

2001

## Is International Bankruptcy Possible?

Frederick Tung

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)

 Part of the [Bankruptcy Law Commons](#)

---

### Recommended Citation

Frederick Tung, *Is International Bankruptcy Possible?*, 23 Michigan Journal of International Law 31 (2001).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/536](https://scholarship.law.bu.edu/faculty_scholarship/536)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



# IS INTERNATIONAL BANKRUPTCY POSSIBLE?

*Frederick Tung\**

Introduction .....	2
I. Debating Universalism .....	9
A. <i>The Universalist Account</i> .....	10
B. <i>Rival Proposals</i> .....	12
C. <i>Is Universalism Possible?</i> .....	14
II. The Intuitive Implausibility of Universalism .....	15
A. <i>Bankruptcy's Wholesale Effects</i> .....	17
B. <i>Bankruptcy Recognition and Extraterritorial Jurisdiction</i> .....	18
III. The Game Theory of International Bankruptcy Recognition.....	22
A. <i>States' Interests and Preferences</i> .....	24
B. <i>Conflicting Bankruptcy Laws and the         Prisoners' Dilemma</i> .....	26
1. Conflicting Preferences and Cooperative Possibilities .....	27
2. The Universalist Dilemma .....	30
C. <i>Repeat Play and Conditions for Cooperation</i> .....	35
IV. Fitting Theory to Facts: Conditions of Play in International Bankruptcy .....	39
A. <i>Fuzzy Commitments</i> .....	40
B. <i>Consequences for Reciprocity</i> .....	45
1. Example 1: The European Union .....	46
2. Example 2: <i>Maxwell Communications</i> .....	47
C. <i>The Role of Courts and Judges</i> .....	52
D. <i>Numbers Problems</i> .....	54
V. Generalizing the Analysis: When Is Cooperation Possible? .....	59
A. <i>A Role for Regimes and Institutions</i> .....	60
1. Norm Elaboration .....	61

---

\* Visiting Professor Law, University of California, Hastings College of the Law (Fall 2001); Professor of Law, University of San Francisco School of Law. A.B. 1983, Cornell; J.D. 1987, Harvard. E-mail: [tungf@usfca.edu](mailto:tungf@usfca.edu); inet: <[www.usfca.edu/law/tung](http://www.usfca.edu/law/tung)>. Many thanks to Steve Bainbridge, Josh Davis, Morton Davis, Bill Dodge, David Franklyn, Jesse Fried, Andrew Guzman, Peter Huang, Lynn LoPucki, Eric Posner, Bob Rasmussen, Bill Wang, Jay Westbrook, and Michael Whincop for helpful critique of earlier drafts. This Article also benefited from the comments of participants at a Boalt Hall Law & Economics Workshop; a faculty colloquium at the University of California, Hastings College of the Law; the Arthur Moller Workshop at the University of Texas School of Law; the USC/UCLA Corporate Law Roundtable Conference 2001; and a faculty workshop at the University of San Francisco School of Law.

2.	Solving Numbers Problems .....	62
3.	Issue Linkage .....	64
B.	A Universalist Regime? .....	65
	Conclusion .....	70

### Abstract

*Although international business firms proliferate, there is no international bankruptcy system. Instead, bankruptcy law remains a matter for individual states. The failure of a multinational firm therefore raises difficult questions of conflict and cooperation among national bankruptcy laws. In the discourse over the appropriate design for an international bankruptcy system, universalism has long held sway as the dominant idea, embraced nearly universally by bankruptcy scholars. Universalism offers a simple and elegant blueprint for international bankruptcy. Under universalism, the bankruptcy regime of the debtor firm's home country would govern worldwide, enjoying global reach to treat all of the debtor's assets and claimants.*

*Despite its conceptual dominance and appeal, universalism has yet to find vindication in any concrete policy enactments. No universalist arrangements exist. While recent challenges to universalism have emerged, the current lively debate over universalism and rival proposals focuses almost exclusively on their comparative efficiencies. This article provides a new perspective and a novel critique of universalism. Applying insights from elementary game theory and international relations theory, this Article shows that universalism suffers serious feasibility constraints: it is politically implausible and likely impossible. Even for states interested in establishing universalist arrangements, they will be unable to do so. They will find themselves in a prisoners' dilemma with no ready solution. The Article concludes that universalism holds only dubious promise as a prescription for international bankruptcy cooperation.*

### Introduction

Scholars of international bankruptcy are caught in the grip of a failed idea: universalism. Generations of scholars have advanced the universalist mantra: i.e., that the assets and liabilities of a multinational firm in bankruptcy should be administered by one court applying one nation's

bankruptcy laws on a worldwide basis. Until recently, this advancement of universalism occurred largely without challenge. Even with recent challenges, however, universalism dominates the debate, as scholars attempt to debunk its claimed efficiency advantages.

This debate over universalism is misguided because, simply put, universalism will not work. In this article, I argue that universalism is politically implausible and likely impossible. No nation has adopted it, and it is unlikely that any will. States will be reluctant to commit to enforcing the decisions of foreign courts applying foreign bankruptcy laws against local parties. In addition, even assuming states exist that would be interested in universalism, structural problems will preclude the achievement of workable universalist cooperation.<sup>1</sup> I rely on elementary game theory and international relations theory to show that even states that prefer universalism will find themselves in a prisoners' dilemma with no ready solution. Impediments to cooperation will afflict even bilateral universalist ambitions, with multilateral universalism all the more unlikely. Because the claimed superior efficiency of universalism implicitly depends on its widespread adoption—if not ubiquity<sup>2</sup>—this implausibility of multilateral universalism is particularly damning to the universalist cause. Universalism should be shelved, and the terms of the scholarly debate should shift to more plausible goals.

Though international firms abound, with assets, employees, and creditors all over the world,<sup>3</sup> there is no international bankruptcy system. Instead, bankruptcy law remains a matter for individual states. The failure of a multinational firm therefore raises difficult conflicts among

---

1. Several impediments make cooperation unlikely. The universalist commitment suffers from crippling indeterminacy, so that even states interested in cooperating will not commit. A workable universalist system also depends on widespread adoption by many individual states, a structural requirement that makes universalist cooperation well-nigh impossible. *See infra* Part IV.

2. *See infra* Part IV.D.

3. DaimlerChrysler provides one nice example. It resulted from the merger of two auto makers—one German and one U.S.—that before the merger were already major players in their respective domestic auto industries. The combined firm maintains group headquarters in both Stuttgart, Germany, and Auburn Hills, Michigan, and its common shares are widely held by European, U.S., and other international investors. *See* DaimlerChrysler, Annual Report 2000 17. The company touts its common stock, the “DaimlerChrysler Share,” as “the world’s first truly global share.” *See* *DaimlerChrysler Investor Relations* [http://www.daimlerchrysler.com/investor/investor\\_e.htm](http://www.daimlerchrysler.com/investor/investor_e.htm) (last visited Aug. 4, 2001). In addition to its German and U.S. operations, DaimlerChrysler owns a 34% stake in Mitsubishi Motors Corporation (Japan) and a 9% stake in Hyundai Motor Company (South Korea). *See* DaimlerChrysler, Annual Report, *supra* at 44. As of December 31, 2000, DaimlerChrysler employed 416,501 people worldwide, of whom 196,861 worked in Germany and 123,633 worked in the United States *See id.* at 55.

national bankruptcy laws,<sup>4</sup> as well as jurisdictional conflicts among national courts attempting to apply those laws.

States have traditionally pursued a territorial approach. Each state applies its own laws with respect to the debtor's assets and creditors within its own borders. The result is a piecemeal, territorial disposition of the firm's assets and uncoordinated, territory-based distribution of value to creditors, in which each territory typically favors local creditors.

This territorial approach has long been the *bête noire* of international bankruptcy scholars, on both efficiency and fairness grounds. One fundamental purpose of bankruptcy law is to halt the destructive race of creditors that otherwise occurs when a firm suffers financial distress. Ideally, bankruptcy imposes a collective proceeding that halts individual creditor collection efforts and attempts to preserve whatever going concern value the firm may have, in order to benefit creditors as a group.<sup>5</sup> By contrast, piecemeal territorial asset disposition is inefficient; it may diminish the overall value of firm assets.<sup>6</sup> Uncoordinated territory-based distributions to creditors also raise fairness concerns: similarly situated creditors of the firm should be treated equally, regardless of their location.<sup>7</sup> Translating these bankruptcy law goals into the international context, however, has been problematic.

While various proposals for international bankruptcy reform have emerged, historically, scholars have almost invariably advocated a universalist approach.<sup>8</sup> The fundamental tenet of universalism is "one law,

---

4. In addition to bankruptcy law, the conflict would include each state's other debtor-creditor laws as well.

5. See generally Frederick Tung, *Confirmation and Claims Trading*, 90 Nw. U. L. Rev. 1684, 1689 (describing corporate reorganization under U.S. law) [hereinafter, Tung, *Confirmation and Claims Trading*]; Philip R. Wood, *Principles of International Insolvency* 1 (1995) (discussing general principles of insolvency).

6. Firm A's assets are likely to be worth more as an integrated operation across international borders than if the State A assets are segregated from those in State B. For instance, suppose the firm manufactures integrated circuits. It designs the products in State A and mass produces them in State B. The design and manufacturing operations are very likely worth more working in tandem than if they are cleaved along national boundaries and sold separately. Even if the firm is liquidated, an orderly liquidation will yield more value than the uncoordinated collection activities of individual creditors.

7. See *infra* Part I.

8. The dominance and longevity of the universalist idea is evidenced by its appearance in 1888 in the very *first* volume of the Harvard Law Review, in which Professor John Lowell of the Harvard Law School made the case for "a single proceeding . . . at a single place." John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 Harv. L. Rev. 259, 264 (1888). Subsequent scholarship to the present has regularly made the case for universalism. See, e.g., Donald T. Trautman, *Foreign Creditors in American Bankruptcy Proceedings*, 29 Harv. Int'l L.J. 49, 58 (1988); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 Brook. J. Int'l L. 499, 515 (1991) [hereinafter Westbrook, *Choice of Avoid-*

one court,” and in its most commonly described implementation, the bankruptcy regime of the debtor firm’s home country—its courts and laws—should govern.<sup>9</sup> That regime should have extraterritorial reach to treat all of the debtor’s assets and claimants, displacing the local bankruptcy laws of other countries to the extent necessary to accomplish a unified administration.

The basic premise to universalism is that national borders should not interfere with business restructuring. Maximizing asset value and distributing that value among claimants are *economic* activities. Their proper conduct should not be affected by the location of particular assets or the territorial attributes of claimants. A unified administration under the home country bankruptcy regime offers predictability, efficiency, and fairness,<sup>10</sup> avoiding the problems that a state-by-state piecemeal approach would present.

The scholarly attraction to universalist cooperation in the international bankruptcy context is not an isolated phenomenon. In many issue areas, globalization has placed enormous strains on once domestic regulatory regimes, forcing governments and their regulators to adapt national regulation to govern international commerce.<sup>11</sup> When cross-border economic activity attracts attention from regulators in several

---

*ance Law*]; Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276 (2000) [hereinafter Westbrook, *Global Solution*]. See also *infra* Part I.A.

9. See, e.g., Donald T. Trautman et al., *Four Models for International Bankruptcy*, 41 Am. J. Comp. L. 573 (1993); Jay Lawrence Westbrook & Donald T. Trautman, *Conflict of Laws Issues in International Insolvencies*, in *Current Developments in International and Comparative Corporate Insolvency Law* 655, 667 (Jacob S. Ziegel ed., 1994) (“[T]he goal in developing choice of law rules in insolvency should be to apply the home-country law as pervasively as possible.”); Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 515.

10. See *infra* Part I.A.

11. In addition to bankruptcy, antitrust, securities regulation, banking law, labor law, and environmental regulation are other salient examples of once domestic regulatory structures now being pressed into international service. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. Rev. 1501 (1998); Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 Yale J. Int’l L. 61 (1999); Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 Cardozo L. Rev. 925 (1996) (discussing Basle Accords and international bank capital requirements); Brian A. Langille, *Competing Conceptions of Regulatory Competition in Debates on Trade Liberalization and Labour Standards*, in *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* 479 (William Bratton et al. eds., 1996) [hereinafter *International Regulatory Competition*]; Alan V. Deardorff, *International Conflict and Coordination in Environmental Policies*, in *Economic Dimensions in International Law: Comparative and Empirical Perspectives* 248 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997) [hereinafter *Economic Dimensions*].

states, these states compete with each other over the primacy of their regulatory structures.<sup>12</sup> Cooperative solutions to these competitive tensions have been proposed in other areas besides international bankruptcy.<sup>13</sup> Cooperative ideas are intuitively appealing. International cooperation seems intellectually elegant. It is optimistic, enlightened and progressive. It signals a forward-thinking, cosmopolitan, one-world perspective.<sup>14</sup> By contrast, territorial competition seems provincial, narrow-minded, and piggish.

Efforts at international cooperation may not always be benign, however.<sup>15</sup> Some may be driven by perverse motives,<sup>16</sup> or generate perverse results.<sup>17</sup> And some attempts at cooperation are simply futile. Tensions between idealistic cooperative inclinations and the realities of territorial competition have generated new thinking about international regulation.

---

12. For example, scholars have debated the appropriate extraterritorial reach of U.S. securities regulation. Compare Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 Mich. L. Rev. 696 (1998) (arguing for “issuer nationality” approach to U.S. securities disclosure—i.e., regime should apply only to U.S.-based issuers), with Stephen J. Choi & Andrew T. Guzman, *National Laws, International Money: Regulation in a Global Capital Market*, 65 Fordham L. Rev. 1855 (1997) (arguing for territorial “transaction location” approach in which U.S. securities regulation applies only to transactions occurring within the United States). See also Stephen J. Choi and Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903 (1998) [hereinafter Choi & Guzman, *Portable Reciprocity*] (proposing that issuer of securities be permitted to select the securities regulatory regime applicable to it).

13. See, e.g., Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 Am. J. Int'l L. 1 (1997) (arguing for integrated international antitrust regulation); Deardorff, *supra* note 11, at 248 (analyzing need for international environmental policy coordination).

14. This abiding faith in internationalism is not new. In Utopia, even treaties are unnecessary for international cooperation:

‘What is the use of a treaty,’ they ask, ‘as though nature of herself did not sufficiently bind one man to another?’ [T]he Utopians . . . think . . . that the fellowship created by nature takes the place of a treaty, and that men are better and more firmly joined together by good will than by pacts, by spirit than by words.

St. Thomas More, *Utopia* 116, 118 (Edward Surtz, S.J., ed., Yale University Press 1964) (1516).

15. Machiavelli saw this aspect of international politics clearly. See Machiavelli, *The Prince* 38 (Quentin Skinner & Russell Price, eds., Cambridge University Press 1988) (1532) (advising against particular types of alliances).

16. See Colombatto & Macey, *supra* note 11, at 926 (arguing that international coordination among banking and securities regulators is not driven by concerns for the public interest, but by regulators’ desire to preserve their regulatory authority and to avoid their own obsolescence in the face of globalization).

17. See Paul Stephan, *The Futility of Unification and Harmonization of International Commercial Law*, 39 Va. J. Int'l L. 743, 786 (1999) (asserting that widespread adoption of the United Nations Commission on International Trade Law Model Insolvency Law would increase uncertainty, rather than reduce it).

Hopeful internationalism has been tempered by states' stubborn and consistent pursuit of their own national interests. Moreover, recent scholarly consensus shows that competition may be beneficial in some regulatory contexts, while admittedly destructive in others.<sup>18</sup> Likewise, while cooperation may be appropriate for some situations, it is not an unmitigated blessing.<sup>19</sup>

This clash between the cooperative impulse and the assertion of territorial self-interest is particularly pronounced in international bankruptcy. Ideal cooperation promises universal benefits, but states have enduring interests at stake in insisting on their territorial prerogatives, as they have historically done.<sup>20</sup> As a practical matter, universalist cooperation has not been forthcoming. "Despite the near-unanimous support of the academic community, policymakers have chosen not to adopt universalism."<sup>21</sup>

Rival reform proposals have recently emerged.<sup>22</sup> These challenges to universalism have focused largely on its hypothetical efficiency. Even if universalism were adopted in the form advocated by its proponents, the argument goes, it would be less efficient than rival proposals.<sup>23</sup> My concern for universalism's political feasibility, however, precedes this efficiency question. The economics of universalism are irrelevant unless some critical mass of states are willing to commit to it. Its promised benefits are merely academic. Universalists and their critics disagree as to whether the world will realistically ever be ready to cooperate at the

---

18. See, e.g., Richard L. Revesz, *Federalism and Regulation: Some Generalizations*, in *Regulatory Competition and Economic Integration* 3, 24 (Daniel C. Esty & Damien Geradin eds., 2001) (discussing differing structures of competition in different regulatory areas); Colin Scott, *Institutional Competition and Coordination in the Process of Telecommunications Liberalization*, in *International Regulatory Competition*, *supra* note 11, at 381 (comparing U.S. and European telecommunications regulatory policies in light of domestic constitutional and institutional arrangements).

19. See generally *Regulatory Competition and Economic Integration*, *supra* note 18; *International Regulatory Competition*, *supra* note 11.

20. The history of European Union negotiations over a cross-border insolvency convention provides one salient example. Despite the best of universalist intentions, the members have been unsuccessful in overcoming their individual territorialist leanings. See *infra* Parts IV.B.1. and V.B.

21. Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 Mich. L. Rev. 2177, 2184 (2000) [hereinafter Guzman, *In Defense of Universalism*]. See also *infra* note 64 and accompanying text.

22. A recent edition of the *Michigan Law Review* is devoted to debating the merits of universalism and two competing proposals: cooperative territoriality and private ordering. See *Colloquy: International Bankruptcy*, 98 Mich. L. Rev. 2177 (2000).

23. See *infra* Part I.B.



level that a universalist system would require.<sup>24</sup> A critical question, then, is how likely is universalism?

The design of a workable system of international bankruptcy is essential given the relentless integration of the global economy. For example, already a third of large U.S.-based publicly traded companies own foreign assets.<sup>25</sup> Soon, all large public company bankruptcies will be international bankruptcies.<sup>26</sup>

An international political perspective is long overdue. The idea of universalism has been around for some time. The modern debate over universalism and rival proposals has gone a number of rounds and still lacks for any discussion of universalism's political feasibility. Any notion that international politics may matter in the development of cooperative

---

24. See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev. 2216, 2251 (2000) [hereinafter LoPucki, *Cooperative Territoriality*]; Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 Am. Bankr. L.J. 457, 468 (1991) [hereinafter Westbrook, *Theory and Pragmatism*]. See also *infra* note 55 and accompanying text.

25. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 Cornell L. Rev. 696, 724 (1999) [hereinafter LoPucki, *Cooperation in International Bankruptcy*].

26. As international business firms proliferate, the focus on international bankruptcy reform has also intensified.

Insolvency law rarely attracts much more than a fleeting interest and ranks low on any government's reform agenda. The commercial community, though sometimes aroused, is also largely disinterested in the subject. Legal and other scholars rarely concern themselves with insolvency law issues. It is thus quite remarkable that, during the last decade of the last century, *corporate insolvency laws and related practices should have assumed an unparalleled national, regional and global importance.*

Ronald Winston Harmer, *Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General Counsel on TA 5795-REG: Insolvency Law Reforms, 1 Law and Policy Reform at the Asian Development Bank 10* (April 2000) (emphasis supplied). The World Bank, the International Monetary Fund, the U.N. Commission on International Trade Law (UNCITRAL), the Organization for Economic Cooperation and Development (OECD), the Asian Development Bank, and several other multilateral institutions have initiated active international and comparative bankruptcy law research agendas. See *infra* notes 251–259 and accompanying text. Among national and international policymakers, as well as academics, international bankruptcy theory has become a prominent topic of discussion. The subject has become mainstream. See, e.g., United Nations Commission on International Trade Law, Working Group on Insolvency Law, Possible Future Work on Insolvency Law: Note by the Secretariat, at 8, U.N. Doc. A/CN.9/WG.V/WP.50 (1999) [hereinafter UNCITRAL Possible Future Work]; Board Receives Report on Russian Program; Structural Benchmarks Remain to Be Met, IMF Survey, Vol. 28, No. 23, Dec. 13, 1999, at 389 [hereinafter Board Receives Report on Russian Program]; IMF Staff, *Recovery from the Asian Crisis and the Role of the IMF*, International Monetary Fund Issues Brief, June, 2000, at <http://www.imf.org/external/np/exr/ib/2000/062300.htm> [hereinafter *Recovery from the Asian Crisis*].

norms in international bankruptcy has been conspicuously absent from the literature. But as Robert Rasmussen has noted, “[a]ny credible theory of how transnational insolvencies should be handled has to wrestle with the problem of comity between sovereign nations.”<sup>27</sup>

This Article addresses the political feasibility question squarely. The Article provides a game-theoretic framework for analyzing impediments to universalist cooperation among sympathetic states. The game-theoretic approach to international cooperation has been a staple of modern international relations theory, applied to many traditional international security and international economic issues.<sup>28</sup> Applications to international law, however, are fairly recent.<sup>29</sup> The Article begins with a summary in Part I of the debate over universalism and its claimed efficiencies. Part II suggests some intuitive reasons why states will be reluctant to adopt universalism. Parts III and IV describe an even deeper problem for universalism, arguing that even states interested in universalist cooperation will have difficulty achieving it. Part III sets out the universalist dilemma. Part IV describes the conditions of play in the international bankruptcy game, showing their inhospitality to cooperation and the gloomy prospects for universalism. Part V contrasts the universalist dilemma with international cooperation that occurs in other contexts. It describes the role that international regimes and institutions play in overcoming impediments to cooperation, while expressing doubt that institutional solutions exist for universalism.

## I. Debating Universalism

Territoriality simply honors the age-old behavior of nations in exercising jurisdiction over assets and parties within their borders. Analysts agree that territoriality is and has always been the dominant

---

27. Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 Mich. L. Rev. 2252, 2255 (2000) [hereinafter Rasmussen, *Private Ordering*].

All the participants in the debate over transnational insolvencies claim that their approach is the most (economically) efficient. Indeed, to date, this is the primary claim of both the universalist and bankruptcy selection clause approaches, both of which have yet to even assert that they respect the noneconomic decisions reflected in domestic bankruptcy law. *Id.* at 2256.

28. See *infra* note 83 and accompanying text.

29. See Ronald A. Cass, *Introduction: Economics and International Law*, in *Economic Dimensions*, *supra* note 11, at 1, 27 (“Until recently, there has been little game theoretic analysis of international law issues, although game theory long has recognized nations as strategic actors.”).

practice.<sup>30</sup> Each nation in which a multinational debtor owns assets decides under its own laws how the assets within its territory should be treated in the face of creditor claims. For example, assume that Firm A has assets, employees, and creditors in both State A and State B. When it suffers financial distress, it files for bankruptcy in State A, where its headquarters are located. This will protect the firm's assets in State A, but under the territorial system that currently dominates,<sup>31</sup> the filing will have no effect on the firm's assets in State B. Creditors may still pursue the firm's State B assets, relying on State B law.<sup>32</sup> The firm might additionally file for bankruptcy in State B, but that proceeding would occur under State B law administered by State B courts.

Historically, analysts have also agreed that a universalist approach is preferable to one segmented by territorial boundaries. The financial distress of a multinational firm should come under one bankruptcy regime, even though several states may claim jurisdiction over various pieces of the firm or over claimants located in or having some other connection with those states.

This Part first explains the case for universalism, and then discusses rival proposals that have recently emerged.

#### A. The Universalist Account

The basic universalist principle is "one law, one court."<sup>33</sup> As most commonly envisioned by universalists, the courts of the debtor's home

---

30. See LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2220; Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. & Econ. 775, 787 (1999) (surveying laws of various jurisdictions and concluding that "the dominant approach to transnational bankruptcies remains territorial"); Westbrook, *Theory and Pragmatism*, *supra* note 24, at 460.

31. For a discussion of the few insolvency treaties that do exist, see Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 Geo. Wash. Int'l L. Rev. 555, 565 & n.42 (2001) [hereinafter Tung, *Fear of Commitment*].

32. The courts of State A might attempt to inhibit creditor collection activity against the firm in State B, but the success of these efforts depends on the State A court's ability to enforce its orders against particular creditors operating outside State A. See *In re McLean Indus., Inc.*, 76 B.R. 291 (Bankr. S.D.N.Y. 1987); 68 B.R. 690 (Bankr. S.D.N.Y. 1986) (illustrating U.S. court's attempt to enforce automatic stay against offshore collection activity).

33. Universalism comes in several flavors, at varying levels of abstraction. See Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 514–18. See also LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 704–32 (separately discussing "pure" and modified universalism).

At its most fanciful, universalism is imagined as a sort of one-world government system. International bankruptcies would be governed by one international bankruptcy law administered by a unified system of international bankruptcy courts, thereby avoiding the messiness of any local influence. See Westbrook, *Global Solution*, *supra* note 8, at 2292. In a related con-

country, applying home country bankruptcy law, would have worldwide jurisdiction over the debtor's bankruptcy. In Firm A's bankruptcy, State A would probably be the home country,<sup>34</sup> and State A bankruptcy law would govern Firm A's bankruptcy worldwide. State A courts would enjoy global jurisdiction to administer State A bankruptcy law with respect to the debtor's assets and creditors everywhere, with other states deferring to State A courts. The home country courts would depend on local courts in other states to carry out home country decisions.<sup>35</sup>

Conceptually, universalism is attractive. A unified proceeding enables one court to administer the entirety of the debtor's assets. This maximizes the value that can be preserved for creditors by facilitating a coordinated disposition of the debtor's assets.<sup>36</sup> It assures creditors' equal treatment,<sup>37</sup> and it avoids the duplicative administrative costs that multiple proceedings would entail.<sup>38</sup> Standardizing home country law as the governing law promotes predictability, thereby lowering the costs of credit and facilitating economic activity.<sup>39</sup> Universalists generally agree that the home country should ordinarily be determined by the location of the debtor's principal place of business.<sup>40</sup> They claim that this approach should be straightforward in most cases, and that judges should be able to handle the rare controversy that might arise.

Professor Jay Westbrook has been the leading advocate for universalism. Recent scholarship by Professors Lucian Bebchuk and Andrew Guzman has also identified other plausible efficiencies from

---

text, Professor Kal Raustiala has commented: "One central lesson to emerge from the history of public international law is that international adjudication barely exists and rarely works." Kal Raustiala, *Sovereignty and Multilateralism*, 1 *Chi. J. Int'l L.* 401, 408 (2000). Even universalists admit that the proposed one-world system is implausible. See Westbrook, *Global Solution*, *supra* note 8, at 2294.

34. Universalist advocates typically propose principal place of business as the proper determinant of the debtor's home country. See *infra* note 40 and accompanying text.

35. "[U]niversality has been commonly defined in terms of a primary proceeding in a debtor's 'home' or domiciliary country, with 'ancillary' proceedings in other jurisdictions where the presence of assets or other matters require local assistance to the primary court." Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 515. See also *supra* note 9 and accompanying text.

36. See Westbrook, *Theory and Pragmatism*, *supra* note 24, at 465.

37. Some creditors are typically more equal than others, however. See Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 508 (explaining role of priority rules in favoring some classes of creditors over others).

38. See *id.*, at 515; J.H. Dalhuisen, 1 *Dalhuisen on International Insolvency and Bankruptcy* pt. 3, § 2.03[3], p. 3-186 (1986).

39. See Westbrook, *Theory and Pragmatism*, *supra* note 24, at 469.

40. See Westbrook, *Global Solution*, *supra* note 8, at 2316; Guzman, *In Defense of Universalism*, *supra* note 21, at 2207.

universalism. Bebchuk and Guzman argue that to the extent territoriality is synonymous with discrimination against foreign creditors, it creates inefficient investment incentives for debtors that would not plague a universalist system.<sup>41</sup> In a later piece, Guzman asserts that greater predictability and lower information costs under universalism would lower the costs of credit.<sup>42</sup> Territoriality forces creditors continually to monitor the location of the debtor's assets and to ascertain the laws of the various jurisdictions to which assets might possibly be moved. Universalism, by contrast, makes asset location irrelevant, relieving creditors of such burdens.<sup>43</sup>

While universalist advocates have not focused much attention on the question of how universalism might emerge, their brief comments suggest that universalism could evolve spontaneously through unilateral reciprocity policies of individual states. By those lights, any state interested in universalism could unilaterally proclaim its willingness to behave as a universalist toward any other state willing to adopt the same reciprocity policy.<sup>44</sup> In this way, universalist states would reveal themselves, presumably allowing emergence of a universalist system over time.

### B. Rival Proposals

Professors Lynn LoPucki and Robert Rasmussen have each questioned the claimed efficiency advantages of universalism, and each has proposed a reform alternative.

In two recent articles, LoPucki has called for cooperation on a territorial basis.<sup>45</sup> Rather than overthrowing the existing territory-based order, LoPucki would build on it. Under his system of cooperative territoriality,

---

41. See Bebchuk & Guzman, *supra* note 30.

42. Guzman, *In Defense of Universalism*, *supra* note 21, at 2198.

43. See *id.* at 2199. Guzman also identifies various distortions in certain lending markets that result from universalism and territoriality. See *id.* at 2190, 2202.

44. Jay Westbrook has proposed "common unilateralism," a sort of unilateral universalism without treaties that would promote a culture of rough reciprocity among states. This reciprocity would be facilitated by domestic institutions that would certify to their respective judiciaries the various other states that qualify for deference based on rough similarity of their laws and their reciprocity behavior. See Westbrook, *Theory and Pragmatism*, *supra* note 24, at 488. See also Bebchuk & Guzman, *supra* note 30, at 804-06 (suggesting unilateral policy of reciprocity). Westbrook has also mentioned the possibility of other more structured devices to accomplish universalism, including piggybacking on the GATT or bilateral investment treaties. See Westbrook, *Global Solution*, *supra* note 8, at 2296. I discuss universalism and international institutions *infra* Part V.

45. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25; LoPucki, *Cooperative Territoriality*, *supra* note 24.

each state would continue to exercise jurisdiction over, and apply its own laws to, the debtor's assets within its territory. Parallel bankruptcy proceedings could occur in each state with debtor assets, and cooperation would occur through the interaction of agents appointed by each state to represent the bankruptcy estate located there.<sup>46</sup> States would negotiate cooperative asset disposition on a case-by-case basis. Particular inefficiencies from territoriality could be remedied through specific international arrangements, without attempting to impose an entirely new regime on recalcitrant sovereigns.<sup>47</sup>

Comparing the benefits of this system to universalism, LoPucki argues that universalism cannot deliver on its promise of ex ante predictability or lower borrowing costs because the "home country" concept is indeterminate<sup>48</sup> and may be manipulated by debtors.<sup>49</sup> Furthermore, the interface between local nonbankruptcy law and universalist—foreign bankruptcy law would cause difficulties. The scope of bankruptcy jurisdiction ceded to a universalist court would always be open to question, and the dramatic shift from local nonbankruptcy entitlements to universalist bankruptcy entitlements would invite wasteful gamesmanship by debtors and creditors.<sup>50</sup> These interface issues are much more manageable under a territorial system.<sup>51</sup>

For his part, Robert Rasmussen has advocated a "debtor's choice" approach, under which each debtor's corporate charter would specify a choice of national bankruptcy law that would apply in case of financial distress.<sup>52</sup> The impetus to this approach is that the universalist choice of home country law may not necessarily be the most efficient choice.

---

46. See LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2219–20. These estate representatives could agree or not, presumably negotiating the fate of the debtor's assets in the shadow of the separate territorial outcomes that would occur absent cooperation. *See id.*

47. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 761.

48. See LoPucki, *Cooperative Territoriality*, *supra* note 24 at 2226. Problems with corporate groups may be especially intractable. *See id.* at 2229.

49. *See id.* at 2230. Universalists assert that determination of the home country will not be difficult in most cases. *See infra* note 145. However, various standards—principal place of business, state of incorporation, headquarters, center of main interests—have been used, with no single standard having emerged. *See* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 713–16 (discussing various tests).

50. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 726–27. *See also* discussion *infra* Part IV.A.

51. See LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2237.

52. See Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 Mich. J. Int'l L. 1 (1997) [hereinafter Rasmussen, *A New Approach*]. See also Rasmussen, *Private Ordering*, *supra* note 27.

Instead, the argument goes, private parties allowed to choose their own governing law would be better able to pick the optimal set of rules.<sup>53</sup>

### C. Is Universalism Possible?

LoPucki seems to agree with universalists that they offer a *conceptually* acceptable approach, and that as states' various bankruptcy regimes converge as a result of the globalization of business, universalism *might* emerge. However, LoPucki and Westbrook disagree about how realistic is the hope for universalism. Westbrook seems to believe that even piecemeal and sporadic deference to foreign insolvency proceedings is appropriate—despite the unpredictability and injustices generated—as it moves us in the right direction toward universalism.<sup>54</sup> By contrast, LoPucki notes that harmonization sufficient to make universalism widely acceptable might take decades or even centuries. The crucial question is “what to do while we are waiting for the ‘new world society’—essentially, a world government—to arrive?”<sup>55</sup>

I argue that the wait will be a long one. I agree with LoPucki's conclusion that a new and improved territoriality is the right approach to reform. However, I am even less optimistic than LoPucki that universalism is possible. At best, universalism is premature. At worst, it is futile. Without directly addressing the efficiency debate among the competing models, I am content to take universalists at their word, ignore universalist critics, and assume the strongest case for universalism.<sup>56</sup> I focus instead on a prior question. Is universalism even possible as a political matter? Only regularized universalist cooperation can deliver the predictability and promised efficiencies of universalism. I argue that such a system is highly improbable.<sup>57</sup>

---

53. See Rasmussen, *A New Approach*, *supra* note 52, at 5.

54. See Westbrook, *Theory and Pragmatism*, *supra* note 24, at 471 (approving instances of judicial deference to foreign proceedings). I use the terms “bankruptcy” and “insolvency” interchangeably.

55. LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2217 (borrowing Jay Westbrook's phrase).

56. See *infra* Part III.B. The improbability of universalism will ultimately affect the validity of efficiency claims by its proponents, however. See *infra* Part IV.D.

57. As will become clear from my discussion, this infeasibility that curses universalism applies with equal or greater force to Robert Rasmussen's debtor's choice approach. I therefore focus my discussion on universalism.

## II. The Intuitive Implausibility of Universalism

States are generally reluctant to commit to universalism. In this Part, I provide some intuitive reasons why. The next Part provides a more formal game-theoretic framework to discuss this fear of commitment and my doubts that universalism may provide a general solution for international bankruptcy cooperation.

Below I compare universalism with international recognition of civil judgments, in order to illustrate the radical deference to foreign law and foreign courts that universalism requires. I rely on existing international arrangements in civil judgment recognition as a rough barometer to show the limits of states' cooperative inclinations with respect to conflicts of laws. Bankruptcy is a particularly difficult area for international harmonization or cooperation. As I have discussed elsewhere in detail, bankruptcy has drastic wholesale effects,<sup>58</sup> and the deference to foreign law and courts demanded by universalism is far greater than any commitment states have been willing to make to date. The observed limits of nations' willingness to commit to relatively narrow cooperation suggests even greater reluctance to accede to the broader cooperative arrangement demanded under universalism.

A conflict of laws arises when a legal dispute involves parties, property, or events that implicate more than one legal system. When a multinational enterprise fails, various states may assert jurisdiction over all or part of the failing firm or certain of its legal relationships. States will seek to apply their own laws to those issues over which they claim jurisdiction. Universalism simply provides a rule to resolve the conflicts of laws that arise in this context.

In the typical bankruptcy context, the debtor will enter formal bankruptcy proceedings in its home country, whose courts will apply home country bankruptcy laws. The home country court will attempt to include the debtor's foreign assets in the proceeding, claiming extraterritorial jurisdiction over those assets and extending the effect of its bankruptcy law to those assets. However, local courts in these other states will also claim jurisdiction over assets within their respective territories. They will seek to apply their own bankruptcy or other debt collection laws to those assets, typically to the benefit of local creditors or other domestic interest groups.<sup>59</sup> Conflicts arise because states generally favor their own

---

58. See Tung, *Fear of Commitment*, *supra* note 31, (describing wholesale nature of bankruptcy proceedings and drastic effects of extraterritorial jurisdiction).

59. "[M]any countries remain focused on the risk of injury to local creditors, almost to the preclusion of other considerations." Jay L. Westbrook, *Creating International Insolvency*



bankruptcy regimes—especially as to firms and assets within their territorial jurisdictions—and may attempt to extend extraterritorial effects to include foreign assets of their domestic debtors. At the same time, states will scrutinize and limit the local effects of foreign proceedings. They will be leery of granting recognition and giving local effect to determinations of foreign bankruptcy courts.<sup>60</sup>

Universalism resolves this conflict by requiring the local court to defer to the home country court and its bankruptcy law. Universalism demands that other states recognize and enforce home country court orders applying home country bankruptcy law.<sup>61</sup> However, states have shown great reluctance to concede their sovereignty in favor of home country law and courts.

---

*Law*, 70 Am. Bankr. L.J. 563, 571 (1996) [hereinafter Westbrook, *Creating International Insolvency Law*] (reflecting on countries' behavior in UNCITRAL Working Group on Transnational Insolvency, for which Professor Westbrook serves as co-leader of the U.S. delegation). The benefits might not always be easy to limit to local creditors:

In the modern world, sophisticated multinational creditors are increasingly able to claim in local proceedings all over the world. Thus it is fair to say that the primary effect of the Grab Rule [territoriality] is to protect the primacy of local procedures and local law, with local creditors and sophisticated multinationals sharing significant practical advantages as a result.

Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 514.

60. “[O]ne may note the dual approach in many countries: own bankruptcies are generally favored and their effect extended abroad as far as possible, while the effects of foreign bankruptcies are subjected to scrutiny and curtailment.” Dalhuisen, *supra* note 38, at pt. 3, § 2.02[3], p. 3–162.

A bankruptcy contractarian might argue that states should be indifferent as to whose bankruptcy law applies, as long as the rule is clear so that debtors and creditors may properly price credit and otherwise plan their affairs. It is clear, though, that states are not indifferent. Each prefers that its regime of ex post loss distribution prevail. One plausible explanation may be that ex post losses from international financial distress are vivid to domestic interest groups, that in turn demand government intervention on their behalf. Or perhaps parochialism is driven by bankruptcy professionals whose economic interest lies in maximizing the size of the market for their local expertise. *See infra* note 93 and accompanying text. The ex ante efficiency benefits from predictable rules, on the other hand, are both more diffuse and less visible than the distribution of ex post losses.

61. *See* Dalhuisen, *supra* note 38, at pt. 3, § 2.03[2], p. 3–181. Recognition of judgments becomes an issue when one state has rendered a binding decision between private parties, but the winning party must seek enforcement—e.g., collect against assets—outside the territory of the rendering state. Both the winning party and the rendering state will be interested in seeing the judgment accorded respect in a state where the defendant's assets may be found. For a thoughtful discussion of international bankruptcy theory within a conflicts framework, see Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 Stan. J. Int'l L. 23 (2000).

Although international recognition of civil judgments is common and becoming more so,<sup>62</sup> universalist bankruptcy recognition is basically nonexistent. Bankruptcy law is among the areas of law least amenable to international harmonization or cooperation,<sup>63</sup> and to date, the history of multilateral insolvency cooperation has been marked by frustration.<sup>64</sup>

#### A. Bankruptcy's Wholesale Effects

Bankruptcy by its nature is a much more drastic type of legal proceeding than a simple civil suit between private parties. A garden variety civil suit settles rights with respect to a particular transaction between the parties, and a civil judgment is simply an order requiring the transfer of money between private parties. Bankruptcy, by contrast, has wholesale effects. It provides for the comprehensive restructuring of a firm and every legal relationship between the firm and its creditors and other interested parties. Moreover, bankruptcy law is "meta-law."<sup>65</sup> In remaking the firm, bankruptcy law overrides contract-, property-, and other legal rights that exist outside of bankruptcy. While reordering prebankruptcy rights, bankruptcy typically effects a blanket prejudgment attachment of the debtor's assets and a comprehensive stay of creditor collection attempts. Bankruptcy prioritizes creditor claims and scales down their recoveries, effectively distributing the losses from the firm's financial distress over the entire body of creditors and other interested parties. In this process, bankruptcy effectively renders judgment with respect to all claims. It then executes these judgments through the bankruptcy distribution. The firm's operations will typically be modified as well, or even liquidated piecemeal. The proceeding will affect not only creditors,

---

62. See Russell J. Weintraub, *Commentary on the Conflict of Laws* 707 (4th ed. 2001). Foreign tax judgments are a significant exception to this trend. See *id.* at 706. While the details of states' practices vary widely, many a state readily recognizes and enforces locally the civil judgments rendered by courts of other states. See Restatement (Third) of Foreign Relations Law, ch. 8 introductory note (1987) [hereinafter Restatement of Foreign Relations]. Numerous treaties on the subject exist. See *id.*; Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 24.38 (2d ed. 1992). See also *infra* note 78. Some states unilaterally grant recognition without insisting on any explicit reciprocity arrangement with the rendering state.

63. See Ian F. Fletcher, *Commentary on Boshkoff, Some Gloomy Thoughts Concerning Cross-border Insolvencies*, 72 Wash. U. L.Q. 943 (1994); Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 Wash. U. L.Q. 931 (1994).

64. See Westbrook, *Creating International Insolvency Law*, *supra* note 59, at 570 (noting limited success of international bankruptcy conventions); Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 Fordham L. Rev. 2543 (1996) (discussing failed efforts at international insolvency reform).

65. The phrase is Manfred Balz's. See Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 Am. Bankr. L. J. 485, 486 (1996).

equity holders, and employees, but also customers, suppliers, and taxing authorities, among others.<sup>66</sup>

With these wholesale effects, each state's bankruptcy regime embodies its own myriad social policies. Each state has its favored creditors, whose recoveries take priority over the general body of creditors.<sup>67</sup> More generally, states take differing approaches to resolving corporate financial distress and may have divergent views concerning the appropriate goals and methods for a bankruptcy system.<sup>68</sup> Each state naturally prefers its own set of policy choices to those of other states. Especially with the bankruptcy of a multinational firm, which is likely to involve assets and liabilities of significant value, states may feel a significant stake in having their own laws apply, especially within their borders. A multinational bankruptcy is likely to have widespread effects in the states in which the firm does business or owns property. Because of these drastic effects and significant social policy implications, states may understandably be reluctant to defer to foreign bankruptcy regimes.<sup>69</sup> Each state will be disinclined to recognize and give local effect to edicts of foreign courts applying foreign bankruptcy law.<sup>70</sup>

### B. Bankruptcy Recognition and Extraterritorial Jurisdiction

Related to the broad social policy implications of recognizing foreign bankruptcy proceedings is the more technical problem of judicial

---

66. See Tung, *Fear of Commitment*, *supra* note 31, 565.

67. In the United States, grain producers and United States fishermen enjoy special priority over general creditors in certain cases. 11 U.S.C. § 507(a)(5) (1994). In South Korea, Mexico, and France, employee priority claims are senior to secured claims. See Soogeun Oh, *Creditor Rights in Insolvency Procedure*, *Insolvency Systems in Asia: An Efficiency Perspective* (OECD, Nov. 29–30, 1999), at <http://www.oecd.org/daf/corporate-affairs/insolvency/in-asia/oh.pdf> (last visited August 26, 2000) (South Korea); American Law Institute, *Transnational Insolvency Project: International Statement of Mexican Bankruptcy Law* 71 (Tentative Draft Apr. 15, 1998) (Mexico); Wood, *supra* note 5, at 24 (France). By contrast, in most countries, employee claims—almost invariably unsecured—are not excepted from the general rule that secured claims have priority over unsecured claims with respect to the secured creditors' collateral. See, e.g., Wood, *supra* note 5, at 24–25.

68. See Wood, *supra* note 5, at 7 (ranking various jurisdictions as debtor- or creditor-friendly based on various factors).

69. For example, in their negotiations over a cross-border insolvency convention, the member states of the European Union were unwilling to abandon local priority rules. See *infra* note 157 and accompanying text. The EU Insolvency Regulation that ultimately emerged preserved territorial prerogatives to a great extent. See *infra* Part IV.B.1.

70. See Dalhuisen, *supra* note 38, pt. 3, § 2.03[2] p. 3–181. For further discussion of states' preference for their own law, see *infra* Part III.A.

jurisdiction.<sup>71</sup> While states vary in their requirements for recognition of civil judgments, each invariably requires that the rendering court have jurisdiction over the defendant-judgment debtor.<sup>72</sup> The defendant-judgment debtor must have some sufficient connection with the forum state to justify the court's exercise of judicial power over her. In light of this basic jurisdictional requirement, universalism represents a fairly bold demand for foreign recognition. It asserts an aggressive jurisdictional reach that has no parallel outside the bankruptcy context.

Assertion of expanded judicial jurisdiction enables a state's courts to export social policy to other states.<sup>73</sup> The jurisdictional test for recognition of foreign judgments can be understood as a mechanism to deter such ambitions.<sup>74</sup> Given the meta-law nature of bankruptcy, the potential for export of social policy is great when a state asserts extraterritorial bankruptcy jurisdiction. Potential importing states, understandably vigilant about such large scale imports, may reject universalism on that basis.

To the extent local creditors' rights are adversely affected by a foreign bankruptcy proceeding, their position is analogous to that of a defendant-judgment debtor in ordinary civil litigation. Local creditors

---

71. In the U.S. lexicon, the issue is referred to as "personal jurisdiction." In other systems, it is often dubbed "jurisdiction to adjudicate."

72. See Restatement of Foreign Relations, *supra* note 62. See also Arthur T. von Mehren & Donald T. Trautman, *The Law of Multistate Problems* 836 (1965) ("In Anglo-American law . . . recognition of foreign judgments turns basically on the question whether in the view of the recognizing court the rendering court had adjudicatory jurisdiction in the international sense."); Scoles & Hay, *supra* note 62, at 1011; Dalhuisen, *supra* note 38, at pt. 3, § 1.06[1], p. 3-70.2.

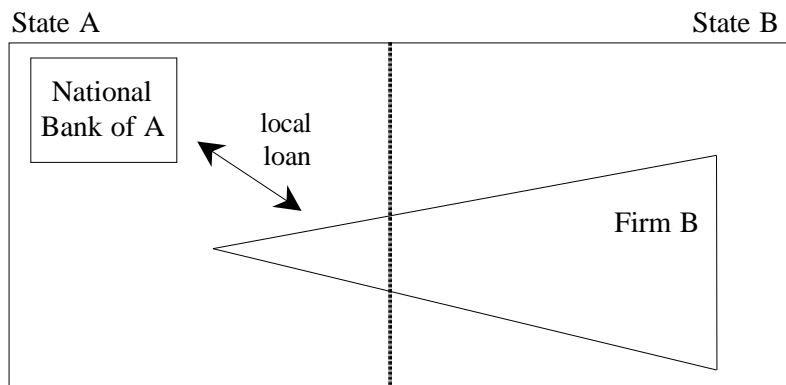
73. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 759. The export of social policy occurs when the rendering court applies its own laws to the dispute at issue, as occurs under universalism. By choosing its own substantive law, the rendering court asserts the prescriptive or legislative jurisdiction of its state. The court then exports its state's social policy through its expansive approach to judicial jurisdiction. See William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 *L. & Pol'y Int'l Bus.* 363, 365-66 (2001).

74. See Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 *Melb. U. L. Rev.* 416, 425 (1999); Dalhuisen, *supra* note 38, pt. 3, § 1.02[1], p. 3-9. Efforts to expand jurisdiction may also appeal to the local bar, which stands to gain in terms of increased representations as the scope of cases that may be heard locally increases. See Whincop, *supra* at 424. Judgment recognition conventions and municipal judgment recognition laws also typically allow for refusal of recognition if it would be incompatible with the state's public policy. See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission of the Hague Conference, art. 28(f), available at <http://www.hcch.net/e/conventions/draft36e.html> (Oct. 30, 1999)[hereinafter Hague Convention]; Whincop, *supra* at 428; Scoles & Hay, *supra* note 62, at 1014. This basis for refusal of recognition further limits states' social policy exporting ambitions.

would have enjoyed collection rights against the debtor's local assets under local law, absent a foreign party's invocation of foreign legal process—in the form of the foreign bankruptcy proceeding—to alter local creditors' rights. Given that the entirety of local creditor dealings with the debtor may have occurred locally, the adverse intervention of a foreign proceeding will trigger extraterritoriality concerns.

By way of comparison, consider the simple contract depicted in Figure 1.

Figure 1



Assume the world consists of two states, State A and State B, represented by the two contiguous squares above. The large triangle represents Firm B, a multinational firm whose home country is State B, but which also has operations in State A.<sup>75</sup> Suppose the National Bank of A, a domestic bank in State A that lends only locally, has extended a loan to Firm B. All aspects of the transaction were conducted in State A. Under these conditions, absent the bank's agreement otherwise, not only would disputes relating to the loan ordinarily be resolved in the courts and under the laws of State A, but any assertion of jurisdiction by courts of State B would be highly contested. That Firm B may be incorporated or headquartered or have its principal place of business or major operations in State B does not by itself confer on State B courts a

75. The orientation of the triangle and its location relative to the State A- State B border are meant to suggest that Firm B's "center of gravity"—however defined—is in State B, but that Firm B also has nontrivial operations in State A. See Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 *Fordham L. Rev.* 2531, 2538 (1996) [hereinafter Westbrook, *Lessons of Maxwell*] (discussing "center of gravity" of *Maxwell* bankruptcy).

jurisdictional reach that is internationally recognized.<sup>76</sup> The transaction at issue has no other connection with State B. While State B might claim such exorbitant jurisdiction for its courts, such an approach is typically condemned by other states.<sup>77</sup> Existing international conventions on jurisdiction and recognition of judgments forbid this exercise of jurisdiction and forbid recognition of any judgment based on such jurisdiction.<sup>78</sup> Yet, this is exactly the deference that universalism demands, not just with respect to specific transactions, but with respect to all the debtor's affairs in State A.<sup>79</sup>

Consider next the general financial distress of Firm B. With the debtor's bankruptcy filing in State B, a universalist system would displace State A bankruptcy law with State B bankruptcy law. It would disempower State A courts, requiring their deference to those of State B. With its bankruptcy filing, the debtor would effectively drag not one but *all* State A claimants into State B, even those with no connection to State B whatsoever except having engaged with the debtor in a transaction wholly within State A. The State B court would assert jurisdiction over assets, parties, and legal relationships wholly within State A. Finally, universalism would require State A to recognize and enforce decisions rendered in the State B proceeding.

In effect, the rights of State A claimants, which would ordinarily include collection rights against debtor assets in State A adjudicated by State A courts under State A law, would instead under universalism be

---

76. For example, the preliminary draft of the Hague Convention on Jurisdiction and Foreign Judgments specifically forbids "the application of a rule of jurisdiction provided for under the national law of a Contracting State . . . if there is no substantial connection between that State and the dispute," and more particularly forbids exercise of jurisdiction based solely on "the domicile, habitual or temporary residence, or presence of the plaintiff" in a particular State. Hague Convention, *supra* note 74, art. 18. The concept of "habitual residence" under this convention is approximately the same as the home country concept under universalism. *See id.* art. 3(2). *See also* Catherine Kessedjian, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, 39–40, available at [ftp://hcch.net/doc/jdgm\\_pd7.doc](ftp://hcch.net/doc/jdgm_pd7.doc) (revised translation October 1997)(noting as an exorbitant basis for jurisdiction "the domicile/habitual residence of the plaintiff").

77. *See* Kurt H. Nadelmann, *Jurisdictionally Improper Fora*, in *Conflict of Laws: International and Interstate* 222 (1972) (describing controversy surrounding the "notorious article 14 of the French Civil Code," which bases jurisdiction on the *plaintiff's* French nationality).

78. *See* Hague Convention, *supra* note 74, art. 26; Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990, art. 28, 29 I.L.M. 1413 (consolidating Brussels Convention of 1968 and the Protocol of 1971) [hereinafter *Brussels & Lugano Conventions*].

79. This is not to question that unified administration of an insolvency proceeding might make economic sense, *see supra* Part I.A, but instead to point out the drastic assertion of crossborder jurisdiction that this sort of approach requires.

disaggregated from those local assets and subjected to foreign rules applied by a foreign court in light of foreign claims. Again, this jurisdictional reach is uniquely a universalist aspiration. A similar assertion of jurisdiction made in the nonbankruptcy context—typically involving a proceeding of more limited scope, concerning only one or a few distinct transactions among a handful of private actors—would have little hope of foreign recognition.<sup>80</sup> In the basic civil judgment context, the State B court would have no jurisdiction over the assets or creditors in State A that had no contact with State B. The State B judgments would therefore not merit recognition. The wholesale nature of bankruptcy makes wholesale recognition even less appealing.<sup>81</sup>

Bankruptcy law's wholesale purview means that recognition of a foreign proceeding effects the wholesale import of another state's regime for deciding sensitive policy issues. Political judgments about local asset disposition and allocation of local losses from the foreign firm's demise are left in the hands of a foreign court. Universalism effectively requires a state's precommitment to wholesale deferral to other states' various prescriptions for financial distress. This is no small request.<sup>82</sup>

### III. The Game Theory of International Bankruptcy Recognition

The preceding Part explained why states will generally be reluctant to adopt universalism. States will be reluctant to precommit to recognizing other states' assertions of extraterritorial bankruptcy jurisdiction. This earlier discussion portends bleak prospects for universalism.

In the remainder of this Article, I consider universalism from a different perspective. Assuming for discussion purposes that states do or may exist that prefer universalism to territoriality, I show that such states will have difficulty implementing universalism. I rely on simple game theory to show that even under the most optimistic circumstances (for a

---

80. Jurisdiction based on the nationality of the plaintiff—in the insolvency context, the party instigating the foreign proceeding would be the appropriate analogue—is considered “exorbitant.” Restatement of Foreign Relations, *supra* note 62, ch. 2 introductory note.

81. See Tung, *Fear of Commitment*, *supra* note 31, at 568.

82. Professor Westbrook suggests that these problems can be avoided by applying universalism only to “large” multinationals. See Westbrook, *Global Solution*, *supra* note 8, at 2298. However, if the size of the firm bears *any* relation to the level of its local activity, it would seem that a “large” firm would be at least as likely to engage in significant numbers of local transactions—employment and supply contracts, for example—as a smaller multinational firm. The failure of the large multinational may have significantly greater local effects than failure of a small one.

universalist), universalism is unlikely to emerge.<sup>83</sup> Whether universalist deference to home country bankruptcy proceedings could be regularized is doubtful. And given that predictability is one of the major promises of universalism,<sup>84</sup> regularity of cooperation is important to the universalist agenda. Universalism is probably impossible, even among sympathetic states.

My analysis proceeds as follows. In this Part, I frame universalism as a prisoners' dilemma and discuss prospects for solving the dilemma under repeat play conditions, which are typical of international commercial interaction. In particular, I discuss simple reciprocity strategies among states, an approach universalists seem to endorse.<sup>85</sup> In the next Part, I show that given the conditions of play in international bankruptcy, simple reciprocity will not solve the universalist dilemma. Finally, in Part V, I contrast the hopelessness of the universalist dilemma with observed cooperation that occurs in other contexts. I describe the role that international regimes and institutions play in facilitating cooperation, and I consider whether such mechanisms might aid universalism.

As prelude to this discussion, I first explain my focus on states as the primary actors in the international bankruptcy game.

---

83. Game theory analysis is standard in international relations discourse. See Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 *World Pol.* 1 (1985); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *Yale J. Int'l L.* 335 (1989); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *Am. J. Int'l L.* 367 (1998); Duncan Snidal, *Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 *Am. Pol. Sci. Rev.* 923 (1985) [hereinafter Snidal, *Coordination*]; Duncan Snidal, *The Game Theory of International Politics*, 38 *World Pol.* 25 (1985) [hereinafter Snidal, *Game Theory*]; Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, in *Cooperation Under Anarchy* 235 (Kenneth A. Oye ed., 1986). It has been applied in the conflict of laws context. See, e.g., Lea Brilmayer, *Conflict of Laws* 182 (2d ed. 1995) (proposing game models for choice of law analysis); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 *Harv. Int'l L.J.* 101, 161 (1998) (applying iterated prisoners' dilemma model to choice of law); Larry Kramer, *Return of the Renvoi*, 66 *N.Y.U. L. Rev.* 979, 1023 (1991); Larry Kramer, *Rethinking Choice of Law*, 90 *Colum. L. Rev.* 277, 340–343 (1990) [hereinafter Kramer, *Rethinking Choice of Law*]. This resort to game-theoretical analysis has not been without controversy. See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 *U. Pa. L. Rev.* 949, 1000 (1994) (doubting that game theory prescriptions for achieving cooperative outcomes apply to judges' choice of law decisions); Louise Weinberg, *Against Comity*, 80 *Geo. L.J.* 53, 55–56 (1991) (questioning applicability of prisoners' dilemma model to choice of law, and describing game theory and choice of law as "Godzilla Meets the Swamp Thing").

84. See, e.g., Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 529 (noting that benefits of universalism depend on "high predictability of results and reciprocity").

85. See *supra* note 44 and accompanying text.



## A. States' Interests and Preferences

Throughout my discussion, I implicitly engage certain simplifying assumptions concerning states' interests and preferences. I treat each state as a unitary actor with well-defined interests and preferences. This approach is familiar to international law and international relations discourse,<sup>86</sup> and has been implicitly followed as well in the international bankruptcy debate.<sup>87</sup> In particular, I have argued that each state prefers its own bankruptcy laws and policy choices to those of other states,<sup>88</sup> without delving into the internal political dynamics that generate these preferences.

This parochialism of states may seem unremarkable and without need of further internal investigation. However, public choice and international relations theorists have cautioned us to be wary of treating states as black boxes or billiard balls.<sup>89</sup> Domestic politics matters for international policy, and unitary actor models of state behavior run the risk of missing important domestic causal variables that affect international policy.<sup>90</sup> Therefore, while I focus primarily on state actors—an approach I

---

86. See Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 29 (1984); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113, 1168 (1999) (defending simplifying assumption that national leaders identify and pursue national self-interest); Abbott, *supra* note 83, at 351 (explaining simplifying assumptions to rational actor approach).

87. See *supra* Part I. The focus on state interests dominates choice-of-law scholarship. "Most scholars now advocate, and courts now apply, some version of government interest analysis, which looks to the states' legislative interests in determining the applicable law." Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. Chi. L. Rev. 1151, 1169 (2000).

88. See *supra* Part II.A. The general assumption that states' favor their own laws is fairly standard in the conflicts of law literature. See *infra* notes 108 and accompanying text (discussing states' interests as embodied in their laws).

89. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Int'l Org. 427, 433–35 (1988); Double-Edged Diplomacy: International Bargaining and Domestic Politics (Peter B. Evans et al. eds., 1993) [hereinafter *Double-Edged Diplomacy*]; see generally, Jonathan R. Macey, *Chicken Wars as Prisoners' Dilemma: What's in a Game?*, 64 Notre Dame L. Rev. 447 (1989) (reviewing John C. Conybeare, *Trade Wars: The Theory and Practice of International Commercial Rivalry* (1987) (noting importance of public choice analysis in understanding trade policy formation)); Colombaro & Macey, *supra* note 11 (denying that states have preferences or interests, and arguing instead that only individuals have interests). See also O'Hara & Ribstein, *supra* note 87, at 1169 (criticizing traditional emphasis on government interests, as opposed to individual interests, in U.S. conflicts scholarship and court opinions).

90. See Snidal, *Coordination*, *supra* note 83, at 926 (acknowledging drawbacks to realist assumption of states as goal-seeking actors with well-defined preferences); Andrew Moravcsik, *Introduction: Integrating International and Domestic Theories of International Bargaining*, in *Double-Edged Diplomacy* *supra* note 89, at 3; Keisuke Iida, *When and How Do Domestic Constraints Matter?: Two-Level Games with Uncertainty*, 37 J. Conflict Re-

justify below—I first comment briefly on influences of domestic actors and interest groups.<sup>91</sup>

In general, a state's preference for its own bankruptcy law and reluctance to recognize foreign bankruptcy proceedings may arise from the desire of domestic political actors to defend the policies implicit in their domestic laws. This may include the preservation of any perquisites that redound to particular groups under those laws. The complexities of a state's bankruptcy regime reflect myriad policy decisions and political trade offs.<sup>92</sup> These trade-offs might enhance the public interest or merely the interests of the victors in domestic rent seeking contests. Regardless of which, political actors will wish to preserve the balance struck in their domestic bankruptcy rules.<sup>93</sup> They will generally resist recognition of foreign bankruptcy proceedings that would upset this careful balance.<sup>94</sup> This home town bias sets the stage for the conflict of bankruptcy laws that arises with the financial demise of a multinational firm.

For the remainder of this Article, I continue with the traditional focus on state actors, assuming that their political leaders pursue national interests, without much further attention to domestic politics. This approach emphasizes external incentives and influences on states, highlighting the systemic constraints and opportunities of the

---

sol. 403, 403–04 (1993) (criticizing realist tradition of “treat[ing] nation-states as unitary actors” and noting that “[i]n reality, foreign policy decisions are the result of political processes within nation-states.”). Moreover, speaking of states' interests and states' preferences may be anthropomorphic: “Institutions in general, and governments in particular, do not have preferences, people do. Governmental policy reflects the preferences of powerful constituents, not some mystically determined set of preferences that might be described as the ‘national interest.’” Colomatto & Macey, *supra* note 11, at 931.

91. States' internal political processes are heterogeneous, of course, so any account necessarily involves some generality and some speculation.

92. See *supra* Part II.A.

93. In general, interest groups with political influence sufficient to affect policy or capture rents from the domestic legislative process will typically also have sufficient influence to preserve these policies or protect these same rents from potential dilution from the incursion of foreign or international laws. Some evidence exists to suggest that bankruptcy professionals exercise significant political influence in shaping a state's bankruptcy law. See Bruce G. Caruthers & Terence C. Halliday, 74 *Am. Bankr. L.J.* 35, 38 (2000) (“Bankruptcy law historically has appeared to be a marginal or complex field of law where most citizens or companies have had little interest and where professional experience should count a great deal.”); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 *Mich. L. Rev.* 47, 57 (1997) (describing lawyers' roles and interests in shaping U.S. bankruptcy law reform); Stephan, *supra* note 17, at 787 (describing influence of technical experts on formulation of international bankruptcy and commercial law). Reluctance to recognize foreign bankruptcy proceedings might therefore arise from professionals' desire to preserve their local franchise in professional services from the foreign incursion that would result from recognition.

94. I discuss the possibility of jurisdiction trading below. See *infra* Part III.B.

international system.<sup>95</sup> It makes the ensuing game analysis tractable; “it simplifies our premises, making deductions clearer.”<sup>96</sup>

Given that my task is to prove a negative, these simplifying assumptions only strengthen my argument. If, as I claim, states considered as unitary actors will be unable to achieve cooperation, consideration of domestic influences would only show universalism to be even more dubious.<sup>97</sup> Opening the black box of the state only reveals more actors and influences that might frustrate cooperative endeavors. In general, as the number of relevant actors rises, cooperation becomes less likely.<sup>98</sup> Identifying the domestic actors within each state only multiplies the number of constituencies that must ratify, and may veto, any cooperative arrangement. “International agreement is less likely when domestic politics is involved. . . . It is not just anarchy but also domestic politics that makes cooperation difficult.”<sup>99</sup> For the most part, I make fairly optimistic assumptions—from a universalist’s perspective—concerning states’ preference for universalism, in order to show its futility.<sup>100</sup> Treating states as unitary actors is consistent with this “best case” approach. Consideration of internal domestic influences would only make universalism *less* likely, not more.

To that analysis we now turn.

### B. *Conflicting Bankruptcy Laws and the Prisoners’ Dilemma*

Even between states that might prefer universalism to territoriality, the states will find themselves in a prisoners’ dilemma.<sup>101</sup> Below, I suggest a plausible account of states’ preference for universalism. Though states generally prefer their own bankruptcy laws, I will assume that states exist that identify a potential for mutual gains from universalist cooperation—no small assumption, and one that is counterfactual for

---

95. See Keohane, *supra* note 86, at 29; Abbott, *supra* note 83, at 351–52.

96. Keohane, *supra* note 86, at 29. While two-level game analysis has been used to capture the interaction of international relations with domestic political constraints, the efforts have been largely descriptive in nature. See, e.g., Double-Edged Diplomacy, *supra* note 89.

97. See Helen V. Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* 80 (1997).

98. See *infra* Part IV.D.

99. Milner, *supra* note 97, at 80. See also Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* 269 (1996) (noting that interests and preferences of citizens may impede government’s “freedom to tit (or to tat) when it is time to do so.”).

100. See *infra* Part III.B.

101. For a description of this most famous of games, see Robert Axelrod, *The Evolution of Cooperation* 7 (1984).

many states.<sup>102</sup> For clarity of exposition, I assume away any problems relating to corporate groups, so that multinational enterprises are assumed to have no subsidiaries, but own their foreign assets directly.<sup>103</sup>

### 1. Conflicting Preferences and Cooperative Possibilities

Assume the world consists of our two states, A and B. Each state must choose an international bankruptcy policy. Its two choices are universalism (“cooperation” in the game parlance) or territoriality (“defection”). As previously discussed, State A will prefer that its bankruptcy law and bankruptcy jurisdiction extend to all situations in which State A may have some plausible interest.<sup>104</sup> In particular, State A will prefer that jurisdictional competence for its bankruptcy regime include the following:

- (x) bankruptcies involving State A firms,<sup>105</sup> including the assets of State A firms, whether located
  - (i) within State A

or

---

102. *See supra* Part II. Jay Westbrook has also noted the difficulties of achieving universalism, enumerating certain preconditions to its realization. My assumption of mutual cooperative gain parallels his assertion for the necessity for “critical-mass reciprocity,” basically that enough states exist that share the perception of mutual gains from universalist cooperation that they will participate in reciprocal arrangements. *See Westbrook, Theory and Pragmatism, supra* note 24, at 467. He further asserts that roughly similar bankruptcy laws are required. *See id.* at 468. However, this condition may neither be necessary nor sufficient. Even “identical” bankruptcy laws would not necessarily cause states to be indifferent as to whose law and courts control particular assets. Given that (a) most states refuse to recognize the tax claims of other states while giving priority to their own tax claims, and (b) professional fees—possibly of sizable amounts—are always at stake, each state would still have some incentive to refuse deference and instead assert its territorial privilege. On the other hand, Westbrook is correct that the more similar are states’ bankruptcy laws, the smaller is the immediate cost of cooperation in a particular case.

103. *See supra* note 48 and accompanying text. If cooperation cannot be achieved in the simple case, it will be even more unlikely given added complexity. *See, e.g., LoPucki, Cooperative Territoriality, supra* note 24, at 2230 (describing easy manipulation of universalist home country standard in context of corporate groups).

104. *See supra* Part II.A. This coincidence of choice of law and forum is consistent with the universalist approach, which also selects the home country court as the appropriate forum. Once home country law is chosen, this forum selection generally makes sense, since home country courts will be the most able at applying that law. *See Rasmussen, A New Approach, supra* note 52, at 33–34 (“Bankruptcy rules are notoriously complex. It is fanciful to expect a court to apply the bankruptcy law of a foreign country with anything approaching an acceptable degree of accuracy. Thus, for pragmatic reasons, a forum should generally apply its own bankruptcy law.”).

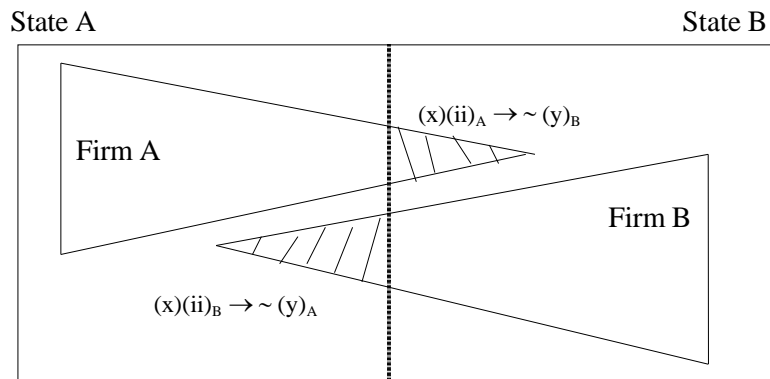
105. That is, firms with home country A.

- (ii) outside the territory of State A;<sup>106</sup> and
- (y) all other assets located in State A that become involved in bankruptcy proceedings,<sup>107</sup> regardless of their ownership, i.e., including assets owned by State B firms.

State B will have similar preferences.

Of course, it is not possible for all of both states' preferences to be fulfilled all the time. Figure 2 illustrates the conflicting preferences.

Figure 2



Firm A is a State A firm; Firm B is a State B firm. The shaded areas of Firm A and Firm B identify the international operations of each firm. It is these offshore assets that trigger international bankruptcy issues when a firm suffers financial distress. Competing assertions of bankruptcy jurisdiction will focus on these offshore assets.

State A's desire to apply its bankruptcy law to assets owned by State A firms but located in State B will clash with State B's desire to have its bankruptcy law apply to all assets located in State B. In general, fulfillment of preference (x)(ii) of either state will require the other state's

106. See *supra* note 60 and accompanying text; Wood, *supra* note 5, at 240 (describing extraterritorial reach of various bankruptcy regimes). Under U.S. law, for example, the bankruptcy estate created upon the commencement of the proceeding includes property of the debtor "wherever located." 11 U.S.C. § 541(a) (1994).

107. I borrow Lynn LoPucki's definition of "located" to include not only physical location of tangible assets, but to encompass intangible assets as to which a state is able unilaterally to enforce its determinations. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 743 and n.228. Under this definition, of course, an intangible asset could theoretically be located simultaneously in both State A and State B. I ignore that wrinkle for present purposes.

relinquishment of its preference (y) and recognition of the first state's assertion of extraterritorial bankruptcy jurisdiction. This of course is universalism. With territoriality, on the other hand, a state will insist on its preference (y) in the face of the other state's assertion of extraterritorial jurisdiction and its preference (x)(ii).

This sort of competition among states to advance their own laws and policies is not necessarily a zero-sum game. One state's gain in having its laws applied to a given dispute does not necessarily diminish a competing state by the same amount.<sup>108</sup> In many disputes, one state will have a greater stake in application of its own law than will other states. One state will more highly "value" application of its law than others. If states could cooperate by deferring to each other's laws on this welfare maximizing basis, then as a group they could make themselves better off than if each state blindly applied its own law whenever it could.<sup>109</sup>

The presumptive welfare maximizing choice of law implicit in the universalist approach, of course, is the law of the debtor's home country. Universalists have not explicitly defended home country law on this basis,<sup>110</sup> but for purposes of my discussion, I assume this choice is plausible. The home country in many cases will have the greatest interest in having its law govern its debtor's bankruptcy proceeding.<sup>111</sup>

---

108. For our purposes, we may assume a state "gains" when its policies are furthered by the application of its laws. See Brilmayer, *supra* note 83, at 193; Joel P. Trachtman, *Externalities and Extraterritoriality: The Law and Economics of Prescriptive Jurisdiction*, in *Economic Dimensions*, *supra* note 11, at 642 (analogizing prescriptive jurisdiction to property rights and discussing jurisdictional trade). In addition, we may assume that a state's gains inure to the benefit of domestic interest groups that supported the original domestic legislative bargain, and therefore that such groups will support such jurisdictional trades.

109. See Kramer, *Rethinking Choice of Law*, *supra* note 83, at 340; Brilmayer, *supra* note 83, at 197; Trachtman, *supra* note 108, at 645.

110. Neither predictability nor the desire for one main forum necessarily requires application of home country law. Predictability only depends on a *clear* choice of law rule, not that the choice be home country law. For instance, a rule that U.S. bankruptcy law (or the bankruptcy law of any other specified jurisdiction) should apply to all crossborder bankruptcies in the world offers better predictability than a home country rule. On the other hand, a desire for one main forum may suggest that whatever forum is selected ought to apply the law it applies best—its own domestic law. See *supra* note 104.

111. Moreover, one can imagine domestic interest group alignments that might coalesce around a universalist policy. Given the absence of any universalist arrangements in the world, scant evidence exists on this question. However, it appears that bankruptcy professionals typically play important roles in promoting bankruptcy reform, both domestically and internationally. See *supra* note 93. Recent international bankruptcy reform efforts have been driven largely by reform-minded lawyers and legal academics acting primarily through "private" legislatures, that is, technical expert groups affiliated with professional organizations or selected by international organizations. See Stephan, *supra* note 17 (discussing private legislatures and role of technical experts in drafting UNCITRAL Model Law on Cross-Border Insolvencies); Westbrook, *Creating International Insolvency Law*, *supra* note 59 (discussing

## 2. The Universalist Dilemma

Assuming that each state values mutual cooperation more than mutual defection, these conditions produce a prisoners' dilemma. I begin with a general description of the dilemma in normal form to illustrate states' incentives under single-play conditions. In the next section, I consider the more realistic scenario of repeated interaction.<sup>112</sup>

Returning to our two-state example, with two policy choices available to each state, there are four possible combinations of their decisions. For each state, we can rank these four possible outcomes in relative order of desirability, with 4 being a state's most favored outcome

---

various reform initiatives). Consistent with this evidence, bankruptcy professionals would likely play a leading role in a given state's adoption of universalism. A state's lawyers and other bankruptcy professionals would presumably prefer universalism if they believed that they would realize a net gain in retentions and fees as compared to territoriality.

Assuming bankruptcy professionals' expertise remains territorially bound, local professionals would favor universalism if they anticipated that they would be exporting their bankruptcy expertise more often than they would be witnessing foreign professional imports. That is, a state's bankruptcy professionals would support universalism if they believed their home jurisdiction would be the home country more often than not. They would lose some revenues, of course, in those cases in which a foreign bankruptcy regime controlled. Issues affecting local assets and legal relationships, which would have been litigated, negotiated, and decided locally under a territorial regime, would instead be subject to the foreign court's home country jurisdiction, where foreign professionals would reap the lion's share of fees. On the other hand, local professionals would stand to gain from the cases in which their state was the home country. Those cases would offer local professionals the chance to export their local expertise as home country bankruptcy specialists, advising foreign as well as local parties as to how the state's bankruptcy regime would operate. Consistent with this proposition, Lynn LoPucki has observed that "American bankruptcy professionals are nearly all universalists, because they assume the reorganizations will all come to the US so [the debtors] can be debtors in possession. Canadian bankruptcy professionals are (mostly closet) territorialists because they make the same assumption." *See* e-mail from Prof. Lynn LoPucki, Security Pacific Bank Professor of Law, UCLA Law School, to author (Feb. 24, 2001) (on file with author).

Of course, a given state's bankruptcy professionals may not hold uniform preferences on the subject of universalism. Those on the losing end of universalism may not be the same as those on the winning end. For example, professionals accustomed to representing unsophisticated local creditors with no offshore lending activities would only stand to lose business under universalism. Professionals representing unsophisticated clients may also not enjoy the same political influence as professionals with sophisticated international firms or lenders for clients. Therefore, the politics of universalism may turn disproportionately on the interests of the elite bankruptcy professionals in each state.

112. In the repeat play of international bankruptcy cooperation, we can think of each state's separate decisions on cooperation or defection as "moves" in the prisoners' dilemma game. In this context, the moves will ordinarily be sequential, rather than simultaneous: when State A is put to the choice of cooperation or defection, it will already have observed State B's earlier strategy choices when State A was the home country requesting State B's cooperation. Whether players move sequentially or simultaneously, or which player moves first in the sequential game, does not affect the equilibrium of the prisoners' dilemma game. *See* Jack Hirshleifer & David Hirshleifer, *Price Theory and Applications* 287 (6th ed. 1998).

and 1 being the least favored. In State A's best scenario—its most highly ranked outcome of—all its preferences are met. It chooses territoriality, while State B chooses universalism. Under this outcome, State B will defer to State A's assertions of extraterritorial jurisdiction when a State A insolvency proceeding involves Firm A operations or assets in State B (State A's preference (x)(ii) above), and State A will not defer to State B when the roles are reversed, but will apply its own law (State A's preference (y) above). State A will enjoy the fruits of State B's deference without having to reciprocate. In game theory parlance, State A will wish to defect, while having State B cooperate.

Next best from State A's perspective is mutual cooperation. By hypothesis, mutual cooperation is superior to mutual defection for State A, so State A is willing to defer when State B is the home country, provided State B reciprocates, i.e., State B defers when State A is the home country. While this outcome does not satisfy all of State A's preferences, it does garner State A the benefits of mutual cooperation. We give this outcome a ranking of 3.

After mutual cooperation comes mutual defection, which we can rank at 2. And finally, State A's worst outcome occurs when it cooperates but State B fails to reciprocate. In this scenario, State A defers to State B's assertions of extraterritorial jurisdiction when State B is the home country, but State B does not accord the same deference to State A's assertions of home country extraterritorial jurisdiction in State B. So neither State A's preference (x)(ii) nor its preference (y) is satisfied. This outcome ranks the lowest at 1.

State A's rank ordering of preferred outcomes, then, is as follows:

- 4 State A defects (chooses territoriality);  
State B cooperates (chooses universalism).
- 3 State A cooperates; State B also cooperates.
- 2 State A defects; State B also defects.
- 1 State A cooperates; State B defects.<sup>113</sup>

---

113. I do not claim that these preferences and payoffs hold for all states. If anything, many states' preferences are likely to be *more* rivalrous than those found in the prisoners' dilemma. Symmetric or asymmetric deadlock may apply, making universalist cooperation even more hopeless. See Oye, *supra* note 83, at 7 ("When you hear hoof beats, think horse before you think zebra. . . . When you observe conflict, think Deadlock—the absence of mutual interest—before puzzling over why a mutual interest was not realized." (internal quotations omitted)); Abbott, *supra* note 83, at 357 (describing deadlock games).



Assuming State B has similar preferences, their respective preference orderings and strategic incentives are reflected in the 2x2 matrix in Figure 3.<sup>114</sup>

Figure 3

		Cooperate (universalism)	Defect (territoriality)
State A	Cooperate (universalism)	3,3	1,4
	Defect (territoriality)	4,1	2,2

Several features of their interaction are noteworthy. State A's best outcome also represents State B's worst outcome, since State B has garnered the costs but not the benefits of interacting with State A. This explains the (4, 1) rankings in the southwest box of Figure 3. Because the two states' preferences are symmetrical, when their policy choices are reversed, their respective rankings of that outcome are reversed as

---

For example, besides states' general concerns regarding recognition described *supra* Part II, particular asymmetries among states may make universalism especially unappealing to some states. Less developed countries (LDCs), which typically import far more direct investment than they export, would see little benefit from universalism. LDCs would find themselves far more often deferring to industrial country bankruptcy regimes, rather than seeing their own domestic regimes applied extraterritorially. Since far more multinational firms are headquartered in industrial countries, those countries—and not LDCs—would more often be the home country for multinational bankruptcies. *See Tung, Fear of Commitment, supra* note 31, at 576–77. Some states may also find themselves consistently “asset-heavy.” Multinational debtors' assets will be disproportionately distributed across jurisdictions relative to the amounts of local creditors' claims in each jurisdiction. Some states may find themselves consistently in relative surplus. Such states may therefore prefer territoriality since that maximizes the amount of assets subject to distribution under the local regime. *See Tung, Fear of Commitment, supra* note 31, at 577. Transfer payments or issue linkage might be helpful in persuading these territorialist regimes to adopt universalism, but there appears to be no political impetus for pursuing such approaches, and universalists have not advocated them. *See infra* Part V.B.

In any event, the prisoners' dilemma model seems appropriate among countries with significant commercial relations and for whom mutual advantage from universalist cooperation would seem to exist. Moreover, universalist advocates implicitly assume these preferences in their advocacy. *See infra* note 118.

114. State A's ranking of each outcome is the first number of the pair, while State B's ranking is the second number.

well, giving us the (1, 4) outcome in the northeast box.<sup>115</sup> In addition, as discussed above, both states are better off if they both cooperate—garnering the (3, 3) result in the northwest box—than if neither do. Mutual defection leaves them the (2, 2) result in the southeast box.<sup>116</sup>

Each state prefers mutual universalist cooperation to mutual territoriality, but they have a problem. They will not achieve mutual cooperation. Instead, they will each choose to defect, even though they both know this to be a suboptimal outcome. This is the prisoners' dilemma. Consider the possible scenarios from State A's perspective. With no ability to assure State B's cooperation (an issue I discuss below) State A is always better off defecting. If State B cooperates, then State A obtains its best payoff by defecting. If State B instead defects, State A is also better off defecting. Otherwise, State A ends up with the "sucker's payoff," its worst result in the game. State B is in a similar predicament and must also defect. For both states, defection is the dominant strategy—each state's best strategy no matter what choice the other state makes.<sup>117</sup> The dilemma is that individually rational strategy choices of the two states result in mutual defection, which for *both* states is an inferior outcome compared to mutual cooperation.<sup>118</sup>

In the international context, the dilemma arises because states' promises may not be credible. Among sovereign states, no ultimate international authority exists to enforce states' promises. No

---

115. If we represent the combination of the players' two strategies as an ordered pair, with a player's strategy as the first element and her counterpart's as the second, then each player's best outcome is DC—she defects while the other player cooperates. Conversely, each player's worst outcome is CD.

116. For each player,  $CC > DD$ . Combining this preference with those described above gives the overall ordering of player preferences:  $DC > CC > DD > CD$ . This is the general definition of the single-play prisoners' dilemma. A further condition that  $CC > (DC + CD)/2$  is required in order to assure the possibility of mutual cooperative benefits from iteration, which is discussed *infra* in Part III.C. This separate condition assures that consistent mutual cooperation returns higher payoffs than if the players merely took turns defecting.

117. See Douglas G. Baird et al., *Game Theory and the Law* 11 (1994) (explaining dominant strategy).

118. That is, DD is not Pareto-efficient. Consistent with this account, universalist advocates, bemoaning the failure of international efforts at cooperation, promise mutual benefits if only states could forswear pursuit of short-term parochial interests in particular cases. Universalists seem to recognize that not all states are ready for cooperation. See *supra* note 102 and accompanying text. However, for those that stand to benefit from mutual cooperation, a prisoners' dilemma exists that can hopefully be overcome. See Westbrook, *Theory and Pragmatism*, *supra* note 24, at 466; Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 518 (describing cooperative benefits); Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 *Law & Pol'y Int'l Bus.* 1037, 1046 (1997). See also Stephan, *supra* note 17, at 785 (viewing international insolvency as "a classic collective action problem").

supranational sovereign exists to force states to abide by their commitments. Without such a central authority, states cannot guarantee future performance of their promises. "Nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests."<sup>119</sup> Even if mutual cooperation is preferable to mutual defection, states will have difficulty making credible their promises to cooperate.

One might suppose that a treaty provides a straightforward solution to this problem of credible commitments. Enforcement of promises can solve even the one-round prisoners' dilemma. However, a treaty does not create its own coercive enforcement authority. It has no independent binding effect. That states often comply with treaty obligations does not necessarily suggest any binding effect. Instead, a state's behavior consistent with its treaty obligations may show only that any benefit from breaching is outweighed by the possible retaliation of its treaty partners.<sup>120</sup> As the costs and benefits associated with compliance and cheating vary, so does the likelihood of compliance.<sup>121</sup>

Perhaps states could back up their universalist treaty commitments with domestic legislation instructing their courts as to application of the appropriate universalist conflicts of law rules. Domestic legislation mandating judicial implementation of universalism might provide some assurance to treaty partners about a state's future cooperation. Presumably, such enabling legislation could only be changed with some difficulty. Its passage might therefore add credibility to a state's universalist commitment.

However, demonstrating precommitment to universalism in this way will be problematic. As more fully discussed below,<sup>122</sup> specifying the

---

119. Oye, *supra* note 83, at 1.

120. See Goldsmith & Posner, *supra* note 86, at 1171.

121. This is not to assume away any reputational consequences that may attach to treaty violations. But these are simply additional costs in each state's decisional calculus. Moreover, reputational effects are ambiguous. A reputation for honoring international commitments must compete with other reputational interests states might have. A reputation for helping one's allies or punishing one's enemies, or a reputation for toughness, for example, might be as or more useful to a state in achieving its international objectives. These various reputational interests may conflict in any given case. Reputation may also not be as critical for powerful states, which may be "the only game in town" with respect to particular issues or transactions. See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 Harv. Int'l L.J. 487, 497-98 (1997). Even assuming a reputation for honoring international commitments were paramount, negative reputational consequences depend on third parties being able to distinguish cooperation from defection, which will not be easy in the context of universalism. See *infra* Part IV.B.

122. See *infra* Part IV.A-B.

universalist commitment with particularity will be difficult, whether in a treaty or in any enabling domestic legislation. Choice of law rules are notoriously imprecise and indeterminate,<sup>123</sup> as universalists admit.<sup>124</sup> The universalist commitment will inevitably be expressed in terms of imprecise standards, relying on the exercise of ex post judicial discretion for their application. But standards and ex post discretion—as opposed to hard-and-fast rules—do not deliver a credible commitment. Instead, they offer only ambiguity concerning the content of any ostensible commitment, and they invite both cheating and good faith disagreement over their proper implementation.<sup>125</sup> Universalist commitments will be fuzzy. But fuzzy commitments implemented through judicial discretion will not be credible commitments, so states will be reluctant to make such commitments in the first place.<sup>126</sup>

### *C. Repeat Play and Conditions for Cooperation*

Happily, states considering cross-border bankruptcy cooperation may anticipate repeat interaction with one another. In this repeat play context, states may have more sophisticated policy options than the once-and-for-all decision either to cooperate or defect. Each state may adopt a conditional strategy, which takes account of the other state's past behavior in deciding its own moves. In this context, the prospects for reaching cooperative outcomes under the prisoners' dilemma improve considerably.<sup>127</sup> Each player has the ability to reward or punish the

---

123. See Whincop, *supra* note 74, at 427–28 (identifying indeterminacy of choice of law rules as reason for absence of choice of law requirement for judgment recognition).

124. See *infra* note 149 and accompanying text.

125. Whincop, *supra* note 74, at 433. As Whincop suggests:

[W]here jurisdiction is defined by standards rather than rules, no credible commitment is made because the content of the standard is only ascertained at the time that the standard is applied to the case. That is inherent in the definition of a standard. Since no commitment has been made other than to apply a standard, courts will have an opportunity to cheat when cases arise, especially when the matters on which a court purports to base its judgment . . . are difficult for other states to observe or verify.

*Id.* See generally Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. Legal Stud. 271, 279–80 (1992) (discussing difficulties of contracting conditioned on information that is unobservable or unverifiable).

126. “[P]arties will not contract on the basis of unverifiable terms. This should apply equally to conventions.” Michael J. Whincop & Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* 159 (2000). This may in part explain why universalism has nowhere been implemented, despite its attraction to commentators.

127. See Oye, *supra* note 83; Axelrod & Keohane, *supra* note 83, at 235. See generally Axelrod, *supra* note 101 (describing experiments confirming evolution of cooperation with repeat-play prisoners' dilemma games).

other—augment or reduce the other's payoff—by cooperating or defecting in any given round of play.<sup>128</sup> Each player also understands that it may be punished in later rounds for defection in the current round. Given the prospect of reward for mutual cooperation and future punishment for current defection, a stable pattern of reciprocal cooperation can emerge.<sup>129</sup> If the game is infinitely repeated, or players do not know when the last round of play will occur, as is typically the case with international commercial relations, stable cooperation is possible.<sup>130</sup>

---

One could also imagine particular rounds of the international bankruptcy game in which the payoffs might not correspond to the prisoners' dilemma, but might be more conducive to cooperation. For instance, suppose that State U, a universalist regime, is the home country for Firm U's bankruptcy, but that significant Firm U assets are located in State T, a territorialist regime. Suppose further that in the particular case, (a) claims of State T creditors are predominantly local employee claims, which do not enjoy priority under State T bankruptcy law, but would enjoy high priority under the bankruptcy laws of State U; (b) State U creditors are primarily banks, which enjoy no priority under the laws of either state; (c) there are no other significant creditor groups; and (d) neither state's bankruptcy laws discriminate against foreign creditors. If State T acted territorially, rejecting the jurisdiction of the State U universalist court and applying its own bankruptcy laws to Firm T's local assets, it would have to distribute the value of those assets pro rata as among State U bank creditors and State T employee creditors. On the other hand, because State T's employee creditors would enjoy priority in the universalist proceeding, relinquishing local assets to the universalist proceeding would enable State T's creditors to recover against those assets before State U's bank creditors. In that situation, the clear benefit to State T creditors from State T's universalist cooperation would likely outweigh any countervailing policy considerations that might argue for territoriality by State T.

While particular cases might arise in which states' preferences are less rivalrous than in the prisoners' dilemma, they are not likely to arise regularly, as my stylized facts above suggest.

128. In fact, each player's payoff is affected more by the other player's move than its own. Each player's move affects its own payoff by only one ordinal ranking, but the other player's move affects the first player's payoff by *two* ordinal rankings. See Snidal, *Coordination*, *supra* note 83, at 927.

129. In Robert Axelrod's cooperation experiments, he found that a Tit for Tat strategy was the overall best performing strategy in computer simulations of round-robin repeat prisoners' dilemma tournaments. With that strategy, a player starts out cooperating, and then in every subsequent round simply plays the strategy that the other player played in the prior round. So every instance of cooperation from Player B is rewarded with cooperation from Player A, and every defection is punished by a retaliatory defection in the next round. See Axelrod, *supra* note 101, at 31. Tit for Tat, however, performs less well in "noisy" environments, where imperfect monitoring or other errors may undercut simple reciprocal strategies for cooperation. See *infra* note 181 and accompanying text.

130. See Oye, *supra* note 83, at 13 & n.25. While backwards induction predicts that for finitely repeated prisoners' dilemma games, cooperation will not evolve, see Axelrod, *supra* note 101, at 10, finite repetition is typically not an issue in international relations. See Oye, *supra* note 83, at 13 n.25. In addition, experimental evidence shows that even in the finite game, players cooperate up until the last few rounds. This divergence between predicted and observed results may be reconciled by relaxing the assumption of common knowledge of rationality. See Barry Nalebuff, *Prisoners' Dilemma*, in *The New Palgrave Dictionary of*

Whether cooperation in fact emerges depends on the “shadow of the future,” the particular contours of the anticipated future interaction between the players. In any given round, cooperation requires each player to forego its single—play dominant strategy move—defection—in the hope of garnering the future benefits of the other player’s cooperation. Therefore, the rational player will weigh the immediate benefits of current defection against anticipated future payoffs from current cooperation. In the context of universalism, a non-home country asked to defer to home country insolvency proceedings must decide whether immediate gains from defection—exercising territorial jurisdiction and applying its own laws to particular issues—outweigh the prospect of future cooperative payoffs—enjoying extraterritorial jurisdiction and application of its own bankruptcy laws beyond its borders when it later finds itself as the home country.

Several factors are critical to this strategy choice and the shadow of the future generally. First, perceived durability of a relationship and anticipated frequency of interaction will improve a state’s willingness to cooperate.<sup>131</sup> With commercial relations, states can typically anticipate that their relationships with other states will continue indefinitely.<sup>132</sup> This perception of a long time horizon means a long future from which cooperative rewards may potentially emerge. Anticipated frequent interaction also assures each player of regular opportunities to garner cooperative future payoffs or if necessary, to punish defection with swift retaliation. If significant cross-border direct investment exists or is anticipated between States A and B, and investment flows are not too lopsided in one direction, then the two states may anticipate that the game of cross-border bankruptcy cooperation will have many future iterations. Each state anticipates that it will find itself in the position of both home country and non-home country in the future. As the latter, it will understand that in any given round, its decision whether to play universalism or territoriality will affect its future payoffs. On the other hand, if States A and

---

Economics and the Law 92 (1998). Common knowledge of rationality means that all the players know that all the players are rational, all the players know that all the players know that all the players are rational, and so on. See Roger B. Myerson, *Game Theory: Analysis of Conflict* 64 (1991). Common knowledge is a very strong informational assumption. For a discussion of its subtleties, see Peter H. Huang, *Still Preying on Strategic Reputation Models of Predation*, 3 *Green Bag* 437, 439 (2000) (reviewing John R. Lott, Jr., *Are Predatory Commitments Credible? Who Should the Courts Believe?* (1999)).

131. See Axelrod, *supra* note 101, at 129.

132. By contrast, in security affairs, a particular act of defection may be decisive in crippling or destroying another player, thereby eliminating the possibility of retaliation. See Axelrod & Keohane, *supra* note 83, at 232–33.

B do not anticipate significant future interaction, then the international bankruptcy cooperation game looks very much like a one-shot game, for which defection is the dominant strategy.

Related to a state's time horizon is its discount factor—how it values future payoffs as compared to immediate payoffs. Players are typically impatient. All other things being equal, they prefer an immediate payoff to an identical payoff in the future. The discount factor captures just how much a state discounts a future payoff as compared to an immediate one.<sup>133</sup> The lower the discount factor, the less a state values the future payoff as compared to the immediate payoff. In the context of the prisoners' dilemma, a low discount factor spells more ready defection than cooperation. Cooperation demands delayed gratification, but the lower the discount factor, the more attractive is the immediate payoff from defection. Therefore, in order for cooperation to emerge, states must have sufficiently high discount factors to induce them to forego immediate defection payoffs in favor of future cooperative payoffs. Finally, with repeat play and the weighing of immediate versus future gains, payoff structure matters. In particular, interval levels of the various payoffs, and not just their rank ordering, are important to consider. For example, the difference between the unilateral defection payoff and the mutual cooperative payoff matters.<sup>134</sup> The smaller this is, the lower is the temptation to defect, since the relative gain from defection is small.<sup>135</sup> In general, relatively higher cooperative payoffs<sup>136</sup> and relatively lower defection payoffs<sup>137</sup> make cooperation more likely.<sup>138</sup>

133. The discount factor  $\delta$  falls between 0 and 1. With money payoffs, if  $r$  is the prevailing interest rate, then  $\delta = 1/(1+r)$ . The present value of a payoff of  $\pi$  dollars is equal to  $\delta\pi$  if paid in the next period. See Robert Gibbons, *Game Theory for Applied Economists* 68 & n.7 (1992). Other payoffs can be similarly discounted. See James D. Morrow, *Game Theory for Political Scientists* 38 (1994). The discount factor may also incorporate the possibility that a game will end. The end of the game means no further prospect for future cooperative payoffs. So a higher probability of the game's end generally means that a state will value immediate payoffs more highly, making defection more attractive. See Gibbons, *supra*, at 90.

134. That is, DC–CC. See *supra* notes 115–116.

135. See Abbott, *supra* note 83, at 364 (describing devices by which player reduces its own defection payoff in order to facilitate cooperation).

136. Namely, CC and CD.

137. That is, DC and DD.

138. See Axelrod, *supra* note 101, at 134 n.3; Robert Jervis, *Cooperation Under the Security Dilemma*, 30 *World Pol.* 167, 171 (1978). The discount factor  $\delta$  can be expressed in terms of these payoffs to specify the conditions under which reciprocal strategies will form cooperative equilibria. For instance, two players playing Tit for Tat strategies will reach a cooperative equilibrium when

$$\delta > \max \left( \frac{DC - CC}{CC - CD}, \frac{DC - CC}{DC - DD} \right).$$

In general, then, States A and B are more likely to succeed with universalist cooperation (a) the longer they expect their relationship to last and the more iterations they expect, (b) the higher their respective discount factors, and (c) the greater are cooperative payoffs relative to defection payoffs. In the best case, each state anticipates numerous iterations of the universalist game, and whatever short-term loss it suffers from deferring to the other state's bankruptcy regime now will be more than offset by reciprocal deference extended by the other state in the future.

#### IV. Fitting Theory to Facts: Conditions of Play in International Bankruptcy

Given these conditions for cooperation, how likely is universalism?<sup>139</sup> In this Part, I discuss the particular conditions of play in international bankruptcy, showing that they will not be conducive to universalist cooperation. Such conditions will impede simple reciprocity strategies—whether unilateral or even treaty based—which universalists have endorsed.<sup>140</sup> First, universalist commitments will be fuzzy, relying on standards and judicial discretion instead of clear-cut rules. Fuzzy commitments mean that states will disagree on what counts as cooperation. Interpretive disagreement will garble the messages conveyed and received via rewards and punishments. Second, judges are typically central to bankruptcy proceedings, but the judicial role is not conducive to implementing reciprocity strategies. Finally, once we move beyond our bilateral example to consider multilateral universalism, the obstacles become well-nigh insurmountable. Even if, between pairs of states, the shadow of the future might be sufficient to induce cooperation and other

---

*See* Morrow, *supra* note 133, at 266; Axelrod, *supra* note 101, at 59 n.4.

139. As a preliminary matter, it should be noted that even if State A and State B have long time horizons and expect frequent interaction in terms of opportunities for crossborder bankruptcy cooperation; even if their respective discounting of future payoffs is not too severe; and even if the payoff structure of their universalist dilemma is hospitable to cooperation, these conditions do not assure cooperation. Though these conditions vastly improve its prospects, cooperation is never guaranteed. Even under ideal conditions, mutual defection is still always a subgame-perfect equilibrium in iterated prisoners' dilemma games. *See* Morrow, *supra* note 133, at 267. Two states attempting to cooperate through reciprocity strategies still need to coordinate on which equilibrium strategies they are playing and what punishment will be used to enforce cooperation. Otherwise, they may settle in to a pattern of repeated mutual defection. *See id.* at 266. In addition, as a practical matter, conditional strategies are often politically difficult to sell to domestic constituents. *See* Oye, *supra* note 83, at 16.

140. *See supra* note 44 and accompanying text.



obstacles could be overcome, these auspicious conditions become far less likely in the multilateral context. Moreover, as the number of interested states increases, the likelihood of sufficiently favorable conditions across all states diminishes.

Taken individually, no single factor necessarily rules out cooperation. In other contexts, similar obstacles have been overcome, typically through international regimes and institutions. In the next Part, I discuss the role that regimes play in addressing impediments to international cooperation. Though universalists have not specifically considered it, I discuss the possibility of a universalist regime, but find one both unlikely to emerge and unlikely to be able to solve the particular set of problems universalism raises.

### A. *Fuzzy Commitments*

Specifying the universalist commitment with precision will be difficult. In this section, I explain the tendency toward fuzzy universalist commitments, before exploring its significance in subsequent sections.

Largely for technical reasons, defining the basic jurisdiction of the universalist court will necessarily involve some vagueness, leaving discretion to judges.<sup>141</sup> Two significant areas are particularly problematic. The first is the specification of rules for identifying the home country. The second is the problem of defining the scope of the home country court's bankruptcy jurisdiction, that is, identifying the local laws or specific issue areas that are displaced by home country bankruptcy law.

Lynn LoPucki's seminal challenge to universalism first raised questions concerning the determinacy of the home country rule.<sup>142</sup> He argued that the "home country" concept is not only indeterminate, but that any determinate rule would be susceptible to eve-of-bankruptcy manipulation—forum shopping—by debtors. He cites egregious cases of debtors

---

141. Paul Stephan offers a public choice explanation for standards in international commercial law. He argues that within the international groups producing unified international commercial laws, such as UNCITRAL, the interaction of technical experts, who essentially produce the initial versions of reform proposals, with wider approving bodies, which must contend with interest group pressure in the process of adopting any proposal, results in the adoption of instruments with few rules that would impose costs on any organized group. Instead, these instruments delay hard choices by leaving actual outcomes to the discretion of future decision makers. See Stephan, *supra* note 17, at 759. With respect to the UNCITRAL Model Law on Cross-Border Insolvency, Stephan further notes that the broad discretion left to bankruptcy tribunals in that instrument enhances the power and prestige of insolvency professionals. They therefore had incentive to support the Model Law despite its creation of greater uncertainty in international insolvency situations. See *id.* at 787.

142. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 713–25.

moving their headquarters or divesting assets just prior to filing in order to facilitate access to favorable fora.<sup>143</sup> No workable definition of “home country” is possible because greater determinacy begets greater manipulability.<sup>144</sup> According to LoPucki, indeterminacy on this basic issue belies the claimed predictability and related efficiency advantages of universalism.

Universalists reply that no hard-and-fast rule is necessary, since the controversial cases will be few. In most cases, the home country will be readily identifiable.<sup>145</sup> Moreover, a “principal place of business” or “center of main interests” standard has worked passably in other contexts.<sup>146</sup>

---

143. As LoPucki notes:

Debtors could accomplish [forum] shops by a variety of means. The most obvious means would be to move the company’s headquarters to the preferred country before filing the case. Contrary to the assertions of some universalists, moving the headquarters of a large company is neither difficult nor unusual. Such moves were made on the eves of several major domestic bankruptcies. While an international move theoretically might be more difficult, they are hardly unknown. For example, BCCI moved its headquarters from London to Abu Dhabi shortly before filing its bankruptcy case in Luxembourg. Dresco Energy moved its headquarters and its center of gravity from Canada to the United States on the eve of its bankruptcy and then moved it back afterwards. To do this, Dresco divested itself of its Canadian properties and Canadian employees before filing its bankruptcy case in Houston, Texas, and then it did the opposite after concluding its case.

*Id.* at 722 (citations omitted). Fruit of the Loom shopped itself into a Cayman Islands bankruptcy proceeding through an eve-of-bankruptcy corporate reorganization. *See* LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2231 & n.71 (describing various eve-of-bankruptcy strategies available to corporate groups that wish to forum shop).

144. *See* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 722–23; LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2235.

145. *See* Westbrook, *Global Solution*, *supra* note 8, at 2317 (“[T]he marginal cases will be few.”); Guzman, *supra* note 21, at 2207 (“[T]here is widespread agreement . . . that, in the vast majority of cases, the home country will be easy to identify—making the issue a minor question.”); Westbrook, *Lessons of Maxwell*, *supra* note 75, at 2541 (noting unusual case of *Maxwell*, in which identification of home country was debatable). *See also* Rasmussen, *A New Approach*, *supra* note 52, at 12 (“In most situations, it will be clear which country is the home of the debtor.”).

146. *See* Westbrook, *Global Solution*, *supra* note 8, at 2316. Place of incorporation might be used as a proxy, but that would be subject to adjustment as the facts required. *See id.* at 2317.

Westbrook cites the Brussels Convention as an example of a successful articulation of rules for adjudicatory jurisdiction. *See id.* However, the reference is inapt. The Brussels Convention concerns states’ obligation to recognize foreign civil judgments. It delineates acceptable and unacceptable bases for the rendering court’s jurisdiction over the defendant-judgment debtor in civil cases. In that context, the possibility of multiple bases for jurisdiction works no great harm. It creates no opportunities for endgame manipulation, since multiple bases of jurisdiction merely broaden a *plaintiff’s* litigation options based on the *defendant’s* activities. By contrast, indeterminacy of the home country standard under universalism *does* create opportunities for strategic behavior by debtors, since it enables debtors to manipulate

A “raw, unsophisticated choice” among rules is unnecessary; instead, the choice may be “multidimensional.”<sup>147</sup> According to universalists, then, such a standard works well for most cases, and judges will presumably apply discretion to the few cases involving indeterminacy or possible debtor manipulation. Without resolving this debate as to its efficiency consequences, I discuss the effect of indeterminacy on states’ reciprocity strategies below.<sup>148</sup>

A second area of fuzziness involves the interface between home country bankruptcy law and local nonbankruptcy law. Once the home country is determined, there is the further issue of determining the exact contours of the home country court’s extraterritorial reach, that is, the scope of local laws and local court jurisdiction that are overridden by the home country bankruptcy regime. Universalism selects home country law applied by home country courts, but only as to bankruptcy issues. Deciding where bankruptcy law ends and nonbankruptcy law begins, however, is not always an easy issue. Put differently, the scope of the universalist choice of law and forum selection rules is not self-defining.<sup>149</sup>

These interface issues will be especially problematic in two areas: creditor entitlements and regulatory issues. As to the former, creditors’ rights in bankruptcy generally depend on their entitlements outside of bankruptcy. Bankruptcy law does not create the contract or property rights that creditors assert against the debtor in bankruptcy. Those rights exist independent of bankruptcy law. But deciding whether a given issue is a bankruptcy issue or one involving nonbankruptcy entitlements is not always simple. For example, when a German debtor has fraudulently conveyed land in Belgium to an innocent third party, it pits the debtor’s creditors against the innocent purchaser. Should German bankruptcy law applied by the German court determine who is entitled to the land? Or should the Belgian court apply its own property laws to decide the ques-

---

applicable bankruptcy law and the appropriate bankruptcy forum through *their own* endgame maneuvers, to the detriment of creditors. Only if the Brussels Convention conditioned jurisdiction over defendants based on *plaintiff’s* activities would the comparison hold. Such an approach to jurisdiction would, of course, be absurd. See *supra* Part II.B.

147. See Westbrook, *Global Solution*, *supra* note 8, at 2317.

148. See *infra* Part IV.B.

149. Universalists recognize these problems as well. See Westbrook & Trautman, *supra* note 9, at 662 (describing difficulty of deciding where local property law ends and universalist bankruptcy rules should take over); See also Westbrook, *Theory and Pragmatism*, *supra* note 24, at 462 (distinguishing choice of law from forum choice, and illustrating when intersection of local and home country laws may create difficult questions).

tion?<sup>150</sup> In general, ownership rights in land are determined by the law and in the courts of the jurisdiction in which the land is located,<sup>151</sup> which in our example would indicate Belgian law and courts. However, determining entitlements to the land would also have clear distributional consequences for creditors, which is a fundamental bankruptcy issue. From this perspective, the German bankruptcy regime should govern. How this issue is ultimately resolved is not as important for our purposes as is the simple illustrative value of the example. It highlights the inevitable murkiness in the content of the universalist commitment.<sup>152</sup>

Regulatory issues may also be particularly nettlesome. To what extent may bankruptcy law modify local regulatory obligations to which a debtor would otherwise be subject? For example, may local environmental clean-up obligations be superseded by home country rescue rules? May the universalist bankruptcy court relieve the debtor from such regulatory obligations in a non-home country? Resolution of these issues within a single national jurisdiction may not be straightforward.<sup>153</sup> Resolution *across* jurisdictions is likely to be quite messy and unpredictable.<sup>154</sup> Consider another example. Under U.S. law, certain bankruptcy-related offerings of securities by a debtor enjoy exemption from otherwise applicable U.S. securities laws.<sup>155</sup> Should all or part of

---

150. See Westbrook & Trautman, *supra* note 9, at 661–62.

151. See *id.* at 661 (regarding choice of law); See Brussels & Lugano Conventions, *supra* note 78, art. 16(1) (regarding exclusive jurisdiction of courts where immovable property is situated).

152. Security interests present similar issues. A creditor's secured status in bankruptcy generally depends on its secured status outside of bankruptcy. Analysts generally agree that this question of secured status should be determined based on nonbankruptcy law, while the *effect* of that status in bankruptcy is a question of bankruptcy law. See Westbrook & Trautman, *supra* note 9, at 661; see also Ulrich Drobniq, *Secured Credit in International Insolvency Proceedings*, 33 *Tex. Int'l L.J.* 53, 65 (1998). This distinction may prove elusive in particular cases.

153. See, e.g., *Ohio v. Kovacs*, 469 U.S. 274 (1985) (holding that prepetition environmental clean-up obligation was liability on a claim and therefore subject to bankruptcy discharge); *Midlantic Nat'l Bank v. N.J. Dept. of Env'tl. Prot.*, 474 U.S. 494 (1986) (holding that Chapter 7 trustee may not abandon contaminated estate property in contravention of local health and safety laws); *New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991) (finding that city's nonbankruptcy action for prepetition clean-up reimbursement costs fell within police and regulatory exception to automatic stay). See generally LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2237 (discussing indeterminacy of scope of universalist bankruptcy jurisdiction).

154. These issues are not likely to be clarified over time. Even if some issues recur, different courts from different legal regimes may take different approaches, with none binding on any other. See Stephan, *supra* note 17, at 792 (discussing lack of density and stability of international commercial law).

155. See 11 U.S.C. § 1125 (1994). See generally Richard E. Mendales, *We Can Work It Out: The Interaction of Bankruptcy and Securities Regulation in the Workout Context*, 46

the local securities regulation as applied to debtor firms be considered a part of the local “bankruptcy law” overridden by a universalist assertion of extraterritorial bankruptcy jurisdiction?

The answer to these questions are not straightforward and may depend on the specific contexts in which they are raised. “Analytically, one must determine the character of the issue before determining the governing law.”<sup>156</sup> Given the complexity of large multinational firms and the unique issues that may arise in particular cases, characterization of legal issues will often have to be improvised. Universalism transplants one state’s bankruptcy regime into another’s legal system, raising unavoidable issues concerning the scope and boundaries of the foreign regime. The resolution of issues that may be critical to specific cases will often have to be tailored on an ad hoc basis.<sup>157</sup> As with the determination of the debtor’s home country, these interface issues will often have to be decided by judges relying on standards and exercising discretion ex post.

---

Rutgers L. Rev. 1211 (1994). For discussion of the opposite problem—opting out of U.S. securities regulation and effects on the domestic bankruptcy regime—see Choi & Guzman, *Portable Reciprocity*, *supra* note 12, at 936.

156. Westbrook & Trautman, *supra* note 9, at 586.

157. The complexity of the choice of law rules of the European Union Insolvency Regulation shows the difficulty of elaborating bankruptcy choice of law rules with particularity. See Council Regulation 1346/2000 on Insolvency Proceedings, 2000 OJ (L 160) 1 [hereinafter EU Insolvency Regulation]. The EU Insolvency Regulation institutes a compromise system that incorporates aspects of both universalism and territoriality. It provides for a universalist main proceeding, which is conducted in the state where the “centre of a debtor’s main interests is situated,” *see id.* art. 3(1), and which has extraterritorial effect throughout the EU. *See id.* arts. 16–18. It is also apparently intended to “encompass the debtor’s assets on a worldwide basis and to affect all creditors, wherever located.” Ian F. Fletcher, *Insolvency in Private International Law: National and International Approaches* 260 (P.B. Carter QC ed., 1999). On the other hand, however, separate territorial proceedings are also authorized in states where the debtor has an establishment, preserving the ability of non-home countries to distribute value pursuant to their own local laws. *See* EU Insolvency Regulation, *supra*, art. 3(2). These secondary proceedings must be winding-up proceedings, and they only affect the debtor’s assets within the particular state. *See id.* art. 3(2)–(3).

Article Four of the EU Insolvency Regulation identifies forum law as the basic choice of law for insolvency proceedings: “the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.” *See id.* art. 4(1). Article Four relies on thirteen subsections for detail. *See id.* art. 4(2). Articles Five through Fifteen then elaborate specific exceptions. *See id.* arts. 5–15. For example, forum law will not displace other law otherwise applicable to an employment contract with respect to the effect of insolvency proceedings on that contract. *See id.* art. 10. The most dramatic exception, from a universalist perspective, is contained in Article Five, which provides that as to debtor assets located outside the territory of the forum state, the *situs* law governing secured creditors’ rights in rem, including the right to seize and dispose of collateral, trumps forum law. *See id.* art. 5.

### B. *Consequences for Reciprocity*

Universalists do not contest the existence of these various muddy areas that may require some exercise of judicial discretion.<sup>158</sup> Instead, universalists contest their significance. Universalists admit that reliance on standards and judicial discretion may sacrifice a bit of predictability for creditors, but such indeterminacy at the margins is tolerable. In any event, universalism with standards is still an improvement over territoriality.<sup>159</sup>

To date, this debate over determinacy has focused on efficiency, i.e., whether indeterminacy does or does not undercut universalist claims of improved ex ante predictability. However, the effect of indeterminacy on the comparative efficiency of universalism only matters if we assume that an otherwise idealized universalist system is already in place. But that may never happen. A prior question exists concerning the political consequences of indeterminacy, in particular, its effect on reciprocity strategies among states. Even if fuzzy commitments would not undermine the comparative efficiency of an otherwise idealized universalist system, fuzzy commitments *will* make the realization of that idealized system less likely.

Reliance on standards implemented through ex post judicial discretion creates ambiguity concerning states' commitment to universalism and makes reciprocal cooperation difficult to achieve. Any professed commitment may not be credible, so states will be reluctant to make or rely on such commitments ex ante.<sup>160</sup> As important, the fuzzy quality of the commitment will make it difficult for one state to interpret whether another has cooperated or defected. A state's refusal to defer to the edicts of foreign bankruptcy proceedings is certainly transparent, but whether that refusal breaches the state's universalist commitment may be unclear in a given case. With fuzzy commitments, good faith disagreement over compliance issues will not be uncommon.

With respect to identification of the home country, for example, certainty in most cases may not be good enough. Acting entirely in good faith, states will disagree as to which is the home country. Fuzzy commitments allow ostensibly cooperative states to assert plausible competing claims to home country status, thereby frustrating the

---

158. "The key point is that the line-drawing problem cannot be avoided; it can only be placed at different points on the commercial spectrum. . . ." Westbrook & Trautman, *supra* note 9, at 584.

159. See Guzman, *supra* note 21, at 2208.

160. See *supra* notes 125–126 and accompanying text.

reciprocity strategy at the heart of the development of universalist cooperation. Ambiguity enables State A to insist on its territorial prerogative, refusing to recognize any claimed extraterritorial effect of State B's insolvency proceeding while also claiming no violation of its universalist commitment.<sup>161</sup> In the face of ambiguous commitments, the best the two states may be able to do is a rough ad hoc territorial compromise.<sup>162</sup> Two examples illustrate these points.

### 1. Example 1: The European Union

The history of EU negotiations over a cross-border insolvency convention exemplifies states' reluctance to contract on the basis of ambiguous commitments. At one stage of negotiations, universalism had been considered and extensively discussed, but indeterminacy in the specification of the home country was a sticking point.

[A]s regards the primary criterion based upon the location of the debtor's 'centre of administration', there was scope for divergent approaches to be adopted when applying the concept to the facts of actual cases. Although each version of the Draft supplied a definition of the expression as meaning 'the place where the debtor usually administers his main interests', this appears only to raise a whole series of further questions. . . . Although both versions [of the Draft] embody a rebuttable presumption, in the case of firms, companies and legal persons, that the registered

---

161. State A may even attempt its own universalist proceeding, claiming extraterritorial effect in State B. This would be necessary from State A's perspective only if significant debtor assets were located in or otherwise subject to the de facto control of State B.

162. International bankruptcy cooperation has already evolved in this direction. In the absence of any international framework for cooperation, judges and lawyers have fashioned ad hoc "protocols" in particular cases. As Evan D. Flaschen and Ronald J. Silverman explain:

In the absence of a formal treaty, practitioners and courts have created what are essentially case-specific, private international insolvency treaties.

. . . The Protocols that have been implemented to date have been influenced both by considerations of universality and certain constraints of territoriality. They strive, in the first instance, to promote an efficient, worldwide coordination and resolution of multiple insolvency proceedings. At the same time, they serve to protect fundamental, local rights material to each of the legal fora involved.

. . . Although the relief provided by Protocols necessarily varies to suit circumstances and legal environments, the essence of the Protocols is to provide a mechanism that controls how the parties will communicate, take actions, and apply both procedural and substantive elements of law.

Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 *Tex. Int'l L.J.* 587, 589 (1998) (citations omitted).

office is the place where the debtor's main interests are usually administered, the manner of rebutting this presumption, and the degree of proof needed, are left uncertain. Given the scope for different views regarding what amount to a debtor's 'main' interests, the potential instability of this basis of jurisdiction was disturbing.<sup>163</sup>

This indeterminacy made universalism problematic, and states were unwilling to commit to it.

The EU Insolvency Regulation that finally emerged in May 2000 is essentially a territorial system with universalist pretensions.<sup>164</sup> It gives a formal nod to universalism, providing for a "main proceeding" in the state where the "centre of a debtor's main interests" is located, with extraterritorial effect throughout the EU.<sup>165</sup> But the Regulation allows territorial winding-up proceedings as well: in any other state in which the debtor has an establishment, a "secondary proceeding" can be initiated. This winding-up proceeding—essentially a liquidation—trumps the main proceeding as to assets located in that state.<sup>166</sup>

## 2. Example 2: *Maxwell Communications*

The famous *Maxwell* case<sup>167</sup> provides a nice illustration of the difficulties of identifying the home country. While admittedly, neither the United States nor the United Kingdom—the two states primarily involved—had undertaken a clear universalist commitment,<sup>168</sup> and therefore had no legal obligation to defer, it would be difficult to imagine

---

163. See Fletcher, *supra* note 157, at 253 n.21 (discussing negotiation of 1970 and 1980 draft treaties).

164. The EU Insolvency Regulation effectively legislates the provisions of the European Union Convention on Insolvency Proceedings, which was duly negotiated among EU members but never entered into force because the United Kingdom's subsequent refusal to ratify. See European Union Convention on Insolvency Proceedings, *opened for signature*, Nov. 23, 1995, 35 I.L.M. 1223 (1996) [hereinafter EU Insolvency Convention]. The UK refusal apparently had nothing to do with the convention itself but with some concurrent friction over Continental reluctance to allow imports of UK beef following the scare over mad cow disease. Following expiration of the ratification period for the treaty, the EU Council promulgated the same rules in the form of a regulation.

165. See EU Insolvency Regulation, *supra* note 157, arts. 3(1), 16–18.

166. See *id.*, art. 3(2)–(3).

167. *Maxwell Communication Corp. v. Barclays Bank (In re Maxwell Communication Corp.)*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

168. Some universalists claim that Section 304 of the U.S. Bankruptcy Code, 11 U.S.C. § 304, expresses a U.S. commitment to universalism. See Westbrook, *Global Solution*, *supra* note 8, at 2323. Others find Section 304 indeterminate. See Bebchuk & Guzman, *supra* note 30, at 783.



that either state would have relinquished its claim to home country status in any event.

Maxwell Communications was a multinational publishing empire headquartered in England, from where it was managed and whence its financial affairs were conducted. While its major debts were incurred in England, however, its principal assets were in the United States. Two U.S. publishing companies wholly owned by Maxwell, Macmillan, Inc. and Official Airline Guide, Inc., accounted for about 80% of Maxwell's assets.<sup>169</sup>

Maxwell initially petitioned for an administration in England,<sup>170</sup> but when the judge appointed administrators not to the liking of the company, the company filed a Chapter 11 petition with the U.S. bankruptcy court in New York.<sup>171</sup> Most universalists would probably agree that the United Kingdom was the home country.<sup>172</sup> However, the U.S. court retained primary jurisdiction over the case, along with the U.K. court. This retention of jurisdiction was no surprise, given the sheer size of the estate, the value of assets in the United States, and perhaps the professional fees at stake.<sup>173</sup>

[M]ost of the debtor's assets were in the United States. This fact was no doubt an important part of Judge Brozman's [the U.S. bankruptcy judge's] insisting on retaining United States jurisdiction and requiring the concurrence of a United States examiner in major decisions in the case. Yet the court had recognized from the start that the center of gravity of the company was in the United Kingdom, the location of its principal executive offices. For that very reason, the court had ceded primary authority for corporate governance to the British administrators, *while protecting against potential injury to U.S. interests through*

---

169. See Maxwell, 170 B.R. at 802. In 1988, Maxwell had acquired Macmillan for \$2.6 billion and Official Airline Guide for \$750 million. See *id.* These two subsidiaries in turn owned assets all over the world. See Westbrook, *Global Solution*, *supra* note 8, at 2321 n.184.

170. Administration is a rescue proceeding under English law. See *infra* note 178.

171. See Leonard Hoffman, L.J., *Cross-Border Insolvency: A British Perspective*, 64 Fordham L. Rev. 2507, 2514 (1996).

172. See Westbrook, *Lessons of Maxwell*, *supra* note 75, at 2537, 2541 n.44 (noting that Maxwell's "center of gravity" was in the United Kingdom, and that the company was "essentially English"). Universalists identify principal place of business and center of main interests as appropriate standards for determining the home country, while rejecting location of assets as ordinarily indeterminate and subject to manipulation. See *supra* note 146; Guzman, *supra* note 21, at 2207.

173. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 25, at 721 (noting significance of professional fees in courts' competition for cases).

*maintenance of the Chapter 11 case and appointment of the examiner.*<sup>174</sup>

Maxwell's bankruptcy proceeded simultaneously in both courts. The U.K. administrators and the U.S. examiner, appointed by the U.S. judge to work with the administrators, worked out a "Protocol" to govern the conduct of the joint proceedings.<sup>175</sup> Ultimately, a "Plan and Scheme" was formulated, which complied with the laws of both jurisdictions,<sup>176</sup> pursuant to which Maxwell's businesses were sold as going concerns and creditors were paid.<sup>177</sup>

*Maxwell* no doubt represents a remarkable achievement in terms of cooperation and coordination in an enormously complex international bankruptcy. However, it also offers a stark illustration of a type of case for which the universalist home country standard and judicial discretion would yield indeterminacy, requiring ad hoc territorial compromise.

Jay Westbrook portrays *Maxwell* as the unusual case "where the debtor's home country might be subject to some plausible debate."<sup>178</sup> But

---

174. Westbrook, *Lessons of Maxwell*, *supra* note 75, at 2537 (emphasis supplied).

175. *See in re Maxwell Communication Corp.*, 170 B.R. 802 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

176. *See id.* The single scheme represented both a plan of reorganization under U.S. law and a scheme of arrangement under U.K. law. *See id.*

177. *See id.*

178. *See* Westbrook, *Lessons of Maxwell*, *supra* note 75, at 2541. Westbrook has also attempted a universalist rehabilitation of *Maxwell*, portraying it recently as a "classic application of modified universalism." He claims that the case was "centralized" in the United Kingdom, and that the U.S. examiner merely stood by to guard U.S. interests. Westbrook, *Global Solution*, *supra* note 8, at 2321. However, the fact that the Plan and Scheme was required to comply with U.S. as well as British law belies Westbrook's characterization of only incidental U.S. court involvement.

Moreover, comments by the British judge in *Maxwell* paint an entirely different picture. The interjection of the U.S. bankruptcy system was no trivial matter from the British perspective. English administration is a very different creature from Chapter 11 in the United States, which is an arrangement negotiated among debtor management and creditors. *See Tung, Confirmation and Claims Trading*, *supra* note 5, at 1689 (describing plan confirmation process). The English administrator, by contrast, does not need to negotiate with creditors or the debtor's management, but instead takes complete control of the debtor company in a matter of hours after his appointment. "He has full powers to do whatever he likes. . . . He can employ the old management if he likes, but if he decides not to, he simply collects the keys of their automobiles and leaves them to go home on the subway." Hoffman, L.J., *supra* note 171, at 2514–15. For the administrators of Maxwell, Chapter 11 was something of a culture shock.

[T]he English administrators found that they had to deal with an Examiner who was responsible to a judge who in turn had to have regard to the various interest groups who jockey for position in any Chapter 11 proceedings. Even the old management, who would simply have been shown the door in England, had their leverage which enabled them to keep a place at the negotiating table. The administrators therefore found that to get anything done—for example, to raise interim finance to keep the

even if the number of these cases is small, the cases are likely to be significant. States will be most likely to vie for home country status—or at least contest other states' claims to such status—in cases involving significant local interests on each side, cases involving large firms with significant assets and huge liabilities at issue, cases for which the immediate costs of deferring are quite high. Given the stakes in a case like *Maxwell*, any plausible claim to home country status will likely be pressed by each state. Likewise, even where the identity of the home country is not in dispute, non-home countries can be expected to press for a narrow jurisdiction for the home country court. They will define broadly the scope of what count as local nonbankruptcy issues, to be determined by local courts according to local law.<sup>179</sup>

\* \* \*

Fuzzy commitments allow each state to assert plausible good faith claims to compliance. This lack of clarity weakens the credibility of any universalist commitment and creates problems of misperception and misinterpretation: states will have trouble distinguishing cooperation from defection.<sup>180</sup> The ambiguity inherent in standards, and haziness with respect to whether the particular application of a standard was “correct” given the underlying circumstances, impair states' abilities to coordinate

---

subsidiary companies going—required a great deal of expensive and time-consuming negotiation.

*Id.* At the end of the day, the English administrators opted for the Protocol simply because it was less expensive than trying to have the U.S. Chapter 11 proceeding terminated. *See id.* at 2516. It is quite clear from the British perspective that administration was held hostage to the structure and process of Chapter 11.

[T]he administrators told me that they were having trouble in New York. Naturally they would have preferred simply to take charge of everything as they were used to doing in England. That would have been quicker and cheaper. But they had been advised that an attempt to terminate the Chapter 11 proceedings in New York would be expensive and delay matters without necessarily being successful. So they felt that the interests of creditors were best served by agreeing to the Protocol.

*Id.* at 2515–16.

179. Issues concerning the interface between home country bankruptcy jurisdiction and local nonbankruptcy jurisdiction will be difficult to anticipate or resolve *ex ante* through clear rules. Instead, as with identification of the home country, resolution of jurisdictional interface issues will depend on judges' discretionary application of imprecise standards *ex post*. *See supra* notes 153–157 and accompanying text.

180. This credible commitment problem contributed to states' disaffection for universalism in negotiations preceding the EU Insolvency Regulation. *See Fletcher, supra* note 157, at 253 & n.21.

on what constitutes cooperation versus defection. Therefore, the administering of appropriate rewards and punishments becomes difficult.

Ambiguity and uncertainty about defection . . . wreak havoc with [the reciprocity] mechanism of sustaining cooperation. Under many circumstances, determining whether a state's actions constitute defection may be difficult or impossible. For example, in the presence of an unforeseen contingency, reasonable people may disagree about how a given agreement should be applied. When they disagree, they cannot coordinate their responses, implying that full cooperation cannot be sustained.<sup>181</sup>

Even with perfect monitoring and ability to identify defection, cooperation is not easy to sustain. But when "noise" is introduced, sustained cooperation becomes even less likely. For example, even if—in the absence of uncertainty—two states could coordinate on playing Tit for Tat strategies to yield a cooperative equilibrium,<sup>182</sup> introducing uncertainty reduces both states' long-run average payoffs to no better than random plays.<sup>183</sup> Moreover, this result obtains even if only a very low probability of misperception exists. A low probability simply means that it will take longer for a misperception to arise, but once it does, it will also take longer to clear up.<sup>184</sup> In other words, *any* noise renders Tit for Tat no better than random plays.<sup>185</sup>

In a noisy environment, more generous strategies than Tit for Tat may enable improved cooperation. For example, a modified Tit for Tat strategy that forbears from retaliating for some percentage of the other player's perceived defections has been shown to be effective in noisy environments.<sup>186</sup> Such a forgiving strategy enables error correction and

---

181. Barry R. Weingast, *A Rational Choice Perspective on the Role of Ideas: Shared Belief Systems and State Sovereignty in International Cooperation*, 23 *Pol. & Soc'y.* 449, 450 (1995). See also Oye, *supra* note 83, at 15 (discussing conditions of play that may limit effectiveness of reciprocity strategies).

182. See *supra* note 138.

183. Per Molander, *The Optimal Level of Generosity in a Selfish, Uncertain Environment*, 29 *J. Conflict Res.* 611, 612 (1985); Nalebuff, *supra* note 130, at 93. Once a mistake occurs, Tit for Tat causes the mistake to echo back and forth, as each state retaliates for the other state's prior defection. In this process of punishing perceived defections, a mistake is as likely to get compounded as it is to be fixed.

184. See Nalebuff, *supra* note 130, at 93.

185. See Molander, *supra* note 183, at 612. If the probability of misperception reaches fifty percent, then cooperation becomes hopeless. Given the slim prospects for cooperation, each state might as well defect in every round. See Nalebuff, *supra* note 130, at 93.

186. See Jianzhong Wu & Robert Axelrod, *How to Cope with Noise in the Iterated Prisoner's Dilemma*, 39 *J. Conflict Res.* 183, 184 (1995). See also Jonathan Bendor, Roderick

dampens the effects of mistaken vendettas between players. The more forgiving the strategy, the more quickly an error can be corrected and cooperation restored. However, adopting a generous or forgiving strategy comes with a cost: generosity exposes a player to greater risk of exploitation.<sup>187</sup> The immediate costs of generosity and forbearance may be quite high. A generous strategy may therefore be unattractive for many states.

Without accurate matching of rewards and punishments to cooperation and defection, any message among players becomes garbled. Reciprocity is frustrated; cooperation is undermined.

### C. *The Role of Courts and Judges*

Compounding the problem of fuzzy commitments, the involvement of courts and judges in deciding questions of universalist recognition creates problems for cooperation. In most industrial countries, a corporate insolvency proceeding is a legal proceeding. It is filed with a court and monitored by a judge, who is the logical candidate to decide questions of cross-border recognition. Establishing conditional policies is politically difficult in any event.<sup>188</sup> Implementing conditional strategies through courts and judges may be futile.

By hypothesis, states enjoy long-run payoffs from universalist cooperation (i.e., extraterritorial application of their bankruptcy laws in appropriate cases) and suffer long-run punishments from defection (i.e., nonrecognition of their extraterritorial assertions of bankruptcy jurisdiction). However, judges are not states; though states may be repeat players in the universalist cooperation game, judges typically are not.<sup>189</sup> For each judge, the decision whether to defer to a foreign insolvency proceeding looks more like a one-shot game. The judge will understand

---

M. Kramer, & Suzanne Stout, *When in Doubt . . . Cooperation in a Noisy Prisoner's Dilemma*, 35 J. Conflict Res. 691 (1991) (discussing generous variations of Tit for Tat).

187. See Bendor et al., *supra* note 186, at 712. Prisoners' dilemma tournament experiments in noisy environments show a sharp trade off between generosity and exploitability. See Jonathan Bendor, *Uncertainty and the Evolution of Cooperation*, 37 J. Conflict Res. 709 (1993).

188. See *supra* note 139.

189. Some states might have only one or a few judges or other officials charged with overseeing corporate bankruptcies. The United States is arguably moving in that direction, as the district of Delaware now fields over sixty percent of all large public company bankruptcy filings in the United States. See Lynn M. LoPucki, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a Race to the Bottom*, 54 Vand. L. Rev. 231, at 234–35 (2001). Even in that case, however, courts and judicial officers will still likely suffer from the institutional deficiencies described in the text that preclude their effective implementation of reciprocity strategies.

the immediate prejudice to local interests from deferring to a foreign proceeding, but may not perceive or care about the long-term consequences of defection. The judge's dominant single-play strategy is therefore defection.<sup>190</sup>

Judges and courts are not institutionally equipped to play iterated games. Each judge applies laws to a specific case. Individual judges will ordinarily have neither the mandate nor the resources to follow the various rounds of play across cases. Each judge will therefore have difficulty matching a "tit" to the appropriate "tat."<sup>191</sup> Judges will be unable to dispense rewards and punishments appropriately.<sup>192</sup> In addition, judges do not individually enjoy payoffs from cooperation or suffer punishments from defection. They are not charged with the representation of state interests over time as are the political branches of government—legislatures and executive officials—and therefore are unlikely to internalize and effect the long-run maximization goals of their respective states.<sup>193</sup> Officers of the political branches may be appropriate agents to dole out rewards and punishments, but judges are not. The judicial function does not lend itself well to conducting foreign relations while deciding specific cases.<sup>194</sup>

---

190. See Dodge, *supra* note 83:

While it may be true that states will continue to decide choice-of-law cases indefinitely, for the judge who makes the choice-of-law decision each case looks more like a single play game. Thus there is little reason to think that cooperation will evolve in conflicts or extraterritoriality based on the individual decisions of judges.

*Id.* at 162; Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 Vand J. Transnat'l L. 975, 1022 (1994).

191. See *supra* note 129 (describing Tit for Tat strategy in repeat prisoner's dilemma).

192. Cf. Sterk, *supra* note 83, at 1009 (noting similar problems for game theory predictions of cooperation in choice of law context).

193. Public choice scholars remind us as well of the political agency costs. Judges may have private interests that differ from the national interest. O'Hara & Ribstein, *supra* note 87, at 1226.

194. [T]he political branches are better equipped to weigh the long-term benefits of compromise against the short-term detriments of deferring to another jurisdiction in a particular case. "The stimuli in the diplomatic forum that encourage effective balancing of short term against long term interests are not operative in the municipal judicial forum except in very general terms." Dodge, *supra* note 83, at 159 (quoting Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 Am. J. Comp. L. 579, 594 (1983)). See generally Oye, *supra* note 83, at 16 (discussing control issues in effecting reciprocity).

These judge-related issues will vary from state to state. One could imagine a state with relatively few insolvency judges and other professionals, who as a group take a strong international and universalist outlook. If the norms of this group developed in a way that paralleled the state's preference for universalist cooperation, then this professional elite might possibly evolve into an effective enforcer of universalist reciprocity. On the other hand, in a state with a large and diffuse group of insolvency judges and professionals, the emergence of group norms

Regardless of other obstacles to universalist cooperation, because of the role that judges and courts play in deciding on universalist recognition in specific cases, the repeat play that characterizes many international commercial interactions will not likely cause the emergence of universalist cooperation.

#### D. Numbers Problems

Thus far, we have focused primarily on our hypothetical two-state world and considered only the two-player prisoners' dilemma. When we move to a world with many states, "numbers problems" arise. Even if bilateral universalism were not difficult enough to realize, multilateral universalist cooperation is even less tractable. As the number of players rises, cooperation issues become far more complex. Both establishing and maintaining cooperation become more difficult.

The existence of commonly shared interests becomes less likely as the number of potential adherents to a universalist arrangement increases. Recall that in our two-state model, we assumed that in both states' preference orderings, the mutual cooperation outcome—reciprocal universalism—was preferred to mutual defection.<sup>195</sup> We were willing to grant this assumption in order to present an optimistic case for universalism. We also noted, however, reasons why many states would not prefer mutual universalism, but would instead prefer territoriality, regardless of another state's willingness to cooperate.<sup>196</sup> As the number of states rises, the assumption that each state prefers mutual cooperation to mutual defection becomes a very strong one. Relaxing the assumption, of course, means that multilateral universalism is doomed.

Even retaining this strong assumption about preference orderings, states' heterogeneity makes it less and less likely that the necessary conditions for sustained cooperation will hold for all of them. One state may discount the future severely. Another may have special domestic political

---

favoring a unified universalist approach may be less likely. See Robert C. Ellickson, *Order Without Law* 177 (1991) (discussing significance of close-knit settings for emergence of welfare-maximizing norms). States might respond to this problem by removing cooperation decisions from judges and centralizing them in the hands of trade or foreign affairs officials. Jay Westbrook has proposed that states create domestic institutions to certify for their respective judiciaries which other states qualify for reciprocity. See *supra* note 44. This thoughtful approach might reduce some information costs, but it may cause other internal problems, as states attempt to restructure domestically-focused judicial and administrative processes to account for foreign affairs concerns.

195. That is,  $CC > DD$ . See *supra* Part III.B.

196. That is, a state may prefer deadlock:  $DC > CC$  and  $DD > CC$ . See *supra* Part II and note 113.

difficulty implementing a reciprocity strategy.<sup>197</sup> Another may anticipate only infrequent iterations of the international bankruptcy game, insufficient to make long-term cooperation worthwhile.

In particular, recall that in our two-state discussion, we noted that roughly symmetric investment flows between our two states would be an important condition related to “iterativeness”—each state’s expectation concerning the frequency of iterations of the international bankruptcy game.<sup>198</sup> With multiple states, a rough multilateral symmetry with respect to investment flows would also be required, so that each state might expect future benefits as the home country. However, as the number of states increases, fulfillment of this condition becomes more and more unlikely.<sup>199</sup>

Even if conditions for cooperation are promising among multiple states, transaction and information costs increase with the number of states. Identifying shared interests and negotiating workable arrangements to the satisfaction of all the players becomes more expensive. In addition, as the number of states increases, each state will have more difficulty anticipating the future behavior of other states and assessing the prospective value of future cooperative payoffs.<sup>200</sup>

Consider the added complexity of negotiating a multilateral universalist agreement. Imagine, for example, several states—otherwise favorably disposed to universalism absent these transaction and information costs—attempting to define the scope of the universalist choice of law rule and to clarify the interface between bankruptcy law and non-bankruptcy law.<sup>201</sup> They must in effect decide what counts as a bankruptcy issue (for which home country law applies) and distinguish that from nonbankruptcy issues (as to which local law would apply). Each state will have particular issue areas (for example, environmental

---

197. *See supra* note 139.

198. *See supra* note 132 and accompanying text.

199. For states with strong commercial ties—the states of the European Community, for example, or NAFTA or ASEAN—this condition might obtain. But even then, all the other factors affecting cooperation would still have to align properly. Within most groups of states, the frequency of expected iterations will differ as among the various pairs or coalitions, making for uneven cooperative impulses. State A may anticipate frequent crossborder insolvency interaction with State B but not State C. Anticipating infrequent iterations with State C, State A may be more willing to defect as to State C than to State B, since any cooperation by State A with State C in the current round may be reciprocated only far into the future. Discounting that future payoff to present value, State A may decide that the short-term gain from current defection is worth more. Uneven cooperation will frustrate the emergence of cooperative norms within the group as a whole.

200. *See Oye, supra* note 83, at 19.

201. *See discussion supra* Part IV.A.



or securities regulation<sup>202</sup>) that it will wish to insulate from possible displacement by the bankruptcy rules of each other state acting as home country. To accomplish this, each state will have to obtain information about every other state's bankruptcy rules and sensitive issue areas, and may need to engage in a bilateral negotiation with each other state to resolve any potential conflict. With two states, of course, only one bilateral negotiation need occur. With three states, three separate bilateral negotiations may be required. With four states, the number of bilateral negotiations jumps to six, and so on.<sup>203</sup> These increased transaction and information costs erode the margin between the cooperative payoff and the short-term gain from defection, making defection all the more attractive and cooperative agreements all the more difficult to achieve.<sup>204</sup>

Recognizing and punishing defection also becomes more complicated as numbers increase.<sup>205</sup> I have already noted that reliance on standards and discretion will engender ambiguity and misperception. With multiple states, this problem is greatly exacerbated. For example, even if identification of the home country were not controversial, the number of unique interfaces between home country bankruptcy law and local nonbankruptcy law multiplies as more states are involved. The chances for previously unanticipated contingencies increase, thereby increasing the likelihood of ambiguity in application of the original universalist agreement. Without an institution to provide definitive resolution of ambiguities and to coordinate punishments for defection,<sup>206</sup> the potential for inconsistent cooperation among participants is high.

---

202. See *supra* note 153 and accompanying text.

203. For  $n$  states, the number of bilateral negotiations will equal  $\frac{n * (n - 1)}{2}$ .

A casual look at the choice of law provisions in the EU Insolvency Regulation illustrates the complexity of these bankruptcy-related choice of law issues for multiple states. See *supra* note 157. See also Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 *Tex. Int'l L.J.* 119 (1998). The existence of the already well-developed and multifaceted EU regime no doubt facilitated negotiation of the EU Insolvency Convention, which was the precursor to the EU Insolvency Regulation. See *supra* note 157. See generally Keohane, *supra* note 86, at ch. 6 (explaining importance of international regimes for reducing transaction costs and disseminating information). Absent the EU regime, it is highly unlikely that such an agreement could have been reached.

204. See Oye, *supra* note 83, at 19.

205. See Axelrod & Keohane, *supra* note 83, at 235.

206. See Weingast, *supra* note 181, at 452 (describing coordination problem of interpreting agreement in light of unanticipated situation); cf. Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 *Am. Econ. Rev.* 190 (1999) (arguing that even without direct enforcement power, WTO through dispute settlement panels acts as multilateral enforcement mechanism by verifying and publicizing violations, thereby causing violator's loss of reputation in trading community).

This will inhibit the development of stable multilateral cooperative norms. The sure payoff from immediate defection becomes much more attractive, and the likelihood of defection increases.<sup>207</sup> For all these reasons, decentralized multilateral cooperative arrangements are unlikely to arise, and any that do will be quite fragile.<sup>208</sup>

With the bankruptcy of an integrated multinational firm, all affected states must cooperate in order to achieve the optimal cooperative outcome,<sup>209</sup> but one player's defection will often trigger the defection of others. In the *Felixstowe* case,<sup>210</sup> these considerations played at least some part in an English court's refusal to defer to a U.S. proceeding. The English court refused to turn over local English assets of a U.S. debtor in Chapter 11 proceedings.<sup>211</sup> Separate insolvency proceedings were apparently also underway or pending in France and several other European countries. Besides the fact that English creditors would have been prejudiced in the U.S. proceeding,<sup>212</sup> the English court noted that in the French insolvency proceeding, the French court likewise refused to defer to the United States. If the French would not defer, why should the English?<sup>213</sup>

---

207. See Oye, *supra* note 83, at 19.

208. "Although game theory does not rule out the possibility of n-state cooperation, the assumptions required for such an outcome are quite strong and usually unrealistic. For this reason, we doubt the utility of n-player prisoner's dilemmas as an explanation for multilateral or "universal" behavioral regularities." Goldsmith & Posner, *supra* note 86, at 1130. Cf. Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 *Int'l Org.* 681 (1992) (describing institutional devices to facilitate multilateral cooperation with large numbers); Robert Pahre, *Multilateral Cooperation in an Iterated Prisoner's Dilemma*, 38 *J. Conflict Resol.* 326 (1994) (arguing that under certain assumptions, multilateralism may be more effective for cooperation than bilateralism).

209. A situation involving multiple players does not always create an n-player prisoners' dilemma, but a series of bilateral prisoners' dilemmas between the different pairs of players. In that situation, resolution of one bilateral interaction would not directly affect the outcomes of others. See Snidal, *Game Theory*, *supra* note 83, at 52-53. With multilateral universalism, though, each defection may potentially reduce the cooperative payoffs for the remaining states, reducing the advantages of any universalist arrangement and encouraging further defections.

210. See *Felixstowe Dock & Railway Co. v. U.S. Lines Inc.*, 2 Lloyd's Rep. 76 (Q.B. 1987).

211. English law did not require any such turnover, but it was within the judge's discretion. See *id.* at 76.

212. Not only would English creditors do far better in a territorial distribution, but the contemplated reorganization would have eliminated the debtor's European operations and instead concentrated resources in North America. Assets repatriated from England would therefore have funded a reorganization benefiting North American trade creditors by preserving commercial relationships with the reorganized entity. English trade creditors, however, would see no such benefit. See *id.* at 77.

213. Lord Hoffman explained:

The French court was willing to turn over assets to the U.S. court only after all French creditors had been paid in full.<sup>214</sup> With little choice, the U.S. debtor had agreed to these French demands. This capitulation the English court read as “not only a serious breach of the [debtor’s] ‘single proceedings’ theory, but also a preference (in the interests no doubt of expediency) of one particular group of creditors.”<sup>215</sup> Therefore, the debtor’s arguments concerning a single insolvency administration and equal treatment of creditors were seriously undermined.

Numbers problems have particular bite for universalism because claims concerning its efficiency advantages over territoriality depend on its widespread, if not universal, adoption. According to its advocates, universalism offers superior efficiency because it makes the location of the debtor’s assets irrelevant to creditors’ rights. Universalism therefore provides ex ante predictability to creditors,<sup>216</sup> relieves them of the burdens of ex post monitoring of the debtor’s assets,<sup>217</sup> and facilitates efficient administration of the debtor’s assets.<sup>218</sup>

By contrast, the argument goes, territoriality suffers from the problem of fleeing assets. Creditors cannot possibly predict their bankruptcy recoveries ex ante because the governing laws will change depending on the various locations of the debtor’s assets, “which may be spread among many jurisdictions and which may be moved at any time.”<sup>219</sup> Creditors are therefore forced to monitor the locations of the debtor’s assets at all times and “must consider the laws of all jurisdictions in which assets are located, or into which assets may move.”<sup>220</sup> Under universalism, only the home country need be identified, and that determination must surely be

---

The proposed scheme of reorganization was that the assets removed from England would be used to keep U.S. Lines going in the United States but that it would withdraw from the European market. This meant that the Felixstowe Dock company [an English creditor] would gain nothing from the reorganization. Furthermore, it was clear that the French, who have a highly developed sense of their own national interest, were for similar reasons not going to allow any of the assets in France to be sent to the United States.

Hoffman, L.J., *supra* note 171, at 2513.

214. French creditors successfully procured the arrest of two of the debtors ships, and the French courts would allow sale of the ships and repatriation of proceeds to the United States. only after all French creditors had been paid. *See Felixstowe, 2 Lloyd’s Rep. at 94.*

215. *Id.*

216. *See Westbrook, Global Solution, supra* note 8, at 2309.

217. *See Guzman, supra* note 21, at 2207–08.

218. *See Westbrook, Global Solution, supra* note 8, at 2309.

219. Guzman, *supra* note 21, at 2207.

220. *Id.* at 2208.

simpler and more predictable than monitoring all the debtor's assets all the time.<sup>221</sup>

The trouble with this neat analysis, of course, is that it assumes the ubiquity of universalism. Universalism yields superior predictability, reduces monitoring costs, and renders asset location irrelevant only if *all* states adopt it. Otherwise, a debtor may always move its assets beyond the jurisdiction of the universalist court, just as under territoriality. Even if many states were to adopt universalism, a highly unlikely prospect, as shown in previous parts, plenty of amenable jurisdictions would still exist in which debtors might park assets comfortably out of the reach of creditors. Absent highly unrealistic assumptions about the world, then, universalism is no better than territoriality with respect to ex ante predictability and monitoring costs. Those arguments for universalism should therefore be put to rest.<sup>222</sup> As important, in a world of incomplete universalism, the problem of fleeing assets frustrates achievement of the unified international administration of assets that is at the heart of the universalist proposal.

Numbers problems suggest that even universalism among a relative handful of states (never mind ubiquity) is unlikely. However, large multinational firms operate in dozens of states, and such firms will continue to grow in size and international reach. Even ignoring problems of strategic asset transfer, any universalist arrangements would be inadequate to handle what will come to be routine international bankruptcies.

## V. Generalizing the Analysis: When *Is* Cooperation Possible?

Conditions of play in international bankruptcy make it highly improbable that multilateral universalism could emerge through simple reciprocity. International cooperation *is* possible, however. We observe it in other international prisoners' dilemma settings,<sup>223</sup> even in the face of these impediments that plague universalism. However, ready examples

---

221. See Westbrook, *Global Solution*, *supra* note 8, at 2309; Guzman, *supra* note 21, at 2207.

222. Recently, Jay Westbrook has justifiably retreated a bit from the predictability thesis. See Westbrook, *Global Solution*, *supra* note 8, at 2326.

223. Behavioral regularities that may resemble cooperation occur in other settings as well. Many of these settings, however, may instead involve the mere coincidence of states' interests, coercion of one state by another, or coordination issues. None of these contexts present the difficult mixed motives at work in the prisoners' dilemma or the concomitant cooperation problems. See *generally* Goldsmith & Posner, *supra* note 86 (discussing various contexts for behavioral regularities indiscriminately referred to as customary international law).

of the *decentralized* multilateral cooperation envisioned by universalists are scarce.<sup>224</sup> Cooperation that overcomes these hurdles typically occurs within the context of international regimes and institutions.<sup>225</sup> In this Part, I first discuss international cooperation that we do observe and the role that regimes and institutions play in facilitating it. Examples from international trade illustrate cooperation that overcomes both vague commitments and problems associated with large numbers.<sup>226</sup> I then explore the possibilities for a universalist regime, briefly re-examining the recently promulgated EU Insolvency Regulation.<sup>227</sup> Unfortunately for universalists, no universalist regime exists, despite ongoing institutional efforts at international bankruptcy reform. The EU case suggests possible reasons for this absence of universalism and implies that even structured approaches to reform will not lead to universalism.

#### A. A Role for Regimes and Institutions

Vague commitments and multiple parties are not unique to the universalist proposal. Yet in other contexts, cooperation occurs despite these impediments. Formal institutions can address vague commitments through processes of norm elaboration. They can solve numbers problems by gathering and disseminating information among member states. Even in the face of intractable prisoners' dilemma or deadlock problems that plague universalism, regimes and institutions can facilitate cooperation through issue linkage. Each of these regime functions I discuss in turn.

---

224. See *supra* note 44 and accompanying text. Theorists suggest that decentralized multilateral cooperation could emerge only under fairly strong assumptions, for example, high quality information or highly coordinated strategies. See Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 *J. Conflict Res.* 3, 6 (1998); Michihiro Kandori, *Social Norms and Community Enforcement*, 59 *Rev. Econ. Stud.* 63 (1992).

225. "[I]nternational regimes and institutions acquire a central role in facilitating multilateral cooperation." Licht, *supra* note 11, at 76. Stephen Krasner defines a regime as a "set[] of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *International Regimes 2* (Stephen D. Krasner ed., 1983).

226. As for the problem of bankruptcy courts attempting to execute national reciprocity strategies, see *supra* Part IV.C., international institutions will not be able to offer much help. That problem is an internal one for each state to address. States might be able to centralize the function of identifying cooperative states deserving reciprocity from their domestic courts. However, this approach may raise other internal problems or may not be feasible because of internal constraints. See discussion, *supra* note 194.

227. See EU Insolvency Regulation, *supra* note 157.

### 1. Norm Elaboration

Institutions provide information and processes that can resolve the problem of fuzzy commitments. Professors Ken Abbott and Duncan Snidal refer to this function as “norm elaboration.”<sup>228</sup> Bounded rationality and high transaction and information costs may make it difficult for states to write complete contracts (i.e., treaties that address all contingencies). Institutions provide processes by which rules and norms are elaborated, “fleshed out” in the context of particular disputes. The World Trade Organization (WTO) provides a salient example. While some aspects of international trade rules are specific and the related state policies relatively transparent, —for instance, compliance with GATT tariff bindings,<sup>229</sup> —a range of trade issues involve standards that raise problems of interpretation and opportunism.<sup>230</sup>

For example, the propriety of antidumping duties turns on assessments of an imported product’s “normal value” and whether its importation causes “material injury” to a domestic industry.<sup>231</sup> Temporary relief from import surges, so called “escape clause” relief, is justified when an importing country experiences increased imports that “cause or threaten to cause” “serious injury” to a “domestic industry” that

---

228. See Abbott & Snidal, *supra* note 224, at 15. See also Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World* (describing role of regime in “specify[ing] what constitutes cooperation and what constitutes cheating”), in *International Regimes* 115, 128 (Stephen D. Krasner ed., 1983).

229. See General Agreement on Tariffs and Trade, art. II, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. The WTO is the body that administers the GATT. It has performed this function since its creation in 1994.

230. Scholars routinely model international trade as a prisoners’ dilemma. See, e.g., Axelrod, *supra* note 101, at 7; Maggi, *supra* note 206, at 195; Judith L. Goldstein & Stephen D. Krasner, *Unfair Trade Practices: The Case for a Differential Response*, *Am. Econ. Rev.* vol. 74, No. 2, 282 (May 1984).

231. See GATT, art. VI(1). “Dumping” is the act or practice of cross-border predatory pricing. That is, a state exports its products at lowball prices in order either to drive out competitors in the importing country or to address a short-term overproduction problem. On the theory that dumping harms the importing country, GATT rules prohibit the practice, and the importing country may justifiably impose a duty to offset the margin of dumping. The point of this tax on the dumped product is to cause an increase in its sale price in the importing country market, thereby nullifying the unfair advantage it would otherwise have had relative to competing locally produced goods.

Importing states’ latitude to impose duties in the face of alleged dumping, however, creates opportunistic temptations for importing states. GATT therefore attempts to discipline antidumping duties and to curb the disguised protectionism that might otherwise arise. Under the GATT, an importing state may levy antidumping duties only on products selling in the local market at less than “normal value,” and only if such sales “cause[] or threaten[] material injury to an established industry” or “materially retard[] the establishment of a domestic industry” in the importing state. See GATT, art. VI(1).

competes with the imported product.<sup>232</sup> These terms are all quite malleable and susceptible of competing interpretations. States may reasonably disagree about their construction, and these areas present some of the thorniest trade issues because of the vague standards involved.

Fortunately for trading nations, the WTO provides a means of clarifying vague commitments and policing disguised trade protection. The WTO Dispute Settlement Understanding (DSU) offers a process to resolve trade disputes.<sup>233</sup> If consultation fails to resolve a dispute, the DSU provides for the establishment of a panel of neutral parties to consider the dispute and render a binding decision.<sup>234</sup> Appeal of a panel decision to the WTO Appellate Body is also possible.<sup>235</sup> Through this process, the WTO clarifies vague standards and distinguishes true violations of trade obligations from misperceptions. Panels and the Appellate Body gather and disseminate information concerning alleged violations. The process resolves ambiguity and promulgates shared understandings about trade obligations. It facilitates monitoring and reciprocity among interested states, thereby promoting cooperation.<sup>236</sup>

## 2. Solving Numbers Problems

Regimes and institutions are also useful in overcoming numbers problems. Moreover, multilateral cooperation typically requires assistance from regimes and formal institutions. Regimes lower the

---

232. See Agreement on Safeguards, Apr. 15, 1994, art. 2(1), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 275 (2d ed. 2000) [hereinafter The Legal Texts].

233. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *id.* at 354, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

234. See *id.* art. 6. "Binding" is a relative term, of course. Even the trade retaliation that a panel may authorize does not ipso facto force a state into compliance with its obligations.

235. See *id.* art. 17.

236. See Maggi, *supra* note 206; Weingast, *supra* note 181, at 458. GATT/WTO relies on other institutional mechanisms to resolve ambiguity as well. While the DSU offers an adversarial process to resolve specific disputes, GATT/WTO has also institutionalized the Trade Policy Review Mechanism, a regular and more generalized review of members' trade policies. Reviews occur periodically and do not depend on initiation by particular disgruntled states. See Trade Policy Review Mechanism, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, The Legal Texts, *supra* note 232, at 380 (1994). These sorts of periodic implementation review further increase information flow among members and reduce transaction costs to cooperation. For a helpful discussion of implementation review in the global environmental context, see Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 Case W. Res. J. Int'l L. 387 (2000).

transaction and information costs that otherwise impede multilateral cooperation.<sup>237</sup> They gather and disseminate information about member states, facilitating identification of shared interests and lowering the costs of negotiating agreements and monitoring compliance.<sup>238</sup> Regimes may also facilitate collective enforcement of any agreements reached. Not only can regimes help to clarify vague commitments, as discussed above, but they lower the costs of promulgating these standards to multiple parties. Regimes may disseminate information about the compliance behavior of particular actors as well, facilitating the development and maintenance of reputations in multilateral settings and increasing the reputational costs of defection.<sup>239</sup> Lower information costs in all these areas make cooperation payoffs relatively more attractive than defection, improving the chances of both reaching and sustaining multiparty agreements. This prospect bolsters the credibility of each state's ex ante commitment to any agreement, further advancing the possibilities for multilateral cooperation.

Again, the WTO provides a useful example. Its success at its function of multilateral information dissemination has made it one of the most effective of international organizations.

Observers . . . often argue that improving the quality and quantity of information about international trade policy has been one of the regime's major contributions. More importantly, without the provision of data and information concerning members' trade policies, behavior could not be effectively monitored and therefore the ability to implement regime rules would suffer.<sup>240</sup>

The WTO facilitates multilateral trade negotiations that enable greater trade liberalization than would occur under bilateral negotiations.<sup>241</sup> In addition, to the extent that multilateral sanctions and enforcement pressure affect states' trade behavior, the WTO plays a critical role in both verifying violations and informing third parties.<sup>242</sup>

---

237. See *supra* Part IV.D.

238. See Keohane, *supra* note 86, at ch. 6. See generally Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 Int'l Stud. Q. 109 (1998).

239. See Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 Econ. & Pol. 1 (1990) (describing role of private law merchant in improving reputation system as device to promote honest trade in early Middle Ages).

240. Jock Finlayson & Mark Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, 35 Int'l Org. 561, 587-88 (1981).

241. See Maggi, *supra* note 206, at 193.

242. See *id.* at 191.



These multilateral functions become especially important when power imbalances exist in bilateral relationships.<sup>243</sup>

### 3. Issue Linkage

Even if the conditions for cooperation do not obtain in a prisoners' dilemma situation, or even if states are deadlocked—that is, they share no mutual interests at all<sup>244</sup>—all is not lost. A regime may still be able to induce cooperation by enabling a change in the payoffs of recalcitrant states, transforming what in isolation would present intractable prisoners' dilemma or deadlock games into more harmonious interactions. Linking issues, or embedding difficult negotiations within a larger set of issues, could reduce discord among states. “[A] given bargain is placed within the context of a more important long-term relationship in such a way that the long-term relationship affects the outcome of the particular bargaining process.”<sup>245</sup> The presence of a regime expands the scope of issues over which member states may negotiate. This broader set of possible trade-offs also creates temporal flexibility, enabling the realization of payoffs over a longer time horizon than would be possible in the absence of existing institutionalized relationships.

The TRIPS agreement,<sup>246</sup> negotiated under the auspices of the Uruguay Round of the GATT, provides a vivid recent example of issue linkage to overcome intractability. Before TRIPS, industrialized countries and less developed countries (LDCs) were deadlocked over the issue of intellectual property (IP) protection. IP protection, like bankruptcy law, was a matter for individual states. Many LDCs found no use for domestic IP laws, surmising that the benefits would go primarily to industrial country firms and investors, who would reap monopoly profits from LDC markets. Without local IP laws, LDC markets were flooded with low-cost unauthorized copies of industrial countries' products,

---

243. *See id.* at 193.

244. *See supra* note 113.

245. Axelrod & Keohane, *supra* note 83, at 241. For example, in our original prisoners' dilemma story, if each prisoner had the ability to harm the other's family in the event of squealing, then the prisoners' decisions on squealing become embedded within a larger set of relationships. The family linkage effectively changes each prisoner's payoffs. Promised punishments for squealing would reduce each prisoner's defection payoffs, so that it would not pay for either prisoner to squeal. Silence would become the dominant strategy.

The few modest treaty commitments that exist with respect to international insolvency are embedded in more comprehensive schemes of commercial cooperation. *See Fletcher, supra* note 157, at 232 (discussing existing international bankruptcy treaties).

246. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts, *supra* note 232, at 321, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS].

which were originally developed, designed, and produced under the protective umbrella of industrial countries' IP laws. The low-cost copies in LDC markets crowded out the more expensive industrial country products, to the dismay of industrial country firms.

GATT/WTO facilitated a viable TRIPS agreement by enabling industrial countries to "pay" LDCs for their acceptance of TRIPS. Payment came in the form of improved access for LDC textile and agricultural exports in industrial country markets.<sup>247</sup> The agreement was acceptable to industrial countries because in addition to setting minimum standards for IP protection, TRIPS explicitly relies on the threat of trade retaliation for enforcement.<sup>248</sup> Embedding TRIPS negotiations and enforcement within the greater GATT/WTO trade framework enabled a trade-off between industrial country IP concerns and LDC export concerns. In addition, tying TRIPS compliance to the basic WTO enforcement mechanism of trade retaliation made TRIPS attractive from industrial countries' perspective. The linkages facilitated by the trade framework made the TRIPS agreement possible.

As with TRIPS, linkages may be the only hope for facilitating universalism among states with asymmetric preferences. For example, absent side payments, LDCs may be particularly unreceptive to universalism. Because multinational firms are much more likely to be headquartered in industrial countries, LDCs may anticipate regularly having to defer to industrial country bankruptcy regimes. By contrast, LDCs will only infrequently find themselves as the home country in a multinational bankruptcy, so their bankruptcy regimes will only infrequently govern internationally.<sup>249</sup>

### B. A Universalist Regime?

If regimes and institutions aid states in overcoming impediments to cooperation in other areas, is a similar strategy available for universalism? States interested in universalism might, for example, attempt to "piggyback" a universalist initiative on an existing regime in which they participate. Existing regimes enjoy economies of scale. With

---

247. See Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. Pa. J. Int'l Econ. L. 535, 560 (1998) (discussing critical issue linkage enabling TRIPS agreement). I refer to "GATT/WTO" because before the Uruguay Round, the WTO did not exist. Instead, the term "GATT" referred either to the agreement itself or to the informal administration of the agreement that had evolved over the years since 1947.

248. See DSU, *supra* note 233, art. 1.

249. See *supra* note 113.

an established regime, the marginal cost of dealing with a new issue is lower than if the issue were to be handled in isolation and from scratch.<sup>250</sup>

Ironically, several international bankruptcy reform projects already exist—sponsored by major international institutions—and yet no universalist proposal has surfaced. The World Bank,<sup>251</sup> the Asian Development Bank,<sup>252</sup> the Organization for Economic Cooperation and Development,<sup>253</sup> and other multilateral institutions already sponsor significant research and reform efforts on bankruptcy law.<sup>254</sup> The International Monetary Fund has included bankruptcy law reform in its conditionality arrangements with Russia and Southeast Asian nations following their recent economic crises.<sup>255</sup> UNCITRAL has promulgated a Model Insolvency Law<sup>256</sup> that is under consideration for adoption in several countries, including the United States.<sup>257</sup> The American Law Institute (ALI) sponsors an extensive Transnational Insolvency Project involving research and law reform goals among the NAFTA countries.<sup>258</sup> And as previously discussed, the European Union has devised an insolvency regulation to coordinate cross-border bankruptcies within the Union.<sup>259</sup>

Despite these extensive reform projects and initiatives, no universalist instrument exists, even as a model for voluntary adoption. While it appears that the formal organizations already exist that could aid univer-

---

250. While universalist-leaning states might attempt to create a regime specifically to facilitate universalism, regime-building is no small undertaking. The upfront costs of negotiating and implementing such a regime might easily outweigh the present value of the anticipated benefits. More likely is the possibility that an existing regime for economic cooperation could be adapted to incorporate a goal of universalist cooperation. See Keohane, *supra* note 86, at 100. “[R]egimes are easier to maintain than they are to create.” *Id.*

251. See UNCITRAL Possible Future Work, *supra* note 26.

252. See Harmer, *supra* note 26.

253. See UNCITRAL Possible Future Work, *supra* note 26, at 7.

254. See *id.*

255. See Board Receives Report on Russian Program, *supra* note 26; *Recovery from the Asian Crisis*, *supra* note 26.

256. U.N. Comm’n on Int’l Trade Law, Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3, United Nations Commission on International Trade Law, 30th Sess., at 3, U.N. Doc. A/CN.9/442 (1997). The Model Law merely permits, but does not require, local courts in an adopting country to cooperate with foreign insolvency proceedings. Whether the Model Law is a positive development or not is subject to debate. Compare Westbrook, *Global Solution*, *supra* note 8, at 2279 (extolling Model Law), with Stephan, *supra* note 17, at 786 (“Rather than solving the coordination problem that exists under current law, the Model Law makes it worse.”).

257. See Westbrook, *Global Solution*, *supra* note 8, at 2279.

258. See Westbrook, *Creating International Insolvency Law*, *supra* note 59, at 564 (describing project).

259. See *supra* Part IV.B.1.

alist cooperation, the *absence* of universalism in the face of these institutional efforts begs for explanation.<sup>260</sup> The most recent institutional pronouncement on cross-border bankruptcy is the EU Insolvency Regulation, and it provides a useful case study for universalist regime possibilities.<sup>261</sup> The EU may represent the best case for regime-based solutions, since the Union involves multiple overlapping commercial, political, and legal relationships among states, all devised to advance the EU's multifaceted integrationist goals.<sup>262</sup> With its dense web of institutions and a common commercial framework, the EU ought to be able to provide whatever norm elaboration, information dissemination, and linkages that might be necessary to engender universalism.<sup>263</sup>

However, as earlier discussed, universalism has not emerged in the EU. Instead, the EU Insolvency Regulation creates a hybrid system in which territoriality may potentially dominate.<sup>264</sup> Historically, the vagueness of the universalist commitment has been a serious impediment.<sup>265</sup> In addition, states have been unwilling to abandon local priority rules. In early negotiations over an EU insolvency convention, it was "unthinkable" that states would "accept the subordination of the rights and expectations of local creditors"<sup>266</sup> to the insolvency regime of another state.

The theoretically elegant precepts of the scheme based upon [universalism] therefore yielded to the political imperatives of the shared desire on the part of the participating States to defend

---

260. Granted, the reform projects of the development organizations focus primarily on bolstering the national bankruptcy laws of LDCs.

261. Because the Regulation does not go into force until May 31, 2002, however, no experience with the Regulation is available to inform our discussion.

262. The major EU institutions are several. In addition to the European Court of Justice and the Court of First Instance, the EU has its own executive arm, the Commission; the Council, which functions roughly like a European Cabinet; the European Council, which consists of all EU heads of state; and the European Parliament, a quasi-legislative body. See John H. Jackson, et al., *International Economic Relations* 191 (3d ed. 1995).

263. As for numbers problems, the constellation of EU institutions should be as effective at reducing information costs as any set of international institutions that exist today. Even performing that function, however, no regime can guarantee that the required mutuality of interests among members will exist or that the shadow of the future is sufficiently strong. See *supra* Part IV.D. In any event, as the discussion in the text shows, even without numbers problems, universalism within the EU seemed to suffer other impediments.

264. See *supra* note 164 and accompanying text.

265. See *supra* Part IV.B.1.

266. Fletcher, *supra* note 157, at 254.

local practices in matters of the preferential treatment of certain types of claim in the process of distribution on an insolvency.<sup>267</sup>

Is some institutional solution available to facilitate universalism? Why have EU institutions been unsuccessful at overcoming obstacles to universalist cooperation? The EU case presents interesting questions for our proffered regime solution, since it offers both a prisoners' dilemma cooperation problem—the vagueness of the home country standard—and a deadlock problem—states' insistence on local priorities.

Whether the problem of vague universalist commitments could be solved by resort to institutional mechanisms is unclear. Recall that the “home country” question involves more than straightforward norm elaboration. Clarification of the home country standard through institutional dispute resolution processes may simply encourage more eve-of-bankruptcy forum shopping,<sup>268</sup> which itself may frustrate states' expectations *ex post* or discourage accession to universalism *ex ante*. So the cure may be no better than the disease. Perhaps extended norm elaboration could deter forum shopping by articulating what constitutes impermissible manipulation. On the other hand, if the debtor actually relocates its center of main interests on the eve of bankruptcy in a blatant attempt at forum shopping,<sup>269</sup> setting the appropriate remedy may be tricky. Nullifying the attempted forum shopping by simply ignoring the eve-of-bankruptcy relocation may not make sense going forward. Vesting home country jurisdiction in the national courts of a now-*former* home country would seem to complicate the conduct of the case, as the debtor's center of main interests is now somewhere else!<sup>270</sup> Complications abound.<sup>271</sup>

---

267. *Id.*

268. *See supra* note 142 and accompanying text.

269. “Center of main interests” is the formulation of the home country standard in the Regulation. *See* EU Insolvency Regulation, *supra* note 157, art. 3(1).

270. There may be other ways to deter forum shopping, for example, by assigning some sort of personal liability to corporate officers. This approach, however, might be unacceptable to some states.

Forum shopping in U.S. bankruptcy has also been an issue. *See* LoPucki, *supra* note 189. However, resolution of that problem is much less critical than in the international context, since the applicable bankruptcy law is U.S. federal law, which does not vary from one U.S. state to another. *See* LoPucki, *Cooperative Territoriality*, *supra* note 24, at 2229. Under universalism, of course, a forum shop changes the applicable bankruptcy law.

271. Other possible indeterminacies relate to the interface of home country bankruptcy law with local nonbankruptcy law. The EU Insolvency Regulation attempts to address this with a detailed specification of the scope of the home country choice of law rule. *See supra* note 149, and accompanying text. In this area, an institutional mechanism for norm elaboration may be helpful for certain recurring issues. However, it is unclear in the context of large and far-flung multinational firms whether interface issues, inextricably tied to the peculiarities of local debtor-creditor laws, will recur or whether *sui generis* issues will predominate, in

Timing may also be an issue. Any regime-based norm elaboration process would have to accommodate the peculiar characteristics of bankruptcy proceedings. Their often time-sensitive nature may make impractical any attempt at international review of particular judicial or administrative decisions in national bankruptcy proceedings. Especially as to the crucial question of home country, review of a national court's decision by the European Court of Justice may be difficult in light of the exigencies of the case.<sup>272</sup>

What about EU states' insistence on their local priorities? Such a stance, of course, produces a territorial system and precludes universalism. States' refusal to "trade jurisdiction" across cases means that universalist cooperation is impossible.<sup>273</sup> Perhaps resort to EU institutions could ameliorate this deadlock. Issue linkage is a possibility, as earlier discussed in the context of the pre-TRIPS deadlock. Given the density of commercial relations among EU states, it may be possible to incorporate other issues into the negotiations over universalism, such that objecting states might be granted offsetting concessions in other areas.

Issue linkage, however, is not a simple process. TRIPS was a special case involving an issue of exceptional significance to powerful interest groups within industrial countries.

Getting intellectual property onto the MTN agenda was itself no easy task. Believing that European support would be necessary and Japanese support helpful in making it happen, the U.S. Trade Representative recommended to the chairmen of Pfizer and IBM that they encourage their European and Japanese counterparts to pressure their governments and EC secretariat leadership to support the idea. Though competitors in global markets, these companies shared the common interest in improved intellectual property protection around the world, especially in developing-country markets, and various European and Japanese trade associations were talked into supporting the initiative.<sup>274</sup>

---

which case indeterminacies will persist. Perhaps with a manageable number of states, norm elaboration could over time narrow the range of indeterminate interface issues. Time will tell whether the EU membership presents a manageable number.

272. This would not preclude the possibility of ex post implementation review. *See supra* note 236 (discussing Trade Policy Review Mechanism and implementation review).

273. *See supra* note 108, and accompanying text.

274. Ryan, *supra* note 247, at 562 (footnote omitted).

Political interests associated with other potentially linked issues might object to any linkage with universalism for fear that it might doom their pet issues. With the TRIPS negotiations, for example, industrial country textile and agricultural interests were sacrificed in order to reach an IP deal with LDCs.<sup>275</sup> International bankruptcy is unlikely to command the same urgent attention and quality of domestic political support as international IP issues. Absent such attention and political support, the impetus to link universalism to some other prominent issue will be lacking. Moreover, it appears that historically within the EU, the most powerful states insisted on their local priorities.<sup>276</sup> With the powerful states insisting on territorial prerogatives, it would be difficult for other states to effect any sort of trade across diverse issues.<sup>277</sup>

In the end, the European experience should give us great pause. Even with the EU's multifaceted formal institutions and commercial relationships, and its deep economic and political integration, universalist cooperation has not been forthcoming. Institutional norm elaboration probably cannot fix the fuzziness of the universalist commitment. In addition, states continue to insist on their territorial prerogatives, which issue linkage is unlikely to solve. The available evidence suggests that even the prospects for regime-based universalism are dim.

### Conclusion

Predicting the future is always a risky endeavor, and proving a negative is impossible. However, my analysis shows many reasons to doubt that universalism provides a plausible prescription for international bankruptcy cooperation. Most states will likely remain territorial in their approach to cross-border insolvency. Even states with welfare maximizing reasons to prefer mutual universalist cooperation will encounter tremendous difficulty attempting to establish and maintain universalist arrangements. Universalism presents them with a prisoners' dilemma that is not easily resolved, either through the standard prescription of repeat play or more elaborate devices.

The hopes of universalist advocates for a decentralized evolution toward universalism are particularly misplaced. The conditions of play in

---

275. See *supra* note 247 and accompanying text.

276. See Fletcher, *supra* note 157, at 254.

277. It is unclear whether *any* of the EU states was willing to compromise on its local priorities. See *id.* If no states are willing to compromise on this issue, then even issue linkage will not help, because *all* states in effect prefer territoriality.

international bankruptcy render states unable to make credible commitments or enforce other states' proffered commitments to universalism. Even if discount factors and payoff structures were conducive to the emergence of cooperation, fuzzy commitments and misperception problems, the involvement of judges, and the problem of numbers would likely overwhelm any attempt at universalism. Even a state that prefers universalism faces the single-play prisoners' dilemma, for which defection is its dominant strategy.

Regimes facilitate multilateral bargains that might not otherwise be possible. However, universalism has not emerged, despite the existence of several active regime-based international bankruptcy reform projects. Universalists have failed to address this conspicuous absence of universalism or to describe a plausible route by which regime-based universalism might appear. Moreover, regimes cannot solve all universalist cooperation problems. As the EU example shows, even strong institutions will not likely be able to remedy the indeterminacy in the universalist commitment or overcome entrenched territorial predispositions.

Universalism is a sexy idea. Conceptually, it is neat and clean, simple and sweet.<sup>278</sup> In the face of inexorable globalization, the notion of a cooperative, internationalist, one-court, one-law bankruptcy system seems irresistible. In fact, however, states differ in their views of the appropriate goals and means for their bankruptcy regimes. Some states will refuse to cooperate. Others may be amenable, but conditions make sustained cooperation unlikely. Cooperation is hardly a given; it cannot be assumed. The universalist proposal seems deceptively straightforward, but only when much that is interesting, important, and difficult about international relations and international cooperation is assumed away.

Scholars in other areas have embraced, rather than avoided, the thorny social and political questions raised by international legal and regulatory interaction. Bankruptcy scholars should do the same. Scholars and policymakers in many issue areas are discovering that the optimal blend of competition and cooperation across international borders must take account of local custom, culture, and history. Likewise, universalism must give way to more nuanced and more textured approaches. Territoriality will remain the dominant approach in international bankruptcy for the foreseeable future and maybe forever. Reform efforts should proceed on that basis, and the terms of the scholarly debate

---

278. "Universality is a very appealing approach. . . . It is intellectually elegant . . . ." Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 515.



should shift accordingly, with territorially-based cooperation as the primary focus.

International bankruptcy *is* possible, but universalism probably is not.