty.

As previously mentioned, the treaty sought to create a system in which there would be a “single administration of the estate of the debtor.”⁷⁴ This runs contrary to both the modern trend of cooperation between simultaneous insolvency proceedings, and the recognition of the EU that secondary insolvency proceedings can even prove helpful in large, complicated cross-border insolvencies.⁷⁵ The consolidation of a majority of the decision making ability into one main proceeding can be a good idea when considered from an efficiency perspective, as well as when considering the interests of the debtor and creditors. Recent cases, however, have demonstrated that bankruptcy courts in different countries can work together, and thus it is not necessary for a treaty to force all activity into one proceeding. In addition, allowing the limited participation of ancillary proceedings, as in the EU regulation, can serve to reduce fears among corporations and Congress that the

69. INSOLVENCY TREATISE, *supra* note 6, at 3-8.

70. Dargan, *supra* note 8, at 116.

71. INSOLVENCY TREATISE, *supra* note 6, at 3-9.

72. *Id.*

73. *Id.* (recording a conversation with Professor Nadelmann, one of the participants in the treaty negotiations).

74. See discussion *supra* Part III.

75. COUNCIL REGULATION, *supra* note 49, at art. 1, para. 1 (stating that the purposes of a secondary proceeding is “to assist the main proceeding in circumstances where the debtor’s estate is too complex or diverse to administer as a whole.”).

U.S. bankruptcy courts may have no involvement in insolvency proceedings with American interests. For these reasons, it is clear that the proposed treaty went too far in limiting all decision making to a single main proceeding, and that this aspect should not be carried forward into a modern treaty. A system that divides responsibility between a main proceeding and limited ancillary proceedings, with firm guidelines in place to facilitate the interaction of the multiple proceedings, would be the more desirable approach.

Instead of creating harmonized substantive law, the proposed treaty "provid[ed] for a choice of law which in general, will govern all proceedings."⁷⁶ The proposed treaty applied a two-part system for determining where the proceeding would be based and which law would apply. The treaty stated that:

[J]urisdiction . . . is given to the State that has located within its territory 'the greater portion on the value of the property of the debtor.' The Courts of that State will apply its laws to the proceedings and administer the estate. The trustee appointed in the State having jurisdiction will be able to Exercise his powers in both States.⁷⁷

Given the conclusion of the previous discussion - that establishing a single proceeding is unnecessary - the jurisdictional element of the new treaty will be slightly less important and can be more flexible. As with any cross-border situation, however, there will have to be some method for establishing where the main proceeding should take place. Rather than having a first-to-file system of priority, a modern treaty should establish a method for measuring the interests of the debtor, creditors, and the countries involved before making a jurisdictional decision. The method used in the proposed treaty, based solely on the "value of the property of the debtor" is too mathematical and inflexible for acceptance. On the other hand, the standard preferred by the EU, the "centre of main interests," is too indeterminate and flexible, and therefore it is expected to be a constant source of argument and litigation in the future.⁷⁸ I would propose a system that places a premium on the state of incorporation, yet also takes into account the location of the assets and the location of the creditors. By including the state of incorporation in the jurisdictional question one can assure that companies continue to maintain their incorpo-

76. *In re Toga Mfg. Ltd.*, 28 B.R. 165, 170 (Bankr. E.D. Mich. 1983).

77. *Id.* at 169.

78. EU REGULATION, *supra* note 55.

ration in the NAFTA countries, thus preserving many powers of corporate control to these countries. The fears of the IRS should be reduced, as this standard would inhibit a corporation's ability to incorporate in a foreign country as a means of avoiding American tax laws.⁷⁹ However, by having a set formula that also addressed the location of assets and creditors, it would prevent companies that, for example, incorporate in the United States, yet keep all of their operations and activities in Mexico, from arguing that the main proceeding should be in the United States.

No matter which jurisdictional formula a treaty employs, it will always be a source of argument and litigation given the growing complexity of cross-border insolvencies. The only sure way to avoid these types of arguments is to create harmonized insolvency laws. While jurisdictional arguments may still result based on language problems, court resources, and the convenience for debtors or creditors, harmonized substantive laws would eliminate the forum shopping problems currently found in cross-border insolvencies. In the failed U.S.-Canada treaty, the State with jurisdiction had total control of the proceedings and would apply its insolvency laws to the debtor's entire estate. This placed too much emphasis on the forum, and would have encouraged the parties to try and force the proceeding into their favored jurisdiction. In effect, this provision would have run counter to the overall goal of the subsequently negotiated NAFTA treaty - to increase cross-border transactions and free trade.⁸⁰ Corporations would have been encouraged to keep their transactions and assets within the borders of their host country, rather than risk exposure to insolvency proceedings in another country. With harmonized substantive laws, these concerns would be eliminated, and corporations would be encouraged to seek out transactions across all three countries, in furtherance of the stated goal of NAFTA.

One aspect of the proposed treaty that was commendable was its overall mission to "provide an equitable, predictable, efficient, and yet flexible system to administer international bankruptcies

79. As discussed *supra* at note 69, some believe IRS concerns worked to derail the proposed treaty. Tax avoidance through re-incorporating in a foreign country is becoming an increasing problem in the United States, and utilizing incorporation in this jurisdictional formula may help to curb this practice. See David Clay Johnson, *Vote on an Offshore Tax Plan is Rolling a Company Town*, N.Y. TIMES, May 9, 2002, at A1 (describing the controversy surrounding Stanley Works decision to reincorporate in Bermuda in order to realize an estimated tax savings of \$30 million per year).

80. See NAFTA, *supra* note 9.

involving Canada and the United States.⁸¹ After a review of the main provisions of that treaty, it seems clear that they failed in their achievement of their mission. While it did propose a predictable system, the methods it employed did little to promote efficiency, flexibility, or an equitable result. Its goal should, however, be carried forward and incorporated into a modern treaty amongst the NAFTA countries.

C. *The Tax Treaties in Force Between the NAFTA Countries*

Lessons for an international insolvency treaty can be found by examining how the United States has utilized treaties to address international taxation issues. As with other areas of the law, the United States has increasingly turned towards treaties as the preferred method for harmonizing tax laws and procedures with foreign countries.⁸² The American Law Institute recently updated their treatise on *International Aspects of United States Income Taxation* in order to provide practitioners with a "valuable tool for comprehending the *increasingly important role of treaties* in determining the tax consequences of international transactions."⁸³ The numerous tax treaties now in existence have served to harmonize tax laws, especially in regards to how they operate in cross-border situations. This harmonization "stems in large part from early efforts of cooperation . . ."⁸⁴ Similar to the current UNCITRAL Model Law, countries had model tax treaties available to serve as a springboard for the negotiation of the terms of a tax treaty; including the 1963 and 1977 OECD Model Law, the 1980 UN Model, and the 1981 U.S. Model.⁸⁵ Furthermore, national tax systems are just as divergent as national insolvency systems, yet this has not prevented the successful utilization of treaties on tax issues. Tax systems can be broken down, based on their main

81. *In re Toga Mfg. Ltd.*, 28 B.R. 165, 169 (Bankr. E.D. Mich. 1983).

82. As of 1997, the United States was a party to tax treaties with at least eighty-eight other countries. See generally RICHARD L. DOERNBERG & KEES VAN RAND, U.S. TAX TREATIES 77 (1997) [hereinafter U.S. TAX TREATIES] (providing a chronological list of U.S. income tax treaties).

83. AMERICAN LAW INSTITUTE, INT'L PRACTICE: ALI INT'L LAW PUBLICATIONS, OVERVIEW OF INT'L ASPECTS OF U.S. INCOME TAXATION, available at <http://www.ali.org/ali/712.htm> (emphasis added). It is interesting to note that the ALI recognizes the importance of treaties in the field of international tax, but remains unconvinced of their potential in the field of international insolvency. See text *supra* note 1.

84. HUGH J. AULT, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 367 (1997) [hereinafter COMPARATIVE INCOME TAXATION].

85. U.S. TAX TREATIES, *supra* note 82, at Forward.

characteristics, into several general families: the Commonwealth systems of countries such as the U.K. and Australia; the Continental system of countries such as Germany and France; and more the independent systems of the United States and Japan.⁸⁶ How treaties have overcome these inherent structural differences can provide guidance for overcoming the differences between the civil and common law approaches to insolvency. Thus, an examination of the development of tax treaties from an era of cooperation, based on Model Laws, and overcoming significant structural differences between the signatory countries, can prove useful for the development of insolvency treaties from the current atmosphere of cooperation and Model Laws.

One important use of treaties in the field of tax is to eliminate differences in taxation based on the location or nationality of the taxpayer.⁸⁷ Due to this goal, "treaty provisions are generally reciprocal in nature."⁸⁸ For example, prior to the tax treaty signed by the United States and Canada, Canadian citizens with property in the U.S. faced double taxation at death, whereas U.S. citizens received a deduction for any Canadian tax paid as a claim against the estate.⁸⁹ The tax treaty signed by the two countries served to reduce this divergent treatment, and brought the policies of each state in closer alignment. The United States has taken this same approach with many other countries, modifying it as needed to fit the concerns of a foreign country. Often these treaties are based significantly on model laws, with the most important being the OECD Model Law. "All of the countries have treaties which are based broadly on the OECD Model Convention."⁹⁰ In addition, many countries have developed their own model conventions or treaties, "which set forth the basic positions that their treaty negotiators will be taking in the opening round of

86. COMPARATIVE INCOME TAXATION, *supra* note 84, at 1. One treatise describes the U.S. and the U.K. national tax systems as, "by their nature, incompatible and any treaty endeavoring to evolve an equitable sharing of the cross-frontier tax burden becomes even more of a compromise than one between two countries using the same system." Jerrold Cohen, Ernst & Whinney, UK/US DOUBLE TAX TREATIES GUIDE 1 (1980).

87. Sharon Lorraine Brown, Note, *Tax Ramifications of the Third Protocol to the 1980 United States-Canada Income Tax Treaty on United States/Canadian Citizens, Permanent Resident Aliens, and Non-Resident Aliens Who Engage in Cross-Border Estate Planning*, 21 SUFFOLK TRANSNAT'L L. REV. 307, 324 (1998).

88. INTERNAL REVENUE SERVICE, INFORMATION ON THE U.S.-CAN. INCOME TAX TREATY, Intro., Pub. 597 (Rev. May 1998), available at <http://www.irs.gov/pub/irs-pdf/p597.pdf> (last visited May 4, 2002).

89. Brown, *supra* note 87, at 308-09.

90. COMPARATIVE INCOME TAXATION, *supra* note 84, at 467.

treaty discussions.”⁹¹ In the current insolvency arena, the UNCITRAL Model Law, as well as the TIP, can serve as the springboard for many of the terms of an insolvency treaty. In addition, during the negotiation of a treaty with the NAFTA countries, the United States could develop a model treaty that may later be used in negotiations with other countries.

On a more detailed level, the United States and Germany included in their tax treaty, “provisions allowing the parties to submit unresolved disputes arising from the terms of the convention to binding arbitration.”⁹² The inclusion of an arbitration provision is important because it guarantees that all participants “have the potential to realize a fair and consistent application of the terms of the Tax Treaty.”⁹³ This is an interesting concept that could help lend legitimacy to an insolvency treaty. Even if an insolvency treaty has set substantive law and procedures, disputes may arise through the interpretation of the treaty by one country’s courts. As will be discussed in Part V, an independent review board comprised of bankruptcy judges from all three countries could provide an important dispute settlement mechanism.

One area of concern that the tax treaties identify is how the NAFTA countries would recognize and treat an insolvency treaty in relation to their domestic legislation. Unlike other areas of the law, tax treaties do not necessarily supplant domestic legislation as the supreme law. As one author has explained:

Under constitutional principles in the United States, statutory [tax] law and treaties are of equal status. As a consequence, in the case of conflict between domestic legislation and treaty provisions, the later in time prevails. Thus, in principle, treaty obligations can be overridden by later, inconsistent domestic legislation.⁹⁴

While this would appear to limit the effectiveness of a treaty, by casting doubt upon its certainty and application, there have been very few pieces of domestic tax legislation that have overridden tax treaty provisions.⁹⁵ In addition, this does not seem to have

91. *Id.* at 476-78 (describing the model treaties of various countries).

92. Paul D. Tutun, Note, *Arbitration Procedures in the U.S.-German Income Tax Treaty: The Need for Procedural Safeguards in Int’l Tax Disputes*, 12 B.U. INT’L L.J. 180, 180 (1994).

93. *Id.*

94. COMPARATIVE INCOME TAXATION, *supra* note 84, at 467 (noting that courts require that “legislative intent to override a treaty obligation must be ‘clearly expressed’ . . .”).

95. *Id.*

caused conflict with Canada's treatment of the tax treaty - where treaties are put into effect by implementing legislation that "typically provides that the treaty will prevail over domestic law in the case of [a] conflict [between the two]."⁹⁶ In many other countries, treaty provisions automatically reign supreme over domestic legislation, without the need for implementing legislation. Therefore, in the drafting of an insolvency treaty, U.S. representatives should examine the other countries' implementation procedures and draft appropriate provisions concerning the implementation of the treaty.

The income tax treaty between the United States and Mexico is also a good example for an insolvency treaty in a number of respects. The treaty "provides conditions under which each country may tax income derived by individual residents of the other country from independent personal services or as employees"⁹⁷ This treaty was generally based on the "Model Treaty of the [OECD] and recent income tax conventions of both parties,"⁹⁸ which presents a similar atmosphere as currently found in the insolvency legal field. In addition, the treaty encouraged cooperation by "includ[ing] standard administrative provisions which will permit the tax authorities of the two countries to cooperate to resolve issues of potential double taxation"⁹⁹ and encouraged communication by providing that "competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement"¹⁰⁰ Most importantly, from an insolvency perspective, the tax convention provided detailed provisions for use in determining which state the taxpayer should be considered a resident of for purposes of taxation.¹⁰¹ In general, a taxpayer is "deemed to be a resident of the State in which he has a permanent home" or with no permanent home, the "State with which his personal and economic relations are closer (center of vital interests)."¹⁰² A similar balancing test contained in an insolvency treaty, as proposed in Part IV B, *infra*, would provide the bankruptcy courts with a proper method for

96. *Id.*

97. Tax Convention with Mexico, Sep. 18, 1992, U.S.-Mex., 1992 U.S.T. LEXIS 193, at letter of submittal from Secretary of State Warren Christopher (May 11, 1993).

98. *Id.* at letter of transmittal from President William J. Clinton (May 20, 1993).

99. *Id.* at letter of submittal from Secretary of State Warren Christopher (May 11, 1993).

100. *Id.* at art. 26, para. 4.

101. *Id.* at art. 4-5.

102. *Id.* at art. 4, para. 2(a).

determining where the primary insolvency proceeding should be filed.

While income taxation, carried out by governments, is different from insolvency proceedings, normally carried out by private parties, these treaties do provide strong examples of how a cooperative atmosphere, universal model laws, and government leadership can lead to the negotiation and implementation of workable treaties.

V. THE NEED FOR AN INSOLVENCY TREATY BETWEEN MEXICO, CANADA, AND THE UNITED STATES

As previously noted, the Model Law, INSOL, and the ALI's TIP are good first steps in the move towards cooperation in cross-border insolvencies, however, more needs to be accomplished within the NAFTA countries. Some would argue that the similarities in the Canadian and U.S. bankruptcy codes, as well as the increase in cooperation between their courts, forecloses the need for a bankruptcy treaty between these countries.¹⁰³ However, without a treaty establishing firm guidelines, procedures and harmonized laws, too much discretion is left in the hands of judges for determining the level of recognition given to foreign proceedings, and not enough certainty is given to companies engaged in cross-border transactions. In addition, Mexico is just as important a trading partner to the United States as is Canada, and with NAFTA already in place, an insolvency treaty between those three countries is a natural next step.

Mexico, as a civil law country, seems to present some obstacle to the adoption of a treaty with the United States and Canada, two common law countries.¹⁰⁴ When one looks at the substantive provisions of the bankruptcy codes of the NAFTA countries, however, it becomes evident that the differences are not insurmountable. In addition, these differences present the perfect reason for a treaty between the NAFTA countries, and help to counter the argument previously advanced concerning a treaty with Canada. Mexico's recent adoption of the Model Law into their bankruptcy

103. See Perry, *supra* note 8, at 499 (questioning that "[p]erhaps the similarities of law and the emerging trend toward modified universality at customary international law are sufficient to preclude the necessity of a treaty.").

104. "The fundamental difference [between civil and common law systems] rather, lies in the powers granted the judiciary for solving disputes, the methods followed by the courts, and the value and force that the decisions of judges have in subsequent application and interpretation of a specific law or statute." 2 COLLIER INT'L BUS. INSOLVENCY, Mex., § 32.02(1) (2000).

code is an important first step in bringing their laws into accord with the United States and Canada, and this should signal responsiveness by their government towards further harmonization. Second, as a civil law country, Mexican judges must "strictly apply the law as written, and must render their decisions . . . 'pursuant to the letter of the law, or the judicial interpretation thereof, and in its absence, to general legal principles.'"¹⁰⁵ This makes the firm guidelines and laws of a treaty all the more important in the Mexican system. An insolvency treaty would allow the United States and Canada to help shape the laws that Mexican courts will follow, and provide a much higher degree of security and protection for their companies operating in Mexico. Along the same lines as written laws, "[t]he Mexican legal system is extremely formalistic in procedural matters. A case may be won or lost for exclusively procedural reasons."¹⁰⁶ An insolvency treaty could help to establish the procedures that Mexican companies, as well as American and Canadian companies, should follow in cross-border insolvency cases, and thus reduce their risk of a procedural default and adverse consequences.

There are also many similar provisions in the codes of the NAFTA countries that could be easily incorporated into the substantive text of a treaty. One such example is with automatic stays. All three countries have a version of the automatic stay in their bankruptcy codes. For example, in Mexico, "upon declaration by the court of a reorganization or a bankruptcy, a stay is automatically imposed, which forbids the making of payments or the delivery of goods and property of whatever kind to the bankrupt in payment of debts owing to the bankrupt."¹⁰⁷ Similarly, in the United States an "automatic stay gives the bankruptcy court an opportunity to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment and reorganization of his or her obligations."¹⁰⁸ Both countries view their automatic stay as extending to all of the debtor's assets worldwide.¹⁰⁹ A treaty would allow the NAFTA countries to work-out

105. *Id.*

106. *Id.* § 32.03(2).

107. *Id.* § 32.04(1)(e)(i).

108. *In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985).

109. See AMERICAN LAW INSTITUTE, TRANSNATIONAL INSOLVENCY PROJECT: INT'L STATEMENT OF MEXICAN BANKRUPTCY LAW 51 (Tentative Draft 1998) (stating, "a moratorium is automatically imposed, which . . . is deemed to have worldwide effects, which are therefore subject to recognition by foreign courts."); *In re Nakash*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (holding that for purposes of the automatic stay,

any differences that did exist in their automatic stay procedures, and place all three countries on the same playing field, with no competitive advantage over the other.

One commentator has suggested that a dispute settlement mechanism could be avoided in the terms of an insolvency treaty by the inclusion of the dispute mechanism resolution already in the main NAFTA treaty.¹¹⁰ Utilizing this supranational dispute resolution body should, however, be cautioned against, as it has become problematic in its application in non-insolvency related matters. Under Chapter 11 of NAFTA, "investor-to-state dispute resolution allows a private investor to prosecute a case against a NAFTA government for failure to provide a NAFTA-granted investor privilege."¹¹¹ One of the most famous cases arising under Chapter 11 is the Loewen Group Case, where the company is suing the United States for \$725 million as compensation for the damages they suffered at the hands of a Mississippi jury.¹¹² Suits such as this have thrown the NAFTA dispute resolution system into a high level of debate and controversy, and demonstrated the limitation and complications created by its dispute settlement mechanism. For these reasons, it is unlikely that it could be included in an insolvency treaty. Instead, an insolvency treaty should focus on providing communication and cooperation procedures similar to those contained in the Model Law, and, if there was a need to create some sort of independent body with limited review rights, to ensure that it was comprised of judges from each country.

Despite the previous discussion, NAFTA has been tremendously successful at achieving its main goal of increasing cross-border transactions and free trade.¹¹³ In the year 2000, in trade with its NAFTA partners, the United States exported \$288,151,000,000 worth of goods and imported \$365,120,000,000 worth of goods.¹¹⁴ As the amount of trade amongst the NAFTA countries continues to escalate, there is going to be a correspond-

"legislative history makes clear Congress' intent that 'wherever located' language be broadly construed to include property located inside and outside of the U.S.").

110. Perry, *supra* note 8, at 498.

111. PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY 1 (2001).

112. *Id.* at Executive Summary, iv-v.

113. See Perry, *supra* note 8.

114. 1996-2000 U.S. DEPT OF COMMERCE, INT'L TRADE ADMINISTRATION, U.S. COMMODITY TRADE BY GEOGRAPHIC AREA, NORTH AMERICAN FREE TRADE AGREEMENT (Canada + Mexico) (last updated Jan. 24, 2002), at <http://www.geocities.com/Pentagon/3076/> (last visited May 10, 2002).

ing increase in the amount of cross-border insolvencies involving the legal systems of all three countries. By taking firm steps towards the creation of an insolvency treaty, the governments of the NAFTA countries can prevent future disputes, protect the interests of their domestic companies, and further the increased level of cooperation and trade that has developed since the signing of the main NAFTA treaty.

VI. CONCLUSION

Cross-border insolvencies are already reaching record levels, both in terms of the size of the company involved and the number of different jurisdictions involved. Current national insolvency laws are ill-equipped for dealing with cross-border situations and national bankruptcy courts are in danger of becoming overwhelmed by their growing caseloads and increasing interaction with cross-border situations. Bankruptcy law is too important for "reform [to] be left to a few academics and insolvency practitioners,"¹¹⁵ and firm guidance from national governments is now required. The governments of Mexico, Canada, and the United States need to bring their bankruptcy laws back in symmetry with the bankruptcy market, and the most effective means for accomplishing that is through an international insolvency treaty.

115. Boshkoff, *supra* note 5, at 935.