

"No Man Is An Island"

The Globalization of Securities Regulation, The Rise of the Internet and The challenge to
Develop Effective and Acceptable Corporate Governance Principles

by

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ABSTRACT

We live in an increasingly global age, where our notions of community often encompass the world. This process has occurred in the past, but in its current guise it has impacted and changed the world like no other process. More and more of the rules governing us, in many areas of our lives, are vested in supranational bodies and in global institutions.

Technological advances allow ideas, investors and business opportunities to cross borders, and evade nationally based regulators. The pace of technological change often outpaces developments in the law, and the willingness of national jurisdictions to cede sovereignty and authority over areas of their national life. On the other hand, the danger posed by ceding too much authority to distant and unaccountable global bodies, raises the specter of creating a democratic deficit, and undermining a local community's control over its own affairs. This is something which nation states and national regulators wish to avoid.

The solution to this dilemma, is often to "think globally and act locally", however in the case of global securities markets, ones fuelled by the internet and an instantaneous transfer of funds, this solution, paradoxically, is sometimes most difficult to implement. Nations still retain control over their own national treasuries and currencies, so they also wish to control their national financial markets. This impedes the ability of trade and capital to flow to where it wishes to go, as governments and nations often have a vested interest in preserving the status quo.

Globalization has been on the march for some time. However, the combination of liberalized trade laws, removal of restrictions on capital movement, the rise of low tax off-shore jurisdictions and the revolution in communications technology, have pushed this process forward at an alarming pace. The law is forced to play catch up, as it grapples with these new challenges, and also must work with the reticence of governments to change their laws and surrender sovereignty. The role played by NGO's and "the people" who often come together and protest groups, such as the W.T.O., is increasingly influencing national governments. In trying to create a system for conducting and regulating global securities trade, a balance must be struck between what these groups will accept, what is in the public good, what is good for the markets, and what the authorities can administer and control. The principles under which business operates also influences how effectively securities markets operate. I shall also examine some aspects of corporate governance to try to determine an optimal set of principles for business to employ in this new global market.

There are many players in this process. In regards to the liberalization and reform of the rules for global trade generally, and the regulations for securities trading specifically, the W.T.O. and its "Top Down" approach to securities regulation, is one approach, while the regional trading blocks, and their "Side to Side" harmonization efforts, form another. The "Bottom Up" approach by the international financial services QUANGOS forms a third leg of the trade liberalization triangle.

In creating a set of global regulations the question of who should administer them merits deep consideration. While the principles adopted to govern and administer the trade in securities may well be global, the administration of the rules on the ground must for the foreseeable future be left in the hands of local nationally based regulators. The criminal sanction of transgressors must also, be left in the hands of the nation state (due to the danger of extraterritoriality, and reasons of administrative practicality).

A set of rules for the trade in securities on a global basis is necessary, as is a way of getting nations to both agree to them and implement them. Facing up to the challenges posed by technology and the innovations of cyber criminals complicates our investigation. The solution will be found through a building a consensus of the many parties to the debate over the globalization of securities regulation, and ensuring that the laws and regulations created can stand the test of time.

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I hope that you who read what follows will find something of use to you, in what really is a dynamic, exciting and sometimes over-looked topic.

CHAPTER 1

**No man is an island, entire of itself;
Every man is a piece of a continent,
A part of the main. ¹**

"Think globally--act locally", could well be the modern regulatory interpretation of that metaphysical Bard's observation on the interconnectedness and interdependence of life. John Donne lived in an era of ever expanding horizons, at the dawn of the early modern age. Seafarers were pushing forward the horizons of the west, trade routes were established and outposts in far off lands were being set up. Soon, beaver pelts from the Canadas, spices from the East, gold from the Americas, and curios from the four corners of the world were brought back to Britain and Europe.

"THE MORE THINGS CHANGE THE MORE THEY REMAIN THE SAME"

This ever expanding commercial activity needed a means of regulation, a generally accepted medium of exchange, defenses against piracy and fraud, and a means for allowing more people to share in the opportunities presented by this new global commerce, and inevitably, a way of spreading the risks associated with it more equitably. Also needed was a means of protecting investors from their own greed, and a way to combat the actions of those unscrupulous "professionals" who deliberately deceived investors, and who helped accentuate such market confidence disasters as the South Sea bubble and the Tulip bulb burst. Pushing forward to the present, we see these debates echoed in controversies, such as the debate over the Euro, in the Enron and MCI-World Com scandals, in concerns over off-exchange trading, worries over cyber-fraud, regulatory arbitrage, identity fraud, cyber piracy, insider dealing and the subversion of anti-fraud defenses and measures designed to safeguard investors (such as fire walls).

HOW TO THWART PIRATES THROUGH THE AGES

In much the same way as rulers of the 17th Century wondered if their navies could combat pirates off the Spanish Main or the Barbary Coast, today's regulators wonder if unscrupulous investors are hiding their ill gotten gains in offshore banking havens while they conduct their illegal activities through such "fraud friendly" locales as Nigeria and Central America. As in the

days of the Spanish Main, uncertain political situations in these host countries, and a weakened or limited span of control on the part of fraud fighting authorities and organizations (who are not always the national regulatory authorities of the illegal investor's host country), characterize these "pirate dens". This set of factors hinders attempts by crusading authorities to clean up modern financial piracy.

FROM SPANISH MAIN--TO MAINFRAME

While much of this modern activity is more likely to emanate from a place like Microsoft's Seattle Headquarters, by someone dressed like Bill Gates, rather than Errol Flynn on the set of Captain Blood², it is just as damaging to world trade and commerce. These "pirates" present modern "Princes" (of commerce and regulation) with the same sorts of anxiety and consternation that King Philip of Spain, or an investor at Garroway's Coffeehouse³ might have experienced, in a former time. Since the world is less a series of "islands" than in John Donne's day, and since finance capital, centred on impersonal,⁴ institutionalized private markets⁵ is one of the major driving forces, both behind the globalization process itself and as a means of funding this expansion, retaining the trust and confidence of investors in these markets, both in the conduct of business in these markets, and in those who participate in them is essential. Hence, regulation must work, and regulators must regulate effectively! The law, is then forced to stay one step ahead of those who seek to evade it.

WHO DARES WINS

The revolution in communications in the past three decades, coupled with the rise of looser capital restrictions, have made capital very mobile. It is certainly very hard for a traditional, terrestrially (and territorially)-- based nation state to unilaterally enforce its legal writ in cyberspace. Since a significant number of legal practitioners, regulators and investors do not fully understand this technology, its application, and its effect, or outcomes, this places the web savvy criminal at a great comparative advantage. Sometimes, in cyberspace, "Who darés wins!"⁶

¹ Donne, John, Devotions XVII, as quoted in Cohen, J. M. and Cohen M. J., The Penguin Dictionary of Quotations (London: 1960, Penguin) 144. Hereinafter, "Donne".

² A famous Errol Flynn movie, from the 1930's, which featured the antics of a group of Pirates.

³ Garroway's Coffee House, in the City of London, served as the first Stock Exchange, as investors, merchant adventurers, and others who wished to buy and sell stakes in capital, voyages of discovery or manufacturing ventures, met to transact business and to drink coffee.

⁴ Shades of Adam Smith's "invisible hand" of the market.

⁵ Khoury, Sarkis, J., The Deregulation of the World Financial Markets, Myths, Realities and Impact (1995: London, Pimlico) at 1-2. Hereinafter, "Khoury".

⁶ Motto of the Special Air Services (S.A.S.).

Technology presents regulators with a constantly moving target, and gives rise to a sort of game that is played out between them and those who seek to evade regulation.

PLAYING FOR HIGH STAKES

The stakes in this game are high. Law must effectively solve these problems, but the law does not exist in a vacuum. Politics, history, legal tradition and customary practice, crowd the field of endeavour. Also, the steady pace of globalization, driven by, and driving along in its wake, the expansion of private capital finance markets, becomes embroiled in debates over the role of the state in regulation; the role of the nation state and national regulators versus organizations, such as the W.T.O; and the role of the International Financial Services Quangos. Furthermore, concepts, such as the rights of one state to physically force legal change in the positive law of another, and of the role played by enforcement agencies (National Enforcement Agencies) in international transactions, also arise for consideration in this debate. The end goal of this process is to create a global system of securities trading, transaction processing and regulation--that all players accept, and that can effectively fight fraud today, and in the future.

A "FUSION" OF DIFFERENT CULTURES AND CUISINES

In trying to navigate these scholastic waters, one encounters many strands of legal discourse. This work is, in effect, a "fusion piece" as it draws together many divergent strands of legal discourse: Trade Law, Securities Law, International Public Law, Administrative Law, the scholarship on the Internationalization of Law and Securities Law, debates on Corporate Governance Standards and Cyber Law. Just as the scholarship in this area is diverse, so too, is the solution. The status quo is no longer going to work, nor is a monolithic global securities regulatory entity likely to be rapidly created to respond to the challenges posed by globalization. That so many areas of legal scholarship impact upon our inquiry, is an indication that the solution will not be purely a Law of Treaties, Securities Law or Trade Law one. Whether or not we will end up creating a new body of law, in the process of trying to create a global system for securities regulation, and global corporate governance is uncertain at this time. What is certain, is that this undertaking is unique, and could lay the foundation for further cooperation and global law making in other areas. Retaining local control over much of the administration and local enforcement of these regulations would be both sound politics and administratively wise. It might also ensure that all nations in the world ratify and enforce these regulations. The regulatory waters we are cruising through are uncharted and filled with many potential icebergs of criminal activity, and jurisdictional limpet mines. The solution to this navigational problem,

therefore, will not fit into any of these boxes neatly, but will end up being a "fusion" of these divergent scholastic strands.

THE W.T.O. AND THE MULTILATERAL SQUAD

The dilemma of how to create a globalized system of securities trading and regulation, in a world increasingly dominated by "border jumping" technology, is a difficult one. Some argue that the use of the World Trade Organization (W.T.O.), and other multilateral trading units presents us with the best means of creating a unified system. Some prefer to work through regional trading blocs, such as the European Union (E.U.), or the North American Free Trade Zone (N.A.F.T.A. zone).

"THE SLOW-POKE"

Both of these solutions, as others tell us, present problems, such as democratic deficit, remoteness from those being regulated and the long time it takes to move the W.T.O. process forward. These people argue that other organizations are better placed to do this kind of market creation. Some argue in favour of having a global regulatory authority, some in favour of a global policeman (usually in the guise of the Securities and Exchange Commission [SEC]), some believe that the markets, themselves, will organically create a set of regulations, as investors ditch "poor" (or "poorly regulated"), markets, and gravitate towards "properly" regulated ones.

GLOBAL VISION--NATIONAL ROAD BLOCKS

Some believe that organizations, such as the Organization of Economic Cooperation and Development (O.E.C.D.), can best negotiate trading standards, while others hold that "salvation" lies through the acceptance of Global Corporate Governance standards. For this to occur, globally accepted financial quantification standards must exist. These will only come to pass when some nations overcome their opposition to dropping their domestic standards and to adopting global yardsticks (such as universal accounting standards). Until such a time, effective global corporate governance standards will remain elusive.

QUANGO TANGO

There are those who argue in favour of giving greater powers to the international Financial Services Quasi Autonomous Non-Governmental Organizations (QUANGOS), such as The International Organization of Securities Commissions (I.O.S.C.O.), and then allowing them to operate through the use of their local affiliates, within each country. There are some problems

with this model, as well, but it does have the advantage of global standards, agreed to at source (by practitioners in the field and on the ground), operated though the auspices of local affiliates (affiliates, that had a significant role in drafting the standards in the first place). Since these groups operate largely in secret, there is a small democratic transparency problem, but for an informed, informal, evolutionary modus operandi, they are one of the best means yet devised.

WHAT FORM TO TAKE?

The form that an increasingly unified global market would take is also a hotly debated issue. Some advocate regulatory arbitrage or market selection (investors will seek opportunities, or invest their monies, in markets, that provide them with the right safety and return guarantees). This is, in effect, a projection of Gresham's law ("bad money drives out good"), onto an entire market or stock exchange. Some commentators want a strictly controlled, "state-dominated" system, patterned after the U.S. regulatory system (which features a strong enforcement arm [the SEC] at the heart of the system). Some advocate more of a "Hanseatic League approach", an autonomous group of independent states, who operate under a loose(ish) confederation, based upon trade and mutual advantage (possibly by means of a multilateral treaty), with fewer of the formalistic structures, as one would see in a system patterned after a "nation state" (such as the U.S.) and with its adjunct enforcement agency (the U.S. SEC). Possibly, so far as regulatory models go, this Neo-Hanseatic League of International Finance, would be akin to the self-regulation one saw for so long in The City of London (before the enactment of the Financial Services Act, FSA, 2000). Certainly this last approach if consistent with the multilateral umbrella of the W.T.O.'s G.A.T.S. system, and if administered by International Financial Services QUANGOS, shows promise.

CHAPTER 2

I will examine these questions and concepts in the chapters that follow. In Chapter 2, my theory and methodology section, I will examine the literature on the above topics, and critique and compliment it, as it pertains to the point of my work. I will try to indicate, which authors, and theories, come closest to being optimal.

CHAPTER 3

In Chapter 3, I examine the Globalization and Internationalization of trade in securities. In particular, I will examine the globalization phenomena, and its historical precedents. I will also inquire into the emergence of our contemporary world trading system.

CHAPTER 4

In Chapter 4, I will delve into Economic and Regulatory Models, Corporate Governance and Computers. In particular, the significant features of the two major economic structural models will come under scrutiny. I will then examine the two major schools of law and regulation, used to regulate the trade in securities around the world. I shall then determine the effectiveness of nationally based laws in regulating international transactions, and whether we have "international laws" or transnational regulation of global securities transactions. I shall also examine the extent to which standards of corporate governance influences, or are influenced by, positive law. I shall then turn my attention to computers, and developments in communications technology, and how they have affected the securities industry and what challenges they pose to terrestrially based nation state centred regulators.

CHAPTER 5

In Chapter 5, I will work towards creating an effective global system for securities trading, and regulation--one which is borderless, and takes account of technology, and the concerns of nation states and national regulators. To do this, I must determine how to create a system, which is both "universal" yet still in the hands of "local actors". How corporate governance standards, and the adoption of universal accounting standards, can ease the way towards global transaction norms, ones which are effective yet not offensive or counter to national legal traditions, will also come in for consideration. I shall also try to determine the appropriate actor to promulgate these "universal regulations". The role of financial services QUANGOs in implementing these universal standards and norms will form an additional aspect of my inquiry. What is the optimal policy is the next stage of my investigation. I conclude by trying to determine whether this proposed system will effectively regulate trade between the many market participants.

CHAPTER 2

THEORY AND METHODOLOGY

The Jurisdictional Problem Introduced

"Think globally, act locally", that famous motto of the environmental movement, besides laying out the modern regulatory dilemma (as alluded to in Chapter 1), in a phrase, also frames the problem we encounter in trying to get a handle on the potentialities and pitfalls posed by the globalization of financial services, and the innovation posed by the internet (for trading, completing transactions and accessing foreign markets). Law has traditionally been a terrestrial construct, vested in the nation state,⁷ and many of the theories of law and legal jurisdiction use the nation state as their basic building block, or bog standard.⁸ Nation states are often very loath to surrender this power.⁹

In fact, states often must be pressured into co-operating with each other when faced with a problem that cannot be solved by traditional nation state centred jurisdiction. Sometimes this involves nations pooling their sovereignty,¹⁰ (as the nations of the E.U. have) in the drive to formulate a common policy or a united means of combating problems, such as global fraud, or enforcing a unified system of securities regulation. Occasionally states harmonize laws, standards and practices. In other situations, states will compromise, and agree that the statutes, laws and regulations of one nation (country A) are close enough to those of another (Country B) for B to accept them as meeting their own requirements. In effect, compliance with one set of rules is necessary and sufficient to comply with another set of standards (the Multi Jurisdictional Disclosure Standards, between Canada and the United States, for example).

⁷ Boutros-Ghali, Boutros, "A Grotian Moment" (1995) 18 Fordham International Law Journal 1609 at 1609. Hereinafter, "Boutros-Ghali". Please see also, Bowman, M. E. "Is International Law Ready for the Information Age?" 1996 19 Fordham International Law Journal 1935 at 1935. Hereinafter, "Ready". Please see as well, Weiss, Edith Brown, "The Rise and Fall of International Law" 2000 69 Fordham Law Review 345 at 346-347. Hereinafter, "Rise and Fall". And finally, please see Janis, Mark W. "International Law?" 1991 32 Harvard International Law Journal 363 at 368-369. Hereinafter, "International Law?"

⁸ Berman, Harold J. "World Law" (1995) 18 Fordham International Law Journal 1617 a 1618-1619. Hereinafter "World Law". Please see also "Ready", supra, note 7 at 1935.

⁹ "Ready", supra, note 8 at 1945-1946.

The Downsides of Co-operation

Sometimes states are required to change, or abandon, cherished legal standards and traditions, and adopt concepts "alien" to their laws or legal institutions (concepts, such as insider dealing in the Swiss legal tradition, for example).¹¹ In some cases, states lose the power to stop or impede legal changes, no matter what their bodies politic might think of it, due to their host government's being a signatory to an international agreement or trading regime, such as the W.T.O., the E.U. or N.A.F.T.A.¹² By all accounts, traditional nation state jurisdiction and the writ of national laws and legal traditions, is being challenged by a new globalizing order.¹³

In dealing with the internet and other "border jumping" technologies, we see, plainly, that there are problems with purely national jurisdiction.¹⁴ "No Man is an Island...", especially on the web, and no nation, or national jurisdiction can rely solely upon itself, the writ of its national laws, and the coercive powers of its investment protection agencies in a situation such as this.¹⁵ Even the mighty S.E.C., despite its best efforts¹⁶ and actions, which, verge upon extraterritoriality¹⁷ cannot always effectively act alone.¹⁸ The realm of rules, mores and procedures, unique to each nation,¹⁹ and broadly encompassed by the term "Corporate Governance"²⁰ is also, fruit for International discourse, discord and ideological dissemination.²¹

¹⁰ "Rise and Fall", supra, note 7 at 348.

¹¹ Mahoney, Paul G. "Securities Regulation by Enforcement: An International Perspective" (1990) 7 Yale Law Journal 305 at 317-318. Hereinafter "Enforcement"

¹² Rise and Fall", supra, note 7 at 349.

¹³ Ibid.

¹⁴ "International Law?", supra, note 7 at 369.

¹⁵ "Boutrous-Ghali", supra, note 7 at 1609.

¹⁶ Win, Jane K, "Catalytic Impact of Information Technology on the New Financial Architecture" (2000)34 The International Lawyer 137 at 143. Hereinafter "Catalytic Impact". Please see also, "Enforcement", supra, note 12 at 306.

¹⁷ "Enforcement", supra, note 12 at 317-318. Please see also, Hamilton, Paul, "The Extraterritorial Reach of the United States Securities Laws, Towards Initial Public Offerings conducted over the Internet" (1998) 13 St. John's Journal of Legal Commentary 343 at 362. Hereinafter, "Hamilton. Please see also, Coffee, John C. "Brave New World? The Impact(s) of the Internet on Modern Securities Regulation" (1997) 52 The Business Lawyer 1195 at 1219. Hereinafter "Impacts"

¹⁸ "International Law?", supra, note 7 at 363.

¹⁹ Gilson, Ronald J. "Globalizing Corporate Governance: Convergence of Form or Function" (2001) 49 The American Journal of Comparative Law 329 at 329-330. Hereinafter, "Globalizing Corporate Governance" Please see also, Cheffins, Brian R. "Corporate Governance Convergence: Lessons from Australia" (2002) 16 The Transnational Lawyer 13 at 15-18. Hereinafter "Cheffins".

²⁰ Although there are other definitions for this term, this is part of it.

²¹ Please see the following titles, over and above those already cited. Westfield, Elis "Globalization, Governance, and Multinational Enterprise Responsibility: Corporate codes of Conduct in the 21st Century" (2002) 42 Virginia Journal of International Law 1075. Hereinafter, "21st Century". Goldman, Michael D. and Filliben, Eileen M. "Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century" (2000) 25 Delaware Journal of Corporate Law 603. Hereinafter, "21st Century Trends".

Trying to get all players, government and market alike, to agree so far as standards and rules are concerned is an important element in creating a truly integrated global market. However due to history, differences in legal and corporate culture,²² and the politics of vested interests and national pride, arriving at such a consensus, between these various players, has proven to be both contentious and elusive.²³ Trying to sort out these differences, bring harmony to disharmony, and work towards overcoming the fears and opposition to change, is certainly on the "shopping list" of those seeking to create an integrated global market. There is, as we shall see, a great deal of commentary on this subject, and a very lively debate on the best ways to proceed.

Interdisciplinary Paradise

This problem in jurisdiction is also mirrored in the literature on the subject. Students of this sub-discipline have a variety of sources to choose from, and from a plethora of disciplines: Law, Economics, Business, M.I.S., International Relations, Securities Law, International Law, International Relations theory, Political Science--all have something to say on the matter. From a theoretical perspective, the major schools of jurisprudence represented are the Law and Economics and Neo-Liberal ones. Most of the people, who write on the Internationalism of Securities Regulation, tend to be from the First World. The most interesting thing about this phenomena (of Globalizing markets) is that a small number of countries are the major players in this game.²⁴ It is a process, which is confined to a select group of countries--large sections of the World's population are shut out of these globalizing markets, and from consideration of their respective needs.²⁵ Proponents of this globalizing system would hold out that as these countries develop, their concerns, too, would come to the fore,²⁶ and that we would focus our attention upon them and their concerns. Much of the scholarship is first-world oriented, but increasingly there is a great deal, which focuses upon emerging markets.²⁷

Branson, Douglas, M., "The Very Uncertain Prospect of "Global" Convergence in Corporate Governance" (2001) 34 Cornell International Law Journal 321. Hereinafter "Branson". Bainbridge, Stephen M., "Director v. Shareholder Primacy in the Convergence Debate" (2002) 16 The Transnational Lawyer 45. Hereinafter "Director v. Shareholder Primacy".

²² "Globalizing Global Governance", supra, note 19 at 330.

²³ Ibid.

²⁴ "Branson", supra, note 21 at 334-335.

²⁵ Ibid at 335.

²⁶ Sassen, Saskia, The Global City: New York, London, Tokyo (Princeton: 1991, Princeton University Press). Hereinafter, "Sassen"

²⁷ Gillen, Mark and Potter, Pitman, "The Convergence of Securities Laws and Implications for Developing Securities Markets" (1998) 24 North Carolina Journal of International Law and Commercial Regulation 85 Hereinafter, "Gillen and Potter" Please see also "Asian Financial Reform. Listen Closely for the Bang", The Economist April 4, 1998 at 90. Hereinafter, "Asian Bang"

There has, also, of late, been a bit of a backlash by the third world against the first, in the recent W.T.O. negotiations,²⁸ which may well herald a new ordering or conduct of world multilateral trade negotiations.²⁹ The first world wants greater liberalization in the trade in services, yet refuses to abandon agricultural subsidies.³⁰ In the negotiating process, they are meeting an organized opposition from many third world countries, who are demanding just this change, in policy, before they will agree to proceed with negotiations to liberalize the trade in services.³¹ Hopefully this new movement, or ferment, will lead to an emergence of more third world voices being heard on the issues of globalizing trade in securities, and the opening up of previously secluded markets, to the full force of international competition and integration. At the very least, we might see a degree of balance enter the scholarship and at best, perhaps, an alternative thesis to some of the prevalent assumptions, and ideas, behind globalization and trade liberalization.

Who writes on this Topic?

Overwhelmingly, the main journals publishing articles in this area, are American. Most of the writers on the globalization of financial services tend to focus upon the trends in legislation, supra-nationalism and harmonization without questioning the basic tenets, which underpin the entire concept of globalization. Many of those who do criticize the underlying assumptions tend to be writing on globalization, per se, or on ways to move (or not move) the globalization process, itself, forward. They often do not mention financial services, at all.

Aspects of the globalization of financial services are certainly open to debate and contention by certain scholars,³² but the wisdom of the entire concept (globalization) is seldom seriously questioned, by those writing on the global revolution in financial services trading and market expansion. From time to time an author, such as Jagdish Bhagwati, will query the wisdom of the first world extending its trade in services to the third world,³³ at the expense of

²⁸ Rudd, Tony, "A Charter for the Poor", Thursday 18 September, 2003 www.the-weekly.net at 1 Hereinafter, "Rudd".

²⁹ Ibid at 2.

³⁰ Ibid.

³¹ Ibid.

³² "Branson", supra, note 21 at 123.

³³ Bhagwati, Jagdish N. "Splintering and Disembodiment of Services and Developing Nations" (1984) 7 The World Economy 133 Hereinafter, "Splintering". Please see also on the topic of the extension of Free Trade to trade in Services, and what it could mean for the 3rd World, Hoekman, Bernard M. "Safeguarding Provisions and International Trade Agreements Involving Services", (1992) 15 The World Economy 707. Hereinafter, "Safeguarding". Please see also, Hoekman, Bernard M. "Market Access Through Multilateral Agreement: From Goods to Services" (1992) 17 The World Economy 707. Hereinafter, "Goods to

third world service providers, but their scholarship really belongs in the realm of trade law and globalization, not in the globalization of financial services, per se. There are those who oppose globalization, and those who oppose extending this process to service provision, but most of those opposed to the globalization of financial services, tend to be ideologically opposed to private markets in general.

Where The Literature Comes From

As stated before, the overwhelming number of journals, that deal with the Globalization of financial services are American-- and so is the content. There is, of course, a significant amount of "British content" out there,³⁴ also, as many scholars have traditionally looked to the British system as either a comparative point of departure from that of their "Cross pond" cousins (the Americans), or as an alternative to American Securities Market administration.³⁵ Europeans, also, look at the City of London, and British regulation, both in comparison to their domestic legal regimes, and in light of the single market, various Commission Directives, and the Lamfalussy process, as a viable, model for an integrated European Securities Market.³⁶

Where is England?

Purely "British" Law Journals, seem less concerned with these topics than either their continental and American competitors, or their related domestic publications in Finance, Accounting, Insurance, etc. These law publications tend to focus on such "high minded" topics as jurisdiction and the Law of Treaties (although publications, such as The Company Lawyer are exceptions). Partly this is due to the way the profession is structured in England, and possibly to the agendas and interest of British legal academics. The self regulating nature formerly enjoyed, in the City of London, meant that there were fewer "Securities Law" issues, which arose, than in the

Services". As well please see, Hindley, Brian and Smith Alasdair, "Comparative Advantage and Trade in Services", (1984) 7 The World Economy 369. Hereinafter, "Hindley and Smith".

³⁴ "Cheffins", supra, note 19. Steinberg, Marc. I and Michaels Lee E, "Offerings. Analysis of Jurisdictional Approaches, Commonality and Reciprocity" (1999) 20 Michigan Journal of International Law 207. Hereinafter, "Steinberg and Michaels" Please see "8 The United Kingdom: Threadneedle Street Ascendant" in Coleman, William D., Financial Services, Globalization and Domestic Policy Change (1996: London, Macmillan). Hereinafter, "Threadneedle".

³⁵ Ibid. Certainly the new regulatory architecture in London has a different "feel" to the U. S. S.E.C. regime. The U. S. also still regulates sectorially (S.E.C., Federal Reserve, Comptroller of Currency, etc), whereas the F.S.A. has a more over-arching or "supremo" feel to its powers and structures. Please see Financial Services and Market Act, 2000. Chapter c.8

http://www.fsa.gov.uk/fsma/data/fsma/act/act_part_i.htm Hereianfter, "FSA 2000".

³⁶ Wegen, Dr. Gerhard, "Transnational Financial Services--Current challenges for an integrated Europe" 60 (1992) Fordham Law Review S95. Hereinafter, "Wegen".

United States, which has a highly regulated market and a very strong governmental agency in charge of its regulation.

Who Else?

The Antipodes, in particular Australia,³⁷ also makes their point of view known. In fact, because Australians tend to have one eye on Britain and the other on America, you can see some excellent comparative analysis from Down Under.³⁸ Canadian scholars do contribute to this debate, slightly, often by writing for American Law Journals.³⁹ Canadian University Law Reviews seem to spend less time on these topics than their American cousins. Many of the Canadian scholars who do write on topics in these areas, often focus upon either the MJDS, or aspects of Canada/U.S. trading. Some unique pieces, do abound, however.⁴⁰ Most of this scholarship, however, tends to be first world in its orientation, although there are exceptions to this rule.

Pity the Poor Americans

The Americans, especially, have had a difficult time coming to grips with erosion of their absolute control over some provisions of their system of securities laws.⁴¹ In particular some commentators bemoan the apparent demise of their Blue--Sky laws,⁴² and certain other provisions of the Securities and Exchange Act of 1934.⁴³ The initial inability to extend American jurisdiction beyond their shores, and thus protect American investors, has spurred the U.S.

³⁷ "Cheffins", supra, note 19

³⁸ Ibid.

³⁹ "Gillen and Potter", supra, note 27 at 85.

⁴⁰ Ibid.

⁴¹ Doty, James R., "The Role of the Securities and Exchange Commission in an Internationalized Marketplace" (1992) 60 Fordham Law Review S77. Hereinafter, "Doty". Please see also, Futterman, Josh, "Evasion of Flowback in the Regulation S Era: Strengthening U. S Investor Protection while Promoting U. S. Corporate Offshore Offerings" (1995) 18 Fordham International Law Journal 806. Hereinafter, "Futterman". Please see also, Hall, Darrell "No Way Out: An Argument Against Permitting Parties to opt out of U. S. Securities Laws in International Transactions" (1997) 97 Columbia Law Review 57. Hereinafter, "Hall". Please see as well, Soderquist, Larry D. "The Role of the S. E. C. in a Changing Market" (2000) 1 Columbia Business Law Review 45. Hereinafter, "Soderquist". Please see Spencer, Lee B. "The Reaction of the Securities and Exchange Commission to the Internationalization of the Securities Markets: Three Concept Releases" (1986) 4 Boston University Law Journal 111. Hereinafter, "Spencer".

⁴² Karmel, Robert a S. "Blue Sky Merit Regulation: Benefit to Investors, or Burden on Commerce" (1987) 53 Brooklyn Law Review 105. Hereinafter, "Karmel Blue Sky". Please see also, Fahrney, Brian J. "State Blue Sky Laws: a Stronger Case for Federal Pre-emption due to Increasing Internationalization of Securities Markets" (1992) 86 Northwestern University Law Review 753. Hereinafter, "Fahrney".

authorities on to try new and innovative means of catching those who run afoul of American laws, whilst abroad,⁴⁴ and to clamp down on those who seek to evade U.S. Laws by sending their money abroad.⁴⁵ These actions have, predictably, spawned an entire mini cottage industry of commentators, pro and con the U.S. policy, and added a new dimension to the debate. The actions of the U.S. S.E.C., have certainly, turned some aspects of International relations theory on their head,⁴⁶ and made it an interesting time to be observing the legislative and administrative scene. The actions of the U.S. S.E.C. in trying to extend their writ abroad, notwithstanding, the challenges posed by cyberspace, have only accentuated the anxieties of the American authorities.⁴⁷ The S.E.C.'s desire to protect American investors from fraud, and to ensure that Americans (or those who do business with them) cannot avoid the reach of U.S. law,⁴⁸ becomes harder to enforce through traditional means, or even by means of their new-found extraterritoriality. This has spurred the American government on to encourage other nations to cooperate with them in their efforts to fight fraud and plug the holes in investor defenses, which cyberspace pries open.⁴⁹

⁴³ "Doty", *Supra*, note 41 at S82. Please see also, Hicks, William J. "Securities Regulation. Challenges in the Decades Ahead", (1993) 68 *Indiana Law Journal* 791. Hereinafter, "Hicks". Please see also, "Soderquist", *supra*, note 41 at 45.

⁴⁴ Choi, Stephen and Guzman, Andrew J. "Portable Reciprocity: Rethinking the International Reach of Securities Regulation" (1998) 71 *Southern California Law Review* 903. Hereinafter, "Portable Reciprocity". Please also see, "Futterman", *supra*, note 41 at 821. Also Grasso, Richard A. "Globalization of Capital Markets" (1997) 21 *Fordham International Law Journal* 390. Hereinafter, "Grasso". Please see also, Keene, Lonnie S. "Globalization and Competition: A Proposal to Liberalize Foreign Securities Disclosure Regulation" (1998) 27 *International Law and Politics* 337. Hereinafter, "Keene". Please see, also, Licht, Amir N. "Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions" (2000) 1 *Columbia Business Law Review* 51. Hereinafter, "Genie".

⁴⁵ Brooslin, Andrew S. "Enforcing Insider Trading Laws: The Need for International Co-operation" (1997) 20 *Suffolk Transnational Law Review* 397. Hereinafter, "Brooslin". Please see also, Choi, Stephen and Guzman, Andrew J. "National Laws, International Money: Regulation in a Global Capital Market" (1997) 65 *Fordham Law Review* 1855. Hereinafter, "National Laws, International Money". Please also see, "Doty", *supra*, note 41 at S82-83. "Futterman", *supra*, note 41 at 821 is also helpful on this point, as would be "Hall", *supra*, note 41 at 81. Please see also, Fox, Merit B. "Securities Disclosure in a Globalizing Market: Who should regulate whom" (1998) 95 *Michigan Law Review* 2498. Hereinafter, "Fox". Finally, Levitt, Arthur J. "Dynamic Market, Timeless Principles" (2000) 1 *Columbia Business Review* 1, would also be of some assistance. Hereinafter, "Levitt".

⁴⁶ Gorra, Matthew F. "On-Line Trading and United States Securities Policy: Evaluating the S.E.C.'s Role in International Securities Regulation" (1998) 32 *Cornell International Law Journal* 209 at 224-225. Hereinafter, "Gorra".

⁴⁷ "National Laws", *supra*, note 45 at 1856

⁴⁸ "Mahoney", *supra*, note 11 at 310-311.

⁴⁹ Choi, Stephen J. and Guzman, Andrew T. "The Dangerous Extraterritoriality of American Securities Law" (1996) 17 *Northwestern Journal of International Law and Business* 207 at 208. Hereinafter, "Dangerous Extraterritoriality"

America Struggles with Jurisdictional Hegemony

This struggle between the desire to stop fraud, and the hesitancy to cede control over the ability to set one's national laws and standards, has been especially acute in the United States,⁵⁰ but, to a lesser or greater extent, has occurred in all nations.⁵¹ For a long time, the United States has had the ability to try to have its cake and eat it too--by using its global reach to enforce a kind of extra-territoriality and compliance upon other nations and foreign domiciled parties.⁵² This is good, up to a point, but there are limits to how far this should proceed. Such extraterritoriality, and coercive attacks upon the sovereignty of other nations, as much of the international relations literature tells us, is a cause for concern.⁵³ Concerns are raised both by those countries who have

⁵⁰ Destler, I. M. American Trade Politics 3rd Ed. (New York: 1995, Institute for International Economics). Hereinafter, "Trade Politics". Please see also, Friedland, John H. The Law and Structure of the International Financial System. Regulation in the United States, EEC and Japan. (1994: Westport, Quorum). Hereinafter, "Friedland". This is especially important at 66-67 when he talks of the American reluctance to deviate from the Glass Steagle system. Please see also, Saunders, Anthony, and Walter, Ingo, Universal Banking in the United States: What could we gain? What could we lose? (1994: Oxford, Oxford University Press). Hereinafter, "Universal Banking". Please see also, "Doty", supra, note 41 at, S82. "Fox", supra, note 45 at 2608-2604, as well as "Futerman", supra, note 41 at 845. Please see also, Millsbaugh, Peter E. "Global Securities Trading: The Question of a Watchdog", (1992) 26 George Washington Journal of International Law and Economics 355. Hereinafter, "Millsbaugh"

⁵¹ Ayling, D. E. The Internationalization of Stock Markets. The Trend towards Greater Foreign Borrowing and Investment (Aldershot: 1986, Gower) at 18. Hereinafter, "Ayling". Please see also, Hirst, Paul and Thompson, Grahame, Globalization in Question. The International Economy and the Possibilities of Governance (1996: Cambridge, Polity Press). Especially at 184-186. Hereinafter, "Hirst and Thompson". Please see also, "Khouri" supra, note 5 at 2. Please see also, McRae Hamish and Cairncross, Frances, Capital City, London as a Financial Centre, (London: 2001, Methuen). Hereinafter, "McRae and Cairncross". Please see also, Vadez, Stephen, An Introduction to Global Financial Markets (London: 2000, MacMillian). " Hereinafter, "Vadez". Poser, Norman S. International Securities Regulation: London's "Big Bang" and the European Securities Markets (London: 1991, Little Brown and Company), Hereinafter, "Poser", at 54 is helpful. For a grasp of the differing systems of corporate governance, corporate structure and corporate culture, so as to better understand the potential problems selective countries bring to the globalization process, please see, Macey, Jonathan R. and Miller, Geoffrey P. "Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan and the United States", (1995) 48 Stanford Law Review 73. Hereinafter, "Macey and Miller". Please also see, Nardulli, Giovanni and Segni Antonio, "E. U. Cross-Border Securities Offerings: an Overview" (1996) 19 Fordham International Law Journal 887 at 898. Hereinafter, "Nardulli and Segni". Please see also, Trachtman, Joel P. "Trade in Financial Services Under G.A.T.S., N.A.F.T.A. and the EC: A Regulatory Jurisdiction Analysis" (1995) 34 Columbia Journal of Transnational Law 37. Hereinafter, "Trachtman".

⁵² "Mahoney", supra, note 11 at 305. Please see also, "Spencer", supra, note 4 at 11. Please see, Licht, Amir N. Games Commissioners Play: 2 x 2 Games of International Securities Regulation (1999) 24 The Yale Journal of International Law 61. Hereinafter, "2 x 2". Please see also, Hunt, Isaac "It's a Small World After all: The S.E.C.'s Role in Securities Regulation Globalization" (1999) 51 Administrative Law Review 1105. Hereinafter, "Hunt". Please see also, "Fox", supra, note 45 at 2617-2618. Please see also, "Dangerous Extraterritoriality", supra, note 49 at 207.

⁵³ "Gorra", supra, note 17 at 343. Please see also, "Hamilton", supra, note 17 at 343. Please see as well, Patterson, Michael E. "Convergence of Global Financial Services" (1997) 121 Fordham International Law Journal 327. Hereinafter, "Patterson". Please see also, "Brooslin", supra, note 45 at 400, and Broadman, Harry G. "G.A.T.S.: The Uruguay Round Accord on Fraud. Broadening the Scope of United States Jurisdiction" (1999) 30 Loyola University of Chicago Law Journal 679. Hereinafter, "Broadman". Please see also, "Dangerous Extraterritoriality", supra, note 49 at 208-209.

had American mores forced upon them,⁵⁴ and among select American international relations scholars who worry about the effect which these changes have had upon international relations theory or the potential effects they will have upon American international relations law.⁵⁵ The constitutionality, of these actions, often undertaken unilaterally by the S.E.C., have also been questioned by International relations scholars.⁵⁶ The influence, which, such unilateralism has had upon spurring on the efforts of other, more international and consensual, efforts at global harmonization of securities laws, has also been commented upon both by scholars of international law, and by those who study the internationalization of securities regulation.⁵⁷ America's struggles with jurisdictional hegemony are made all the more difficult by the advent of "border jumping technology", such as the internet, the literature's treatment of which we shall examine presently.

The Internet in Literature

The literature on the use of the internet in the realm of the securities world⁵⁸ falls into the three broad categories: (1) technological pieces (computers and society): (2) computers and how they have changed the domestic (especially American) legal regimes (and practice) and (3) computer--dominated transactions and their effects upon public policy both international and national.

(1) Articles on Technology

The first kind of articles, on technology, alternate between "marveling at what wonders God hath created," and warning of the dire consequences which these new processes pose to business and regulatory control.⁵⁹ Some of this literature requires an almost technical knowledge of computers, and what they can do.⁶⁰ Since there are legal issues, which could potentially arise out of these elements of software development,⁶¹ it is helpful to gain a knowledge of these

⁵⁴ "Mahoney", supra, note 11 at 317-318.

⁵⁵ "Hamilton", supra, note 17 at 361.

⁵⁶ Ibid.

⁵⁷ "Mahoney", supra, note 11 at 320.

⁵⁸ Franks, Tamar, "The Internet, Securities Regulation and Theory of Law" (1998) 73 Chicago-Kent Law Review 319. Hereinafter, "Frankel". Lessing, "The Path of Cyberlaw" (1995) 104 The Yale Law Journal 1745. Hereinafter, "Lessing". Lessing Lawrence, "The Zones of Cyberspace" (1996) 48 Stanford Law Review 1403. Hereinafter, "Zones of Cyberspace".

⁵⁹ Rice, Denis T. "Jurisdiction in Cyberspaces--Which Law and forum apply to Securities Transactions on the Internet?" (2000) 21 University of Pennsylvania Journal of International Economics and Law 585, especially at 601-605. Hereinafter, "Rice". Please see also, "Gorra", supra, note 46 at 209-211.

⁶⁰ "Rice", supra, note 59 at 601-605.

⁶¹ Ibid.

technological issues. It can be most difficult, however, for someone without an M.I.S.--type background to check up on the sources for articles, such as these.

(2) Influential to Domestic Law and Practice

The second set of articles we are confronted with are those, which are produced by, or produced for, those who try to practice in this area. Some of these are statutes, or books of regulations, while others are Law Firm Memos and other topic specific items.

(i) Special Purpose Statutes or alterations to domestic law

The second source of material, influential on domestic law and practice, comes in two or three sub-sources. The United States, in particular, has embraced internet law with a vengeance, and a significant amount of case law, and special purpose statute law exists regarding computers, and how computer oriented transactions, affect the law.⁶² Canada, by way of contrast, initially has gone a different route, and, for the most part, has chosen to treat the computer phenomena as just one more technological innovation, which can be dealt with, by means of the evolution of existing law.⁶³ In some cases, the effects which computers have upon transactions, such as sale of goods, are recognized by adding sections to the existing statutes to cover, or include, these provisions or innovations. Special purpose computer or internet laws are being considered, and do exist in draft form.⁶⁴ Some of these have been created in conjunction with organizations, such as UNCITRAL, and others done at the behest of the Dominion (Federal) Government.

(ii) Law Firm Memos

Besides special purpose statutes, there is also a plethora of Law firm memos on various aspects of computers and securities Law to choose from. Memos on such things as on-line prospectuses,⁶⁵ on-line offerings,⁶⁶ and the effects which web-sites can have on the liability of

⁶² Geist, Michael A. Internet Law in Canada 2nd Ed. (2001: North York, Captus). Hereinafter, "Geist". Please see also, Stuckey, Kent D., Ed., Internet and Online Law (1996: New York, Law Journal Seminar Press) ss 1.02[4]. Hereinafter, "Stuckey". Please see also ss 2.03[3], and its reference to The Communications Decency Act of 1996. Please see also, Cronin, Mary J., "Privacy and Electronic Commerce" in Impardto, Nicholas, Public Policy and the Internet. Privacy, Taxes and Contract (2000: Stanford, Hoover Institution) at 17. Hereinafter, "Cronin".

⁶³ "Geist", supra, note 62. Please see also, Takach, George S. "Internet Law: Dynamics, Themes and Skill Sets" in Hamilton, Barbara M, Coke, Ronald L, and McCaffey, Taylor, Technology: Responding to the Legal Challenges. 1998 Isaac Pitblado Lectures (1998: Winnipeg, Law Society of Manitoba) at 19. Hereinafter, "Takach".

⁶⁴ "Takach", supra, note 63 at 17.

⁶⁵ Dickey, Jonathan C., Hudson, William L, and Smith, Douglas D. "Direct Public Offerings on the Internet" in Securities in Cyberspace (1997: Gibson Dunn & Crutcher LLP,

companies,⁶⁷ are all provided for the use of clients, scholars and practitioners alike. Certain aspects of the Securities and Exchange Act (1934) are also affected by the Cyber dimension, and form the subject of other memos.⁶⁸

(3) Journal Articles

Thirdly, there are, of course, the usual collection of Journal articles on such similar subjects, which form the basis of the memos (although they are of a less "hands-on" nature).⁶⁹ The Neo-liberal school of regulatory analysis is well represented in these articles,⁷⁰ along with the libertarian (Law and Economic--type) school,⁷¹ which supports a market--determined system of regulatory structure. There are also a few New-deal type commentators,⁷² who are loyal to the depression-era view of the U.S. Federal Government's role as referee in the financial system. Whether or not the cyber dimension affects U. S. Securities regulations and/or turns it on its head is covered by some of these articles.

www.gdlaw.com/publications/upload/SecLit06.asp. Hereinafter, "Direct public Offerings". Please see also, "S.E.C. Clarifies When a Posting on the World Wide Web is not a Securities "Offer" within the U.S." April 7, 1998 (1998: Gibson, Dunn & Crutchan LLP) www.gdlaw.com/pulications/uploads/SecLit24.asp. Hereinafter, "S.E.C. clarifies".

⁶⁶ Ibid.

⁶⁷ Littenberg, Michael R. "S.E.C. Issues New Internet Release" June 2000 (2000: Schuller Rolth and Zabel LLP) <http://www.sr2com/Pub/inm-newsletter.html>. Hereinafter, "New Internet Release".

⁶⁸ "S.E.C. Clarifies When a posting on the world wide web is not a Securities "Offer" within the U. S. April 7, 1998, (Gibson, Dunn & Crutchan, LLP), www.gdlaw.com/publications/uploads/SecLit24.asp. Hereinafter, "Clarifies". Please see also, Gerstein, Kenneth S. : Securities Regulation and the Emerging Online Financial Institution" (1998, Schultze Roth & Zabel LLP) http://www.srz.com/pub/sec_seminar_1.html Hereinafter, "Gerstein"

⁶⁹ Black, Barbara, "Securities Regulation in the Electronic Age:" Online Trading Discount Broker's Responsibilities and Old wine in New Bottles (2000) 28 Securities Regulation Law Journal 15. Hereinafter, "Black". Please see also, Bowman, M. E. "Is International Law Ready For the Information Age?" (1996) 19 Fordham International Law Journal 1935. Hereinafter, "Bowman". "Gora", supra, note 46 is also helpful on this point. Please see also, "Hamilton", supra, note 53.

⁷⁰ Cushing , Paul M. "Barriers to the International Flow of Capital: The Facilitation of Multinational Securities Offerings" (1987) 20 Vanderbilt Journal of Transnational Law 81. Hereinafter, "Cushing". Please see also, Garten, Jeffrey E. "Self -Regulation in the Global Context" (2000) 1 Columbia Business Law Review 23. Hereinafter, "Garten".

⁷¹ Trachtman, Joel P., Regulatory Competition and Regulatory Jurisdiction in International Securities Regulation December 9, 1999. Paper written for a Conference on Regulatory Competition and Economic Integration. Hereinafter, "Trachtman Competition". Please see, "Licht 2 x 2" supra, note 52. Please see "Dangerous Extraterritoriality", supra, note 49.

⁷² "Fahrney", supra, note 42 at 757. Please see "Hall", supra, note 41.

The Hinge which Connects my Inquiry

The ability of off-shore players to evade U.S. terrestrially based securities law, and the latter's attempts to bring these foreign parties to heel,⁷³ presents us with the connecting point where international relations-type Scholarship, Law, Computer studies, Corporate Governance analysis and regulatory harmonization scholarly inquiries coverage. This point forms the hinge upon which my investigation shall proceed. In looking at these issues, I shall confine myself to a study of the terrestrially-based Big-Board markets (London, New York, Hong Kong, Tokyo, Frankfurt, Toronto). I shall refer to the off-exchange dealing networks, and Bulletin Boards, obliquely and shall also examine NASDAQ, if only to determine how this sort of "virtual" market affects the more established markets, and to see what lessons they can learn from NASDAQ. I shall look at various other areas of scholarship: International Relations, Trade Law, International Public Law, Securities Law, Globalization and especially the Globalization of Securities Law, to see where these areas interconnect, and where they diverge. The solution to the question of how to create a viable system of global securities regulation and corporate governance, one that will both enjoy the support, and gain the acceptance of, the world's nations, and also thwart those who would destroy and undermine it, will not be found in any one area of scholarship or methodology. We must go beyond the confines of international relations theory, for example, and co-opt nation states to enact, administer and enforce, global regulations and standards. We must use consensus to create these standards, and all nations must have a hand in their authorship. In seeking consensus, however, we cannot water the regulations down to the point where they are acceptable to all nations, but ineffective at preventing fraud or other misdeeds.

A significant part of my inquiry will examine the appropriate body to task with the creation and administration of these regulations. Since the body must have an international focus, be known and respected by all stakeholders and have the expertise and ability to create these regulations, this tasking is a significant responsibility. Since there are also issues regarding macroeconomic structure, capital market development, legal culture, national sovereignty and autonomy to be considered, in the drafting of these regulations, the choice of drafter is an important consideration.

In examining the system of law and regulation to be enacted, consideration must be given to the impact of technology. The revolution of communications technology over the past 20 years has meant that regulators are presented with administrative problems, challenges to their authority

and areas of regulatory evasion, unknown even 10 years ago. The march of time and the pace of technological development will only magnify these problems, and intensify the efforts of regulators to stay one step ahead of technological change. This challenge underlines the importance of creating a legal and administrative architecture, capable of moving with the times, and allowing for changes in the technological sphere (which will then flow through to the legal one). This requires both vision and wisdom, in the design of the regulatory system. To do this will take some time, and require much cooperation among nations, and securities regulators. In examining these various issues and considerations, what we shall do is to inquire how law, international relations (global law and practice), and cyberspace (computers) interact with each other in the quest to create an integrated and seamless market for securities which can only be described as global.

Corporate Governance--Connecting The Dots

In the drive to create a global, integrated, market for securities, certain things are essential. A unified set of standards, and an agreed upon means of evaluating performance, are two of them. In a world where borders are permeable, and wrong-doers, sometimes beyond the reach of both domestically based regulators, and terrestrially based laws--the creation of a universally "level playing field" is imperative.

The United States has been at the forefront of recent attempts at corporate governance reform.⁷⁴ Besides advocating it as public policy, they have also been supportive of the efforts of organizations, such as the O.E.C.D., and the International Chamber of Commerce, who have tried to draft international rules and standards for business conduct. Being the land of free enterprise and the home of the brave and the brash, U.S. scholars have helped create what one commentator called a "cottage industry" in corporate governance. Fuelled on by some of their own domestic scandals, Americans will now dispense as much information, or even more, than a person wants to know on the topic, and are very happy to explain how their economy, business or society can be improved, or safeguarded against the next Enron, etc.

⁷³ "Mahoney", supra, note 11 at 320. Please see also, "Dangerous Extraterritoriality", supra, note 49.

⁷⁴ Gervurtz, Franklin A. "The Globalization of Corporate and Securities Law: An Introduction to a symposium, and an Essay on the Need for a Little Humility When exporting One's Corporate Law" (2002) 16 The Transnational Lawyer 1 Hereinafter, "Gervurtz", "21st Century", supra, note 21 at 1075. Please see also, "Globalizing Corporate Governance", supra, note 19.

It seems as though the S.E.C., realizing that they cannot control cyberspace or completely isolate American investors from it, have switched their focus of attack to the rules governing business and the standards used to measure performance. Needless to say, commentators are all over the map on these questions, with a fulsome display of views and schools of thought at the ready.

I'm A Yankee Doodle Dandy!

It is not too surprising that many commentators who write on corporate governance focus upon the United States, and the vagaries and profundities of U.S. law and practice.⁷⁵ While concepts, such as fraud and the basic tenets of a corporate director's or officer's fiduciary obligations, are more or less universal, much of what certain American commentators are saying, is really directly germane to U.S. law and experience.⁷⁶ The Anglo-Saxon model, which pays lip service to the notion of share holder control, and wealth maximization,⁷⁷ is compatible with certain types of legal structures, and certain types of reforms. What this type of scholarship has to say to family integrated holding companies, family trusts, Keireitsus, and countries with a bank-centred form of corporate finance,⁷⁸ is very much open to question.

Unfortunately, there does, as more than one commentator has observed, seem to be an attitude, on the part of some corporate governance authors, that what's sauce for the Yankee share holder goose, is also sauce for the Japanese Keireitsu (or any other form of corporate holding structure) gander.⁷⁹ We have certainly advanced from the bad (good?) old days of the early '90's and "Crony capitalism"⁸⁰ in Asia, where its proponents tried to hold it up as a recession proof, strife-proof, long term planning alternative to "Anglo-Saxon shareholder greed", short termism, and the volatile stock market cycle. "The Asian Flu", in part, put paid to such tub-thumping, but may well have encouraged many pro-American commentators, to bang the drum for U.S. corporate governance theories, as the one size fits all solution to the problems posed by regulation the burgeoning tide of global commerce.⁸¹

⁷⁵ Among them. "Branson", supra note 21, who on 333-334, takes some commentators to task for the narrowness of their vision, and their parochial legal outlook.

⁷⁶ Ibid.

⁷⁷ "Cheffins", supra, note 19 at 15.

⁷⁸ "Globalizing Corporate Governance", supra, note 19 at 330.

⁷⁹ Ibid at 331.

⁸⁰ Editorial "Liberte, Egalite, Equity. Look Out Crony Capitalism" Far Eastern Economic Review April 16, 1998 at 10. Hereinafter, "Liberte, Egalite, Equity".

The collapse of such former stock market darlings as Enron, and MCI Worldcom, despite their reporting to the most comprehensive and extensive investment regulatory structure in the world,⁸² exposed some of the problems that can occur even in a "perfect" system, like the U.S. Some American commentators, have also, been eating humble pie since then, and even chide the insolence and arrogance of many of their countrymen, whose previous enthusiasm for the American notions and concepts of corporate governance, have already been noted.⁸³ This reassessment, of the unqualified wisdom of adopting U.S. (or any country's standards) and then trying to graft them onto alien cultures, is well founded.

As other commentators will tell us, the questionable wisdom of carte blanche American normative adoption notwithstanding, there is much we can learn from the Anglo-Saxon model.⁸⁴ Directors' liability and fiduciary obligations, especially in an ever-changing world, are concepts all observers can benefit from examining at length. As some very eminent American scholars told a congressional hearing into Enron,⁸⁵ the fusing of Auditing and Business strategy, into the same vessels (The Large Accounting Firms), was a case of convergence taken too far.⁸⁶ This is a lesson all observers should take note of. The break down of the principles underlying the Berle-Means Test⁸⁷ (the Model used to explain some American Corporate Governance norms),⁸⁸ should serve as a wake up call to all nations, national financial structures, and commentators, and rouse them into examining conditions in their own back yards (to see whether conditions have changed). There are other aspects of the debate over American corporate governance norms, which are universally applicable to all observers, and some of these will be discussed at some length, later on.

⁸¹ "Branson", supra, note 21 at 330-331

⁸² Coffee, John C., Jr. and Flom, Joseph, "The Enron Debacle and Gatekeeper Liability: Why would the Gatekeepers Remain Silent?" Testimony of Professor John C. Coffee Jr. and Adolf A. Berle Professor of Law, Columbia University Law School, and Joseph Flom, Visiting Professor of Law, Harvard University Law School. Before The Senate Committee on Commerce, Science and Transportation, December 18, 2001. Hereinafter, "Coffee & Flom".

⁸³ "Gevurtz", supra, note 74 . "Branson", supra, note 21 at 330-331.

⁸⁴ "Cheffins", supra, note 19 at 42-43.

⁸⁵ Seligman, Joel, "Oversight Hearing on "Accounting and Investor Protection Issues" Raised by Enron and Other Public Companies", Prepared statement of Professor Joel Seligman, Dean and Ethan A.H. Shepley University Professor, Washington University School of Law, U. S. Senate Committee on Banking, Housing and Urban Affairs. Hereinafter, "Seligman Issues".

⁸⁶ "Coffee & Flom", supra, note 82 at 8.

⁸⁷ "Cheffins", supra, note 19 at 15-17.

⁸⁸ Ibid.

Internationalists--The New You!

There are a surprising number of people who advocate a fusing together of various streams of corporate practice and governance, the world over, to create global norms.⁸⁹ As many of these commentators point out, great progress has already been made in this area, and standards are much more harmonized than in the past. The effect of the E.U. on enhanced integration, springs first to mind, and there is certainly a great deal of literature on this, from a myriad of sources: legal and business scholars, and the European Commission, pressure groups, Business Associations Financial News Organizations and others. The work of the O.E.C.D. and the international chamber of commerce in this area, is also singled out for special attention.⁹⁰ Many of the scholars writing on internationalization are American, but other nations, also, contribute their perspectives. Unfortunately, however, these scholars, also, tend to be from the first world, so we don't hear from the developing world as much as might be optimal.

Roadblocks on the Road to Global Standards

The literature on the globalization of corporate governance norms is replete with examples of how steps are being taken to unify business standards, and numerical means of measurement. Such innovations as the three day settlement rule on international trades in securities, international accounting standards and agreements on how items, such as goodwill, are to be calculated, are just some of the measures taken to unify or co-ordinate, business around the world. There are, also, roadblocks on the way to building this new standard--many of them presented by the United States.⁹¹ The Americans seem wedded to their domestic standards of disclosure, fiduciary obligation and, in particular, a certain number of their accounting standards.⁹² This dogged adherence to the tried and true standards has cost the United States a great deal. Many nations' companies, would not list on the New York Stock Exchange, due to the "invasive" nature of the information they were required to file with the Securities Commission (S.E.C.),⁹³ and for the trouble and cost required to create accounting reports, which would comply

⁸⁹ Please see "Branson", supra, note 21, who while not convinced of "convergence" or "one size fits all" does discuss a coming together of some nations, debunks many convergence myths, and presents an impressive array of sources. Please see also, "Globalizing Corporate Governance" supra, note 19, in which the author goes through various efforts at governance norm convergence, and picks out the best paths forward, as well as outlining the pros and cons of each proposed means of convergence.

⁹⁰ "Branson", supra, note 21 at 136.

⁹¹ "Garten", supra, note 70 at 30-31 who hi-lights the ongoing S.E.C. /International Accounting Standards saga.

⁹² Hunt, Isaac C. "It's a Small World After All: The S.E.C.'s Role in Securities Regulation Globalization" 1999 51 Administrative Law Review 1105 at 1112-1115. Hereinafter, "Hunt".

⁹³ "Garten", supra, note 70 at 30.

with U.S. regulations. Comments are divided on the wisdom of the American government's decision not to adopt IAS;⁹⁴ also, there is much comment upon what this means for the future of the United States in the wider world and for the future of I.A.S..⁹⁵

Comparative Visions, Laws and Practices

Other commentators, have weighed in with their comments and their own nation's concepts of business practice, corporate governance, and the way things can and should operate. The perspective provided by Winfried van den Muijsenbergh, on Dutch social democracy,⁹⁶ for the benefit of an American audience,⁹⁷ is especially instructive. Also, German co-determinism seems quite exotic to Anglo-Saxon eyes.⁹⁸ Some other commentators, provide some additional comparative analyses for the benefit of an American audience.⁹⁹ This, in a nutshell, sums up the good and bad side of these comparative visions--since they are laid before an audience used to the Common Law, and the Anglo-Saxon economic (and financial) structural model, we, as readers from a similar system, can understand the translation (or explanation) that the commentator provides to the American audience. The con, of course, is the fact that, yet again, it is first world, and especially American, voices that we hear. It is, however, instructive to compare systems in other lands. Global corporate governance, is not the only kind of global structuring which is being built, or contemplated. We shall presently examine another type of structure in the making.

The Quest for a Global Governance Mechanism

The problems and challenges, which the development of technology and the evolution of commercial theory place upon a legal and political system, that is terrestrial and nationally oriented, are significant. Trying to resolve this apparent dichotomy is one of the major problems facing the securities authorities and national governments of the world, at the dawn of the 21st century. An offshoot of this phenomena, is the attempt to set up some form of a global governance system to co-ordinate and administer any system of global securities regulation.¹⁰⁰

⁹⁴ Brunner, Janice Grant, "All Together Now? The Quest for International Accounting Standards 20 1999 University of Pennsylvania Journal of International Economic Law 911 at 936-937. Hereinafter, "Brunner", "Garten", supra, note 70, at 30-31. Please see also, "Hunt" supra, note 92 at 1115-1116.

⁹⁵ "Brunner", supra, note 94 at 933-936.

⁹⁶ Van den Muijsenbergh, Winfried, "2002 Corporate Governance: The Dutch Experience" 16 2002 The Transnational Lawyer 63. Hereinafter "Dutch".

⁹⁷ Ibid.

⁹⁸ Roe, Mark J. "German Codeterminism and German Securities Markets" 1998 1 Columbia Business Law Review 167. Hereinafter, "Roe".

⁹⁹ "Wegen", supra, note 36.

¹⁰⁰ Fontecchio, John M.: "The General Agreement on Trade in Services: Is it the Answer to Creating a harmonized Global Securities System?" (1994) 20 North Carolina Journal of International Law &

The commentators on this subject, range in opinion, from those who are very much in the realm of internationalists (ones who are very committed to internationalism and supra-nationalism), to those who are very much committed to a far more nationally-based system of regulatory modeling.¹⁰¹ These last commentators want nationally based regulatory authorities to have a greater role in regulatory administration and in the formulation of internationally based systems of securities trading. This too (ing) and fro (ing) between these two schools of thought, in part, explains the glacial pace of the W.T.O. process. Some of the third world countries, themselves, have also weighed into this process and slowed up the pace of integration, somewhat. Their fears for their own domestic markets and for their service providers have caused them to speak out. Also, some of these countries have been horse trading, trying to end agricultural subsidies in return for service sector tariff reform.¹⁰²

Some of these commentators are very pro E. U. (or pro supra national political body) and anti-national regulation (in other words they advocate a reduced role for the nation state).¹⁰³ There are others, who are not so staunchly in favor of ceding power to a supra-national body.¹⁰⁴ Some commentators worry about democratic deficits, which they claim, such movements towards supra-national governance will bring in their wake.¹⁰⁵

The O.E.C.D. vs. Caribbean Commonwealth Countries

I shall use, as a case study in global governance, the attempts by the O.E.C.D. to enforce a system of disclosure standardization, and tax harmonization upon the Caribbean

Communications Regulations 115. Hereinafter "Fontecchio". Please see also, Goulder, Robert, "Amery Aide Sees Growing Discontent with O.E.C.D. Tax Haven Campaign" Tax Notes International, January 9, 2001, <http://www.freedomandprosperity.org/Articles/tni01-09-01/tni01-09-01.shtml>. Hereinafter, "Amery Aide". Please see also, Karmel Roberta S. "Regulatory Aspects of Securities Trading. Can Regulators of International Capital Markets Strike a Balance between Competing Interests?" (1986) 4 Boston University Law Journal 105. Hereinafter, "Strike a balance".

¹⁰¹ "Rudd", supra, note 28 at 2.

¹⁰² Ibid.

¹⁰³ Zagaris, Bruce "U. N. Report Calls for New Spirituality: The Creation of Two Organizations to Aid International Tax Enforcement" Tax Notes International July 23, 2001 <http://www.Freedomandprosperity.org/papers/zagaris-un/zagaris-un.shtml>. Hereinafter, "New Spirituality". Please see also, Sommer, A. A. "I.O.S.C.O.: Its Mission and Achievement" (1996) 17 Northwestern Journal of International Law and Business 15. Hereinafter, "Sommer".

¹⁰⁴ Scott, Cordia, "O.E.C.D. Harmful Tax Competition Move May Violate W.T.O. obligations Expert Says", Tax Notes International April 24, 2001, <http://www.freedomandprosperity.org/Articles/tni01-25-01/tni01-25-01.shtml>. Hereinafter, "Harmful". Please see also, "Millspaugh", supra, note 50. Please see as well, Goulder, Robert, "New Coalition Strikes back at O.E.C.D. Tax Haven Campaign" Tax Notes International December 2, 2000, <http://www.freedomandprosperity.org>. Hereinafter, "New Coalition".

¹⁰⁵ Zaring, David, "International Law by Other Means, The Twilight Existence of International Financial Regulatory Organizations" (1983) 33 Texas International Law Journal 282. Hereinafter, "Zaring".

Commonwealth countries.¹⁰⁶ Many of these countries have protested against what they perceive to be infringements upon national autonomy and sovereignty, by an un-elected, non-public International body.¹⁰⁷ Scholars certainly divide upon the merits of this claim.

Some scholars, take the position that these countries are tax havens, and safe harbours for criminals, (the true modern successors to their ancestors on the Spanish Main). Not only do these locales provide safe haven for modern day cyber pirates, as their critics charge, but their legal regimes also assist others who seek to avoid disclosure regulations, and heaven forbid--tax laws! For these multitude of sins, some advocate that these jurisdictions should be curbed, and their regulations brought into global compliance.¹⁰⁸ Other commentators claim that all nations should be free to set their own taxation laws,¹⁰⁹ and that what the O.E.C.D. is proposing, is to re-implement a form of colonialism on these developing countries, by imposing a European-style welfare state and a high cost governmental supervisory and fiscal structure, upon them.¹¹⁰ While much of this opposition comes from the United States, and from a neo-liberal school of politics, commentary and scholarship,¹¹¹ these scholars certainly have a point (particularly since similar points have been made in other debates about supra nationalism, and the role for national regulators, nation states and national autonomy in a world dominated by the rush to create a pan national or supra national ordering of things).

¹⁰⁶ Scott-Joynt, Jeremy "The Row Over Off-Shore Financial Centres" (2001) 1 Commonwealth Currents 2 at 2. Hereinafter, "Row". Please see also, "Center for Freedom and Prosperity Issues Memo to Low-Tax Countries Regarding the OECD Paris Task Force Meeting" Tax Notes International February 28, 2001 <http://www.freedomandprosperity.org/Articles/tni02-28-01/tni02-28-01.shtml>. Hereinafter, "Centre for Freedom and Prosperity". Please see also, Drury Trevor and Gnaedinger, Chuck, "Allegations of Underhandedness Emerge at the O.E.C.D.'s Harmful Tax Competition Meeting in Paris", Tax Notes International <http://www.freedomandprosperity.org/Articles/tni03-01-01b/tni03-0101b.shtml>. Hereinafter, "Allegations". As well, please see Griffiths, Dilwyn, "International Efforts to combat Money Laundering: Developments and Prospects" (October 1993) Commonwealth Law Bulletin, 1824. Hereinafter, "Griffiths". Please see also some material from the O.E.C.D., such as "Developments in Non-Cooperative Countries and Territories" 7 Sept.01 Financial Action Task Force on Money Laundering" <http://www.oecd.org/media/release/nw01-75.a.thm>. Hereinafter, "Non-Cooperative". Please see also, "O.E.C.D.-Commonwealth Agree to Work towards Global Co-operation on Harmful Tax Practices" Paris 10 January 2001 <http://www.oecd.org/media/release/nw01-03a.htm>. Hereinafter, "Agree"

¹⁰⁷ "Harmful", supra, note 104 at 2. Please see also, "Zaring", supra, note 105 at 318.

¹⁰⁸ "Griffiths", supra, note 104 at 1826. Please see also, "Agree", supra, note 106 at 2. Please see as well, Financial Task Force on Money Laundering, "Basic Facts on Money Laundering" <http://www.oecdwash.org/News/Press/2000/news2000-065.htm>. Hereinafter, "Basic Facts".

¹⁰⁹ "Centre for Freedom and Prosperity", supra, note 36 at. Please see also, Zagaris, Bruce, "Applications of O.E.C.D. Harmful Tax Practices Criteria to the OECD countries shows Potential Dangers to U. S. Sovereignty (April 25, 2001) <http://www.freedomandprosperity.org/papers/b204-25-01.shtml>. Hereinafter, "Zagaris Harmful"

¹¹⁰ "Zagaris Harmful", supra, note 109 at 2.

¹¹¹ "Center for Freedom and Prosperity", supra, note 106, "Harmful", supra, note 104, "New Coalition", supra, note 104, "Allegations", supra, note 106.

This debate lies at the heart of the International vs. National debate: how much sovereignty does a nation state retain, in this new globalized world order, and how much is to be surrendered for the common good? Furthermore, how much authority does a glorified "talking shop", like the O.E.C.D., have to make laws, and push around sovereign national governments? Certainly the W.T.O.'s trumping of national sovereignty is one thing, when it comes to trying to supercede the will of a government, but the O.E.C.D. is not the same kind of association. As such, its suitability for the creation of binding coercive international (multilateral) agreements is open to question. In studying this question we can, potentially, move international relations scholarship in new directions.

"Where The Trade Winds blow"--Trade Law

One method used to help unify, or harmonize, global securities law, is by reform of the rules or laws of international trade. One of the principal means for moving this reform forward is by the use of W.T.O.--type multilateral negotiations. Other groups, besides the W.T.O., employ these methods, also, in their drive to liberalize trade (either trade in general, or specifically in the realm of trade in securities). The major methods, and literature in the area, are examined below.

"Top Down"

In looking at these issues, one cannot escape the inevitable process of harmonization of rules and regulations, nor an examination of the large global organization responsible for these measures. The W.T.O. regime has imposed a set of Trade Standards and a Tariff Structure upon the world,¹¹² and is in the process of redefining the delivery of services.¹¹³ The process employed by the W.T.O. in the realm of Securities regulation (and other areas) is called the "Top Down" approach to global regulation and regulatory reform.

"Bottom Up--Quango Angle"

The other major way of effecting change in these global regulations, is via the use of Quangos or other non-governmental actors. These parties practice what is termed the "bottom up" approach to regulatory harmonization. These are usually private organizations and they work with devolved powers or authority from their national governments.¹¹⁴ These organizations, typically, administer one element of their country's domestic financial service sector (or sub-

¹¹² Thomas, Jeffrey, and Meyer, Michael A., The New Rules of Global Trade. A Guide to the World Trade Organization (1991: Toronto, Carswell) at 28. Hereinafter, "Thomas and Meyer".

¹¹³ Ibid

sector). For example, I.O.S.C.O. (International Organization of Securities Commissions), is composed of individuals who enforce rules and standards for Securities dealing within their own countries.¹¹⁵ Members from organizations, such as the U. S. S.E.C., the B C. Securities Commission and the Ontario Securities Commission and the Financial Services Authority (F.S.A.) (G. B.) make up the membership of this organization.¹¹⁶ Since these organizations know the field, from daily experience,¹¹⁷ there is something to be said for this model. The notion of these private organizations taking on too much power and usurping the role of national governments is a real drawback to this system of regulation. Some commentators, have made these observations, on occasion, also.¹¹⁸

"Side to Side"

The third form of harmonization is done via modifications and harmonization attempts within trading blocs, separate from the W.T.O. process. This "side to side" policy involves the use of an organization, such as the European Commission, to create a set of guidelines, which will apply to all trading bloc members.¹¹⁹ The national regulators from these member states will have an influence on the drafting of the policy, but must enforce the unified policy, once it is decided upon and ratified by the governments of the various member states.

This policy cannot be in opposition to W.T.O. policy. A certain exception in the W.T.O. regime does exist, however, for regional trading blocs, to allow them to harmonize inter-bloc regulations, without having to apply them to other non-trading bloc W.T.O. members.¹²⁰ These then are some of the major themes, I shall cover, and some of the major works upon them.

My Research Disclaimer

Clearly, there is much in the way of literature out there, and there are many areas of sub-topics one can discover as one writes. It is always tempting to expand one's topic as one goes along, but I shall confine myself to examining established Stock Markets (with references to private dealing networks and NASDAQ, where appropriate), such as London, NYSE and

¹¹⁴ "Zaring", supra, note 105 at 305

¹¹⁵ "Ibid, "Sommer", supra, note 103 at 17-18

¹¹⁶ Ibid.

¹¹⁷ "Sommer", supra, note 103 at 18-19.

¹¹⁸ "Zaring", supra, note 105 at 318.

¹¹⁹ Commission of the European Communities, Proposal for a Directive of the European Parliament, and Council on the Prospectus to be Published When Securities are offered to the Public or Admitted to Trading (2001: Brussels, The European Commission). Hereinafter, "Prospectus Directive".

Toronto, and trying to determine what the effect developments in technology and law will have upon these established markets. I shall delve into some aspects of International relations theory, but this is a study mainly concerned with Securities regulation, not international treaties.

A great deal of my work shall examine the W.T.O. regime, the N.A.F.T.A. Zone and the E.. U. , by strict rights, however, this is not a trade law paper, in the truest sense of the word. While this work focuses upon the Globalization of Financial Services, and clearly touches on wider issues in the Globalization process, it in no way shape or form purports to be a study on the globalization phenomena, nor do I try to pretend that I have read all of the serious authors on this subject in all of its many areas. In short, as noted above, this is a unique "fusion" topic which is of a hybrid, interdisciplinary nature. Such a special topic merits the special means of analysis I have laid out above.

The changes in the world of investment, corporate finance, trade law, technology and international relations have turned the old divisions in theory, and subsequently in scholarship, on their heads. Consequently, the old theories and scholastic divisions between the various sub-topics do not always work as before, and some of the classic divisions within the scholarship have broken down. To solve this dilemma and to work on the various topics encompassed by this study, a fusion of genres and divisions is necessary. What follows is just such a fusion.

¹²⁰ "Thomas and Meyer", *supra*, note 112 at 65

CHAPTER 3

GLOBALIZATION AND INTERNATIONALIZATION OF TRADE IN SECURITIES

I Coming to Terms with Globalization

Globalization has been defined as many things, by many authors, and is studied in many contexts. Globalization has often been treated as a new phenomenon but, in fact, similar patterns have occurred before. Our contemporary pattern of globalization does, however, show some significant differences from previous patterns in history. We shall presently examine these points, as we try to understand our current globalizing phenomenon, and point the way to the future.

What is Globalization?

Globalization is the process by which the constrictions of borders and regulations are pushed aside, freeing up peoples, trade goods, cultural phenomena and commerce to freely move between states and cities; as these spheres of human relations become steadily interconnected and integrated into one universal or world-wide society or entity, national governments, national distinctions, and national regulations will disappear or descend into irrelevancy. Globalization has been studied in all aspects of human endeavor, but its leading edge has been and continues to be, the advancement of money, money management, financial markets and financial transactions.¹²¹ Finance has always been in the vanguard of globalization,¹²² and due to the nature of the process itself, is likely to remain so for the foreseeable future. Globalization did not happen overnight, and we have seen similar periods before in world history.¹²³ We shall presently examine the history of globalization's development, both in the recent past (post World War II), and in more distant times.

¹²¹ "Dotty", supra, note 41 at S78. Please see "Mahoney", supra, note 11 at 306-307.

¹²² Arner, Douglas, W. "Globalization of Financial Markets: An International Passport for Securities Offerings?" (2001) 35 The International Lawyer 1543 at 1543, "Khoury", supra, note 5 at 1-2.

¹²³ Aguirre, Ernesto, "International Economic Integration and Trade in Financial Services: Analysis from A Latin American Perspective" (1996) 27 Law and Policy in International Business 1057 at 1057. Hereinafter, "Aguirre".

JOHN DONNE, JOHN CABOT AND JAMES COOK.

While "no man is an island" . . . ,¹²⁴ for a long time the sea presented quite a barrier between peoples and cultures. During several periods in western history,¹²⁵ these barriers were breached, and a combination of economic necessity, scientific curiosity or technological development drove men forward and caused them to branch out further afield than their predecessors, in search of new economic horizons and new vistas of opportunity.

The period after the "discovery"¹²⁶ of America by Vespucci and Columbus, presented the West with just such a golden opportunity. Over the next 280 years from 1492,¹²⁷ until the dawn of the Napoleonic Age, great discoveries were made, new trade routes established, and the world circumnavigated.¹²⁸ vast Western Empires were germinated, new communications with far flung places started, while the time that these communications took was shortened. The basis for the consolidation of the far reaches of the world into one of several linguistic, legal, cultural and political groupings had thus begun.¹²⁹

Taking a globe, which boasted literally tens of thousands of linguistic, dialectic and vernacular, verbal and written, systems of communication, and then placing them into one of 6 or 8 linguistic groups, vastly shortened the time necessary to disseminate knowledge, and greatly facilitated the speed and ease of communications. Since speed and ease of communications, are hallmarks of globalization,¹³⁰ in both its older and contemporary periods, these are no mean feats, and taken together establish the preconditions for a more "global" society, or, at least, one more open to the world around it.

"ORDER! ORDER!"--LEGAL HARMONIZATION.

Trying to unify and stamp order on the non-unified, has been a hallmark in the development of English Common Law. Whether we are talking about the development of the

¹²⁴ "Donne" supra, note 1 at 144.

¹²⁵ Not to mention many periods in Far Eastern History and that of the other regions of the world.

¹²⁶ Traditionally, the first Western sighting of foreign lands is treated, or termed "Discovery" in the literature. This nomenclature is not universally accepted, by some constituency groups.

¹²⁷ When "Columbus sailed the ocean blue", according to the children's nursery rhyme.

¹²⁸ Marshall, P. J., "Introduction" in Marshall, P. J. (Ed.) The Oxford History of the British Empire. Volume III The Eighteenth Century (1998: Oxford, at the University Press) at 18-19. Hereinafter, "Marshall Introduction".

¹²⁹ Ibid at 21.

¹³⁰ Strange, Susan, The Retreat of the State. The Diffusion of power in the World Economy (1996: Cambridge, Cambridge University Press) at 101-102. Hereinafter, "Strange".

Common Law, or about the development and extension of any legal system, such legal standardization and reorganization has followed in the wake of any territorial, commercial or jurisdictional expansion undertaken by any nation, supra-national structure or international organization. Legal harmonization, for example, followed soon after 1066,¹³¹ and was a precondition for nation building, in King William's England. The role played by the conquering Norman Judges, in the development of early English Common Law, was pivotal.¹³² In the early days, after the Norman conquest of England, the Judges, appointed by the new King, went around the country trying cases.¹³³ If they were in doubt on a decision, they tended to do what had been done, locally by custom (often by their Saxon predecessors, or by the local village customs).¹³⁴ To make their legal system unified and consistent, they began to write down their decisions, and refer back to what other judges had done in similar circumstances.¹³⁵ The origins of the Common Law, the writing down of decisions, precedence, and the concept of *stare decisis*, lay here.

As in King William's Norman Kingdom, today's global business leaders need certainties, and assurances of the rules and regulations, in a given polity, before they can make effective business and investment decisions. Today's lawyers, and policy globalizers are similarly faced with the prospect of taking a myriad of local customs and traditions and joining them together, into a unified whole, to facilitate business transactions, and provide much needed certainties for business and citizenry alike.

Taking a world of different laws, and placing them into one of two or three recognized systems of law also facilitates trade between other nations in that legal network, and between networks, as a certainty and order are assured. Legal harmonization helps to establish a degree of certainty within a polity (polity A), encourages other jurisdictions to include polity A in their commercial networks, and facilitates both the expansion of commerce, within the jurisdiction, while also encouraging outsiders to come into this polity and make use of these laws for their

¹³¹ It also gave the King greater control of his officials, greater control of the law and its development and greater standardization and certainty of outcome. Please see Carpenter, David, The Struggle for Mastery of Britain, 1066-1284 (2003: London, Allen Lane) at 156-157. Hereinafter, "Carpenter". Please see also, Gall, Gerald The Canadian Legal System 2nd ed (1983: Toronto, Carswell) at 42. Hereinafter, "Gall". Please see, also, Jennings, W. H. and Zuber, Thomas, Canadian Law 2nd Ed., (Toronto: 1972, McGraw Hill Ryerson) at 3. Hereinafter, "Jennings and Zuber".

¹³² "Carpenter", supra, note 131 at 156-157.

¹³³ Clanchy, M. T. Early Medieval England, (London, 1997: The Folio Society) at 105, who noted that some contemporary wags observed that such individuals (Circuit Judges) "wandered from the path of equity to plunder the people." Hereinafter, "Clanchy".

¹³⁴ *Ibid* at 99 and 110.

¹³⁵ *Ibid* at 110.

business transactions.¹³⁶ Legal harmonization¹³⁷ is also a key element of contemporary globalization; the means by which this should be done, and which nations' laws to harmonize, are also topics of hot debate among contemporary commentators.

"Culture...culture" The Birth of Global Culture

The Persian carpet, the craze for tea in the reign of Queen Anne, the advent of Wedgwood's Blue Willow China pattern, the architecture of the Royal Pavilion at Brighton, the export of wool serge cloths, and textbooks featuring Queen Victoria, to the far reaches of the globe, are all manifestations of a more interconnected world, learning from, borrowing ideas from, and exchanging trade goods with each other. What a gentleman in Shanghai needed a turned up stiff Victorian collar¹³⁸ for, or what use someone in Birmingham had with a hookah pipe,¹³⁹ is very much open to question. What these phenomena show us is that peoples, the world over, were incorporating items from other parts of the globe into their daily lives, and into their cultural pantheon.¹⁴⁰

Music and Sport as Cultural Exports

Perhaps some of the best examples of this interchange can be seen in the worlds of sport and music. Games such as cricket, football and golf were invented (or largely popularized) in the British Isles, and then exported throughout the reaches of the Empire and from there to the rest of the world. Now, some of the world's best cricketers come from India, Pakistan and Australia, the best golfer in the world is American, and football (soccer) is the world's game (except in America).

¹³⁶ Certainly this is the principle behind the E.U.'s Single Market. Please see "Introduction" Internal Market <http://europa.eu.int/Scadplus/leg/en/lvb/170000.htm> at 8. Hereinafter, "Single Market Intro". On the general benefits which legal harmonization has on transaction price, please see, "Steinberg and Michaels", supra, note 34 at 208-209. Please see also "Fontecchio", supra, note 100 at 117.

¹³⁷ As many commentators have debated and re-debated over the past decade or so. Please see "Mahoney", supra, note 11 and "2X2", supra, note 52.

¹³⁸ A hall-mark of Western style in the 19th Century, it (and other aspects of Western fashion, home decor and other elements of style) came to be adopted by "civilized" (or in other words, Westernized) people the world over, in the course of the 19th Century

¹³⁹ A curiosity brought back from the East by Anglo-Indians and others who had traveled there. The advent of Opium addiction, which came to affect people, such as Samuel Taylor Colerage, was another foreign habit and consequence of this earlier contact with other cultures.

¹⁴⁰ Kemp, Tom, Industrialization in Nineteenth Century Europe (2nd Ed.), (1989: London, Longman) at 170-171. Hereinafter, "Kemp". Please see also, "Hirst and Thompson" Supra, note 51 at 19. As well, please see Tominlinson, B. R.: "Economics and Empire: the Periphery and the Imperial Economy" in Porter, Andrew Ed., The Oxford History of the British Empire Volume III. The Nineteenth Century (1999: Oxford, Oxford University Press) at 55-57. Hereinafter, "Tominlinson".

In the realm of music, composers have borrowed traditional lyrics and music for their compositions for a long time.¹⁴¹ Foreign instruments (the bongo drum, coconut shells, etc.) have also found their way into the orchestra pit. The western musical canon is most definitely a global one, with Beethoven getting as much play time by the Tokyo Symphony, as the one in Bonn, and with modern popular music being as much about entertaining the newly rich hipsters in China, as those "T'weens" we hear North American advertisers and focus so much on.

In the genre of military music, strange bagged (having a bag that air was blown into) Near Eastern hunting horns made from a goat's bladder, migrated to Scotland and Ireland, became bagpipes,¹⁴² and can now be found in the arsenals of most of the world's armies (and many police forces), including such eclectic units as the Kyber Rifles (Pakistani Army), the Royal Gurkha Rifles, the Royal Hong Kong Police (and post '97, The Hong Kong Police Pipe Band), the Black Watch Royal Highland Regiment (Montreal, Canada), and even pipers (but not Kilts!) in the United States Marine Corps.

The brass band tradition, in the military, goes back to the time of the Pharoes, in Egypt.¹⁴³ It was perfected in Britain,¹⁴⁴ France and Germany, in the 18th and 19th centuries, and can now be found in every military force (Army, Navy, Air Force, Marine Corps) of the world. Many of these bands play similar pieces, but in their own musical styles and traditions.

Diffusion--An Important Precondition.

The foregoing are better examples of cultural diffusion than "global culture," per se, but diffusion, interchange and harmonization of structures, consumer goods and institutions (such as Pipe Bands) are preconditions for the emergence of a "global culture". It is arguable that the more widely common consumer goods (such as Coca-Cola or Ford Motor Cars) and institutions (such as western-style law courts) became, throughout society, the easier it is to establish a "global" order. Such diffusion, then, provides the preconditions for establishing a universal culture, one that can be called "global". Taking the completely heterogeneous and diverse world,

¹⁴¹ Puccini's "Turandot" uses a vignette from the Imperial Anthem of the Ching Dynasty, for example, and there is also some traditional Japanese music in his "Madame Butterfly".

¹⁴² They are mentioned in the Bible, and in the Old Testament it is written that "Jubal was father of the Fiddlers and Pipers" Please see "Pipes and Pipe Bands Part 1"

[wysiwyg://destination.immsmain.com/2000/chapter 7 /pipers1.html](http://wysiwyg://destination.immsmain.com/2000/chapter%207/pipers1.html) Hereinafter, "Pipers".

¹⁴³ Farmer, Henry , George, Military Music (1950: New York, Chanticleer Press) at 10. Hereinafter, "Farmer".

which James Cook, John Cabot and others, found and then molding it into a something approaching a unified whole,¹⁴⁵ was quite an achievement.

The Western Imperial Experience.

In part, this consolidation and unification process was accomplished during a period of intense cultural and normative influence, known as the Western Imperial experience. From the time of the first voyages of Discovery,¹⁴⁶ the western powers established "branch offices,"¹⁴⁷ trading posts and Colonies in the lands they discovered.¹⁴⁸ Some of these lands were largely uninhabited while others had pre-existing populations. In establishing western dominance, these native populations were sometimes displaced, damaged through war and pestilence, or in some cases, destroyed. Many of the remaining natives were hostile to the Westerner's presence. Over time, however, the process of trying to assimilate these natives into the western mainstream proceeded apace.¹⁴⁹

The legacy of this, all over the world, is clear today. In some places, the incorporation of the native population was highly successful, and in other places, nowhere nearly so. This process, whatever one thinks of it, was very important to the establishment of a global market for global cultural, consumer, and service oriented products (financial services, legal services, etc). This, then, was another precondition for the establishment of Globalization.

Communication Revolution--Getting Out the News--Fast

The significance of having everyone in the world speak or understand one of seven or eight languages has already been alluded to.¹⁵⁰ The significance of the speed communication travels, has not been discussed. Contemporary literature on globalization highlights the significance

¹⁴⁴ Ironically, many of the early musicians in the 18th century bands, were from Africa, and many bandmasters, later on, came from Germany (bands have truly been global, right from day one!).

¹⁴⁵ Today's world appears to be on course to become even more of a unified whole.

¹⁴⁶ "Marshall, Introduction", supra, note 128 at 20-21

¹⁴⁷ "Kemp", supra, note 140 at 170-171.

¹⁴⁸ Williams Glydwr, "The Pacific: Explorations and Exploitation" in Marshall, P. J., Ed., The Oxford History of the British Empire. Volume III. The Nineteenth Century (1998: Oxford, Oxford University Press) at 559. Hereinafter, "The Pacific".

¹⁴⁹ This has been done with varying degrees of success. Some natives integrated with Western ways better than others. In some cases, this incompatibility with western culture has hurt those native populations, impeded their advancement and led to great sociological problems.

¹⁵⁰ It enhances the ease of communication, the transference of knowledge and the dialogue between various peoples.

of the enhanced speed of modern communication,¹⁵¹ which allows modern business, to have its operators located in the far-flung corners of the world, and still have instantaneous update on the business' various activities fed to headquarters in real time. This has allowed for a far greater expansion of business globally and has meant that the four corners of the world can instantaneously influence decision-making, and directly communicate with decision-makers.

This has vastly reduced decision-making time, cut layers of bureaucracy, simplified the corporate structure and brought decision-makers,¹⁵² closer to the heat of the action.¹⁵³ This communication revolution has also flowed into other areas of endeavour.¹⁵⁴ Other things which the communications revolution has expedited include news, which now travels faster via satellite link,¹⁵⁵ e-mail which, speeds communication, and text messaging, which allows anyone, anywhere, to give and receive written messages. News of fashion and cultural trends now travels faster.¹⁵⁶

A global "culture" of fashion, style and esthetic taste coupled with common trends in design, and completed with common points of cultural reference and societal structure is now possible. The revolution in communications has facilitated the expansion of trade in financial services,¹⁵⁷ brought the world closer together, and made enhanced political communication possible. These are only possible because people can communicate with each other in languages, alphabets and by linguistic means, understood the world over. Surprisingly, the pre-cursors for this situation did not occur with the advent of www, but, rather, started out rather earlier, in 1840 to be exact, with the original world wide web, which we shall presently examine.

The World Wide Web of the 19th Century

How would you like to cut the time it takes information

¹⁵¹ Especially in places like the city of London and Wall Street, communications technology has certainly changed the business. Kynaston, David The City of London, Volume IV, A Club No More, 1945-2000 (2002: London, Pimlico) at 690-691. Hereinafter "A Club No More". Please see also "Strange", supra, note 130 at 100-103

¹⁵² Owners, shareholders, management.

¹⁵³ The production floor, etc..

¹⁵⁴ "Hirst and Thompson", supra, note 51 at 118-119.

¹⁵⁵ "Strange", supra, note 130 at 101.

¹⁵⁶ And thereby influences peoples lives, the world over, that much sooner

¹⁵⁷ Saunders, Anthony, and Walter, Ingo, Universal Banking in the United States. What could we gain? What could we lose? (1994: Oxford, Oxford University Press) at 64-65. Hereinafter, "Universal Banking", please see also "Khoury", supra, note 5 at 179.

*to go from one point of the country to another by 70 or 80%?
How would you like instantaneous access to your own communications device, which would
allow you to contact
anyone, anywhere in the world? How would you like to
keep in touch with your out-of-town business affiliates
for only pennies?*

The foregoing could well be an advertisement for a long distance phone company, or an internet service provider-- it could also have also been an advertisement, from 1840, for that new-fangled creation, of Sir Roland Hill (the person who advised the government on Postal reform, suggested that an adhesive stamp be the means of paying for this, and is the person credited as the "father" of the modern postal service), the Adhesive Postage stamp! To my knowledge no such ad exists, was ever created in 1840, nor was such an argument used to pass the Statutes through Parliament authorizing the establishment of the postal service, or the creation of the Post Office. However, these words aptly describe the service, explaining how it works, and hi-lighting its benefits. What follows is a description of the first World Wide Web.

How Not to Do It--Expensive, Inefficient And Unreliable

Previous to Sir Roland Hill's reforms, British and to a large extent the world's, postal services were inefficient, expensive and not user friendly.¹⁵⁸ Mail was very infrequent, expensive to send,¹⁵⁹ relied upon the uncertainties of the sailing ship, the willingness of friends or relatives to act as couriers, and could always be tampered with or destroyed during a stage coach hold-up. Worst of all, the person receiving the letter usually paid the postage,¹⁶⁰ and often they couldn't or wouldn't fork out the delivery fee.¹⁶¹ The mail service was consequently a high-risk venture, fraught with many problems. Private companies were not given much incentive to improve the service. At one time, private Mail companies were outlawed, but several unofficial Mail companies did exist and operate their own mail services.¹⁶² Due to the high costs of postage, abuse of the system was rampant, as businesses, and banks took advantage of having M.P.'s and

¹⁵⁸ De Righi, A. G. Rigo, The Story of the Penny Black, and its Contemporaries. (1980: London, The National Postal Museum) at vii and 1. Hereinafter, "Penny Black". As the author also noted, before 1840, postal delivery was used as a revenue generation device for the treasury, more than as a means for carrying the mails and facilitating communication between people. Please see also, Mathias, Peter The First Industrial Nation. An Economic History of Britain 1700-1914. 2nd Ed. (1983: London, Methuen) at 113. Hereinafter "First".

¹⁵⁹ "Penny Black", supra, note 158 at 2.

¹⁶⁰ Ibid. Please see Webb, R. K., Modern England. From the 18th Century to The Present 2nd Ed., (1980: New York, Harper and Roe) at 225. Hereinafter, "Webb".

¹⁶¹ "Penny Black", supra, note 158 at 2.

¹⁶² Ibid at 2.

Peers on their boards, so as to take advantage of their free postage fringe benefit.¹⁶³ It was also felt in some quarters, that the high cost of postage was destroying the incentive of people to learn to read and write, and take part in the literary (or in the very least literate) world, by participating in the postal system.¹⁶⁴ These costs, evasions, and problems were also seen to be holding back and retarding the progress of trade and industry.¹⁶⁵ Eventually the British Parliament took action.¹⁶⁶

What Happened in 1840?

In 1840 the modern version of the Post Office was established.¹⁶⁷ The basic rate of Domestic Mail within the British Isles, was set at one penny and the cost of the service was paid by the sender.¹⁶⁸ To denote payment of postage, an adhesive label was purchased and affixed to the envelope, and then "stamped" with a cancellation.¹⁶⁹ The first stamp was born. This system was efficient, cost effective, (for sender, addressee, and postal service alike), portable and convenient.¹⁷⁰ People could buy stamps, carry them on their person, attach them to envelopes, and then deposit them in a post box. Just like e-mail in the 21st century, you could employ stamps to assist you in contacting anyone, anywhere.¹⁷¹ You could write letters, whenever you wanted, and post them any time. This was quite an innovation in personal communications, compared to what had come before.

The first stamp, for domestic mail, was black.¹⁷² For postage further afield, a 2 pennies stamp¹⁷³ was also issued. The government opened a series of branch outlets around the country, (Post Offices or Sub-Post Offices), and employed special couriers (Postmen) to accept deliveries

¹⁶³ Ibid.

¹⁶⁴ Ibid. On first glance this reason does seem a tad spurious, but there may well be some point to the notion that high transaction costs act as a disincentive for people to participate in an activity. Certainly there are vast schools of legal scholarship which lobby for low transaction costs to allow for greater market access and participation by a greater number of consumers in the market sector in question, so I suppose that this is not too far from this "postal participation point".

¹⁶⁵ Ibid. Such charges, at the high point of the Manchester Liberal school of thought (we must remember that the Corn Laws were repealed around this time!), were tantamount to high treason, so at any price, so the thinking went, trade must be promoted.

¹⁶⁶ Ibid at 5.

¹⁶⁷ Ibid. Although a Post Office had existed since the 1600's.

¹⁶⁸ Ibid at 4.

¹⁶⁹ Ibid at 5.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² The famous Penny Black, issued in May, 1840, the world's first adhesive postage stamp, and the progenitor of a payment system for document delivery, which persists to the present day. Please see "Penny Black", supra, note 158

of posted letters, and also to deliver correspondence to addressees' home addresses. It was usually possible to post a letter from London to Edinburgh in less than a week, and to reach the more remote areas of the country (Great Britain) in about a week. This was a communications revolution! This revolution featured low transaction costs, was a user pay service, was manned by reliable couriers, and provided relatively speedy delivery.¹⁷⁴

Communication In The 1990's

Bounding forward to the 1990's, some of the selling points of the Internet are that it lowers transaction costs, is instantaneous, it features certainty of data delivery (bugs viruses and technical failures notwithstanding) and as encoding software and document delivery mediums have improved, it also provides a high degree of dependability. If you subscribe to an I.S.P. you pay (but there are free public terminals in Public Libraries, etc). The costs for sending an email are low (free for the most part). The Internet is accessible by anyone, anywhere. In essence, we have a mirror image of the 1840's Postal system.

Everyone "Gets into the Act"

Returning, in time, to the Victorian Age, the postal system, begun by Britain, quickly expanded overseas.¹⁷⁵ Many Continental European jurisdictions had small local mail systems.¹⁷⁶ When they saw the British experiment, and noted its success, they began to copy it. Britain also exported the notion of the adhesive postage stamp to many of her Colonies, and to other reaches of her Empire.¹⁷⁷ The expansion, of this system, was a boon to business.¹⁷⁸ For example, a company with international interests could now keep in fairly close touch with its Indian division (for example) or its Canadian operations. Furthermore, the company could now exert a fair degree of corporate control, over those divisions, communicate its decisions fairly quickly, and all at a cost of just pennies. It is interesting to note that all modern communications technology notwithstanding, this means of communication is still widely employed today by business, which still sends a great deal of its non-time-sensitive, and bulk communications, by post.

¹⁷³ 2d, blue or Tuppenny Blue. Ibid.

¹⁷⁴ Ibid at 5.

¹⁷⁵ Ibid at vii.

¹⁷⁶ The postal monopoly enjoyed by the Princes of Thurn and Traxis, (now in modern Germany) being the most famous of them.

¹⁷⁷ Canada, for example issued its first stamp in 1851!,

¹⁷⁸ "Penny Black", supra, note 158 at vii

Other Uses.

Besides the large scale mercantile concerns (the Jardine Matheson's [early participants in the China trade and significant actors in the founding of Hong Kong] and Hudson's Bay Companies of the world), business made use of this new postal medium in other ways also. The spread of literacy and public education, a precondition for the expansion of the printed word, greatly facilitated the dissemination of written tracts, the world over. This meant greater demand for books, and an expansion in publishing. The publishing industry, was also assisted by this heady combination of enhanced literacy, (people's ability to read and use their products), Empire (providing a wider distribution channel)¹⁷⁹ and relatively cheap distribution costs¹⁸⁰ adding greatly to their customer base, and to the demand for their products. This was, above all, a revolution in personal communications; people began to write letters to friends, relatives and sweethearts. Pen friendships began, marriage proposals were sent via post, and people began to connect with the world through their own personal networks,¹⁸¹ and create their own way of understanding or interacting with the outside world.¹⁸²

Direct Mail and the Birth of Personal Networks

This time, too, was the time in which mail-order and direct mail companies got their start; with Sears Roebuck and Company, the T. E. Eaton Company (of Toronto), J. Barbour and Sons (South Shields, Tyne and Wear, England), being just three of them. Eaton's and Sears', particularly, had a significant influence on the growth and development of both the Canadian and American domestic consumer goods markets, respectively. The medium of mail changed the world greatly. People now communicated directly with each other, all over the world, and created their own informal personal networks (Church, Missionary groups, etc.). Business could maintain quick, cheap and efficient communications with subsidiaries in far-off lands, and mail order dry goods companies could now bring the finest merchandise of the metropolis to the furthest reaches of the countryside, or the other side of the world. It would not be too great an exaggeration to speak of this 19th century communications system as a World Wide Web of Bonded Paper, Sealing Wax and the Imperial Penny Post.¹⁸³ This "web" helped to shrink the world and bring people together in an ever-widening network of commerce, political fellowship, scientific and scholarly interchange, while helping to foster cultural and commercial integration.

¹⁷⁹ Remember our example of textbooks showing Queen Victoria earlier in chapter 3 (Page 31 note 138)?

¹⁸⁰ Remember our example of the Imperial Penny post, earlier in the chapter, Page 35, note 173?

¹⁸¹ Those to whom they wrote.

¹⁸² Through others in their community of shared interests.

¹⁸³ By 1898, postage throughout the British Empire was reduced to one penny for a regular sized letter.

This, then, did for the world of Victoria, what Bill Gates, www and our contemporary forces of Globalization, have done in Queen Elizabeth's reign.

Other Pieces of the Puzzle.

Lest we leave the reader with the impression that the advent of the postage stamp, alone, did all this, there were a few other innovations which facilitated the speed and dispatch of letters and parcels and made the postal system viable.¹⁸⁴ Firstly the advent of the steam engine meant that both ships and land vehicles (steam engines) could travel further and faster than before.¹⁸⁵ Dashing across the Atlantic in a week, by steam, was a significant improvement on sail power.¹⁸⁶ The innovation of Railroads, also, meant that land travel times declined greatly.¹⁸⁷

Other innovations, besides the postal service, helped to speed communications, and drive globalization forward. The significance of increased literacy, to the expansion of communications in the 19th century has already been discussed; this medium helped speed communications, as well as popularize ideas and diffuse them faster. The role of the telegraph, also, helped speed communications, and provided a link between sound and written word.¹⁸⁸ Laying the Trans Atlantic cables helped facilitate the development of some countries also. At the end of the century, radio and telephone came into greater general use.¹⁸⁹ These all helped speed communications, link the world and assisted the path of globalization. The expansion of Empire, the industrial revolution and Britain's (and other countries') need of foreign markets for expansion and development, spurred on many of these activities, and facilitated the globalization of the 19th century.¹⁹⁰ Written letters and post were one of the linking structures in this process, in much the same way that e-mail links the dot com world of today.¹⁹¹

¹⁸⁴ Briggs, Asa, "VIII New Things And Old" in Young, G. M. Ed., Victorian England (1999: London, The Folio Society) at 498-509. Hereinafter, "New and Old".

¹⁸⁵ "First", supra, note 158 at 257.

¹⁸⁶ Ibid at 286.

¹⁸⁷ "Modern England", supra, note 160 at 269.

¹⁸⁸ Telegraphs were sent in Morse code, transcribed onto paper and then delivered by courier. Please see "New and Old", supra, note 184 at 500-504.

¹⁸⁹ Ibid.

¹⁹⁰ "Hirst and Thompson", supra, note 51 at 19.

¹⁹¹ And puts a "human face" or "familiar and pleasing personal interface" upon many people's personal dealings with this modern globalizing world wide entity.

Significant Differences

Despite the similarities, there are some differences between modern globalization, and its 19th century antecedents. Some of this modern globalizing is "back tracking", trying to undue the constriction, division, government regulation and nationalism engendered by two world wars, the depression and de-colonization.¹⁹² In this modern process, all of the players are sovereign, independent nation states, not colonies or "empty" spaces, filled with natives "just waiting" to experience the "joys" of "western civilization". The legacy of these "joys" has engendered a degree of mistrust between the first and third worlds, and this has impeded the pace of 21st century globalization.¹⁹³

The pace of globalization, in a previous age, was partially driven by national governments, keen to expand the areas under national control, determined to stop other nations getting too close to strategic colonies, etc., and in some cases, foreign expansion distracted attention from problems at home.¹⁹⁴ Strong mercantile or corporate interests did exist, however,¹⁹⁵ and often, as in the case of the Suez Canal,¹⁹⁶ the British South African Company (Rhodesia and Sir Cecil Rhodes),¹⁹⁷ the British East India Company,¹⁹⁸ and the Hudson's Bay Company,¹⁹⁹ these companies played a significant role in the foundation of several countries²⁰⁰ and, in some cases, also served as a *de facto* government for these nations at various stages in their histories.

¹⁹² Volcker, Paul, "Perspectives on Global Capital Markets" (1997) 21 Fordham International Law Journal 367 at 367. Hereinafter, "Volcker".

¹⁹³ As we have seen in the stalls over trade negotiations, and the recent actions of the Group of 21.

¹⁹⁴ Rich, Norman, The Age of Nationalism and Reform, 1850-1890 2nd Ed., (1977, New York, W. W. Norton) at 238. Hereinafter, "Rich". Please see also "Modern England", supra, note 160 at 356-358.

¹⁹⁵ "Kemp", supra note 140 at 170-171. Please see O'Brien, Patrick, "Inseparable Connections: Trade, Economy, Fiscal State and the Expansion of Empire, 1688-1815" in Marshall, P. J., Ed., The Oxford History of the British Empire Volume II, The Eighteenth Century (1998: Oxford, Oxford University Press) 53 at 73-74. Hereinafter, "Trade and Empire".

¹⁹⁶ Lynn, Martin, "British Policy, Trade and Informal Empire in the Mid Nineteenth Century:" in Porter, Andrew, Ed., The Oxford History of the British Empire. Volume III The Nineteenth Century (1998: Oxford, Oxford University Press) 101 at 112. Hereinafter, "Informal Empire".

¹⁹⁶ This is known as "The Race for the bottom" in regulatory analysis.

¹⁹⁷ Newbury, Colin, "Great Britain and the Partition of Africa, 1870-1914: in Porter, Andrew, The Oxford History of the British Empire. Volume III, The Nineteenth Century (1998: Oxford, Oxford University Press) 625 at 641-643. Hereinafter, "Partition".

¹⁹⁸ Ray, Rajat, Kanta, "Indian Society and the Establishment of British Supremacy, 1765-1818" in Marshall, P. J. The Oxford History of the British Empire. Volume II The Eighteenth Century (1998: Oxford, Oxford University Press) 508 at 512-514. Hereinafter, "British Supremacy".

¹⁹⁹ Martin, Ged, "Canada From 1815" in Porter, Andrew, (Ed) The Oxford History of the British Empire. Volume III. The Nineteenth Century (1998: Oxford, Oxford University Press) 522 at 525-526. Hereinafter, "Canada 1815".

²⁰⁰ Rhodesia, India, and Canada respectively.

Modern Globalization--A Private Affair

While contemporary governments are involved in the W.T.O., and in other governmental efforts to simplify trade rules, and enhance global co-operation, the modern pace of globalization is largely driven by the private sector. Furthermore, modern globalization, in industry, is more about outsourcing production to the third world, for re-import back to the first world, than it is about the establishment of markets in the 3rd world for the production of the first.²⁰¹ Finally, modern globalization seeks to take the achievements of the past (regarding legal, cultural and linguistic harmonization), and create one set of universal rules (as opposed to putting the world's peoples into one of 7 systems).

Monetary Globalization--Not the Same Old Game

A major difference in the financial sector is that no one centre is quite as hegemonic and dominant as the City of London was in the late 19th century (1890 - 1914).²⁰² New York is almost today's London, and its dominance grows as time goes by, but London is still a very important center. Continental Europe and the Euro Zone potentially, also, threatens the "New York as London" scenario, and the Far East markets, (Tokyo, Hong Kong and eventually Shanghai), are waiting in the wings. There were other financial centers in the 19th century, also, but none could seriously challenge the primacy of the City of London.

The modern market for securities is a 24-hour one,²⁰³ and is conducted from a multitude of financial service sector platforms; this means that multiple (or several) financial centres, in all time zones, are needed.²⁰⁴ Any of these centres, or platforms, could rise up to challenge the primacy of New York. Since the American market is highly regulated, the possibility by-passing it with a more loosely regulated structure exists.²⁰⁵

²⁰¹ "Hirst and Thompson", supra, note 51 at 118. This was a pattern of the previous era of globalization in the 19th Century.

²⁰² "Kemp", supra, note 140 at 170-171.

²⁰³ "Khoury", supra, note 5 at 1-3.

²⁰⁴ Ibid at 8.

²⁰⁵ This is known as "The Race for the bottom" in regulatory analysis. Some argue that certain market players (issuers, investors, financiers) will gravitate to a more loosely regulated jurisdiction, so as to avoid costs of compliance, interference of government, higher transaction costs, and enjoy greater corporate strategic freedom. Other commentators, dismiss such arguments, but there is a school of thought, which advocates a more limited role for regulation, to avoid just such a race. Please see Choi, Stephen J. and Guzman, Andrew, "National Laws, International Money: Regulation in a Global Market" (1997) 65 Fordham Law Review 1855 at 1869-1873. Hereinafter, "National Laws".

The advent of the Internet and cyberspace platforms also²⁰⁶ present us with an additional rival for New York's dominance. Since it is harder to regulate cyberspace,²⁰⁷ this also presents a problem for New York. A multi-platform world is much harder to control and order, and presents investors with a multitude of financial centres to choose from,²⁰⁸ which is a wrinkle not seen in the Victorian City of London. There are also a plethora of regulatory regimes to choose from in this modern world.²⁰⁹ This is or isn't a good thing, depending upon an investor's tolerance of risk, a company's willingness to pay investors a risk premium, and whether or not a more loosely regulated regime is good public policy.²¹⁰

A decentralized world is harder to organize. If the goal of public policy is to "encourage" the creation of unified standards, rules and procedures globally, then the diversity of locales and regulatory regimes, coupled with investor's ability, through modern communications technology, to access any stock, anywhere, presents regulators with a double dilemma. Dealing with this problem reinforces the importance of efforts to create a unified system of securities regulation, and ensure that all jurisdictions become part of it. The dominance of the City of London, and the power of the Royal Navy worked for Britain in the 19th Century: in the 21st more is needed. The major difference between the two periods, besides the difficulty of controlling a multi-jurisdictional world, is the time factor. Communications are now instantaneous, the pace of change bafflingly rapid, the ability to build a truly "global" group, project, or organization, with all of its members never having to leave their homes--possible! These, then, are the major differences between the two periods of globalization. We shall now presently examine how our

²⁰⁶ Weinberg, Neil, and Kruger, Daniel, "The Big Board Comes Back From the Brink" *Forbes* November 13, 2000 274 at 276-277. Hereinafter, "Big Board". Please see also, McGlosson, Christina K. "Who Needs Wall Street? The Dilemma of Regulationg Securities Trading in Cyberspace:" (1997) 5 *CommLaw Conspectus* 305 at 305. Hereinafter "Who Needs Wall Street?"

²⁰⁷ "Gorra", supra, note 46 at 212-214.

²⁰⁸ "Khoury", supra, note 5 at 3.

²⁰⁹ "Steinberg and Michaels", supra, note 34 at 208-233

²¹⁰ There is certainly a great deal of debate on these questions, with some of the more libertarian commentators opting for a more market driven laissez faire type of regulatory regime selection mechanism, while others opt for a more public interest kind of model for determining regulations. Please see "Ibid", as well as "Gillen and Potter", supra, note 39, Romano Roberta, "Empowering Investors: A Market Approach to Securities Regulation" (1998) 107 *Yale Law Journal* 2359. Hereianfter, "Romano Empowering". Licht, Amir N. "Regulatory Arbitrage for Real: International Securiteis Regulation in a World of Interacting Securities Markets" (1998) 38 *Virginia Journal of International Law* 563. Hereinafter, "Regulatory Arbitrage for Real" As well, Fox, Merritt B., "Securiteis Disclosure in a Globalized Market: Who should regulate whom?" (1997) 95 *Michigan Law Review* 2498. Hereinafter "Who and Whom". And finally, Tractman, Joel P. "Trade in Financial Services under GATS, NAFTA and the E.C. A Regulatory Jurisdiction Analysis" (1995) 34 *Columbia Journal of Transnational Law* 37. Hereinafter, "Tractman Jurisdictional Analysis".

modern post World War II system of global trade came about, and how this led to our contemporary period of globalization.

II How has our Modern System of Trade Emerged?

The "Sunlit uplands" of the late Victoria Age's Imperialistically inspired globalization came to a screeching halt in 1914.²¹¹ "The Guns of August," focussed the attention of Europe's great powers (and their Empires), of Britain and her Empire, and eventually, the United States, upon the trenches, and the first Global "Total war". Measures were brought in by Governments to command their economies,²¹² and mobilize their populations into battle,²¹³ some of which remain today (such as Income Tax). Fallout from the cataclysm of 1914-18, continued into the '20's,²¹⁴ while Germany and Russia were still not fully recovered even into the '30's.²¹⁵ The convertibility of currencies to gold²¹⁶ did not return in the way it had in the late 19th century,²¹⁷ and in many countries government economic control measures remained on the books.²¹⁸

The 1930's and the Coming of War

The depression of the 1930's further balkanized the world, and led to an expansion of protectionist measures, such as the Smoot -Hawley Tarrif in the U.S., and Britain's adoption of Imperial preference in 1933.²¹⁹ This uncoupled the global process further, and did not help economic recovery.²²⁰ The coming of the Second World War, increased government control over the economy;²²¹ currencies were no longer convertible, in the City of London, business deals were fewer,²²² rationing of scarce goods and services was implemented,²²³ factories were

²¹¹ "Volcker", supra, note 192 at 369.

²¹² "Modern England", supra, note 160 at 488-489.

²¹³ Ibid.

²¹⁴ Gilbert, Felix, The End of the European Era, 1890 to the Present 3rd Ed., (1984: London, W.W. Norton) at 161. Hereinafter, "Gilbert".

²¹⁵ Ibid at 270 and 240. Although, Russia did better than Germany in the later part of this period (the '30's).

²¹⁶ The Gold Standard.

²¹⁷ Kynaston, David, The City of London. Volume III., The Illusions of Gold 1914-1945 (2000: London, Pimlico). Hereinafter, "Kynaston Gold". At 116-122.

²¹⁸ "Modern England", supra, note 160 at 490.

²¹⁹ "Thomas and Meyer", supra, note 112 at 2. Please see also, "Modern England", supra, note 160 at 531.

²²⁰ "Modern England", supra, note 160 at 531.

²²¹ "Kynaston Gold", supra, note 217 at 465-466. Please see also, "Modern England", supra, note 160 at 570.

²²² "Kynaston Gold", supra, note 217 at 462-463.

²²³ "Modern England", supra, note 160 at 570.

converted to war production,²²⁴ and international civilian trade, was superceded by military procurement and supply, in the ranking of national economic priorities.²²⁵

Commerce and War

International trade was also extremely hazardous, during the war. Ships faced the danger of being sunk, and trains were liable to be bombed, hence the risk premium, for conducting commerce in this time, increased enormously. Information, the life blood of commerce and globalization, was also rigidly controlled by the government, and a very stringent system of economic planning was implemented in all belligerent countries.²²⁶ In a phrase, almost everything which had gone into creating the pre-1914 pre-Victorian world order had, by 1945, been undone! Where optimism, trust and a degree of brotherhood (at least among the first world nations) had been the underlying sentiment, in the 19th century, in the 20th century, after half a century of war, militarism and economic dislocation, the bi-polar opposite was true.

Victory and G.A.T.T.

The underlying sentiment, in 1947, when the nations of the world met to try to rebuild the world trading order, was to turn the page on the last 30 years of history, and failed economic policy.²²⁷ The intention behind G.A.T.T., for the signatory nations, was to abandon the divisive protectionist policies of the recent past, get the world economy moving again and to lay the foundations for a world free of want, especially conflict-inducing want, and (though not stated explicitly) to prevent the further spread of the "Iron Curtain" of Communism (the Soviet Russian Empire had certainly benefited from the war, and now encompassed much of Eastern and Central Europe). Most European and Asian signatory nations had seen their economies, and industrial bases, devastated by the war, and needed free access to markets, such as the United States, to rebuild their economies.²²⁸ While there was some suspicion between nations, there was also a desire to move forward. G.A.T.T. can, in part, also be seen as a leap of faith by the signatory nations of 1947.

²²⁴ "Gilbert", supra, note 214 at 252-253.

²²⁵ Ibid.

²²⁶ "Modern England", supra, note 160 at 570.

²²⁷ "Thomas and Meyer", supra, note 112 at 2

Other Institutions.

Along with the G.A.T.T., which was supposed to only be a temporary system, (but lasted for 40 years due to conflicts between signatory nations)²²⁹ other international institutions were established, which have now become household words. Partially because of the example of Germany's severe inter-war finances, and the problems many smaller countries had experienced during the depression, the World Bank²³⁰ and the International Monetary Fund²³¹ were established to monitor the global financial situation, and act as leader of last resort to sovereign national governments, in deep financial trouble. Over the past 50 years clients have included 1970's Britain, during the bad old days of "the British disease", Indonesia, after the Asian Flu, and a plethora of Central and South American countries. The verdict on the effectiveness, objectivity and utility of this institution is not always positive, but it has helped to sustain a large number of countries, and assisted them with restructuring of their public finances and debt loads, over the years.

"The New Gold Standard"

In 1945 it was recognized that the world's currencies needed a stable trading regime. The United States emerged from World War II with the strongest economy in the world, and as bankers to the world, having lent Billions and Billions to all major allied belligerents.²³² The economic situation in the rest of the world was dire. The industrial plant in almost all of Europe and Asia had been obliterated. That of Britain, very badly damaged, obsolescent and geared for war production. Almost all of the war's major participants were bankrupt, and every nation in Western Europe received Marshall Plan Aid.²³³

In trying to re-float the world's economy, it was recognized that a standard, or benchmark, was needed. Since America was economically hegemonic, since American dollars were largely funding this reconstruction, since any outstanding loans had to be paid back in American dollars, and since going back to gold wasn't an option, the United States Dollar became

²²⁸ "Gilbert", supra, note 214 at 375. "Thomas and Meyer", supra, note 112 at 3. "A Club No More", supra, note 151 at 2-3.

²²⁹ "Thomas and Meyer", supra, note 112 at 3.

²³⁰ Ibid. Please see also Brown, Michael Barrat, Models in Political Economy. A Guide to The Arguments (1986: London, Penguin) at 64. Hereinafter, "Michael Barrat Brown"

²³¹ Ibid.

²³² "Michael Barrat Brown", supra, note 230 at 64.

²³³ "Gilbert", supra, note 214 at 388.

the world's currency Standard.²³⁴ Exchange rates did not float freely, nor did capital flow where it wished, as it was needed for reconstruction, and for the rigid economic planning, which became a hallmark of many western economies, during war time, and continued into the post war era.²³⁵

Enter Bretton Woods

The American town where this system of fixed exchange rates was agreed upon, was Bretton Woods, hence the term "The Bretton Woods System" or "The Bretton Woods Agreement".²³⁶ These things together established a system, which was freer than the wartime planned economies and certainly freer than the system established in the nations of the Soviet Empire. "No man is an island..." and the failed policies of protection, autarky, reparations, war time planning, and fiscal retrenchment, provided ample proof to all who cared to observe. The post-war Bretton Woods system provided the Western World with its longest sustained period of growth in history.²³⁷

Uncoupling the Standard.

The Bretton Woods system stayed in place until the United States abandoned the partial convertibility of the U. S. dollar into gold, in 1971.²³⁸ Before 1971, the Bretton Woods system had begun to be undermined by international transactions (in Eurodollars), which outflanked the highly controlled system of exchange rates and capital controls, then in place in western countries.²³⁹ As international transactions proceeded in the 1960's, some companies needed a pool of capital in other countries to fund their activities. This was the origin of the so-called Euro Bond Market.²⁴⁰ This pool of capital grew after the oil price shock of the early '70's.²⁴¹

Once there was a substantial body of "loose" capital out there, it was free to gravitate to the highest bidder, or seek out the best terms and rate of return.²⁴² In effect a version of Gresham's Law (good money drives out bad), came to apply here, and investors gravitated

²³⁴ "Hirst and Thompson", supra, note 51 at 388.

²³⁵ For an example of this in action, one need only look at the degree of centralization, nationalization, progressive taxation increases, and economic planning carried out in Britain in the years after 1945. Other nations, to a lesser or greater extent, followed this mode. Also please see "Modern England", supra, note 160 at 574-576.

²³⁶ "Hirst and Thompson", supra, note 51 at 45.

²³⁷ "Michael Barrat Brown", supra, note 230 at 64.

²³⁸ Ibid at 66.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid

towards this free and loose source of capital. Since the effect of the rise in the Eurobond and Euro markets was to help undermine Bretton Woods, it can be said that Eurobonds and loose capital ("good money") helped drive out the "bad" money from the market place. Whether or not the reader agrees that this was an example of Gresham's law in action or not, over the course of time, as transactions became more international, the rigid "official" capital structure (Bretton Woods) was undermined. By the 1970's the global system of fixed exchange rates became unsupportable; it therefore collapsed and what emerged was the beginnings of our contemporary global financial system, which features floating exchange rates and freer movement of capital.²⁴³

From G.A.T.T. to Today

As interconnectedness expanded, and global transactions became commonplace, the General Agreement on Tariffs and Trade was finally replaced with the World Trade Organization.²⁴⁴ The Tariff reduction efforts in trade goods had been so successful that by the 1980's, serious negotiations began to expand tariff reduction into the realm of services.²⁴⁵ This movement is certainly not without its critics, but an agreement on a regime of tariff reduction for trade in services has emerged.

G.A.T.S. and M.O.U.'s

A supplementary agreement, called the General Agreement on Trade in Services (G.A.T.S.), covers trade in this area.²⁴⁶ There are significant differences between it and the original G.A.T.T.-type agreement.²⁴⁷ The trade in financial services is covered by means of an Annex on Financial Services.²⁴⁸ It is an "opt in"--type of agreement, in which signatories can opt to place certain areas of their domestic financial services industry into this regulatory structure.²⁴⁹

²⁴³ "Hirst and Thompson", supra, note 51 at 46.

²⁴⁴ "Thomas and Meyer", supra, note 112 at 24-25.

²⁴⁵ Ibid. Please see also, "Splintering", supra, note 33, "Safeguarding", supra, note 33, "Goods to Services", supra, note 33 and "Hindley and Smith", supra, note 33. Please see also, Stern, Robert M. and Hoekman, Brian, "Issues and Data Needs for G.A.T.T. Negotiations on Services", (1987) 10 The World Economy 39. Hereinafter, "Issues and Data", please see as well, Sampson, Gary P. and Snape, Richard H. "Identifying the Issues in Trade in Services", (1985) 8 The World Economy 171. Hereinafter, "Identifying Issues".

²⁴⁶ "Thomas and Meyer", supra, note 112 at 211.

²⁴⁷ Ibid.

²⁴⁸ "Annex on Financial Services" General Agreement on Trade in Services. The Results of the Multilateral Trade Negotiations. The Legal Text (1994: Geneva, G.A.T.T. Secretariat). Hereinafter, "Annex on Financial Services". Please see also, "Second Annex on Financial Services" General Agreement on Trade in Services. The Results of the Multilateral Trade Negotiations. The Legal Text (1994: Geneva, G.A.T.T. Secretariat) at Paragraph 2. Hereinafter "Second Annex".

²⁴⁹ "Thomas and Meyer", supra, note 112 at 211.

There are phase-in periods in the M.O.U., and consideration is given to the relative sophistication of the signatory nation's financial service industry.²⁵⁰ This was done, in part, to placate the concerns of many third world countries, who were afraid of western, and especially American, institutions overwhelming their domestic financial service providers (banks, brokerage houses etc), as well as the American fears that developing countries would not open up their markets very far, but under the Most Favoured Nation formula applied under the G.A.T.T./W.T.O. "Mainstream" formula, would gain access to the relatively liberalized U. S. Market. This caused the Americans to also pursue an Opt out under this agreement (in effect they reserved the right to restrict entry into certain listed sectors of their Financial Services industry.²⁵¹ These concerns, as mentioned earlier, are still with us.

Public Law Foundations

These agreements have laid the International Public Law foundations for an emerging global system for the trading of securities. The process of peeling back tariffs and restrictions in the goods sector is well established.²⁵² By including services, and in particular, financial services within this global trade umbrella, nations have a degree of certainty in dealing with each other. Nations also, under the W.T.O., have a proven global structure to work within, while they retain the ability to influence the process of regulatory creation (which hopefully breeds more willing compliance). The above advantages are also combined with the enforcement and dispute resolution mechanisms of the W.T.O.

All That Glitters Is Not G.A.T.S.

The downside to this process, is that the Annex on Financial Services, is an enabling-- type of instrument, and does not lay down specific guidelines for conducting the trade in financial services. "No man is an island...", and in this case, no single entity, certainly not the W.T.O., is or has, a monopoly on the creation, or administration, of these rules. The W.T.O. is an amazing organization. In the space of 56 years the G.A.T.T.-- W.T.O. structure has moved the process of trade and tariff reform forward by light years from its humble beginnings in 1947.²⁵³ This organization certainly has its detractors, and after "the Battle of Seattle" and the Genoa

²⁵⁰ Ibid at 210-211

²⁵¹ Ibid.

²⁵² Ibid at 202-203.

²⁵³ Ibid.

Summit,²⁵⁴ many do not trust the W.T.O. Furthermore, the remit and scope of the W.T.O. is rather "broad brushed" and "big pictured." The W.T.O.'s modus operandi is predicated upon dealings between sovereign national governments, and working with practices, laws and policies, which prevent sovereign nations, companies and service providers from having access to the national markets of the W.T.O.'s member states. As such, the detail and minutiae required to set up, run and enforce the standards, rules and regulations necessary to run an integrated global market for securities, are way beyond both its present capacity, and supervisory resources. Other groups must, be involved in framing, running and enforcing the rules of such a system. We shall now examine some of the other organizations involved in this process.

Who Else is Working on this Project?

Besides the W.T.O., many other players are involved in the process of globalizing the trade in securities. I shall briefly introduce some of these institutions, and describe their roles in the process. We shall encounter these actors further on into our investigation,²⁵⁵ so I will deal with these groups in depth at that time. As noted in Chapter 1, the process of globalizing the trade in securities is a complex and multi-faceted one. To use the terminology of Chapter 1, I have already dealt with the "top down" process, the W.T.O., so, the other efforts can be broadly grouped into the "Bottom-Up" and "Side to Side" categories. We shall pay special attention to the "Bottom Up" category, partly, due to the large number of players in the process, and partly because of their significance to any globalized world trading order. However, we shall first "move sideways".

The "Side to Side" Means of Globalization.

The World-Wide trading system exists in many guises. The W.T.O. system is the governing regime for trade in goods and services, among signatory nations; there are, however, other structures in place which are, also, at work reducing any remaining trade barriers in the trade of goods and services. One of these structures is the regional trading bloc. The most famous, and arguably most successful, regional trading blocs, is the European Union (The European Economic Community). From the treaty of Rome in the '50's, to Maastricht and beyond,

²⁵⁴ To name but two incidents. Please see Gamble, John, Kina and Ku, Charlotte, "International Law--New Actors and New Technologies: Centre Stage for N.G.O.'s: (2000) 31 Law and Policy in International Business 221. Hereinafter, "New Actors". This will give you an idea of how NGO and other civil society groups opposed to the W.T.O. type of Free-Trade Agenda are now using new technology to get the world out and oppose those with whom they disagree.

great progress has been made in trying to eliminate trade barriers, and to bring the "islands" of Europe closer together.²⁵⁶ Of late, attention has been directed towards reform of the capital markets.²⁵⁷

The European Dimension

The system chosen was that of creating a common barrier or floor of regulatory standards beneath which the regulations of various member states could not fall.²⁵⁸ This was necessitated, in part, due to differences in laws, the various standards of corporate governance and varying levels of capital market sophistication, among the member states.²⁵⁹ The differential economic structural models employed in these states, also, impede a homogenized "one size fits all" solution. In particular, the structure and strength of German banks, and the primacy of the City of London as a major world financial centre, militates against trying to "shoehorn" or create, overnight a homogenized system for all the member States of the European Union.²⁶⁰

Europe is trying to create a unified system, and attempting to do so through a gradual process of harmonization and standardization.²⁶¹ The commission through various Directives and legislative initiatives, is trying to establish the important ground norms, which an effective

²⁵⁵ In subsequent chapters.,

²⁵⁶ "Gilbert", supra, note 214 at 443-444.

²⁵⁷ Internal Market <http://europa.eu.int/Scadplus/leg/en/lvb/170000.htm>. Hereinafter, "Internal Market". Please see also, The EU Committee of the American Chamber of Commerce, Response to the Lamfalussy Committee of Experts on the Regulation of The European Securities Markets (September 27, 2000) <http://www.eucommittee.be/pop/pop2000/Fin/fin17.htm>. Hereinafter, "EU Committee". As well, please see Transactions in Securities <http://europa.eu.int/Scadplus/leg/en/lvb/124031.htm>. Hereinafter, "Transaction". As well, please see McCauley, Robert N. and White, William R. The Euro and European Financial Markets BIS Working Papers No. 41. (1997: Basle, Bank for International Settlements). Hereinafter, "BIS 41". As well please see, Interinstitutional Monitoring Group, First Interim Report Monitoring The New Process for Regulating Securities Markets in Europe (The Lamfalussy Process) Executive Summary (May 2003, Brussels, The European Commission). Hereinafter, "Inter-Institutional Monitoring Group".

²⁵⁸ "Transactions", supra, note 257 at 1. Please see also, Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading (2001: Brussels, The European Commission) Chapter IV. Article 15. Hereinafter, "Prospectus Directive".

²⁵⁹ "EU Committee", supra note 257 at 1.

²⁶⁰ Friedland, John H. The Law and Structure of the International Financial System. Regulation in the United States, EEC and Japan (1994: Westport, Quorum) at 8-10. Hereinafter, "Friedland".

²⁶¹ Warner, E. Waide, "Mutual Recognition and Cross-Border Financial Services in the European Community" (1992) 55 Law and Contemporary Problems 7 at 8. Hereinafter, "Warner".

European securities market should possess, and then work forward from these, with the member states, to enact changes to the legislative framework.²⁶²

The beauty of this "side-to-side" activity is that it is permitted under the W.T.O. system.²⁶³ This "side-to-side" process can go on simultaneously with the W.T.O. process. The European Union actions are not the only example of the "side-to-side" process in action. The N.A.F.T.A. zone in North America, is a free trade area, which is expanding its jurisdiction. In the area of financial service, a Memo of Understanding (M.O.U.) between the S.E.C. and the Ontario Securities Commission has allowed for common share offerings between the two nations' exchanges. In fact, the Committee of Wise Persons examining the Canadian regulatory system, praised it most highly, and used the desire, of many market participants, to strengthen and preserve it, as justification for changing the Canadian regulatory system, and switching to a national system of regulation.²⁶⁴ This has allowed for a more integrated and united kind of market structure within North America. I shall deal with these "side to side" entities in Chapter 4. The recent announcement by the A.S.E.A.N. nations of their intention to create a new "economic community" similar to that of the E.U., within the next 30 years, shows that the "side to side" process is alive and well. I shall now examine the "Bottom Up" process.

"Bottoms Up!"

The third means of globalization is the "Bottom Up" method. This is carried out by institutions, organizations and associations which are involved with, or connected to some aspect or element of the securities trading or regulatory enterprise. Some of these groups represent securities commissions, (the International Organization of Securities Commissions, [I.O.S.C.O.] or The Federation of International Bourses et Valeurs [F.I.B.V]), Banks (The Basle Committee of Banking), Professional Standards Associations (The International Accounting Standards Board [I.A.S.B.]), Business groupings (The International Chamber of Commerce, The Organization of

²⁶² Commission of the European Communities, Communication from the Commission To the Council, The European Parliament, The Economic and Social Committee and the Committee of the Regions "Working Together To Maintain Momentum" 2001 Review of the Internal Market Strategy (2001; Brussels, The European Commission) at 9. Hereinafter, "Working Together".

²⁶³ "Thomas and Meyer", supra, note 112 at 336-337.

²⁶⁴ "Part VII--Securities Transactions Outside The Jurisdiction. 7.1 International Issuers. National Instrument 71-101--The MultiJurisdictional Disclosure System", Consolidated Ontario Securities Act, Wise Persons Report: It's Time, December 2003, Ministry of Finance, Ottawa http://www.wise-arerties.ca/main_en.html at 27. Hereinafter, "It's Time". Regulation and Rules, with Poocy Statements, Blanket Orders and Notices, (1999: Toronto, Carswell) at 685. Hereinafter, "Ontario Securities Act"

Economic Development [O.E.C.D.], The European Chamber of Commerce) and Law enforcement agencies (Interpol and other Police groups, that focus on eliminating commercial crime, Money Laundering [the O.E.C.D.'s taskforce on Money Laundering] and Cyber Fraud).²⁶⁵ These groups have had varying levels of success, with their many reform projects. They have, in concert, had a major effect upon moving the internationalization of laws and regulation forward. Some groups are more successful in this process than others, and certain groups, such as I.O.S.C.O., are far more important to this process than others. We shall have a much more fulsome introduction to this group in Chapter 4, so I will now deal more generally with the collective effects of these "Bottom Up" globalizers.

The Common Link Between These Globalization Actors.

These actors tend usually to be composed of associations, and/or professionals involved with the trade in, or the regulation of the trade in securities or in measuring the financial results reported by companies whose shares trade on the Stock Exchanges of the world. A second group of players are organizations such as The International Chamber of Commerce, who are in effect, business lobby groups, working to create regulations that are "business-friendly". These groups all share a proximity to the areas in which they advocate. These groups are periodically consulted by governments on proposed regulatory changes, and frequently testify before government sub-committees when policy changes are being mooted. Beyond this, these various groups are quite different in their compositions, the level of power or authority they have over their areas of endeavor, and the members of these organizations (the people or agencies who form their country's delegation to groups, such as I.O.S.C.O.) all have differential relationships viz a viz their national governments. I will deal with these relationships in depth in Chapter 4, but I shall now, briefly, examine the relationships between one or two of these entities, influencing or setting policy and regulations.

Lobby vs., Q.U.A.N.G.O.

Some groups, such as the International Chamber of Commerce, are "business pressure groups" (as mentioned earlier) and glorified think-tanks. They tend to be more reactive; they respond to policy initiatives, they are asked for their comments on new legislative proposals, and

²⁶⁵ Please see "Sommer", supra, note 103, "Zaring", supra, note 105, "Row", supra, note 106, and "Griffiths", supra, note 106, for an idea of how these organizations function and what roles they play.

frequently testify at public hearings.²⁶⁶ These groups often find themselves in the position of "lobbying" decision-makers, in the hopes of getting the desired result.²⁶⁷ These groups have no power of their own. Often these groups release their own reports on a given topic, or contribute to the public debate on an important issue.²⁶⁸ This contribution is usually, although not always, in response to something initiated by a government, International regulatory body or some other group empowered to make rules, enact regulations or pass laws.

These groups frequently attract people of high calibre and talent to their staff, which helps build credibility among decision makers and assists in having their advice and suggestions properly considered. Some of these groups consequently acquire a high degree of expertise in given areas of endeavor, and can be given the task of drafting regulations, or initiating policy, instead of responding to it. The International Chamber of Commerce, for example, has drafted some international corporate governance codes. These rare exceptions notwithstanding, such organizations, for the most part, are reactive, usually study problems or issues placed into the public domain by others, tend to be the "interest group" of a particular identifiable segment of the market, and most importantly, they do not have administrative or quasi-legislative powers of their own.

Into the Q.U.A.N.G.O. realm, fall groups such as the International Organization of Securities Commissions (I.O.S.C.O.).²⁶⁹ Membership in this organization is drawn from the national regulatory bodies of member states.²⁷⁰ The Ontario Securities Commission, the S.E.C. and the Financial Services Authority (F.S.A.) from Great Britain, among others, all send representatives to this organization. These organizations are charged with administering the regulations, within their respective countries, often with setting rules their nation's rules and regulations, as well as with enforcing them.²⁷¹ In many cases, these organizations either recommend prosecutions against those who violate these rules and regulations, or pursue such prosecutions themselves. These organizations have legislative or administrative autonomy, by means of devolved power from their national governments; they have the power to initiate

²⁶⁶ "Eu Committee", supra, note 256. Please see also, The European Capital Market Institute, <http://www.ecmi.es/overview.htm> at 1. Hereinafter, "ECMI".

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ "Sommer", supra, note 103 at 15-16.

²⁷⁰ Ibid at 16-17.

²⁷¹ Ibid at 17-18.

regulation, and they are pro-active in the realm of legislative and regulatory changes.²⁷² They also often initiate and move policy debate forward.

I.O.S.C.O.--A Model Q.U.A.N.G.O.

I.O.S.C.O. is close to the market and market players it regulates, and its members possess a high level of skill and expertise in the areas they administer, and devise regulations for. The down side of a relationship such as this is that these people tend to be administrators and bureaucrats,²⁷³ for the most part, and can sometimes lack the politician's acumen. These people are also, not elected, or in any way, democratically accountable to anyone, which some commentators believe is a problem.²⁷⁴ The increasing globalization of markets, makes this a more serious problem. If the I.O.S.C.O.'s of this world are to be given a greater say in how a global securities trading system will be set up and function, something must be done to erode, or impede, the looming "democratic deficit."²⁷⁵ These, then, are some of the groups involved in "Bottom Up" globalization. We shall now turn our attention to some of the laws enacted in the past 20 years, to determine the success thus far achieved by efforts to unify and globalize the trade in securities.

"Positively Positive"--Laws and Legal Change.

My goal, here, is not to engage in a clause by clause analysis of Statues, nor to pursue a historical account of statutory change. In trying to determine the success of these globalization efforts; since 1947, it is important to see how laws, regulations, and procedures have changed, and to determine how much of this is attributable to the efforts at globalization outlined above. Some of these general efforts have already been alluded to, and some will be dealt with in Chapter 4, but a brief overview of the efforts already expended, and their level of success, is in order.

G.A.T.T.--Public International Law

The G.A.T.T.--W.T.O. efforts at trade law reform, have already been discussed, as has G.A.T.S and the M.O.U. on Financial Services. As previously stated, their effect has been enormous on the trading regimes of member states.²⁷⁶ Since tariffs are the prerogative of national

²⁷² Ibid at 28.

²⁷³ Ibid at 28. Please see also, "Zaring", supra, note 105 at 318.

²⁷⁴ Ibid. Please see "Zaring", supra, note 105 at 319.

²⁷⁵ "Zaring", supra, note 105 at 327.

²⁷⁶ "Thomas and Meyer", supra, note 112 at 202-203.

governments, much of the W.T.O. regime's efforts have been reflected in the Public International Law Sector. Many of the protocols and actions required to make these W.T.O. elements work, are done through treaties, diplomatic notes and official filings of various W.T.O. documents with the Secretariat in Geneva, or in the case of violations or duties in retaliation for violations, or alleged violations of trade law, notes are also delivered to the offending government.

This is still a government to government process, and does not always, affect the positive statutes of the countries in question. Governments will change regulations, end subsidy programmes, or announce an opening up of a certain domestic economic sector, to comply with W.T.O. regulations but, the W.T.O. regime is, in Common Law countries, never formally enacted as a statute. In some Civil Law Countries, Treaties do become part of the positive law of the land, but the government still revises domestic statutes, rules, policies and regulations, to take account of new responsibilities, as opposed to having the W.T.O. legislation sit there on the books, as the source of domestic law and policy. In a phrase, to examine domestic law and policy, we must remove ourselves from the Public International Law sphere.

International Financial Services QUANGOS

In the realm of domestic law and policy, we have seen that the international financial service QUANGOS have had a more direct and visible influence on positive law and regulation.²⁷⁷ This is due, in no small part, to the narrower scope of their orientation, and also their proximity to the markets and market players. A second example of this proximity in action is provided by the International Accounting Standards Board has helped change the way many companies report assets, such as goodwill, and this has led to a revised way of preparing and interpreting financial statements.²⁷⁸ In those countries that have adopted these standards, failure of a domestic reporting issuer to use them, or report the numbers in accordance with these principles, will cause the company to run afoul of financial disclosure regulations, and make it liable for criminal sanction or administrative fines.

²⁷⁷ "Zaring", supra, note 105 and "Sommer", supra, note 103 have amply demonstrated this, but "Steinberg and Michaels", supra, note 34 at 236-247 also gives a good synopsis of the work of some Financial Services Quangos.

"International" Accounting Standards--Well Not Quite!

These standards have come a long way in the past 20 years, and while International in name, they are not quite universal.²⁷⁹ The United States, for one, is reticent to abandon FASB and adopt these new standards as their own²⁸⁰ (or at least allow foreign issuers to list on an American Exchange using these Accounting Standards).²⁸¹ These new standards also, potentially, affect corporate governance norms (the level and nature of disclosure, etc) along with shareholders' scrutiny of management.²⁸² Adoption of these standards, therefore, has potentially wide ranging effects. These standards alone will not unify the world's securities regulation. We shall presently examine some side to side globalizers.

N.A.F.T.A. and "Side to Side"

The continuing efforts of the "side-to-side" globalizers often have the most graphically obvious effects on positive law and regulation, among signatory nations. In the N.A.F.T.A. Zone, Canada and the United States have altered their domestic positive laws, to take account of the provisions of the Multi Jurisdictional Disclosure Standards. The reforms proposed for the Canadian regulatory architecture will piggy-back upon these efforts, and create a market (and a regulatory system) for capital in Canada, which is truly national.²⁸³ This may assist in the creation of a more seamless North American market for capital. The system as it currently operates allows Canadian and American companies to cross-list on each another's exchanges, to raise capital in both markets, and to offer shares to each other's investors, by merely complying with their home national standards, and a few special provisions.²⁸⁴ The B.C. Securities Act, for example,²⁸⁵ reflects this change and has incorporated this provision into its body, and now allows American Companies who fall under the M.J.D.S., access to the Canadian market.²⁸⁶ Any new

²⁷⁸ "Brunner", supra, note 94 at 912-915

²⁷⁹ Ibid at 925.

²⁸⁰ Ibid.

²⁸¹ Ibid, although companies can still use their standards so long as they reconcile them with U.S. G.A.A.P.

²⁸² Ibid at 934-935.

²⁸³ "Arner", supra, note 122 at 1551. Please see also, "It's Time", supra, note 264 at 27.

²⁸⁴ Ibid. Please see also, Gillen, Mark. R. Securities Regulation in Canada (1992: Toronto, Carswell) at 111-112. Hereinafter, "Gillen".

²⁸⁵ "Use of The Multi-Jurisdictional Disclosure System by Canadian Issuers in the U. S. Market" NIN 91/22, British Columbia Securities Act, and Rules Annotated with British Columbia Regulations, Policy Statements, Blanket Orders and Rulings and Notices and Interpretation Notices 1998 (1998: Toronto, Carswell) at NIS 12-56. Hereinafter, "B.C. Securities Act". Please see also, "National Policy No. 45 Multijurisdictional Disclosure System" Ibid 9-231 at 9-233. Hereinafter "National Policy 45". Please see also, "It's Time", supra, note 264 at 27.

²⁸⁶ "National Policy 45", supra, note 285 at 9-233.

national system of securities regulation, for Canada, would merely incorporate these requirements on a national scale.

Europe and "Side to Side"

In Europe, the various Commission Directives and the Lamfalussy process have altered the positive laws, business models, governmental structures and enforcement mechanisms of several member states.²⁸⁷ Being part of the Treaty of Rome process, member states must abide by, and enact into their positive law, all Directives of the European Commission.²⁸⁸ National parliaments, however, often receive Directives, re-draft them, and then enact them into the canon of their domestic laws. In effect, the regional bloc's laws, becomes the national jurisdiction's positive law. This is the most highly influential globalizing source of law that we have surveyed.

S.E.C.--"Law Givers to the World"

The initiatives, of the U.S. S.E.C., have also borne fruit in several nations' positive law.²⁸⁹ The crack-down on money laundering has led to a situation in which groups, such as the O.E.C.D., have tried to force certain countries into enacting the changes to their positive law the O.E.C.D. deems appropriate.²⁹⁰ The S.E.C., also, has lobbied certain countries, to enact changes to their positive law to assist the S.E.C. in their efforts to combat insider dealing. For example, after the S.E.C. placed considerable and protracted pressure upon Switzerland,²⁹¹ to enact some insider- dealing provisions into their positive law, the Swiss government eventually enacted a provision into their criminal law outlawing insider dealing.²⁹² There were, within the first few years of these provisions, very few prosecutions under this new law. Looking at the Swiss

²⁸⁷ "Arner", supra, note 283 at 1554-1559.

²⁸⁸ Ibid at 1559.

²⁸⁹ Some through a series of M.O.U.'s concluded by the S.E.C. and a plethora of countries, on things such as co-operation between their various national law enforcement agencies. Please see "Doty", supra, note 41 at S83-84.

²⁹⁰ Moulette, Patrick, "Money Laundering: Staying Ahead of the Trends" OECD Observer <http://www.oecdobserver.org/news/fullstory.Php/aid/244>. Hereinafter, "Staying Ahead of the Trends"; please see also, Financial Task Force on Money Laundering, Basic Facts About Money Laundering, http://www1.oecd.org/fatf/Mlauding_en.htm. Hereinafter, "Basic Facts About Money Laundering". As well please see, "The Financial Action Task Force Reports on Latest Money Laundering Trends" OECD Press Release <http://www.oecdwash.org/NEWS/PRESS/2000/news2000-006.htm>. Hereinafter, "OECD Press Release". Also, please see "Ten Years of Combating Money Laundering" OECD Observer October 1, 1999 <http://www.oecdobserver.org/news/fullstory.Php/aid/63>. Hereinafter, "Ten Years of Combat".

²⁹¹ "Mahoney", supra, note 11 at 317-318.

²⁹² Ibid.

experience, it is clear that the U.S. S.E.C. exerted a great deal of influence on the positive law of Switzerland, but comparatively little effect upon the Swiss administration of justice.²⁹³

Progress of "Global Law"

"Global Law," or the globalizing effects of law, have proceeded significantly over the past 20 years. The effects of all three major kinds of players, in the globalization process, the "Top Down", "Bottom Up", and "Side to Side", have had significant effects upon the positive laws, rules and regulations of nation states. Some have had greater effects than others, some of these effects are of a broader, or more general type, while others are much more specific and "hands on". We do not as yet have a monolithic, or unified, global positive law in the realm of securities regulation. We shall presently examine the current level of integration or unity in global financial markets.

III How Unified Or Integrated Are Today's Financial Markets? How Did We Get Here?

The process of trying to break down trade barriers, and open up markets to foreign trade and international competition, has been going on for some time, as noted previously.²⁹⁴ The petro dollar financed Euro Bond market was the first post-war "free-flowing funds vehicle".²⁹⁵ The end of the Bretton Woods system, the oil price shock and stagflation heralded the demise of Neo-Keynesian state planning, restrictions on capital flow and a highly specialized and compartmentalized financial services sector.²⁹⁶ The work of the G.A.T.T./W.T.O. in shifting the tariff-reform and market access debate, into the realm of services, led to a remarkable transformation in the way business, especially the financial business, was conducted.²⁹⁷ We shall presently examine national governments' efforts to reform their domestic economies, open up their markets to foreign competition, and to export this set of reforms abroad. By answering these

²⁹³ Ibid. The Swiss Government lacks an "SEC-Like" organization, and does not have a separate Securities Act. It is also unlikely to create either, in the near future, just to enforce this new regulation. This was enacted solely to allow the S.E.C. to get around the Dual criminality provisions in the existing U.S.-Swiss Co-operation Treaty, on Criminal matters. As far as this goes, it has been a success, but the negotiations were very contentious and didn't do much for American-Swiss relations.

²⁹⁴ The work of the W.T.O. and the other processes of globalization as outlined to date, illustrates this point clearly. Please see, "Thomas and Meyer", supra, note 112 for a more detailed description of the work of the W.T.O.

²⁹⁵ A truly global market. Please see "Khoury", supra, note 5 at 3-10.

²⁹⁶ "Michael Barrat Brown", supra, note 230 at 67-68.

²⁹⁷ With G.A.T.S. and the Annexes on Financial Services paving the way for truly global markets and fair and equal access by financial service providers of member countries to the financial systems of other member states.

questions, and examining the role played in all of this by technology, we can, hopefully, determine the current level of international integration.

De-Regulation and "The Big Bang".

The 1970's were very bad years for stock markets around the globe. The uncertainties of the oil price shock, stagflation, the ending of Bretton Woods and Neo-Keynesianism, coupled with the flight to precious metals (gold was at a record high!) and debt instruments, saw both the London and New York Exchanges experience severe declines. The West's Macroeconomic model was clearly not functioning properly, and something had to be done. The 1980's ushered in a new age.

"The Lady Is Not For Turning" Meets Deregulation--Thatcherism And Reaganomics

In May, 1979, after the infamous "Winter of discontent", when, it was said, that the dead went unburied, the trash uncollected and nothing worked, Margaret Thatcher and her Conservatives were elected in Britain. She was neither an old-Etonian patrician, like Harold MacMillian, nor a mercurial Europhile wet, like Edward Heath: she was different!²⁹⁸ For one of the first times in its history, the British Conservative Party had become ideological.²⁹⁹ The ideology they followed was closer to Milton Freedman, von Hayek, and Sir Keith Joseph's Conservative Policy Unit, than the "One Nation" Toryism of Disraeli and Salisbury.³⁰⁰

Breaking the Mold of British Politics

Among the policies adopted by Thatcher and the Conservatives were privatization of most of Britain's state owned industry, encouraging people to purchase their own homes from local authorities, giving power to the people over various areas of their lives (as the rhetoric went [thereby removing it from the government's remit and payment]), reducing trade barriers, abolishing capital controls, and freeing up the movement of capital.³⁰¹ Lady Thatcher and many of her policies were not universally popular, either within the wider sphere of British life, or within the Conservative Party.³⁰² This did not deter "The Iron Lady"--she went ahead with her

²⁹⁸ Cosgrave, Patrick, Thatcher, The First Term (1985: London, The Bodley Head) at 63. Hereinafter, "Cosgrave".

²⁹⁹ "A Club No More", supra, note 151 at 581. Please see also, Ibid, at 19-23.

³⁰⁰ "Cosgrave", supra, note 296 at 19-23.

³⁰¹ "A Club No More", supra, note 151 at 562.

³⁰² Cockerell, Michael, Live from Number 10. The Inside Story of Prime Ministers and Television (1989: London, Faber & Faber) at 298-299 as well at 307-309. Hereinafter, "Live from Number 10".

policies anyway! The old post war consensus of British politics was torn up,³⁰³ and social relations changed. This was tantamount to a revolution in British politics and public life!

Thatcherism in Economics and Policy

Within a couple of years of coming to power, a massive government-induced recession gripped Britain, unemployment stood at levels not seen since the 1930's; the "job for life" or "featherbed" mentality of British industry (management and shop floor alike), was on the run, and large amounts of Britain's industrial base was gone, in the process of going or in serious decline.³⁰⁴ The effects of all this hardship, however, were to make Britain a more competitive economy, to reduce red tape, and to germinate the inklings of an "enterprise culture".³⁰⁵ These policies caused enormous economic dislocations, some of the effects of which are still felt today, but the British example encouraged countries all over the world to try to reconfigure their economies, reduce the role of the state in the economy, divest themselves of state industry (usually at a profit for the treasury), reduce taxes, open up their economies, and, in particular, their financial sectors to greater competition.³⁰⁶

Ronald Reagan in the White House

In November, 1980, based largely upon the electorate's disillusionment with stagflation and the Carter administration, and after answering "No" to his famous question "Are you better off than you were four years ago?", Americans put Bonzo's favorite playmate, Ronald Reagan, into the White House.³⁰⁷ In America, the Reagan revolution was called "de-regulation",³⁰⁸ but basically consisted of de-layering bureaucracy, simplifying regulations, transferring government authority, and reducing the role government played in the lives of Americans. The Reagan administration instituted the largest tax cut in American history, and authorized the largest peacetime defense build up ever. This led to a huge budget deficit,³⁰⁹ largely funded by foreign

³⁰³ There was general agreement among both major parties in post war Britain on the role of State industries, the centrality of the Welfare state, Britain's defense commitments, etc. Please see also, Gilmour, Sir Ian, Dancing with Dogma. Britain Under Thatcherism (1992: London, Simon and Schuster) at 107. Hereinafter, "Gilmour".

³⁰⁴ "Gilmour", supra, note 303 at 28.

³⁰⁵ Gilmour ("Gilmour", supra, note 303) would certainly disagree with my point, and for several reasons, some of which he elaborates upon on pp 68-71 and 101-104. However "Cosgrave", supra, note 298 at 158-161, puts a different interpretation to these facts. They were, as both concede, rather popular policies at the time ("Gilmour" at 104 and "Cosgrave" at 161).

³⁰⁶ "McRae & Caincross", supra, note 51 at 155-156.

³⁰⁷ "Cosgrave", supra, note 298 at 179.

³⁰⁸ "Khoury", supra, note 5 at 80.

³⁰⁹ Ibid at 210-211.

investors purchasing American Treasury Bills and other gilt-edged investment instruments. Opening up American markets to further competition,³¹⁰ and expanding the role of private capital and private capital markets in the funding of American government debt, as well as seeing private capital markets play a greater role in the corporate debt market, were spin-off effects of the Reagan reforms.

The Role of Capital Markets in Britain and America

In both Britain and America the role of private capital markets, especially equity markets, was crucial. Britain expanded, through massive privatization issues, the number of shareholders, while also widening the breadth and depth of share ownership throughout British society.³¹¹ In fact, some of her Privatization issues, were so massive that it was felt there wouldn't be enough takers in Britain, so facilities to place a tranche of these shares abroad were established.³¹² "No man is an Island"..., and certainly when money is needed in a globalizing world--one with relatively free flowing capital movements, this is certainly the case. Capital in such a situation, will flow to the source of its need, or the financial instruments will drift into an inviting anchorage in friendly foreign harbours.

"Breaking into New York"

The most likely destination for these shares, after the London market, was New York.³¹³ Placing shares in this market, however, posed problems for British issuers. Due to differences in accounting standards between the British and American systems of accounting, and the incompatibility of some elements of British law and corporate governance norms (then), with the Securities and Exchange Act (1934), it was decided to place these shares in trust, with a Trustee,

³¹⁰ Ibid.

³¹¹ ""McRae and Caincross", supra, note 51 at 155-156. Although "Gilmour", supra, note 303 at 103-104 would take issue with part of this thesis. He does admit that it was popular in the short term. How many small private shareholders have retained their holdings, or expanded them is open to question. There are more shareholders in Britain than ever before, and shareholding does percolate further down the social scale than heretofore had been the case. It must on these points, at least, be adjudged successful. The Lady herself, believes that national ownership of corporate entities is "...ownership by an impersonal legal entity...it amounts to control by politicians and civil servants" Thatcher, Margaret, The Downing Street Years (1993: London, Harper Collins) at 676-677. Hereinafter, "Thatcher". She continues in this vein when she notes that by returning these assets to the public, "...particularly the kind of privatization, which leads to the widest possible share ownership by members of the public, the state's power is reduced and the people's power enhanced." Ibid at 676. In her own mind, at least, privatization was a form of "people power".

³¹² "A Club No More", supra, note 151 at 660.

³¹³ "Arner", supra, note 283 at 1549.

in New York,³¹⁴ such as the Bank of New York,³¹⁵ and have that trustee issue units, called American Depository Receipts.³¹⁶ The accounts of these units, would be consistent with American Accounting Standards, corporate governance norms and the Securities Act.³¹⁷ Besides their normal British annual reports, these issuers also issue a separate conversion document, and a set of notes, reconciling British and U.S. G.A.A.P., so that investors, regulators and market players can understand and be fully conversant with the financial state of the company.³¹⁸

Ironing out the Kinks

This was an early example of the problems which foreign companies would face in cross-listing their shares on other nations' exchanges. It was from then on, that the International Accounting Standards Board and I.O.S.C.O. began their work in earnest.³¹⁹ This global market featured round-the-clock trading, extensive arbitrage opportunities, the cross-listing of shares, and the chance for finance companies to be truly global. In fact some, such as H.S.B.C. and I.N.G.-Barings, are in the process of establishing global "brands" in banking and financial services.

The Success of Privatization

From Britain and America, the privatization/deregulation revolution swept the world,³²⁰ with even such stalwarts of state owned industry as Canada (with its Crown Corporations) and Socialist Sweden privatizing some government assets. The two high points of this process had to be: (a) that many former Communist nations, in post-1989 Eastern Europe, adopted the privatization credo (often with disastrous results), and (b) that, in Britain, by 1987, the opposition Labour party, which had long been vociferous opponents of privatizing state assets, was trying to censure the government for not setting the price of British Petroleum high enough.³²¹ At this time, also, as we have already noted, the G.A.T.T./W.T.O., began to consider expanding tariff reform into the areas of services. As we have already established, finance had long been in the vanguard of globalization, at least from the time of "Cape Town to Cairo,"³²² and so it is hardly

³¹⁴ Ibid.

³¹⁵ Who acted (and acts) for companies, such as British Gas.

³¹⁶ "Arner", supra, note 283 at 1549.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ "Sommer", supra, note 103 at 23. Please see also, "Steinberg and Michaels", supra, note 34 at 238.

³²⁰ "Gilmour", supra, note 303 at 104. Please see also, "Arner", supra, note 281 at 1544.

³²¹ In effect, they were now "guilty" of not realizing enough of the value of the state asset, by not charging a high enough price for it!

³²² Finance was needed for railway construction in the outposts of Empire, and this famous phrase stated Britain's territorial ambitions in Africa, to have a Railway line, which ran from Cape town (Cape Colony,

surprising that finance reform and the ability of capital to travel to where it was needed, to finance projects overseas, would be among the earliest of deregulation reforms. Government policy, played and continues to play, a major role in the process of internationalization and international economic integration.

Communications Makes it Possible

The above-described revolution in market design and global trading would not have been possible without massive changes in technology, and in particular, within the communications technology sphere.³²³ We have all used the term "Computer Revolution"--but in finance, it really has been like a force 11 earthquake on a 10 point Richter scale! Along with advancements in computers, developments in communications, such as cellular telephones, text messaging, video conferencing and satellite communications, have allowed news, business information, orders to buy and sell, along with transfers of money and other assets to travel to the four corners of the world at the push of a button, or the click of a mouse. The round-the-clock trading revolution of the 1980's was facilitated by the increasing sophistication of computers.³²⁴ Day-trading would not be possible without the increased sophistication of personal computer technology and the dissemination of securities quotations in real time.³²⁵

The speed with which news of investment prices, market activities, underlying macroeconomic trends, or changes in the material facts of an issuer travels, has a direct bearing upon how quickly the market can absorb the information, and what use they can make of it. One of the natural inhibitors to the integration of securities markets, is the barrier imposed by uncertainties of market conditions and conditions influencing the material facts of foreign issuers. Removing this uncertainty reduces the costs of entry into this market by foreign investors, and reduces any risk premium an investor must pay to invest in these stocks.³²⁶ As we have seen to

South Africa) to Cairo (Egypt, and a British protectorate by the end of the 19th Century), going through entirely British territory. They eventually succeeded in possessing the real estate to fulfil these dreams.

³²³ Geiger, Uri, "The Case for the Harmonization of Securities Disclosure Rules in the Global Market" (1997) 283 *Columbia Business Law Review* 241 at 252. Hereinafter, "Geiger".

³²⁴ "Strange", supra note 130 at 100-102.

³²⁵ This is possible due to a combination of technology, know how, opportunity and the freedom to disseminate investment information, the investor's freedom to act upon it, and the ability of the distribution network to receive "rents" or charges for this service, either through subscriptions on the part of the service users, or through advertising revenue.

³²⁶ This is partly reduced where there is a fast flow of communications. Part of this problem recedes in the face of unified accounting standards as it is now possible to gauge a better picture of a company's results, while certainty of laws and enforcement mechanisms also reduces the risk premium or troubles which investors encounter in foreign markets.

date, the factors influencing entry are much more complicated than this simple example, but access to information has greatly assisted the integration of securities markets. Access to information has been greatly facilitated by the revolution in communications technology.

The Past as Present and Future

The world has had a long history of attempts at globalization. The Western Imperial experience helped lay the groundwork for today's globalization efforts. Revolutions in communications technology have been important, then and now. There are several concurrent processes of globalization at work presently, and each has its place in the process. Markets are becoming more globally integrated, as time goes by, and this has been made possible due to the confluence of government policy changes, and communications advances. We shall now examine macroeconomic regulatory and corporate governance models, to determine their effect upon the globalization of securities regulation.

CHAPTER 4

ECONOMIC AND REGULATORY MODELS, CORPORATE GOVERNANCE AND COMPUTERS

Part I A Diverse World

The world economy is a very diverse entity. Besides varying levels of development, economic sophistication, and institutional effectiveness, there are also legal, cultural (business cultural) and macroeconomic modular differences among nations of the world. Even within the western, or "first", world there are significant differences between macroeconomic structural models, corporate governance norms, legal and regulatory systems. This makes the task of weaving together these diverse strands of the world's legal mosaic and the global economy that much harder.

"No man is an island"... and on the world wide web the computer provides the bridge between these "isles" of economic activity and corporate cultural diversity. The ability of technology to cross national borders and evade national regulations present its own set of problems for nationally-based regulators, and hi-lights the differences in macroeconomic models, market sophistication and regulatory standards, which the world still labours under. What follows is a discussion of all these factors. We begin our discussion, however, with an examination of global macroeconomic modular diversity.

What Are The Two Major Macroeconomic Models?

There are many ways to structure an economy. Over time various models have been tried and rejected. Our purpose here is not to look at planning, Keynesiansim or Laissez faire but to examine the macroeconomic structure of a given nation's financial system.

The two macroeconomic structural models employed, by most nations today, are the bank-centered model³²⁷ and the stock exchanged centred model.³²⁸ The bank-centered model is

³²⁷ "Friedland", supra, note 50 at 8-10. Please see also, "Universal Banking", supra, note 50 at 86-91. As well, please see Dufey, Gunter, "The Blurring Borders of Banking", in Siebert, Horst (Ed.) The World's New Financial Landscape: Challenges for Economic Policy (2001: Heidelbere , Springer-Verlag) 117-138 at 117-118. Hereinafter, "Dufey", Please see also, Poser, Norman S. International Securities

especially prevalent in certain countries. European countries tend to employ this model, (although there are very notable exceptions to this rule),³²⁹ while the stock exchange centered model is particularly strong in Common Law, or English speaking countries (again with some very noteworthy exceptions).³³⁰

The Bank Centered Model--What is it?

As the name suggests, the bank centered model has, at its heart, a central role for banks.³³¹ In some countries banks, not the stock market, tend to be the gatekeepers of the financial system.³³² Banks in these countries are the major source of funds for corporate investment and capital projects.³³³ Through bank-brokered corporate alliances and through interlocking shareholdings between allied companies (in other words, companies within a banking consortium hold shares in one another, so as to assist one another and stave off take over bids). Under this system, banks are, also, the major arbiters of corporate control.³³⁴ In countries such as Germany, the universal banking model predominates.³³⁵ This model allows banks to engage in all elements of the finance business: Deposit Banking, Merchant Banking, Investment Banking, Brokerage, Insurance and International Banking (Foreign Lending).³³⁶ This system stands in contrast, to the United States model, which prevents Brokerage, Investment and Deposit Banking from being conducted by one entity.³³⁷

Regulation--London's "Big Bang" and the European Securities Markets (1991: Boston, Little Brown and Company) at 394-395. Hereinafter, "Poser".

³²⁸ "Friedland", supra, note 50 at 10. Please see also, Coleman, William D. Financial Services, Globalization and Domestic Policy Change (1994: London MacMillan) at 329. Hereinafter, "Coleman".

³²⁹ Japan in Asia, is one of the major proponents of the Bank Centred model, although she also has a very significant capital market. In France, the capital market is very independent of the banks, and until recently, the state was a major player in the financial markets. Holland, also, has a more bourse oriented, as opposed to a bank-oriented system. We shall give this question proper consideration, later on in the chapter.

³³⁰ That is not to say that Banks are not strong financial players in Common Law jurisdictions, nor that non-Common Law countries must, automatically, be bank-centred. These and other points will, again, be properly considered later on in the chapter.

³³¹ "Poser", supra, note 327 at 394-395.

³³² "Friedland", supra, note 50 at 8-10.

³³³ "Universal Banking", supra, note 50 at 91.

³³⁴ Ibid.

³³⁵ Ibid. please see also, "Poser", supra, note 327 at 4.

³³⁶ Ibid.

³³⁷ "Friedland", supra note 50 at 151. Although the formal division has now ended, as noted by "Dufey", supra, note 327 at 131-132. Banks, in the U.S., are still watched closely and their loan/Investment

Development of Capital Markets

In countries with a bank-centered model, the capital markets, while often significant (Frankfurt, Germany and Tokyo, Japan, for example), are relatively undeveloped and unsophisticated.³³⁸ These capital markets do not act as a market for corporate control, nor is there, traditionally, very much corporate fund raising activity carried out within these markets (Preferred Shares, Corporate Debentures).³³⁹ Bank loans, and bank syndicate sponsored funding packages, tend to make up most of the corporate fundraising activities in these countries.

Cartel-like Structures

In some cases, banks become part of industrial groupings. In Germany, this mirrors a cartel-like structuring. I say mirrors, because although the German Cartels were broken up years ago, the ownership characteristics of contemporary German industry mirror this model greatly.³⁴⁰ For example an auto maker, such as Daimlers-Benz, will frequently be aligned with a steel manufacturer, such as Thiesen, and a banking group (to provide liquidity as well as financial facilities for end-user consumers). This banking group will hold some Daimler-Benz shares, and may well arrange for a sympathetic "allied" entity to cross-hold shares in the car company. This entity will place some shares with the Bank, who may in turn, also arrange for Daimler-Benz to also acquire some of their allied company's shares. This structure ensures a degree of vertical integration, and corporate "allies" if they are ever needed.³⁴¹ This system cossets and protects incumbent management from shareholder activism, and from the ability of the minority shareholders to hold management to account for their actions and decisions. Certain schools of corporate governance, and certain commentators, hold that this is a bad thing,³⁴² certainly the role, rights, and status of individual small shareholders is open to question in such a system.³⁴³

portfolios are scrutinized carefully to ensure that depositor's money is protected. There are limits, however, as to how much depositors' money banks can place into equities.

³³⁸ "Universal Banking", supra, note 50 at 94.

³³⁹ Ibid at 92-95.

³⁴⁰ "Universal Banking", supra, note 50 at 90-91.

³⁴¹ Ibid.

³⁴² Certainly shareholder primacy is the orthodoxy in U.S. corporate law, as Stephen M. Bainbridge tells us in "Bainbridge", supra, note 21 at 47-48.. Although, as the author mentions the twinning of shareholder primacy with shareholder control (which many observers assume to be the case in Anglo-American capitalism) is a misnomer.

³⁴³ "Dutch", supra, note 96 at 68.

How Sophisticated are the Markets?

In some bank- centered systems, (Switzerland for example) the capital markets are very "thin", and feature a very low trading volume (of shares).³⁴⁴ This makes it difficult for shareholders to sell off their holdings in general or to realize a profit on them (as there seems to be less price movements than in the Anglo Saxon countries). This rigid and stagnant structure is changing,³⁴⁵ at least in Germany³⁴⁶ and Japan, but one of the downsides of a Bank-Centered system, is that in many countries, it has encouraged the creation of a weak, undeveloped, capital market.³⁴⁷ Markets, due to their traditional "junior"³⁴⁸ role in the financial structure, compared to banks, do not have the opportunity to become as sophisticated and developed, as, say Wall Street and the N.Y.S.E., or the City of London (L.S.E.). Take-over bids, junk bonds, derivatives, options and other "modern" financial market creations, either do not take root in such countries and markets, due to the primacy of the bank (as institution), within the financial model, or if these structures do emerge they are laggards compared to their "Exchange centered" brethren. Like any muscle, if the capital market is not given sufficient exercise it will not become vigorous and strong, but will be undeveloped and flabby.

What About Enforcement Mechanisms?

All markets have a policing element. London is self-regulating, but has placed some significant investigation and enforcement measures, in the hands of the S.F.A., and the L.S.E.³⁴⁹ At the other end of the spectrum, the United States Securities and Exchange Commission has extensive powers to root out suspected fraud and corruption and bring the perpetrators to justice.³⁵⁰ Bank-centered jurisdictions are no different, each has an authority charged with keeping the markets "clean". How effective each of these enforcement authorities are, is open to question. Switzerland for example would not, until recently, disrupt their strict bank secrecy laws to assist the S.E.C. with investigations regarding insider dealing in share transactions.³⁵¹ Since the Swiss market does not function in the same way as an Exchange-centered model market, this

³⁴⁴ "Poser", supra, note 327 at 404.

³⁴⁵ Ibid. at 405-407. A comprehensive package of Proposed reforms is laid out, by the author, some of which has subsequently been adopted. Switzerland, however, has not quite caught up with the Anglo-Saxon Exchanges.

³⁴⁶ "Universal Banking", supra, note 50 at 104.

³⁴⁷ Ibid. at 93-94.

³⁴⁸ Ibid.

³⁴⁹ Buckle, Mike, and Thompson, John, The U.K. Financial System. Theory and Practice 3rd Ed., (1998: Manchester, Manchester University Press) at 383-386. Hereinafter, "Buckle and Thompson".

³⁵⁰ "Mahoney", supra, note 11 at 314-315. The S.E.C. has been especially active in the International arena over the past few years, trying to enforce their standards.

³⁵¹ Ibid at 317-318.

omission was perhaps not as significant as it would be in the U. S. The enforcement authorities, in Switzerland, were not remiss or inadequate, as they only enforced the law on their books. The Swiss law itself, by international standards, was inadequate. The Swiss market capital is unsophisticated and underdeveloped;³⁵² hence their laws reflect this reality.

Legal Systems And Macroeconomic Models.

There is a perception that civil law countries are "natural" fits for a bank-centered macroeconomic model. This assertion does not conform to the facts. Holland is a civil law society yet their stock market behaves more like London than Zurich.³⁵³ France invented modern legal codes, yet her macroeconomic model is a hybrid between banks and bourse, between public and private ownership.³⁵⁴ Take-over bids and financings are more common place in France than in Germany or Switzerland. Japan is a civil law bank-centered macroeconomic entity, without the universal banking model--in fact the law creating Japan's post-war banking system was based upon the Glass-Steagle Act (of the United States),³⁵⁵ which features very strict and formal divisions among the various kinds of banks, and the roles and ownership structure of each.³⁵⁶

Culture and history, are often as significant as the legal system, in determining which macroeconomic model is established, and how the capital markets function within a given community. In Germany, for example, the family business model has predominated far longer than in many other countries. As family-owned concerns, in Germany, needed money, they tended to turn to small private banking houses, to provide the needed investment capital. Conversely, Britain has long since turned away from this model of investment capital provision.

This begs the question, is it a mere co-incidence that Britain and Holland have a similar approach towards investing and the stock market, and share a similar history of "outside" (non-family) shareholders, early on in their mercantile/capitalist experience?³⁵⁷ Some of the early Joint

³⁵² "Poser", supra, note 327 at 403-404.

³⁵³ "Dutch", supra, note 96 at 73. An example of this is in regards to the realm of take-over bids and the employment of the capital markets as an arena for corporate control (a corporate control mechanism). There are also movements towards the creation of new or revised corporate governance standards, perhaps more towards a shareholder welfare protection there heretofore had been the case.

³⁵⁴ "Coleman", supra, note 328 at 42.

³⁵⁵ "Universal Banking", supra, note 50 at 86-87. Please see also, "Friedland", supra, note 50 at 151-512.

³⁵⁶ "Friedland", supra, note 50 at 151-152. Although the formal division and prohibition was honoured more in the breach since certain restrictions, present in American Law especially "...the Attribution of ownership to affiliates and subsidiaries" Which "...are not present in the restriction on bank ownership in Japan".

³⁵⁷ "Dutch", supra, note 96 at 63-74.

Stock companies, in both countries, were monopoly foreign trading companies (the Dutch East Indian Company, The Hudson's Bay Company), or merchant adventurer's shipping companies.³⁵⁸ Consequently, these entities needed significantly more capital to finance their new ventures than a company creating a new foundry forge would require, hence we saw the rise of outside shareholding, in an earlier period, in Britain and Holland, than in Germany.³⁵⁹ It so happens that in the industrial development of many German City States, Kingdoms,³⁶⁰ and commercial centers, small scale (or relatively small scale) family capitalism was more prevalent than voyages of Global discovery.³⁶¹ Switzerland's capitalism, also, developed more along German lines, than Dutch ones. Having provided you, the reader, with a grounding in the bank-centered model of macroeconomic structure we now turn our attention to the private finance capital (or stock market) centered macroeconomic model.

The Private Finance Capital (Stock Exchange-Centered) Model of Macroeconomic Structure.

What is it?

In many countries, the macroeconomic structural system is centered upon the stock exchange. This system features the stock exchange, as primary arbiter of the financial system, and as the main fundraising vehicle for business.³⁶² Under this system, a company desirous of cash goes out into the market and sells newly issued shares, or sells new kinds of shares (say of preferred shares [if they already have common shares out in circulation]).³⁶³ They also use the corporate bond market, or they float an issue of corporate paper in the money market. banks, bank loans, and bank financing do play a role in these nations' economics, but they are minor compared with the role played by the capital markets.³⁶⁴ In these stock market centred economics, banks are frequently players in the capital markets themselves; in Canada, for example, many large Bay Street brokerages are owned by Canadian chartered banks.

³⁵⁸ Ibid

³⁵⁹ Kynaston, David, The City of London. Volume I A World of Its Own 1815-1890. (1994: London, Pimlico) at 16-17. Hereinafter, "A World of its Own". War finance and government debt, also played a significant role in the development of the City of London as a premier financial centre in the 17th and 18th centuries.

³⁶⁰ Germany, until 1870, was a series of principalities and Kingdoms (in fact they numbered several hundred before Napoleon), united by Prussia, into the German Empire (1870).

³⁶¹ Carr, William A History of Germany 1815-1945 2nd Ed. (1979: New York, St. Martin's Press) at 18-19 and at 36-37. Hereinafter, "Carr".

³⁶² "Friedland", supra, note 50 at 8.

³⁶³ "Gillen", supra, note 284 at 16-17.

How Developed are Capital Markets in these Countries?

Not too surprisingly the Capital markets, in the private capital finance model countries, are highly developed. Since the market is employed frequently in these jurisdictions, the "muscle" gets lots of exercise; hence it becomes toned and strong. The high degree of utilization of capital markets, for a plethora of purposes, has allowed for the development of a range of financial service products to accommodate a multitude of different users.³⁶⁵

How Sophisticated And Mature Are These Markets?

Without wishing to generalize, it can be said that the more significant the role of a capital market is to an economy, or macroeconomic modular system, and the larger, and more diverse, the clientele, the more sophisticated the market will have to become in its offerings of financial service products to keep these market participants happy.³⁶⁶ Markets whose muscles are highly toned and developed, due to the multitude of demands placed upon them and the roles required of them, are likely to be more mature and developed than those markets, whose roles are fairly minor. There are certainly exceptions to this rule, but it is as good an explanation as any.

It is interesting to note that most of the financial service sector innovations, or novel products, over the years have been invented or tried out first in these markets. Options, Derivatives and partially paid shares (shares of new issues paid for in installments) all originated in an Exchange centered market.³⁶⁷ Since there are a plethora of heterogeneous capital users, and a myriad of requirements placed upon capital markets in societies following this model, it stands to reason that these markets would also create the most innovative financial products. We now turn our attention to regulatory standards in countries following this macroeconomics structures pattern.

How Effective are the Regulations?

It is impossible to generalize or editorialize about the effectiveness and quality of legal supervision, when confronted with a plethora of regulatory regimes and a myriad of countries, but it is safe to say, that in all countries that follow an exchange centered macroeconomic model, there is a strong respect for the health of the market, and the desire for there to be a fair, open and honest market. Most significantly, there is also a strong desire to maintain the appearance of

³⁶⁴ "Friedland", supra, note 50 at 8.

³⁶⁵ "Khoury", supra, note 5 at 80-83.

³⁶⁶ Ibid. Most of these came from sophisticated Exchange-centred nations.

market honestly and openness. This is to maintain the public's confidence and ensure their continued participation in the stock market. It is in this context that the Enron debacle must be viewed.³⁶⁸ There was a crisis of investor confidence in the market after the scale of the Enron scandal became apparent,³⁶⁹ and to maintain public confidence, and rectify the situation, significant remedial measures were undertaken.³⁷⁰ Other elements of a common regulatory approach include the desire to stop insider dealing,³⁷¹ and coming down hard on those who make false or misleading statements.³⁷² This, again, is done to protect the market's reputation and buttress public confidence.

Do These Laws Work?

The effectiveness of the enforcement mechanism can be gauged by the fact that prosecutions do occur, and that scandal or not, investors still invest in the market; it is also noteworthy that when a significant scandal or evidence of misdeeds occurs, it is a cause célèbre.³⁷³ If corruption in the markets was considered commonplace, or just part of doing business, evidence of wrongdoing, market manipulation and other corruption wouldn't merit front-page headlines. The legal systems and regulatory regimes, vary in each of these countries. One approach is represented by the United States system of regulation, with the S.E.C. and The Securities and Exchange Act at its heart.³⁷⁴ The second approach has traditionally been London's system of self-regulation. Traditionally this market was self regulated by the Exchange (L.S.E.), and groups like the Securities and Futures Authority (S.F.A.). This has now given away to a statutory approach, under the authority of the Financial Services Authority (F.S.A.). This organization does have a wide mandate and covers all aspects of the financial system. This organization authorizes and registers firms and market participants, and also imposes criminal sanctions when necessary (although they must apply to the courts to obtain the authority to do so). This agency also works to educate consumers and seemingly behaves more like a Canadian

³⁶⁷ Ibid. Please see also, "Dufey", supra, note 327 at 125-126.

³⁶⁸ "Coffee and Flom", supra, note 82 at 1.

³⁶⁹ Due in part to fears that there were other potential "Enrons" out there, just waiting to erupt. Please see Ibid for a better explanation of the problems posed by all of this. Please see also Seligman, Joel, Prepared Statement of Professor Joel Seligman, Dean and Ethan A. H. Shepley University Professor Washington School of Law Tuesday, March 5, 2002, Oversight Hearing on "Accounting and Investor Protection Raised by Enron and Other Public Companies. U.S. Senate Committee on Banking, Housing and Urban Affairs. <http://banking.senate.gov/02-03hr/030502/seligman.htm> at 3. Hereinafter, "Seligman U.S. Senate".

³⁷⁰ "Coffee and Flom", supra, note 82 at 4-7.

³⁷¹ Trading for personal benefit on inside information (information that the general public does not have). Please see "Gillen", supra, note 284 at 270-272 for a complete definition.

³⁷² Ibid at 421-422.

³⁷³ "Seligman U.S. Senate", supra, note 369 at 2.

Securities Commission than the S.E.C.³⁷⁵ There are different ways of applying statutory regulation. Various countries, also, have different roles for their domestic Stock Exchanges, Finance Ministries, and Securities Administrative authorities. Although each system is different, they do have many similar norms. Maintaining the public's confidence in the market mechanism's in-corruptibility is primary among them.

Which Jurisdiction Has Such A Macroeconomic Structure?

It is not as easy as it looks to determine if there is any connection between legal systems and macroeconomic model. Most of the bank-centered economies, are also Civil Law countries. Most Commonwealth Common Law Countries are market-centered economies. However, in Canada³⁷⁶ and Australia,³⁷⁷ the banks have played a very strong role in the financial system, historically, and sometimes, through their ownership of brokerage companies, etc., have come close to playing a role similar to banks in a Bank-centered system.³⁷⁸ The Canadian Banking system is very similar to a Universal Banking system, and with the erosion of historic 4 pillars of Canadian finance,³⁷⁹ the Canadian Chartered banks are beginning to more closely resemble Universal Banks. We shall now turn our attention to the effectiveness of national regulation in the world of international transactions.

Part II National Laws Meet Global Transactions--Who Prevails?

As mentioned earlier, the W.T.O. system places international securities law into an enabling public international law context.³⁸⁰ The "Side to Side" globalizers create regionally

³⁷⁴ "Coleman", supra, note 327 at 158-159.

³⁷⁵ Pawley, Michael, Winstone, David and Bentley, Patrick, U.K. Financial Institutions and Markets (1991: London, Macmillan) at 237-254. Hereinafter, "U.K. Financial ". For an idea of the modern regulatory architecture, please see "FSA 2000", supra, note 35. As well, please see "Consumer Education" Financial Services Authority <http://www.fsa.gov.uk/consumer-education/> Hereinafter, "Consumer Education", Please see also, "Authorization" Financial Services Authority <http://www.fsa.gov.uk/authorization>. Hereinafter, "Authorization". Please see also, "Supervision", Financial Services Authority <http://www.fsa.gov.uk/supervision>. Hereinafter, "Supervision". As well, please see, "Enforcement" Financial Services Authority <http://www.fsa.gov.uk/enforcement>. Hereinafter "Enforcement".

³⁷⁶ "Coleman", supra, note 327 at 224-225.

³⁷⁷ "Cheffins", supra, note 19 at 24-25.

³⁷⁸ The primary guardians or operators in the system. Please see "Dufey", supra, ote 327 at 117.

³⁷⁹ Banks, Brokerages, Trusts and Insurance. Please see Canadian Securities Institute, The Canadian Securities Course (1993: Toronto, The Canadian Securities Institute) at 53-54. Hereinafter, "C.S.C.". Please see also, "It's Time", supra, note 264 at 8.

³⁸⁰ The G.A.T.S. here is seen as a prototype for a global Securities law, and certainly the Annex on Financial Services lays the groundwork for countries open their markets up to competition, and this body

integrated (or homogenizing laws) while the "Bottom Up" Globalizers create international laws, which are very "hands on" and functional, but rather narrow in their scope, and with a myopic vision. There are many "gray areas" or "black holes" where there is no global law or regulation. To date no "World Wide Securities Act" has been enacted. This leaves national jurisdictions free to enforce their own national laws.

PeaShooters vs. Tanks.

Since these various national laws are different, and form an uneven patchwork, they have sometimes proven to be inadequate tools for regulating a global securities market.³⁸¹ When dealing with transnational transactions, these national laws can be particularly ineffective against computer-based, or generated, transactions.³⁸² Sometimes the frustration of a national jurisdiction, or national financial regulatory authority, with the regulatory regime of another has boiled over and caused the frustrated jurisdiction (lets for the sake of an argument call that jurisdiction, the S.E.C.!)³⁸³ to take action against the "offending" jurisdiction. This causes the "good" jurisdiction to either impose sanctions upon the "offending jurisdiction", or to "pressure" them, (as the S.E.C. did with Switzerland)³⁸⁴ into adopting the desired Legislative outcome. In the alternative, the "frustrated" jurisdiction, can try to apply its own Securities Laws and standards to any or all transactions and dealings to which its nation becomes a party or to which it can potentially become a party.³⁸⁵ This last scenario is, in effect, an example of extraterritoriality.³⁸⁶

Many nations do not like having another nation's laws superimposed upon their own. These actions often create ill-feeling among nations and national regulatory authorities. "No Man

could always go further in subsequent annexes and flesh out some form of "Securities Law " or regulatory principles. This is certainly one school of thought or option open to the world's securities authorities. Please see "Annex on Financial Services", supra, note 248 and "Second Annex", supra, note 249. The utility of G.A.T.S. for this purpose is the opinion of John M. Fontecchio who feels it could bring the various national regulators together. Fontecchio, John M. "The General Agreement on Trade in Services: Is it the Answer to creating a harmonized Global Securities System?" (1994) 20 North Carolina Journal of International Law and Commercial Regulation 115 at 123. Hereinafter, "Fontecchio".

³⁸¹ "Gorra", supra, note 46 at 213.

³⁸² Rather akin to employing a peashooter against a tank. Please see, "Rice", supra, note 59 at 595-597.

³⁸³ "Mahoney", supra, note 11 at 306 and also at 317.

³⁸⁴ Ibid. at 317-318.

³⁸⁵ Brakebill, Kenneth W. "The Application of Securities Laws in Cyberspace: Jurisdictional and Regulatory Problems Posed by International Securities Transactions" (1996) 18 Hastings Community and Entertainment Law Journal 904 at 912-914. Hereinafter, "Brakebill". In his article, Brakebill cites the American Courts use of the "Effects Test" as justification for the extraterritorial extension of American Sovereignty to cover foreign based transactions involving Americans.

³⁸⁶ Ibid. at 912.

is an Island..." and in this world, national regulators can ill-afford to allow ill feelings engendered by the extraterritorial imposition of their regulations to colour their relationships with their regulatory colleagues. There are increasingly, however, more international conventions coming into force in a number of areas of legal endeavour, which may reduce the need for extraterritoriality. We shall now briefly examine how agreements are enacted into domestic law before examining, in depth, international regional harmonization (also called "Side to Side" globalization).

International Law As Local Statutes

As mentioned, earlier, modern nation states become signatories to global agreements and enter into global partnerships by a number of different means. International agreements, as mentioned previously, are enacted into Domestic Law in many ways. Nations become signatories to International treaties, such as G.A.T.S. or the Kyoto Accord, and then the provisions of these agreements are put into domestic law and practice through the enactment of domestic Parliamentary Statutes. Another way for fairly minor provisions, in International agreements, to come to life in a nation's Domestic Law, is by means of regulatory promulgation. In fact, there is probably more "international" regulations are promulgated than statutes. Domestic governments are not the only entities negotiating international agreements or enacting them into domestic law. International provisions are also enacted into law through the employment of organizations, such as I.O.S.C.O., whose provisions are introduced into domestic law by their member's national securities commissions.³⁸⁷ This national, legislative and global Q.U.A.N.G.O. activity, in enacting international legal provisions into domestic law, does not occur in a vacuum. Regional actors, also, assist the spread of globalization, through the use of "side to side" globalization techniques. We shall presently examine this process in depth.

"Side to Side" Front and Centre.

Regional trading blocks have become much more prominent in the last few years, although they have been around since at least the time of the Hanseatic League, in the 16th century.³⁸⁸ Regional blocks exist and make regulations under the W.T.O., as long as they don't do

³⁸⁷ "Zaring", supra, note 105 at 287.

³⁸⁸ Elton, G. R. England Under the Tudors (1997: London, The Folio Society) at 8. Hereinafter, "Elton".

so in violation of the member's wider allegiance to the W.T.O.³⁸⁹ The most successful trading block, in the modern world, is the E.U.,³⁹⁰ whose policies, we shall view presently.

"Harmonized Passports" And All That-The E.U.

Beginning with the Treaty of Rome in 1957,³⁹¹ and continuing to the present day, the E.U. has been steadily trying to re-mould the face of its member states, from a gaggle of squabbling enemies, into a homogenized entity.³⁹² How homogenized remains to be seen. The E.U., however, has made great strides in trying to unify, harmonize and homogenize various facets of law and practice among its member states. The E.U., is a work in progress, but its progress to date has been impressive.

One of the major areas of work undertaken by the European Commission, in the past few years, has been in the realm of financial services reform.³⁹³ Several attempts were made to bridge the gaps between member states' domestic laws, in a whole host of areas, including take over bids, common prospectus provisions, and common rules on market ethics.³⁹⁴ Due to the differential levels of capital market development and market maturity within the member states themselves, the "one size fits all" attempt to unify laws failed.³⁹⁵

As mentioned previously, many states in continental Europe, especially those existing in a bank centered Macroeconomic system, have relatively underdeveloped and unsophisticated capital markets.³⁹⁶ This sometimes also translates into a weak system of financial regulation. States, such as Britain, have rather developed markets, and sophisticated notions of market probity, etc. Trying to create a solution, which did not offend the local customs and legal traditions of the member states, yet still provide a "community standard", identifiable by all, was a dilemma for the Commission.³⁹⁷ The solution that emerged was a unique structure designed to

³⁸⁹ "Thomas and Meyer", supra, note 112 at 336-337.

³⁹⁰ Trachman, Joel P., "Trade in Financial Services Under G.A.T.S., N.A.F.T.A. and the E.C.: A Regulatory Jurisdictional Analysis" (1995) 34 Columbia Journal of Transnational Law 37 at 59-61. Hereinafter, "Jurisdictional Analysis".

³⁹¹ "Gilbert", supra, note 214 at 337.

³⁹² "Jurisdictional Analysis", supra, note 390 at 59.

³⁹³ Freshfields Bruckhaus Deringn Financial Services News <http://www.freshfields.com/practice/finserve/update/200110/eu.asp> at 1. Hereinafter "Financial Services News".

³⁹⁴ "Arner", supra, note 283 at 1553.

³⁹⁵ Ibid.

³⁹⁶ "Universal Banking", supra, note 157 at 94.

³⁹⁷ "Arner", supra, note 283 at 1554-1555.

move the process of normative standardization forward, without running afoul of traditional legal conventions, within these states. The secondary goal was to do this without watering down the legislation so much that we end up with a "race to the bottom."³⁹⁸

What Did They Do In The E.U.?

The European Commission, instead of unilaterally re-writing each state's securities laws, introduced a set of common minimum standards, for each member state to enact into its laws to ensure commercial probity, protection of investors, the positive reputation of the markets, and standardized, or unanimous, rules, in this area on the part of member states.³⁹⁹ This was done to ensure that no one could seek to gain entry into the E.U. by accessing a "weak link" in the E.U. regulatory chain.⁴⁰⁰ One of the most significant pieces of securities legislation which has emerged is a Common Prospectus Directive.⁴⁰¹

The Prospectus Directive--How Does it Work?

This directive, much as the M.J.D.S. does in North America, allows a listing company's compliance with one regime, within the E.U., to satisfy the listing requirements of the others.⁴⁰² Other jurisdictions, who have more stringent requirements than the Commission's Directive, may still keep their provisions on the books and apply them, to companies registering within their own jurisdictions; once a company has satisfied registration requirements within one E.U. member state's jurisdiction, however, they have a "single passport" to register or list on any other member state's Exchange.⁴⁰³ A Directive on common prospectus requirements, makes this possible. For those jurisdictions with fairly stringent regulations, such as the City of London, an E.U.-wide Common Prospectus allows the Exchange officials to assess the financial data provided by the company and ensure that it follows acceptable accounting and business practices (yet London can still maintain its own rules in areas not covered by the Prospectus Directive if it so chooses).⁴⁰⁴

³⁹⁸ Jurisdictions competing for business, by lowering their standards to the lowest common denominator, so as to make their jurisdictions 'business friendly' due to a dearth of "red tape", and the fewer questions being asked being best, as the operative policy. Please see Choi, Stephen J. and Guzman, Andrew T., "National Laws, International Money: Regulation in A Global Capital Market" (1997) 65 Fordham Law Review 1855 at 1874-1873. Hereinafter, "National Laws, International Money".

³⁹⁹ "Arner", supra, note 283 at 1553.

⁴⁰⁰ Ibid. at 1558.

⁴⁰¹ "Prospectus Directive", supra, note 257.

⁴⁰² Ibid. at 18.

⁴⁰³ Ibid.

⁴⁰⁴ "Prospectus Directive", supra, note 257 at 4.

Also key to making this system work is the use of unified accounting standards, and here the European Commission has adopted the I.A.S. ones, designed in conjunction with I.O.S.C.O. Furthermore, other I.O.S.C.O. initiatives and policies are to be used in other areas of Community-wide business legislation. This should allow the Commission to better integrate the member states of the EU into community law, and bridge the chasm posed by differing legal cultures and the differing historic experiences of commercial regulation, within member states. The Commission, however, was less successful in trying to create a take-over code. The proposal for a unified take-over code did not work, nor was the earlier attempt at a Prospectus Directive (the public offer Prospectus Directive [attempted in 1989])⁴⁰⁵ successful, in part because both directives tried to harmonize everyone together. A common "passport"-type directive with the community standards "Common Flooring" approach will now be tried in attempts to create the take over code.⁴⁰⁶ Based upon recent experience, with the Prospectus Directive, this approach is more likely to succeed.

"Gold, Frankincense and Myrrh"--The "Wise Men" Ride Again.

To monitor the progress of this harmonization and minimal standards process, a "Committee of Wise Men", under Baron Lamfalussy has been periodically monitoring the progress of E.U.-wide regulatory and legal harmonization.⁴⁰⁷ This progressive, and constant, approach has netted several benefits to the Commission, who now receive timely update reports on the progress of member states in complying with the Commission's various Financial Service Sector Directors.⁴⁰⁸ Since there is currently no E.U. Securities Commission, these "Wise Men" provide the "government" (in this case the Commission) with a degree of professional competence and specialized knowledge in this area, as well as an arm's length view of the harmonization process on the part of member states. They also file progress reports on Member States' compliance with Commission guidelines.⁴⁰⁹ Should the Commission ever consider a change in policy direction, these "Wise Men" could also advise the Commission on the feasibility of such a course and the ability of each member state's securities administrators to comply with such change.

⁴⁰⁵ "Arner", supra, note 257 at 1558.

⁴⁰⁶ Ibid.

⁴⁰⁷ In the financial services sector, that is. Please see, Transactions in Securities, <http://europa.eu.int/scadplus/leg/en/lvb/124031>. at 2. Hereinafter. "Transactions in Securities".

⁴⁰⁸ "Lamfalussy", supra, note 257.

Does This Help Us?

The work of the "Wise Men" and the Commission furthers the globalization of securities regulation, within the E.U. In much the same way as the Western Imperial experience, took innumerable linguistic and cultural groups and "streamlined" them into the top 8 major cultural and linguistic combines--the Commission is in the process of trying to create a common floor, or base standard, beneath which European regulations cannot sink. The Commission via this process, is also trying to bring additional business standards, rules and practices, among member states, more into line with one another.⁴¹⁰ Due to the different macroeconomic structural models being followed among member states, and due to significant differences in laws, legal regimes and business customs, this will take quite a long time to accomplish.

Eurospeed--Fact or Fiction?

Since the E.U. is represented by a single voice in trade negotiations, in the W.T.O., the development of a single market in Europe (and the concomitant national normative and structural reforms within member states to accomplish this goal) should help speed up the process of global financial sector reform within the W.T.O.⁴¹¹ Instead of waiting for Portugal to get on side with Germany, Spain, France or Britain--now all of these nations have broadly similar standards and rules. The more states in agreement, the fewer states to build consensus among, which should lead to faster negotiation times. In theory, this should help the W.T.O. in its efforts. The downside to all of this, however, is that should the E.U. adopt a policy, which eventually becomes at variance with where negotiators wish to shift the W.T.O., this can slow down, or grind to a halt, the entire trade process. Agricultural subsidies are an issue, which have led to disputes, between the Americans and the E.U., in the past.⁴¹² This has threatened the progress of previous trade negotiations and stands as an apt example, of what can happen if a single bloc of states takes a unified stand in a trade dispute. Potential source of problems or not, the E.U.'s efforts, in trying to establish minimum standards, and the "Single Passport" have done a great deal to facilitate the globalization of securities regulation. We now turn to an examination of efforts in the N.A.F.T.A. zone.

⁴⁰⁹ Ibid. at 6.

⁴¹⁰ Ibid. at 6-7. The committee are also well aware of their special position and their interim ad hoc type of role in the process of securities market reform.

⁴¹¹ In theory at least, if not always in practice. Although trade negotiations can drag on with this formula too. The Uruguay round lasted from 1986 to 1994. "Thomas and Meyer", supra, note 112 at 18-24.

What About North America?

In North America, Canada, the United States and Mexico have also been advancing the "side to side" globalization process through the creation of the North American Free Trade Agreement.⁴¹³ In the realm of securities regulation, this has seen the creation of the Multi Jurisdictional Disclosure System (M.J.D.S.) between Canada and the United States.⁴¹⁴ This allows shares to be cross-listed on the exchanges of each of the signatories to the M.O.U. establishing this system. The proposed consolidation of the Canadian Securities regulatory system should make this system function more smoothly, as companies will only have to deal with one national regulator.⁴¹⁵ To participate in the M.J.D.S., a jurisdiction's disclosure and accounting standards must be compatible with U.S. and Canadian standards (which, because of differences between U.S. G.A.A.P. and I.A.S., leaves out many of the world's jurisdictions), while the legal enforcement regimes must also be comparable.⁴¹⁶

To date, only Canada and the United States have signed this agreement.⁴¹⁷ It was originally hoped that Britain would join, also,⁴¹⁸ but remaining differences between British and American Accounting Standards, and the innovations of the European Commission (in the realm of financial services harmonization and community wide standardization) made this unlikely.⁴¹⁹ The initiative for the M.J.D.S. was taken by the U.S. S.E.C., in the hope of assisting with the cross-listing of foreign shares on American Exchanges.⁴²⁰ This did not happen, and instead,

⁴¹² Ibid. at 20.

⁴¹³ A new project, Free Trade of the Americas is in the pipeline. But if this entire hemisphere-trading group is to have any "teeth" it will take a long time to create. It will, at any rate, be a long time creating unified Securities laws for North, South and Central America, and for the Caribbean (a veritable minefield of Islets), and the South Atlantic, is upon us. On the current NAFTA, please see "Arner", supra, note 283 at 1550-1551.

⁴¹⁴ "Gillen", supra, note 284 at 110-111.

⁴¹⁵ Ibid. Please see also, "It's Time", supra, note 264 at 3 and at 18-19 and at 27. For an update on the current status of the reform process, please see "Strengthening Securities Regulation" The Budget Plan, Chapter 4 (Budget 2004) <http://www.fin.gc.ca/budget04/bp/bpc4c3.htm> at 19. Hereinafter, "Budget 2004". Currently the O.S.C. and the U.S. S.E.C.. By the virtues of M.J.D.S. being a national policy, companies regulated by the BC Securities Commission and falling under the B.C. or Alberta (or whichever Provinces') act, can list on the N.Y.S.E. the A.S.E. or N.A.S.D.A.Q. so long as they meet the Ontario Securities Act Standards. This would change under the proposed legislation, as there would be one regulator for Canada, located in Ottawa, who would establish national rules and regulations. Compliance would only then be necessary with one set of national regulations, as opposed to the current system, which requires companies in B. C. or Saskatchewan to meet the Ontario Rules to automatically qualify for entry into the U. S. market, and acceptance by the S.E.C. in the U.S.

⁴¹⁶ "Arner", supra, note 283 at 155.

⁴¹⁷ Ibid.

⁴¹⁸ "Cushing" supra, note 70 at 113-114.

⁴¹⁹ Ibid. at 103.

⁴²⁰ "Arner", supra, note 283 at 1551.

companies either stay away or use the trust vehicle of American Depository Receipts (A.D.R.'s) to facilitate foreign issues access to the North American capital markets.⁴²¹ Instead of bringing a large number of foreign cross-listings into the North American (in other words U.S.) market, this system has become a blue print for an integrated North American capital market. The provisions of the M.J.D.S. have been enacted into Canadian Law, and can be found in the Securities Acts of all the provinces. This will be maintained under the proposed Canada-wide Securities Regulatory authority, as identified by the Phelps Report ("It's Time"), and endorsed in the 2004 Federal Budget.⁴²² This was done under the provisions of a National Policy.⁴²³ When M.J.D.S. was signed, it was done under the auspices of a National Policy. Since at that time, Canada did not have a national securities law, M.J.D.S. had to be done through agreements between the O.S.C. and the U.S. S.E.C., with the proviso that Canadian companies registered in other jurisdictions could participate so long as they conformed to the O.S.C. standards. A National Policy is adopted by all Provincial Securities Commissions, in unison. (Call it a "Canadian I.O.S.C.O." if you like).⁴²⁴

What's Up With M.J.D.S.?

The M.J.D.S. features common prospectus standards and states that any prospectus satisfying the regulatory requirements of one jurisdiction satisfies the requirements of all members of the M.J.D.S. (in this case the O.S.C. and the U.S. S.E.C.).⁴²⁵ To date, most of the traffic has been one way, as Canadian companies have rushed south to list on the New York Stock Exchange or have gone to Wall Street, for their financing requirements. This system has worked because of the compatibility of the U.S. and Canadian Laws; besides both being common law jurisdictions (Quebec notwithstanding), the principles of "full, plain and true disclosure of all material facts" by a reporting issuer, and notions of the fairness, impartiality (and their appearance), are enshrined into the regulatory regimes and business cultures of both nations.⁴²⁶

⁴²¹ Ibid. at 1549.

⁴²² "B.C. Securities Act", supra, note 285 at 9-231 and 9-233. Please see "It's Time", supra, note 264 at 27. Please see also, "Budget 2004", supra, note 415 at 19.

⁴²³ Ibid.

⁴²⁴ This, of course, takes account of the crazy quilt of Canadian Securities legal jurisdictions, and the plethora of regulatory authorities. There is currently no national securities law for Canada, although this is about to change. Under the new regime, all policies will be "National".

⁴²⁵ "B.C. Securities Act", supra, note 285 at 9-231 and 9-233. Please see also "Gillen", supra, note 284 at 110-111, and "Steinberg and Michaels", supra, note 34 at 254-255. Please see, also "It's Time", supra, note 264 at 27. Please see as well, "Budget 2004", supra, note 415 at 19.

⁴²⁶ "Cushing", supra, note 70 at 108-111. Please see also "Steinberg and Michaels", supra, note 34 at 353.

The compatibility of Canadian accounting standards, with U.S. G.A.A.P., in no small measure,⁴²⁷ also, helps to make this agreement work.

New System--New Dangers

One danger with this system, as with the case of the E.U., is that the North American Bloc may begin to see this as a vibrant alternative to international harmonization.⁴²⁸ The U.S. has been known to insist upon its standards in the past in matters of global financial regulation.⁴²⁹ In fact, the recent success of the North American Stock Market (1992-2000) may be enough to convince the American authorities to hold fast against adopting I.S.A., and on insisting that an American level of enforcement, disclosure and normative standards be adopted by the other nations of the world. This could make the U.S. unwilling to compromise in the next round of W.T.O. negotiations.

Fortress America

The United States is not afraid to go against the rest of the world on issues they feel strongly about, such as the International Criminal Court. On an issue of great national importance to Americans, such as the control of the global financial system, they are less likely to give way to international pressure. These potential dangers notwithstanding, the process of North American regulatory harmonization (even if it is more narrowly focussed than within the E.U.) is helpful, in the process of facilitating the globalization of securities regulation.

What Are All Those Non State Actors Up To?

"Side to Side" is fine, but what about "Bottom Up"? The non-state actors, whom we have already met in Chapter 3, also, do their bit to "make our laws closer together". These institutions, simultaneously, work to harmonize or unify laws and regulations, often on a micro scale, while the "Top Down" and "Side to Side" globalizers, are working out some of the larger scale or "Big Picture" elements. These groups, as mentioned earlier, are either of a lobby, or pressure group type, or of a Financial Service Q.U.A.N.G.O. type. The later group possesses actual devolved power, from their national governments, and can initiate, as well as respond to, policy initiatives. The pros of this system have already been alluded to, and some of the cons also mentioned.

⁴²⁷ "Cushing", supra, note 70 at 109.

⁴²⁸ As was explained by Janice Bruner in her article on I.A.S., "Bruner", supra, note 94 at 930-935.

⁴²⁹ Ibid. Issues, such as I.A.S. (I.A.S.B.), Insider Dealing Provisions and the extraterritorial reach of the S.E.C. being just three thorny issues to come up between the United States and the rest of the world in the past few years.

Dislocation and Deficit

In a globalizing world, one increasingly divided into regional trading blocs, some of the dislocation and distance of decision-makers from democratic accountability begins to look quite serious. The ability of the "I.O.S.C.O. Community" to decide among themselves, that a certain policy is to come to pass, might lead them to "push" their host government into moving in the desired direction.⁴³⁰ This may or may not be a good policy initiative, but the process could lead to "capture" of the legislative process by these specialists, who then would begin to control certain narrow aspects of global financial policy.⁴³¹

With the talent of a group as formidable as I.O.S.C.O. ranged against him, a Finance Minister would have to be very brave to over-rule his most senior Financial Advisors and most respected market professionals. This sort of "group think and capture" mentality is termed Neo-functionalism,⁴³² in the realm of international affairs, and at least one commentator believes that the actions of these Q.U.A.N.G.O.s could eventually verge upon this;⁴³³ this would be harmful in an International globalizing order which is itself, remote enough already from average people.

While the concentration of greater power in the hands of non-elected and remote international financial services bureaucracies (such as I.O.S.C.O.)⁴³⁴ may be cause for concern, there is also a silver lining; the groups enacting "regulations" are also usually in charge of enforcing them. This would seemingly give them greater motivation to create rules, which are enforceable, and to redouble their efforts to make these rules work. Rules and rule-makers are important considerations in assessing the effectiveness of a regulatory system, and the rules by which business plays; however, the corporate customs (culture) of a jurisdiction, can be almost as important a determinant of behaviour as the written positive laws and regulations. We shall presently examine these concepts, and others, in our section on corporate governance.

Part III Standards Of Corporate Governance And Positive Law.

Corporate governance is a multifaceted entity, one which takes in reporting of financial results (quantitative standards), business ethics (Enron, etc.), the role of shareholders, and the roles of Non-Executive (outside) vs. Executive (inside) Directors, both in the management of the

⁴³⁰ "Zaring", supra, note 105 at 318-319.

⁴³¹ Ibid.

⁴³² Ibid. at 313.

⁴³³ Ibid. at 324-325.

company and at special times, such as during a hostile take over bid or tender offer. There is a veritable library of Royal Commission reports, Q.U.A.N.G.O. reports, and Lobby group reports, available along with some significant, landmark, studies such as the Cadbury Report and the Greenbury report. There is a complete "industry" in corporate governance, with pundits, academics, directors (or ex-directors) journalists and a bevy of ex-governmental officials, lined up on every financial talk show, news- cast or other media operation, ready to provide the viewers with the benefit of their knowledge.

Differences Between Norms And Cultures

Corporate governance norms differ among countries and corporate cultures. While positive laws are broadly similar, globally,⁴³⁵ the different systems of laws, legal regimes, corporate practice and histories of various nations have shaped their corporate governance norms. The roles of shareholders are different in Dutch companies, than American companies, for example.⁴³⁶

Some Observations on Regulatory Cultural Differences Between Nations

Nations may be brought closer together in a world wide web of commerce, but in matters corporate, there are still many differences in regulatory style and normative behaviour between the nations of the world. T. Boone Pickens, for example, is certainly an American phenomenon, one who could never exist in Switzerland (where there are almost no hostile take over bids). The concept of "Administrative Guidance", which is a policy option sometimes exercised by the Ministry of Finance and International trade in Japan⁴³⁷ to regulate the affairs of the Japanese securities markets, is an odd concept for Americans to fathom. Such governmental activities come across as rather opaque to American eyes.

The role of "The Old Lady of Threadneedle Street" (The Bank of England), and the use of self-regulation, in the financial services industry, was something which baffled regulators in some jurisdictions (who were used to a government centred regulatory agency). The role played

⁴³⁴ Ibid. at 327. Democratic deficit, remoteness from the electorate, and the potential for "group think" on the part of these aloof groups, which can also lead to neo-functionalism.

⁴³⁵ There are significant differences, but fraud is illegal in most countries as is theft, while parties who feel aggrieved can bring an action for breach of contract. Insider dealing is not illegal in some countries, and there are other things, which are crimes in one country, and permitted in others. However, these exceptions notwithstanding, this rule pretty much proves itself. For some ideas on differences, you can consult "Steinberg and Michaels", supra, note 34 or "Tractman", supra, note 22

⁴³⁶ "Dutch", supra, note 96 at 65.

by the new Financial Services Authority will change this culture, but investors, the world over, still seem to feel comfortable doing business in London, which remains one of the world's premier financial markets, even after the changes and upheavals of the past 20 years. German companies, still largely family and network controlled, find the S.E.C.'s levels of accounting disclosure far too invasive for comfort. In fact, America's insistence on F.A.S.B. and U.S. G.A.A.P., stands as a major roadblock to the progress of globalization, yet this is a very strongly held American corporate governance norm⁴³⁸ (which still did not protect American investors from Enron). "No man is an island" yet, in corporate governance terms, there sometimes seems to be vast archipelagos of culture, history, practice, and vested interest separating players in the international scene. In part this is due to the relationship between corporate governance and positive law, which we shall examine presently.

Positive Law and Corporate Governance--"Chicken or Egg"?⁴³⁹

The forgoing is a very useful point to consider when examining differences in corporate governance norms between nations. For example, to what extent has the American experience with the Sherman Act anti-trust busting (circa 1890 to the present) and the panoply of American Securities Law and administration as embodied in the Securities Act, and the Securities Exchange Act, (circa 1930's to the present) influenced American approaches to corporate governance? The American system of securities regulation is very formal, highly explicit (written down, in the U.S. Code, the Securities legislation and innumerable opinions, regulations and rulings by the S.E.C.), extremely legalistic, as opposed to a self-regulating and administrative model (the governing authority in the U.S., the S.E.C., are composed of lawyers, not industry professionals), and the investigation proceedings highly adversarial and judicial. Lawyers and law, not industry professionals and the exchange, lie at the heart of this system.⁴⁴⁰ The S.E.C. is empowered to act independently of the exchange,⁴⁴¹ the Treasury and even the U.S. Government.

Looking at the S.E.C.'s approach to corporate governance norms, either in America, or within other jurisdictions, it is arguable, that this same legalistic "Trust Busting" culture or those

⁴³⁷ "Friedland", supra, note 50 at 186.

⁴³⁸ "Brunner", supra, note 94 at 925-928.

⁴³⁹ An extrapolation of the old saying "Which came first --the chicken or the Egg?". In relation to our title, is and are corporate governance standards influenced by prevailing positive law and legal culture, and /or how do corporate governance norms influence that positive law?

⁴⁴⁰ Please see "Friedland", supra, note 50 Chapter 2 at 65-115.

same New Deal "norms" are visible. With the continued persistence of American authorities on the use of U.S. G.A.A.P. by those wishing to list in America,⁴⁴² one also sees a formalistic culture in evidence. The U.S. feels their standards are the best and that to satisfy certain corporate governance norms regarding transparency, et. al., these rules of financial disclosure must prevail. There are aspects of American securities law, especially the section dealing with disclosure, which are well served by U.S. G.A.A.P.,⁴⁴³ so moving to a system which enshrines a lesser standard of disclosure might do investors and other market actors a disservice, and run contrary to American Securities Laws and governing principles. The foregoing raises the very pertinent question: are these governance norms a result of the positive law regime which has grown up in the U.S., a system, which itself, was based upon a very specific American experience of Trust Busting,⁴⁴⁴ Anti-Competition Laws and rebuilding the U.S. financial system after the crash of '29,⁴⁴⁵ or are they a source of inspiration for the positive laws of the land? Do the norms follow the law or do the norms inspire law? Depending upon our answer to this question--can we extrapolate this rule and historic experience and apply it to other states?

In case of the United States, it seems that the prevalent views on corporate governance predate the Securities Act by a few months.' Professor Berle published his landmark article on the nature of the corporation in 1932.⁴⁴⁶ The famous Berle-Means test,⁴⁴⁷ identified the players in the corporate game, and set out their respective roles. The Berle Means test purports that management and the board of directors exercises judgement and runs the company on behalf of the company's beneficial owner - the shareholders.⁴⁴⁸ The long-term interest of the shareholders is the prime directive in other words.⁴⁴⁹ Shareholders can, and should, challenge incumbent management if they feel they are not working in the shareholder's (and hence the company's) best interest. The wide dispersion of these shareholders, and their relative dilution of forces, makes the mounting of such a challenge unlikely.⁴⁵⁰ Much of this thesis has been challenged, over the

⁴⁴¹ As opposed to the London Market, where the Exchange retains a certain degree of power and influence in the governance of member firms and participation within the London market. Please see "Friedland", supra, note 50 at 5-6 and 8-10.

⁴⁴² "Brunner", supra, note 94 at 930.

⁴⁴³ Ibid at 926-929.

⁴⁴⁴ "Friedland", supra, note 50 at 70.

⁴⁴⁵ Ibid at 67.

⁴⁴⁶ "Cheffins", supra, note 19 at 15.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid at 15-16

⁴⁴⁹ Ibid at 16.

⁴⁵⁰ Ibid.

years,⁴⁵¹ but it is still the benchmark used to compare against new theories on American governance. All theories of corporate governance, in the United States, take their cue from this.⁴⁵² Some theorists speculate that the passage of time and events have rendered much of this theory obsolescent. As a theory behind how shareholdings and the relationships between owners and managers work, it, however, still has merit.⁴⁵³ The rise of Pension Funds, Unit trusts and Mutual Funds, all of whom have or potentially have large shareholdings in a particular company, returns the theory of shareholder relations back to the Berle Means ideal--you now have several large shareholders of a company with enough votes, and shares, to exercise control over management, and hold them to account (although there is little indication of institutional shareholder activism).⁴⁵⁴ In this world of giants and titans, it is the small minority shareholders who get trampled in this dance of elephants. They cannot, as more than one commentator has pointed out, exercise anything approaching their "true" rights under the Berle Means test.⁴⁵⁵ These shareholders potentially get left out in the cold.

In the cold or not, the interests of small shareholders, and large, are protected by American Securities laws and corporate governance norms; in fact, protection of the individual shareholders' rights from the abuses of management, and actions which violate their fiduciary duties, or actions, which are not in the best interests of the company (in other words shareholders) are enshrined into American Securities Laws.⁴⁵⁶ The fact that many Deposit Banks, in the 1920's, had taken savers' deposits, and speculated unwisely and lost this money in the Stock Market (through investment portfolios, and through Banks acting as both deposit Bankers and Investment Bankers), led directly to the Glass-Steagle Act, which separated brokerage, Investment Banking and deposit Banking.⁴⁵⁷ American Corporate governance (and societal) norms such as shareholder primacy, and market transparency, (so that all players could glean a true picture of conditions), are plainly in evidence within the Securities Act and the Securities Exchange Act.⁴⁵⁸ In both our examples, the ground norms led to "Corporate Governance norms" and to their eventual translation into law and regulations. It is uncertain whether other jurisdictions'

⁴⁵¹ Ibid.

⁴⁵² For or against the base proposition, but base proposition it is. Please see "Bainbridge", supra, note 21 at 46-49.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid at 50-51. Maybe not what Professor Berle had in mind, but an approximation all the same.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid at 46-47.

⁴⁵⁷ "Friedland", supra, note 50 at 65-66.

⁴⁵⁸ Ibid. Chapter 3.

relationship between corporate governance and legislation is as clearly demarcated but, in the American case, this pattern is clear.

How does Holland do it?

In Holland the overarching ground norm appears to be a degree of social democracy and the social cohesion of society.⁴⁵⁹ Society is an organic whole, and the rights of workers, managers, shareholders and the long-term viability of the company must be considered.⁴⁶⁰ The long term is what the Dutch purport to plan for, which means that long-standing relationships between incumbent management, and the founding or ownership group of many companies.⁴⁶¹ Voting share are often restricted, with the ownership trust or group, having a "Super-Voting" or superior category of shares, to those held by the general public (the public can't usually vote, but they can receive dividends, and can sell their shares).⁴⁶²

Most "Un-American"

This certainly flies in the face of many American corporate governance norms. Some, but very few, American companies have such shares, and successful litigation has been launched against these kinds of structures, in some U.S. states. In Canada, such structures do exist, but they have come in for greater challenge of late, and may eventually die out. Certain Canadian companies have recently brought in these types of shareholdings and this is without controversy.⁴⁶³ Some schemes have seen this kind of structure but act as a kind of "Poison Pill" defense against takeovers. This is an intriguing concept, but might be against the corporate governance norm of holding corporate management accountable for decisions and of using the capital market as a device for corporate control.

In Holland the relationship between the shareholders and management is more respectful and paternalistic, than adversarial.⁴⁶⁴ Takeover bids are possible, and do occur, in Holland, but certain Poison Pills defenses, such as ballooning shareholdings, are available to Dutch registered companies. This has the effect of entrenching incumbent management, and makes a truly hostile bid much less likely to succeed than would be the case on Wall Street or in the City of London.⁴⁶⁵

⁴⁵⁹ "Dutch", supra, note 96 at 64-65.

⁴⁶⁰ Ibid. at 65.

⁴⁶¹ Ibid. at 66.

⁴⁶² Ibid. at 67.

⁴⁶³ Canadian Tire among them.

⁴⁶⁴ "Dutch", supra, note 96 at 65.

⁴⁶⁵ Ibid at 67.

L.V.M.H. ran up against this defense, when they mounted a hostile takeover bid for Gucci a few years ago.⁴⁶⁶ Gucci, an Italian Company, was registered in Holland, and, as such could, and did, take advantage of certain defenses against hostile takeover bids. The court, where L.V.M.H. pled its case, upheld these provisions,⁴⁶⁷ and eventually, when the designer Tom Ford threatened to walk, L.V.M.H. gave up. Under the subsequent European Securities legislation, this defense would likely be allowed to continue, since it was above and beyond the scope of current legislation. Whether an eventual European Takeover code will allow such defenses against takeovers is anyone's guess. It will, however, be interesting to see how the Commission proceeds with the thorny issue of how to open up European markets, and allow them to function as instruments of corporate control, while also not destroying the Haus bank or integrated holding company system which has predominated for so long in many continental European countries. Perhaps the W.T.O., I.O.S.C.O. or some other supranational body will "make up" the Europeans' minds for them, by creating a system, which the Commission will eventually sign onto, thereby eliminating the need to solve these intra-community differences in corporate holding culture "in-house".

Dutch Norms

It would seem that Holland's social compact between different stakeholders is one vote for "the chicken" (corporate governance) over "the egg". This Dutch norm seems to go back to the time of the Dutch East Indian Company,⁴⁶⁸ when it was felt that shareholders were really placing their savings in perilous conditions.⁴⁶⁹ Since some of these shareholders were also stakeholders in other ways with this venture, it seemed to be prudent to look after more than one constituency. Dutch Society, due to their history and sometimes perilous conditions under which they dwelled (waters, dykes, land reclamation and the damage of flooding, etc.) developed a co-operative social culture and identity.⁴⁷⁰ This was replicated in the corporate governance sphere and Dutch positive law followed. There may be some moves to adopt a more "U.S. style" set of norms, in the future, but contemporary Holland is a long way from this system.⁴⁷¹

⁴⁶⁶ "Luxury Goods Cockfight" The Economist March 27, 1999 at 64. Hereinafter, "Cockfight". Please see also, Hamilton, Kirstie, "Gucci Shareholders Threaten Court Action", The Sunday Times 4 April, 1999 at 3.3. Hereinafter, "Court Action".

⁴⁶⁷ "Court Action", *Ibid.* at 3.3.

⁴⁶⁸ "Dutch", *supra*, note 96 at 63.

⁴⁶⁹ *Ibid.* at 64-64.

⁴⁷⁰ *Ibid.* at 65.

⁴⁷¹ *Ibid.* at 73.

The Euro Dimension

In fact, it is this kind of normative question (national cultures and historic experience framing the laws of one nation but not another) which has bedeviled European negotiators in their quest to unify the laws and regulation.⁴⁷² Each State's experience is unique and historic experiences influence positive law. In countries where the capital market has not traditionally been a market for corporate control, the Dutch model of co-operative capitalism and their use of certain "Poison Pill" defenses would be quite acceptable.⁴⁷³ The aim, in some countries, has been to see the company as a revenue generator and a vehicle where the interests of many stakeholders are to be considered (while banks, in these countries, have played the role of middlemen or referee in the financial system [joining investors, creditors, and corporate entities together]).⁴⁷⁴ This "institutional" model is in direct conflict with the Berle Means model, which dominates Anglo-American corporate governance.

Governance Und Geld in Germany

In Germany, the banks, major shareholding groups, the block holding "group" (or majority controlling entity) form a bloc, which effectively excludes other shareholders from meaningful decision making.⁴⁷⁵ The legal requirement of allocating half of the board seats to workers,⁴⁷⁶ further encumbers German companies⁴⁷⁷ and makes "slash and burn" restructuring less likely due to large number of redundancies required. These two factors (block holders, and employee seats on corporate boards) in the eyes of some commentators, such as Mark J. Roe, have both prevented German companies from moving ahead,⁴⁷⁸ and helped retard the development of a properly functioning German capital market.

In examining corporate governance in Germany (and in some other European countries), we must also factor in the Co-determinism model which employs both worker's councils and Executive Councils.⁴⁷⁹ Both groups interests must be considered. Therefore, it is hardly surprising that consensus is hard to reach on corporate governance norms or positive law in

⁴⁷² "Arner", supra, note 293 at 1553.

⁴⁷³ "Dutch", supra, note 96 at 65.

⁴⁷⁴ "Universal Banking", supra, note 157 at 90-91.

⁴⁷⁵ Ibid. Please see also, Roe, Mark J, "German Codeterminism and German Securities Markets" (1998) 1 Columbia Business Law Review 167 at 167. Hereinafter, "Roe".

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid at 168-169.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

Europe.⁴⁸⁰ It will likely take a long time for the member states, of the E.U., to iron out an acceptable system; but given time, the continued monitoring of the "Wise Men" and the simultaneous work of all three kinds of globalizers, unification will eventually come.

What's Happening in Japan?

In some non-E.U. countries, who also have a bank centered macroeconomic structure, we see similar kinds of corporate governance norms or philosophies viz. a viz. the shareholders, other stakeholders, and the placement of "higher" motives than profit and shareholder maximization, at top of a corporation's list of priorities.⁴⁸¹ In Japan, the Keireitsu holding structures,⁴⁸² similar to the outlawed pre-1945 Zaibatsu,⁴⁸³ ensures that those companies allied with the company in question have a significant cross-holding of shares.⁴⁸⁴ Japanese banks, until recently, held a vast portfolio of shares.⁴⁸⁵ These factors, and the tradition of relying upon Bank financing for corporate expansion,⁴⁸⁶ also led to a sometimes thinly traded and inadequate market by international standards and an equities market, which became highly corrupt. Tokyo, these facts notwithstanding, is still one of the worlds premier markets,⁴⁸⁷ but it could be so much more if some structural reforms were made.

Japan's Schizophrenic Laws/Norms

Japan, ironically, is a country with an American style division of Banking activity (based upon the Glass Steagle Act).⁴⁸⁸ In this bank-centered economy, under the Japanese regulatory regime, only certain banks can cater to certain aspects of corporate activity.⁴⁸⁹ The other banks are called in to perform other functions. The national culture and dominant corporate governance norms, here again, put consensus, and the welfare of the group, above and beyond any constituency, such as shareholders.⁴⁹⁰ The maximization of shareholder's welfare is, therefore,

⁴⁸⁰ It also extends and greatly elongates the decision making time in corporate Germany. Please see "Arner", supra, note 293 at 1553.

⁴⁸¹ "Macey and Miller", supra, note 50 at 81-83.

⁴⁸² "Friedland", supra, note 50 at 151-155.

⁴⁸³ Ibid at 151-152. Please see also "Universal Banking", supra, note 147 at 86. As well, please see "Macey and Miller", supra, note 51 at 83.

⁴⁸⁴ "Macey and Miller", supra, note 51 at 80-83.

⁴⁸⁵ And often, in the Banking crunch of the 1990's had to liquidate them at terrific losses. Banks under the new banking law can only hold a maximum of 5% of a company's shares (down from 10%). "Universal Banking", supra, note 157 at 91.

⁴⁸⁶ "Friedland", supra, note 50 at 8-9.

⁴⁸⁷ "Khoury", supra, note 5 at 8.

⁴⁸⁸ "Friedland", supra, note 50 at 150-151.

⁴⁸⁹ "Universal Banking", supra, note 157 at 85-86. Please see also, "Friedland", supra, note 50 at 85-86.

⁴⁹⁰ "Macey and Miller", supra, note 51 at 83-87.

not on the top of corporate Japan's agenda, nor is it likely to be, so long as cross-holdings of shares in other entities are allowed.⁴⁹¹ Some companies have begun to sell off these portfolios, and while this has assisted market liquidity greatly, in Japan, it has depressed the price of some equities as they were "dumped" into the market in sufficiently large tranches, during corporate divestitures.

Japan--Crisis and Opportunity⁴⁹²

The economic crisis in Japanese finance has opened the way for major reforms,⁴⁹³ and while there have been some significant reforms to date, more may be needed to heal Japan's financial malaise.⁴⁹⁴ As we can see, culture, norms and corporate governance, often predates, or supercedes, positive law. Japan's experiences are different from America's in this area. We shall now presently examine some American Corporate governance issues.

Recent Events And Corporate Governance.

"No man is an island..." and in the realm of law, no one aspect of the legal, normative or regulatory system, of a given polity, operates independently of others. Law must be consistent with local cultural sensitivities, to gain the obedience of the governed; laws must be enforced, and justice must not only be done, but be seen to be done. Laws must adequately address contemporary problems, and issues and provide the public with the safety and protection they want and deserve.

In examining some recent scandals, and trying to relate them to the realm of corporate governance it would be prudent to keep the above legal nostrums in mind. It is arguable that aspects of American corporate governance and corporate law, were inadequate, and could not fulfil the lofty, yet necessary, "mission statement" for what law should do and be, as outlined above. As leading corporate governance guru, John Coffee III, testified before the U.S. Congressional inquiry, into Enron,⁴⁹⁵ it's not so much that there was something completely wrong

⁴⁹¹ Corporate Japan also found it prudent to liquidate some of these portfolios (also at great losses). Please see Ibid at 82-83.

⁴⁹² The Chinese character (Hanzi) for crisis, also means opportunity, hence, in the lore it has come down that every crisis also presents an opportunity, if you have the foresight to grasp it and take advantage of it.

⁴⁹³ Special Report, Japan, "The Non Performing Country", The Economist February 16, 2002 at 25. Hereinafter, "Non Performing".

⁴⁹⁴ Ibid.

⁴⁹⁵ "Coffee and Flom". Supra, note 82 at 1.

with the U. S. corporate governance system, just that it malfunctioned.⁴⁹⁶ The volume of trades today, computer tracking notwithstanding, makes individual trades hard to monitor. Unlike in times past, people, or market actors, who engage in dubious trading practices or engage in insider dealing, usually get caught by the market surveillance units. In some cases, however, the criminals leave the jurisdiction, send their money abroad, or lose it on other stock market speculations. Efforts are currently underway to block people from fleeing the jurisdictions, and to open up the accounts of banks in offshore banking centers, but this is a work in progress.

There may well be some aspects of North American, and in particular American corporate governance standards, which "invite" problems, such as Enron. The fact that Enron happened in the most highly regulated market in the world demonstrates, as more than one commentator observed, that no standard is perfect.⁴⁹⁷ Furthermore, perhaps too much information is required in disclosure and this may mean that the regulators, and public interest watchdogs, do not have enough time and resources to properly assess it all, and examine the data for fraud and regulatory evasion.⁴⁹⁸ This is a case of information overload, in other words.

Another observer pointed out the potential danger of combining too many roles into one entity.⁴⁹⁹ When auditors (accounting firms) also become business service consultants, and when business strategy becomes the mainstay of their business, the temptation to look the other way on the company's accounts can become too great for them to resist.⁵⁰⁰ This temptation "corrupts" the major gatekeepers of the corporate governance system-- the auditors. In the case of Enron this caused some very bad fallout in the wider market, and raised some significant issues of trust of the other market participants, on the part of the wider investing community. The decline in the number of large accounting firms means a greater concentration of business in the hands of a few firms, so there are now fewer firms to share the work.⁵⁰¹ Furthermore, you now have less choice in who you can hire to do your audit; now you can only choose between 4 or 5 large accounting firms, so if you became unhappy with one, you have fewer places to switch your business to.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ In other words, there were, therefore, fewer firms to chose from, (assuming that your business adviser and financial auditor had to be separate companies). Please see "Coffee and Flom", supra, note 82 at 2.

Taking Convergence Too Far!

I would argue that movement towards auditor/consultants takes convergence too far. Having an accounting firm do corporate strategy removes the accounting profession from its primary purpose--producing, auditing and reporting on financial records. This "convergence" in other areas of the financial world, banks, brokerage, investment banking and even law may give rise to more such scandals in the future. In retrospect, Enron looks "inevitable", although Prof. Coffee warns us not to view it as such.⁵⁰² In trying to discharge one set of duties (strategic thinker, business advisor, etc) these multi-taskers may fall down in another area (impartial auditor of company results, for example). Such potential problems underlines the necessity of formally preventing excessive "over-bleeding" of professional functions, to the greatest extent possible. If such over-bleeding becomes commonplace it is important to ensure that as many different sets of eyes see these results as possible. Some of these ideals could be enshrined into a system of International Corporate Governance. We shall presently examine the feasibility of constructing such a system, (with or without the emergence of a concomitant system of global securities laws.)

Global Corporate Governance Norms--Yea or Nay?

Construction of norms, without positive law to underpin it, would seem odd at first glance. There are many voluntary codes of conduct in the world, and there has been an attempt to write a corporate governance code at the global level, by the O.E.C.D.⁵⁰³ To date these concepts have not taken hold, nor have they gripped the imagination of either the corporate governance industry, nor any of the major players, in the globalization debate, such as the United States. That being said, it is still worthwhile to examine the feasibility of creating some global corporate governance norms ahead of a global set of securities laws. As has been demonstrated, previously, in some countries the "Chicken" does come before the "Egg".

Trying to Create Global Corporate Governance Norms.

At first glance, this notion seems counter intuitive. Based upon our examination so far, it seems that we do not have a unified or monolithic, globally accepted, notion of how business should be conducted. Nor is there consensus on the role of capital markets in the Macroeconomic structure of society. This would seem to make any consensus on corporate governance standards impossible. Furthermore, when even the Western world cannot agree on accounting standards,

⁵⁰² Ibid at 1.

the role of super-voting shares, whether to have employees on the Board of Directors of a company, and on the fiduciary duty of Directors,⁵⁰⁴ the prospect of consensus on corporate governance, in the wider world, seems slight. The world can't decide whether the corporation exists as a profit maximization vehicle, geared towards the maximum shareholder wealth maximization,⁵⁰⁵ or as an organic structure, geared towards wise stewardship of a revenue generating resource, whose responsibility it is to look after all the stakeholders of the enterprise, in the hopes of continued existence on the part of the corporation, and continuing pay packets (workers), dividends, (shareholders) taxes (government) and remuneration (Directors and Management).⁵⁰⁶ Since even the Berle-Means equation is questioned, by some observers,⁵⁰⁷ those with aspirations to create global standards for governing or organizing such a diverse and "controversial" entity (in the sense, that no consensus has emerged in the corporate world) seems wide of the mark. Yet, we live in hope, and shall try to do just this.

Who Should Set Them?

In trying to come up with global corporate governance norms, either "cum or ex"⁵⁰⁸ global securities law, it would be helpful to determine who should set them. This is an important question, because if the group setting rules and regulations is not respected among those with whom it works, its efforts will not be accepted. The efforts of the O.E.C.D. in trying to negotiate M.A.I., illustrates this point.⁵⁰⁹ This group is not universally respected, is not balanced in its membership (a significant number of member states come from the "Rich" Northern Hemisphere countries) and is exclusionist (while its policy actions have a global reach, not all states are members [the way they are with the U.N. or the W.T.O.]).⁵¹⁰ This gave the O.E.C.D. a credibility problem over M.A.I., which their opponents used to their great advantage.⁵¹¹ The W.T.O., which is more representative of the world's nation states, has now taken some of this work on, and while they may not be popular in some quarters, there is a greater acceptance of this organization, than of the O.E.C.D.

⁵⁰³ Wallace, Cynthia Day, "The Legal Framework for Regulating the Global Enterprise. Going into the New WTO Trade Round--A Backward and a Forward Glance", (2002) 16 The Transnational Lawyer 141 at 145. Hereinafter, "Wallace".

⁵⁰⁴ "Cheffins", supra, note 19 at 41-43.

⁵⁰⁵ Ibid. Please see also, "Dutch", supra, note 96 at 65.

⁵⁰⁶ "Dutch", supra, note 96 at 65.

⁵⁰⁷ "Cheffins", supra, note 19 at 16-17.

⁵⁰⁸ "Cum Securities Law"--in the context of having a global securities law in place. "Ex Securities Law"--without a global securities law having come to pass.

⁵⁰⁹ "Gamble and Ku", supra, note 254 at 255.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

Some Candidates

Some possible candidates for the drafting authority of global corporate governance standards are the International Chamber of Commerce, the International Accounting Standards Board, (which the United States participates in as a member, even if the United States is not a party to the I.A.S.) and the Stockholm Chamber of Commerce (who created one of the sets of rules commonly used for International Commercial Arbitration hearings). The W.T.O. could always take over the administration of these rules also, but this might then give them too much to do in this area, and stretch their resources beyond the breaking point. The W.T.O. Secretariat could always acquire additional resources, but this could also cause alarm among some states, who feel that this organization is already too powerful and intrusive in the lives of many states. The Stockholm Chamber of Commerce has already created a respected set of International Arbitral Rules, which are commonly used in the business world; they would be prime candidates to create a set of corporate governance norms. There are other candidates, also, to create these norms, no matter who creates them, the real question is who should administer them?

Where Would Administrative Power Rest?

Creation of these standards is only half of the battle. To make these standards effective, a way must be found to enact these regulations, or principles, monitor compliance and enforce any sanction, levied under them. The writ of the enforcement authority must run down to the level of the company, or party, engaging in the conduct deemed inappropriate. Short of creating a new global bureaucracy, with powers rivaling those of the S.E.C., it seems that the best way of enforcing "global" standards, and principles, is to have a "local" partner. National Finance Ministries and the local delegations of or to I.O.S.C.O. are possibilities, but the success of this formula is not certain, as these groups already have a great deal to do. I.O.S.C.O., may well have a role in administering a global system of securities regulations, so giving them normative supervisory responsibility, too, might not sit too well with some parties. The U.N. has always stayed out of economic affairs (hence the W.T.O.), so giving them the responsibility for administering these sorts of norms, might be an odd choice at first glance. Since the U.N. has tried to be the modern post-war world's "conscience", giving them this duty might not appear so strange after all. This would certainly promote a "division of powers" at the global level, with neither the W.T.O. nor an I.O.S.C.O. type organization acquiring too much responsibility and/or power in the international global governance equation.

Finding a group to administer these standards is one thing; while this may be a difficult thing to do, it is within the realm of possible. However, trying to decide upon penalties for transgression, and a means of enforcing this writ, is quite another (far more difficult), thing. There is also the danger that states, would view this corporate governance "watch dog" with derision or regard them as a threat to their nation's sovereignty and their nationals' freedom to contract and conduct trade. It is to a brief examination of these concerns that we now turn.

Will Global Standards Impair Nation-States' Sovereignty?

If the "global ethics guardians" are not respected (or feared) by national governments there will be credibility and compliance problems.⁵¹² States, in the international arena, tend to act according to their own national self-interest. Concerns over the economic well-being of a large company domiciled within a nation state's jurisdiction can exert great influence upon how that state addresses challenges (or perceived challenges) to its economic autonomy. National governments will resist anything, which threatens jobs, and the well being of its economic assets, business interests and voters. The recent controversy over the U.S. tariffs on Canadian softwood Lumber is a case in point. The W.T.O. declared these duties illegal, but the U.S. has continued to apply them. Recent movements by the U.S. to protect their textile workers in the south, from competition, shows that narrow national economic self-interest still often wins out. Corporate governance standards, ones with teeth, inevitably would cut into nation states' freedom of action; this might cause some states to attempt avoidance, if possible, or encourage them to try overriding the jurisdiction of the bureaucratic entity making these rules. The example of the O.E.C.D., and some of the Commonwealth Caribbean states, stands as a case in point.⁵¹³ The O.E.C.D. has embarked upon a campaign to combat money laundering,⁵¹⁴ and has created guidelines and issued reports on the progress of various national prudential systems⁵¹⁵ and in any

⁵¹² Ibid at 255.

⁵¹³ Drury, Trevor and Gnaedinger, Chuck, "Allegations of Underhandedness Emerge at OECD's Harmful Tax Competition Meeting in Paris" Tax Notes International March 1, 2001 at 1. Hereinafter, "Allegations".

⁵¹⁴ Financial Task Force on Money Laundering. "Basic Facts About Money Laundering" http://www1.oecd.org/fatf/Mlaudinging_en.htm Hereinafter, "Basic Facts" Please see also, Moulette, Patrick, "Money Laundering: Staying ahead of the latest trends: OECD Observer May 26, 2000, <http://www.oecdobserver.org/news/fullstory.php/aid/244>. Hereinafter, "Moulette". Also, please see, "Ten Years of combating Money Laundering" OECD Observer, October 1, 1999 <http://www.oecdobserver.org/news/fullstory.php/aid/63>. Hereinafter, "Ten Years". Also, Moris, Dr. Gilbert NMO, and Tosti, Padideh, "The Coming Anti-Climax Review of the OECD/FATF Initiatives" Center For Freedom and Prosperity <http://www.freedomandprosperity.org/papers/morris2/morris2.shtml>. Hereinafter, "Coming Anti-Climax"

⁵¹⁵ "Basic Facts" Ibid, "Ten Years", Ibid, Please see also, Financial Action Task Force on Money Laundering, "Developments in Non-Cooperative Countries and Territories" 7 September 2001,

or all improvement, thereto.⁵¹⁶ One of their points of focus, became the Commonwealth Caribbean Countries, whose banking laws were judged, by the O.E.C.D. to be promoting, or encouraging money laundering within their jurisdictions.⁵¹⁷

Antics of the O.E.C.D.

A great fight erupted over the O.E.C.D.'s proposals, which eventually saw the Secretary General of the Commonwealth, The Hon. Donald MacKinnon, and the head of the O.E.C.D. accusing each other of leaking documents, and creating misleading assumptions about the speed, nature, and progress of negotiations.⁵¹⁸ Eventually American pressure groups, including the Center For Tax Freedom a Washington, D.C.-based anti-tax "pressure" or "lobby" group, got involved in trying to stop the O.E.C.D.⁵¹⁹ Among other things the O.E.C.D., was accused of trying to force these nations into imposing income taxes on their populations (currently free from this burden)⁵²⁰ and trying to force them to create a European style welfare state⁵²¹ (not necessarily true); suffice to say, certain parties to this dispute felt that it was in their best interests to oppose these measures, and a battle royal ensued. The O.E.C.D. is not the W.T.O.,⁵²² and consequently commands none of the respect, nor inspires any of the fear of this body. Furthermore, the more "restricted", and "elite" membership of the O.E.C.D., engenders much contempt in some quarters.⁵²³

<http://www.oecd.org/media/release/nw01-751.htm> Hereinafter, "Developments in Non-Cooperative". As well, please see OECD, "OECD Publishes Framework for a collective Memorandum of Understanding on Eliminating Harmful Tax Practices" 24 November 2000 Hereinafter, "Publishes Framework". Finally, OECD, The APEC-OECD Co-Operative Initiative on Regulatory Reform, 2000-2001 November 2000, (2000: Paris, O.E.C.D.). Hereinafter, "Initiative on Regulatory Reform".

⁵¹⁶ But for the low opinion in which they are held in some quarters, this would seemingly make them ideal for this job; since they have not the credibility in some quarters, they are not the ones for this task. Please see "Gamble and Ku", supra, note 254 at 255-256.

⁵¹⁷ Goulder, Robert, "Center for Freedom and Prosperity Encourages Bahamas to Defend Tax Policies" Tax Notes International January 2, 2001, <http://www.freedomandprosperity.org/Articles/tni01-02-01.shtml> at 1. Hereinafter, "Bahamas Defend".

⁵¹⁸ "Allegations", supra, note 513 at 1.

⁵¹⁹ Goulder, Robert, "New Coalition Strikes back at OECD Tax Haven Camp" Tax Notes International http://www.freedomandprosperity.org/Articles_on_tax_Xompetition/tni12-02-00/thi12-02-00...12/6/01. Hereinafter, "New Coalition".

⁵²⁰ "Center for Freedom and Prosperity Issues Memo to Low-Tax Countries Regarding the OECD Paris Task Force Meeting" Tax Notes International February 28, 2001 at 2. Hereinafter, "Memo for Low Tax".

⁵²¹ Cordia, Scott, "Congressional Black Caucus Says OECD Tax Move Unfairly Blasts Developing Nations" Tax Notes International March 27, 2001 at 2. Hereinafter, "Black Caucus".

⁵²² "Gamble and Ku", supra, note supra, note 254 at 255.

⁵²³ Ibid.

Willingness To be Bound

From the beginning international law been based upon the willingness of states (nation states being the major building block since the Peace of Westphalia in 1648) to be bound by the agreements they have signed.⁵²⁴ If a state will not be bound to an international agreement, or sacrifice a small portion of its sovereignty for a common purpose, (especially in light of Article 2 of the U.N. Charter, which calls upon members to respect the territorial integrity of other members, preserve their sovereign independence and refuses to recognize territorial gains derived from force of arms)⁵²⁵ there is little that other sovereign nations can do, short of declaring war to force the recalcitrant nation state into compliance!⁵²⁶ Boycotts, countervailing duties, breaking off of diplomatic relations, and blackballing the rogue states at International gatherings and assemblies,⁵²⁷ are all tools in the arsenal but alone, or even in conjunction, they cannot bring a recalcitrant state to heel.⁵²⁸

How to Sell These Standards

The difficulty in forcing Nation States to comply against their free will means that in setting corporate governance standards, the international body who sets them, must be fair, and their process of creation must proceed along on a consensual path. This means that they are likely to proceed gradually. The body chosen to write these rules (principles, etc.) must command respect and also have broad support from the entire community of nations. The group charged with enforcing them needs to be viewed favourably and trusted by the community of nations. The administration and application of these rules and regulations must be transparent, with the application of any sanctions, even-handed and fair. If these conditions do not exist, states, especially powerful states, will pick and chose which regulations to follow, and this will make global corporate governance rules and principles, less than universal. In answer to the question of whether these global corporate governance principles could arise before a systematic

⁵²⁴ "Bowman", supra, note 69 at 1935. Please see also, Lukasuk, I. I., "The Principle *Pacta Sunt Servanda* and the Nature of Obligation Under International Law" (1989) 83 The American Journal of International Law 513 at 513. Hereinafter, "Lukasuk".

⁵²⁵ "Boutrous-Ghali", supra, note 7 at 1610.

⁵²⁶ When Nazi Germany (and even Wiemar before it!) began to tear up the Treaty of Versailles, which the German Government signed in 1919, there was little the allied powers could do, short of going to war with them (which in the wake of the Great War, none of them were willing to do in the early 1930's). Please see Lamb, Richard, The Drift to War, 1922-1939 (1991: London, Bloomsbury) at 174-176. Hereinafter, "Lamb".

⁵²⁷ Such as happened to Zimbabwe at the recent Commonwealth C.H.O.G.M. in Abuja, Nigeria.

⁵²⁸ In many ways, North Korea, Cuba and Burma are 3 of the most fully autonomous nations in the world today, due to their relative isolation from the rest of the world, and their lack of obligation to other nations. Perhaps isolation isn't so good after all!

regime of global positive law, in regards to the trade of securities arises, the short answer is yes! Throughout history legal principles have often preceded, or underlain, the subsequent positive law adopted in a given jurisdiction. In creating a global law for securities trading, this pattern could potentially repeat itself. Having established some methods for the erection of global corporate governance principles, we now turn our attention to computers, and how they have affected law and governance, in the financial realm.

Part IV Computers In the Securities Industries--A True Challenge For Terrestrial Law.

We speak, often, of "The Computer Revolution", the New Industrial Revolution, or a shift in economic/social paradigm; nowhere is this more evident than in the Investment world! Long before day trading and on-line brokerage, came to the fore, computers had already radically transformed the Securities Industry.⁵²⁹ The City of London and Wall Street, once separate markets, with a half day (or more) information lag (the time taken for information, prices and results to "jump across the Pond"), now though still formally separate Exchanges, are in fact, part of a global market. The five-hour time lag between London and New York is the only thing that stops these markets running concurrently, but through arbitrage,⁵³⁰ the filling of part orders on the other Exchange, the exercise of options, etc., it is now possible to access both markets, simultaneously, in real time.

How Have Computers Changed The Securities Business?

Computers have impacted the Securities Industry in many ways. Their major effects upon the trade in securities can be grouped into 3 major categories: (1) Communicating news and information; (2) Spreading this information to a wide distribution network; (3) Allowing people to access the technology, interact with each other, and participate in its benefit. We shall presently look at all three.

Communication

In the days of yore (before computers) the ticker tape machines of old, gave some international prices and news, but only to brokerage houses, and a few select clients (those private clients wealthy enough to have their own ticker tape machines). Now the internet, and Financial

⁵²⁹ "Khoury", supra, note 5 at 179.

⁵³⁰ If you want 1,000 BP, your broker (or you!) can look up the prices in New York and London, and exercise the trade where you get the best price. "Khoury", supra, note 5 at 8-10.

News Services, such as Bloomberg, broadcast these prices and news in "real time" to the world (or at least to anyone who can gain access to a computer). In the 1980's the use of computers, faxes, satellites, and enhanced communications made round the clock trading possible.⁵³¹ This was, again, done by the industry professionals and intermediaries; in the '90's and beyond, this is being done by the general public. This is a long way from ticker tapes, trading on the floor of the Exchange, and the proverbial cigar chomping capitalist in a Top Hat.⁵³² Developments in communications technology have laid the foundation for this new world trading order-- computers are the engine, which drives it forward.

The Computer and Business Applications Change.

Computers have been most prominent in the emergence of a global trading order. Some of the changes and innovations of the last three decades have already been mentioned in this section, while the capacity to electronically transfer funds globally, in a nanosecond, has already been dealt with in some detail. Computers have affected the securities industry in both the retail and institutional sides,⁵³³ both in the buying and selling of securities, but most intriguingly, their effect has been seen in portfolio management and investment philosophy.⁵³⁴ New concepts of how to enter or participate in the market have been thrown up by these computer-inspired investment vehicles.⁵³⁵ Furthermore we now have, thanks to the internet, the option of receiving prospectuses and disclosure materials on-line,⁵³⁶ not to mention the option of purchasing shares through an on-line offering or primary distribution.⁵³⁷ These have all been cleared by the US S.E.C.⁵³⁸ and been found, with certain caveats and restrictions to be completely lawful;⁵³⁹ the S.E.C. has also, however, created criteria for allowing these to take place.

⁵³¹ Ibid. at 8.

⁵³² The character best illustrated in the character "Daddy Warbucks" (Little Orphan Annie) or Mr. Monopoly (from the game "Monopoly").

⁵³³ "Khoury", supra, note 5 at 8.

⁵³⁴ Ibid. Please see also, "Dufey", supra, note 327 at 127.

⁵³⁵ Ibid. Day trading, aggressively buying and selling as opposed to long term investment, people investing in Mutual Funds, and checking their investments on line, are just a few of these new innovations.

⁵³⁶ Gerstein, Kenneth S. Securities Regulation and the Emerging Online Financial Institution http://www.srz.com/pub/sec_seminar_1.html at 2. Hereinafter, "Gerstein".

⁵³⁷ Littenberg, Michael R., SEC Issues New Internet Release <http://www.srz.com/pub/inm-newsletter.html> at 4. Hereinafter, "Littenberg".

⁵³⁸ Ibid at 4-5.

⁵³⁹ Ibid.

Computers As Globalization Facilitators.

The computer revolution has made the revolution in financial services, trading possible. Globalization, in financial services, would not have been possible without the advances in computers, alluded to earlier.⁵⁴⁰ Advances in laws, have also played a role in the expansion of globalization. Yet, without the ability to link up with (or reach out to) foreign, locales, the ability to disseminate information to investors and the ability to grant them access to foreign locales, and markets in a timely manner, globalization would be a hollow shell. Computers and computer technology facilitate the workings of a truly global market for capital, one conducted in real time. Arbitrage opportunities--won't always wait until you wire the money, or call up your broker on the transatlantic telephone; nor will some opportunities wait until paper contracts or prospectuses come through the post. Modern globalization is about speed--speed of communications and speed of action!⁵⁴¹ Without computers, you cannot, in the context of financial markets, have either!

Tajikistan and Virtual Capitalism

Communications (and computer) advances have advanced the boundaries of globalization. What follows, is a small illustration of the centrality of computers in facilitating international transactions. There has been a lot of effort expended recently, in developing the lands and resources of former East Block territories. In particular, the oil wealth of the Caucausses has come in for examination and exploitation.

For our purposes, suppose that a company wished to lay a pipeline in Tajikstan and tap into her oil wealth. You cannot build a pipeline in Tajikistan without the money to pay for it. Carrying large sums of money is dangerous, and Tajikistani banks might not honour your cashier's cheque. Furthermore, your joint venture partners might not want to wait for their money for three weeks. Computer based communications technology, makes it possible to do these transactions in a short time. While these technological advances, may make globalization possible, they do present regulators with significant problems. We shall presently turn to an examination of some of these difficulties.

⁵⁴⁰ Arbitrage, dealing on two markets simultaneously, day trading online brokerage, DIY trading, on line prospectuses and on line offerings. Please see "Khoury", supra, note 5 at 10. As well, please see "Brakebill", supra, note 385 at 904-909.

Computers--The Regulators' "Problem Child".

Computers networked together into the internet, present regulators with both a challenge and an opportunity.⁵⁴² Computer-based transactions, can jump regulatory fences, and computer based information sources, can outwit the best government censor. Bulletin Boards and Chat rooms provide fraudsters with great opportunities to promote their vision (of where a stock's price should be),⁵⁴³ disseminate their own information (whether or not it has any bearing on reality),⁵⁴⁴ and spread rumors and gossip (which, especially during sensitive periods {take over bids, etc.} have been known to influence prices), and to do this with near impunity, (hiding behind a pseudonym; and/or getting a hacker to break into other people's computer accounts and use their identities as an alias).⁵⁴⁵ In effect, these are new twists in an old game.⁵⁴⁶ None of these tactics is new, nor can crooks be easily stopped. However, as the authorities master one "new" fraud technique, another is adopted by the crooks. Furthermore, it takes a great deal of time and money to uncover a tangled World Wide Web of deceit, and, sometimes, law enforcement agencies are hampered in their efforts to do this.

Solicitations--New Twists on an old Game.

One thing, which never seems to change in the Investment world, is that somebody is always touting the next "get rich" quick scheme. The internet now allows people to do this seemingly away from (or out of the reaches of) the law. There are certain jurisdictions, who are more "Fraud Friendly" (for our purposes we shall call them safe harbors for Cyber Pirates) than others. Within this "select" group, Nigeria stands out as one of the "best" fraud friendly jurisdictions. Cyber pirates make use of these harbours as bases to stage bold raids and "plunder expeditions" against unsuspecting web surfers.⁵⁴⁷

The S.E.C. has been very aggressive in trying to protect their nationals against this web Piracy gone mad.⁵⁴⁸ They have drawn upon their "Snail Mail" actions, (their policies adopted

⁵⁴¹ "Brakebrill", supra, note 385 at 902-904 and 905-909.

⁵⁴² Starr, Judith R. and Herman, David "The Same Old Wine in a Brand New Bottle: Applying Traditional Market Manipulation Principles to Internet Stock Scams: (2001) 29 Securities Regulation Law Journal 236 at 236-237. Hereinafter "New Bottles".

⁵⁴³ "Rice", supra, note 59 at 567.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ "New Bottle", supra, note 542 at 237-239.

⁵⁴⁷ Keeping with our Pirate metaphor developed earlier. For more on Pirates, see, Konstam, Angus and McBride, Angus, Pirates, 1660-1730, (1998: Oxford, Osprey). Hereinafter, "Pirates".

⁵⁴⁸ "Gorra", supra, note 96 at 224-225.

against bogus solicitations made by post), in their endeavors to stamp out this fraud. The fact that they have to battle miscreants in all of cyber space is a very significant hurdle to breach. The S.E.C. has concluded that an offer made to sell securities anywhere in the world, is one, which can conceivably, impact U.S. investors (although under certain circumstances, they have backed away from such a strict and literal interpretation of their powers).⁵⁴⁹ The S.E.C.'s main position is technically correct, but logistically impossible to enforce. Trying to impose your laws upon the entire world takes extra-territorially to the greatest (and most ridiculous) lengths possible. The S.E.C. has enlisted the help of other enforcement agencies around the world, through the use of Memos of Understanding with other Securities Commissions.⁵⁵⁰ They also work with the Commercial Crime units of organizations such as the R.C.M.P. and Interpol, in the quest to stamp out Cyber Piracy.

The lack of global securities laws, and global standards for corporate governance and commercial conduct hampers their efforts. Since some states do not see an advantage in bringing their standards "up to snuff", these measures are not adopted by the "offending" nations. Since, as noted earlier, nation states cannot impose standards upon other recalcitrant nation states; short of going to war there is little that can be done. In the realm of economic affairs, adoption of corporate governance standards are still the prerogative of nation states, who do, or do not, adopt them, as they see fit. Even under the W.T.O.'s G.A.T.S. regime these matters, due to their complexity and the impossibility of building a consensus, would likely be consigned to a document similar to the Annex on Financial Services, which is a voluntary "opt in" sort of document.⁵⁵¹

Part V Global Corporate Governance Standards

In the last few years, the U.S. S.E.C. seems to have turned their attention away from trying to edit or control the Internet, and, instead, are now intent upon trying to get both the positive law and business standards (or corporate governance standards) unified (or harmonized),⁵⁵² globally. If you can't control the cyber space platform, their actions seem to

⁵⁴⁹ "SEC Clarifies", supra, note 65 at 1.

⁵⁵⁰ Lash, William H. III, "International Securities Regulations" (1997) 31 The International Lawyer 361 at 363-364. Hereinafter, "Lash".

⁵⁵¹ Although the expectation is that, eventually all states would sign up for all of the Annexes' areas of endeavour. Please see "Thomas and Meyer", supra, note 112 at 234-237.

⁵⁵² "Gorra", supra, note 46 at 224-225.

suggest, then you should control the actions on both sides of a cyber space transaction. This is a very difficult thing to do, in a world, where some states seek to harbour Cyber Pirates. The O.E.C.D.'s actions on banks' reporting and prudential measures (which was, partially designed to crack down on money laundering),⁵⁵³ is part of these efforts, and has had a significant measure of success⁵⁵⁴ (but also is a movement, not without controversy).⁵⁵⁵ These reform activities are a work in progress.

To have any chance of success, these anti-fraud efforts will have to continue. New partners will have to be brought into the fight against these pirates, and fraudsters. The unification of corporate governance, alone, will not solve these problems. No matter how this works out, the road ahead will be long and hard, and also fraught with many obstacles. Many states will see these measures (investment standards) as attacks upon their sovereignty and will throw up roadblocks. The criminal element will always try to stay one step ahead of the forces of law and order. It must also be remembered that law enforcement groups are often playing "catch up"--trying to respond to technological innovations, and new ways pirates employ technology for their own crooked benefit. This means that initiative is often in the hands of wrongdoers. States sometimes need to be convinced of the potential dangers posed by a new technology. Consequently they don't always respond pro-actively to new technology nor work to "close loopholes" in the law, to eliminate opportunities for criminals. This must change if the forces of law and order are to remain in the ascent. We shall presently examine how these many aforementioned stimuli are moving the debate over, and the pace of, cooperation in global regulation and enforcement, forward.

Do Computers Make The Case For Unified Global Standards?

The difficulty in controlling content on the web has been established.⁵⁵⁶ In the case of regulatory authorities, it is a case of them having the twin trouble of trying to control miscreants' access to their "unsuspecting" nationals via the web,⁵⁵⁷ and protecting their nation's "greedy, and gullible" investors from frauds, scams and other things that are designed to hurt them. In the regulatory endeavor, it is the latter, which frequently presents greatest problems than the former. In examining the actions of international regulators, it is instructive to observe the actions of the

⁵⁵³ "Basic Facts", supra, note 514

⁵⁵⁴ "Ten Years", supra, note 514.

⁵⁵⁵ "New Coalition", supra, note 519.

⁵⁵⁶ "New Bottle", supra, note 542 at 236-238. Please see also, "Rice", supra, note 59 at 595-599.

⁵⁵⁷ "New Bottle", supra, note 542 at 236-238.

U.S. S.E.C., the world's most invasive and pro-active securities regulator. After trying to unilaterally regulate cyberspace securities transactions which involve, or could conceivably involve, Americans,⁵⁵⁸ to the point where they were verging upon extraterritoriality,⁵⁵⁹ the United States authorities now seem to be pushing for a more universal form of corporate governance. This, when coupled with movements towards International Accounting Standards (although the Americans are not part of I.A.S.),⁵⁶⁰ behooves greater consolidation and standardization in other areas of law, practice and regulation.

A "Feeding Frenzy" of Regulatory Activities

These movements, also, feed off one another. For example, it is not much use to have international disclosure standards, if the numbers being reported by the issuer (from country A) are fraudulent, misleading, or the data used to calculate them, based upon a different set of assumptions than those which hold sway in the land where the stock is cross listed (country B). This, in a nutshell, encompasses the Enron⁵⁶¹ and International Accounting Standards dilemmas.⁵⁶² To give a degree of certainty to the probity of the calculation procedure and the integrity of those who create financial statements, some form of international standards would be optimal.

To ensure that investors can compare "Apples to Apples", a set of international reporting standards and calculation procedures, would be advisable. The persistence of the U.S. authorities in their "mission" to make the world "regulate American",⁵⁶³ means that either we continue with these to-ing and fro-ing sessions, between the players in international financial regulation, or we try to find agreement on a workable set of principles, standards and procedures.

The resentment felt by the other sovereign nation states towards unilateral incursions onto their sovereignty (such as the O.E.C.D.'s tussle with the Caribbean Commonwealth Countries,⁵⁶⁴ and the Swiss battles with the U.S. S.E.C. over insider dealing provisions shows),⁵⁶⁵ means that acting alone, on the part of one state (or national regulatory and enforcement agency), is not

⁵⁵⁸ "Gorra", supra, note 46 at 224-225, "SEC Clarifies", supra, note 65 at 1-3.

⁵⁵⁹ "Brakebrill", supra, note 385 at 921-923.

⁵⁶⁰ "Brunner", supra, note 94 at 930.

⁵⁶¹ "Coffee and Flom", supra, note 83 at 1.

⁵⁶² "Brunner", supra, note 94 at 930.

⁵⁶³ Ibid at 930. Please see also "Mahoney", supra, note 11 at 312-313.

⁵⁶⁴ "Allegations", supra, note 513 at 1.

⁵⁶⁵ "Mahoney", supra, note 11 at 317-318.

going to work. Inducements and sanctions must be devised to get all nations to sign onto such international standards, lest a few rogue states continue to act as "pirate dens" for Cyber Pirates and global fraudsters. The alternative, to such multilateralism is, as we have seen over the course of the last two decades, the unilateral imposition of American regulatory standards, by American authorities upon an increasingly resentful world. Since, as mentioned before, there is no way to compel a state to comply with their international obligations, consensus and agreement seem to point the best way forward.

"The Missing Connecting Link" to Global Regulation

While the web and computers don't, on their own, make these sorts of co-operations imperative, they do add the connecting link to the regulatory jigsaw puzzle. Without international markets, and legal regimes which promote interconnectivity, the ability to access and act upon this information would be of very little use. The advent of computers, however, does spur on efforts to reach some sort of consensus, or understanding, on international laws, regulations and corporate governance standards for the trading of securities. We shall presently examine how we might create such an integrated global trading system for securities in Chapter 5.

CHAPTER 5

CONDITIONS FOR CREATING AN EFFECTIVE GLOBAL SYSTEM FOR SECURITIES TRADING AND REGULATION

In Overview

To date we have examined many aspects of global securities law, securities regulations and the differences among the macroeconomic structural models employed by various nations. We have examined the problems posed by technology, which jumps borders, and the ensuing dilemma for terrestrially (and geographically) based laws and regulatory authorities. We have probed the limitations of national jurisdiction, and state sovereignty in a global commercial world. We have also discussed the degree to which states tolerate extraterritorial incursions into their sovereignty by the regulatory agencies of other states--all in the name of globalization. We have also discussed the role played by international organizations (of the QUANGO variety) in drafting regulations and in lobbying national governments to change policies, as well as the efforts by members of these organizations' national delegates in "lobbying" host governments (as individuals). We have also examined the role played by international lobby groups, such as the International Chamber of Commerce, in response to the issues of the day.

The Debate--To Date

The debate over the globalization of securities regulation, also, encompasses the roles played by business standards, corporate culture and corporate governance standards, so we have examined these topics also. Of special note, within corporate governance, is the problem posed by the "convergence" of functions formerly performed by separate entities, (e.g., accounting firms providing consulting services or corporate advice). The Enron debacle and some of the other problems, which arose out of such "convergence", remind us of the problems we can encounter as we move forward, both from the context of the evolution of business procedures, and by the attempts to globalize the way business is conducted. These issues and factors have been

examined at length, in this work, and must continue to weigh heavily upon our minds as we consider the best way to construct a global order for regulating the financial services industry.⁵⁶⁶

Proposed Changes--What We Must Bear In Mind

In advocating change to prudential and regulatory systems, we must keep in mind the differences in various nations' histories and legal systems as well as differing macroeconomic structural models. There is no "one size fits all" solution to the global regulatory dilemma. As has been mentioned previously, one nation trying to impose its norms upon others will not work (as we saw with the Swiss Insider Dealing Law and the O.E.C.D./Commonwealth dust up).⁵⁶⁷ We also live in a truly "global" world now.⁵⁶⁸ All players, jurisdictions, and participants, at all levels of economic and social development, must be accommodated. Yet the proposal must be effective enough to accomplish the goal of meaningful reform, and structural harmonization/unification. This is a significant challenge--one fraught with many perils. It is with the above caveats in mind, that we must now approach the business of "designing" the "optimal" global system for the trade and regulation of securities transactions.

"Universal"--Yet "Local"

The dilemma posed by trying to create a universal, or global, system yet keeping such a system in "local" hands, both in the control and regulation context as well as in the input or accountability context, is a very significant one. Assuming that the creation of a global S.E.C. (or world wide securities regulator) is not in the cards (at least for the foreseeable future), a means of proceeding must be found--one which builds upon local institutions and actors, and grafts the global onto the local. In a perfect world, where time is not an issue, evolution and gradualism are always the best policies. Since the pace of globalization, and the globalization of securities markets, are proceeding apace,⁵⁶⁹ and since computers allow people, the world over, access to any market, anywhere, time is of the essence.

⁵⁶⁶ By this I mean the Professionals involved in the industry (Lawyers, Accountants, Management Consultants, Brokers, Investment Bankers, etc), the securities industry (Exchanges, Banks, etc), and the corporate governance structure itself.

⁵⁶⁷ "Mahoney", supra, note 11 at 317-318. Please see also, "Allegations", supra, note 513 at 1.

⁵⁶⁸ The seemingly facile absurdity of this point, notwithstanding, this was not always necessarily, the case. "Hirst and Thompson", supra, note 51 at 18-20.

⁵⁶⁹ "Khoury", supra, note 5 at 2, also at 8-10.

Pirate Dens and Local Jurisdiction

Since jurisdiction over markets and market participants is still national, and is likely to stay so for the foreseeable future, it is with nation states that we must deal. One down-side of dealing with varying national jurisdictions, is that illegal anomalies, such as "cyber pirate dens" can and still exist, among the nations of the world. So long as nations or jurisdictions perceive any "national advantage" from allowing cyber pirates or other undesirables to thrive in cyberspace, this will not change. Since the world continues to view issues from the perspective of the nation, as opposed to the globe, parochialism and "Nimbyism" will continue to rule the decision making of nation states. Eradicating these cyber pirates and other on-line desperadoes, will require more than a naval flotilla.⁵⁷⁰ Gunboat diplomacy might be the only way to force states to close their "cyber pirate dens",⁵⁷¹ and since this is neither a practical, nor in light of the advent of the U.N. Charter and Security Council, a viable option, other means must be found to close up the "dens".

This growth and expansion, of the global equities market, has coincided with advances in information technology. As this global business has expanded national regulatory authorities have found that the traditional weapons in their administrative arsenals are increasingly ineffective if applied unilaterally. The seeming impotence of national regulators to act alone to combat computer generated frauds, has led to greater interest on their part in combining with their colleagues in other countries to stop global frauds. In effect, this means that "action this day",⁵⁷² is required.⁵⁷³ The fear that the expansion of global markets will also lead to an expansion in global frauds is a motivating factor, in the actions of national regulators (such as the S.E.C.). Global co-operation will go some ways towards eradicating these "pirate dens" and other jurisdictional evasion devices.

⁵⁷⁰ As was employed by the 19th Century Royal Navy off the Barbary Coast. Please see "Pirates", supra, note 547 at 2.

⁵⁷¹ As discussed previously, one of the few "effective" ways to coerce a recalcitrant nation state into honouring an agreement or commitment is to mount military actions. This is frowned upon, within the community of nations, and also goes against the U.N. Charter, hence is not usually a viable strategic option.

⁵⁷² To invoke Sir Winston Churchill's famous administrative instruction (used on Ministerial documents, and other orders he wanted executed quickly.)

⁵⁷³ Action sooner, as opposed to later.

Borders are Jumped--Governments Are Scared

Computers, and the "border jumping" technology of the web, present national regulators with a problem they have never faced before.⁵⁷⁴ Since communications, in the past, were usually physical (a piece of paper sent by post, etc) they could usually be captured or stopped by the police in a given jurisdiction. Telephone solicitations and communications can be curtailed, by the police working in co-operation with the Telephone authorities in the jurisdiction of the fraud's origin.⁵⁷⁵ Digitization, and the ability to transfer money in a nanosecond, has changed all of this.⁵⁷⁶ Far more worrisome, than this is the fact that computer hackers can hide behind innocent people, the world over, who have no idea that their phones, modems or identities are being appropriated for these felonious purposes.

If the police cannot catch fraudsters, the authorities, so the thinking goes, must be able to isolate their nationals from such villains. Alas, technology does not allow them to do this even with the requisite effectiveness.⁵⁷⁷ This places the onus upon national regulators to either protect their nationals from the fraudulent antics of others, or, at the very least, give their nationals a "fighting chance" against these pirates. Time and the pace of technology often make it appear as if the crooks and other fraudsters are ahead, of the game, in the battle for global supremacy. This perception (and the partial reality behind it) underscores the importance of creating a truly universal system.

What About The "Foisting"?

If our goal is to have both global corporate governance standards, and a seamless global system of securities regulation and Exchange rules, in place and to have it done "yesterday"⁵⁷⁸-- then our goal is unrealistic. Based upon the wide chasm of differences between nations and legal systems, creating a unified international system, right away, is impossible. This means that, in the absence of global consensus that we shall see either (a) a lot of foisting, (b) the acceptance by investors and regulators of the imperfect world we dwell in or (c) great patience, on the part of regulators and investors, as they wait while a system is developed by evolutionary means.

⁵⁷⁴ "Rice", supra, note 59 at 595-596.

⁵⁷⁵ Until recently phones had to have land-based telephone numbers and monies had to flow to a physical location (address on land in a national jurisdiction). Computers and wireless communications have changed all of this. For some information on the border jumping capabilities of computers, please see "Rice", supra, note 59 at 595-596.

⁵⁷⁶ "Strange", supra, note 151 at 100-103.

⁵⁷⁷ Ibid.

⁵⁷⁸ Immediately or post haste.

Firstly, we do not, thankfully, live in isolation. Unification goes on "Top Down", "Bottom Up" and "Side to Side" simultaneously and continuously. Secondly, neither (a); (b) nor (c) will work as stand alone options. We have seen in the Swiss case⁵⁷⁹ and in other situations⁵⁸⁰ where the S.E.C. and other regulators have thrown their weight around, that the "natives" do not like having foreign standards imposed upon them by extra-territorial means. In an ever globalizing world, putting up with a market mechanism which does not even try to protect investors is not an option, and invites greater problems;⁵⁸¹ investors will demand risk premiums on cyber transactions, market prices will become distorted, due to corruption and unequal trading practices, and, worst of all, people will lose confidence in a market which cannot even give the appearance of tracking down fraudsters, and preserving its image. With option (c) we may have to wait for the dawning of global consensus. In furtherance of this goal, we must actively work towards achieving it, while using the tools we have, inadequate as they may be, to crack down on corruption.

Genus of Consensus

There are currently enough rules which nations have signed onto, through G.A.T.S. and various I.O.S.C.O. type agreements, for consensus to emerge. What is needed is the political will, on the part of national governments, to enforce the protocols and agreements they have already signed. The efforts of the O.E.C.D.,⁵⁸² whose anti-corruption campaigns have amounted to a--"shame the financial Service Sector Johns"--⁵⁸³ approach to "outing" bad behaviour,⁵⁸⁴ might be one way to encourage proper behaviour and advance the process of reform, all while keeping the ball firmly in the court of national governments and regulators. In a world of free-flowing global capital, money will go to where it gets the best terms, where it has the best (safest) system of regulation, and where it makes the highest return on capital. Large global financial institutions, increasingly, control the flow of funds, and are increasingly demanding certain

⁵⁷⁹ "Mahoney", supra, note 11 at 317-318.

⁵⁸⁰ Ibid at 318-320.

⁵⁸¹ "Gorra", supra, note 46 at 212-213.

⁵⁸² The Financial Action Task Force Reports on the Latest Money Laundering Trends , (Paris, 25 January 2000) <http://www.oecdwash.org/NEWS/PRESS/2000/news2000-006.htm>. Hereinafter "Money Laundering Trends". Please see also, "Griffiths", supra, note 100.

⁵⁸³ "Forum Economic Ministers Meeting, Alofi, Niue, 25-26, July, 2000", Harmful Tax Competition and Money Laundering

<http://www.forumSec.org.fj/docs/FF.MM%202000/Harmful%20Tax%20&%20Money%20Lau...> 12/6/01. Hereinafter "'Niue", Please see also, "Ten Years of Combat", supra, note 290. As well, please see "Staying Ahead of Trends", supra, note 290. Please see, also, "Developments in Non-cooperative", supra, note 515.

⁵⁸⁴ Ibid.

regulatory safeguards or certain regulatory structures. Countries who are pro-active in setting up a regulatory system, compatible with what the financial services community advocates, see business flow to their jurisdictions. Those nations who do not enact optimal financial regulations see business (and capital) leave the jurisdiction. This fear has certainly been a motivating factor in both the creation of a new national securities regulatory system in Australia, and the proposed new national architecture for Canada.

"Desire the Right"⁵⁸⁵

The above "shaming" and "outing", notwithstanding,⁵⁸⁶ additional ways of rewarding good citizenship and sanctioning bad, on the part of national governments, must be found. The O.E.C.D., in its dealings with the Caribbean Commonwealth countries,⁵⁸⁷ showed great misjudgment. The external body (O.E.C.D.) treated some countries differently from others⁵⁸⁸ thereby negating the transparency and "level playing field" principles, (under which law and open capital markets operate). Under the O.E.C.D. regime, local standards and regulations were to be superceded by external rules "extraterritorially" imposed.⁵⁸⁹ Furthermore, these rules were being "foisted" upon these Caribbean Commonwealth countries by a self-appointed group of "experts" who did not have the sovereign power to impose such conditions;⁵⁹⁰ this group was not made up of sovereign nation states,⁵⁹¹ nor was it a group, whose membership was open to all.⁵⁹² In fact, the nations in question (the Commonwealth Caribbean Countries) did not belong to the O.E.C.D.⁵⁹³ There were, in the final analysis, lots of "sticks" pointed by the O.E.C.D., but no "carrots" pro-offered! As stated previously, the coercion of sovereign nation states is always inadvisable.

⁵⁸⁵ The Motto of the Falkland Islands (British Crown Colony), but as good a motto or mission statement for the international financial markets and their regulators, as any other.

⁵⁸⁶ "Developments in Non-Cooperative ", supra, note 515 and "Staying Ahead of Trends", supra, note 290.

⁵⁸⁷ Ibid.

⁵⁸⁸ It was alleged by some, that Luxembourg and Liechtenstein were being given more time to set their regulations in order, due to the fact that they were "European" countries (and that in effect the Paris based O.E.C.D. was playing favorites). Please see, Scott-Joynt, Jeremy, "The Row Over Offshore Financial Centres" 2001 1 Commonwealth Currents 2 at 3. Hereinafter, "Scott-Joynt".

⁵⁸⁹ "Allegations", supra, note 513 at 1.

⁵⁹⁰ Ibid.

⁵⁹¹ Nor was it an assembly of 1st Ministers of Finance Ministers, either. Please see, "Gamble and Ku", supra, note 254 at 255.

⁵⁹² Ibid.

⁵⁹³ Thereby violating the principle of the consent of the governed and the principle of "no taxation without representation" (a principle responsible for both the English Civil war and the American Revolution).

"The Swiss--Miss"

Similarly, in dealing with the Swiss regulatory authorities,⁵⁹⁴ the S.E.C., like the R.C.M.P., may "have ... got their man..."⁵⁹⁵ but the victory in the shape of the Swiss insider-dealing law was very hollow.⁵⁹⁶ There have been very few prosecutions under this law, the Swiss, an independently minded people at the best of times, were "not amused" with the actions of the S.E.C. The notion of insider dealing was not native to Swiss law;⁵⁹⁷ the authorities were neither fully committed to enforcing this new law, nor did they make the effort to culturally condition their markets, society, market players, or enforcement authorities to prepare for this new reality and make such vigilance a part of their ethical and legal canon.⁵⁹⁸ The tussle which the S.E.C. had with the Swiss authorities, to obtain enactment of this law, undoubtedly strained relations between the two nations, and made future co-operation between the two, on other issues, less likely. From the perspective of changing Swiss commercial practice, or of transplanting Anglo-American Corporate governance or legal norms into Switzerland, this policy must be judged a failure (although, as mentioned previously, some people would judge this exercise a success).

Does a Small Group "Pushing" An Initiative Heighten Resentment?

As we have seen throughout, when one or two actors, or a select group of state actors, are seen to be "pushing" or "advocating" a particular agenda or policy initiative, it does seem to breed greater resentment than when a larger, more diverse group advocates changes.⁵⁹⁹ If it is perceived that "the rich" or "the Western" Countries are "ganging up" on the "poor" countries, this can stiffen resolve and increase resentment on the part of the Third World. An illustration of this point occurred at the recent W.T.O. meeting, where the determination of the rich western nations

⁵⁹⁴ "Mahoney", supra, note 11 at 316-318.

⁵⁹⁵ A corruption of the R.C.M.P.'s famous motto "We always get our man!"

⁵⁹⁶ Although "Mahoney", supra, note 11 at 518, seems to take issue with me on this point. Yes, this law can be "spun" as a victory for American negotiating pressure, but the fact that there does not seem to be the will on the ground to enforce the law, means that Swiss commercial behaviour has not changed. While the Swiss may well share information with the American authorities on U.S. nationals, or on others who have engaged in insider dealing in the U.S., they will note, seemingly apply their own Swiss domestic law to their own citizens, particularly in transactions within Switzerland! The reform has been transplanted into the garden of Swiss Jurisprudence, but the cutting has not taken!

⁵⁹⁷ Ibid at 318.

⁵⁹⁸ Ibid.

⁵⁹⁹ An example, being the aforementioned Swiss Insider Dealing Law and the U.S. pressure exerted to see it enacted. Please see, "Mahoney", supra, note 11 at 318. The Group 21 Countries and the West on trade issues, also comes in for inspection, on this point. Please see, "Rudd", supra, note 28 at 2. In the case of L.D.C.'s, and the West (especially the E.U.), over agricultural subsidies, please see, "Thomas and Meyer", supra, note 112 at 20.

to have their farm subsidies and see W.T.O. expansion into the service sector of the third world, too, led to a schism, with many of the "poorer" nations on earth.⁶⁰⁰ The Group of 21, a group of Third World nations opposed to this initiative, threatened to disrupt the current round of W.T.O. negotiations.⁶⁰¹ The experience of the S.E.C. with the Swiss authorities⁶⁰² and of the O.E.C.D. with the Caribbean Commonwealth countries⁶⁰³ provide additional illustrations of how nations respond to others "ganging up" on them. A more diverse coalition in international relations, such as that assembled to ban land mines,⁶⁰⁴ has a far greater chance of political success.

What is the Trade-off Between "Universal And Local"?

Consensus on landmines is one thing, but in areas of national self-interest and sovereign jurisdiction, is consensus possible? A consensus can emerge, from the community of nations, that cyber fraud, and insider dealing, are bad things. In principle, all nations agree that this is a bad thing. In practice, if a given state sees some advantage in the status quo, or some particular disadvantage in change, their adherence to this consensus will disappear. Meaningful and effective consensus, consensus with teeth, then is hard to come by.

What is Consensus?

Consensus cannot be imposed without the "consent", or "consensus" of the governed. Consensus is not, however, majority rule, or the dragooning of the weak by the strong-- but, rather the general agreement by all parties to the debate on the best way forward. How do we best build this consensus? The use of the W.T.O. forum does build upon, or create, a kind of consensus. This formula, where everyone is represented at the table,⁶⁰⁵ is certainly preferable to an M.A.I. type of situation,⁶⁰⁶ where most of the parties affected by the O.E.C.D.'s actions, weren't at the table (because they didn't belong to the O.E.C.D.).

The United Nations Security Council

In some international decision-making situations, such as the U.N. Security Council, all nations are not represented. In the context of the U.N. Security Council, the U. N. General

⁶⁰⁰ "Rudd", supra, note 28 at 2.

⁶⁰¹ Ibid.

⁶⁰² "Mahoney", supra, note 11 at 316-318.

⁶⁰³ "Scott-Joynt", supra, note 585 at 3.

⁶⁰⁴ A movement originally championed by the late Princess of Wales, and by Canada's Lloyd Axworthy, which eventually became a broad-based coalition of rich and poor nations alike (but not, ironically the United States!),

⁶⁰⁵ "Thomas and Meyer", supra, note 112 at 4-6.

Assembly agrees to have the Security Council take decisions on security matters, and act for them. The fact that not all members are on this council is immaterial. Some seats are permanent, while others have a rotating membership.

An attempt is made, however, through the election of the temporary or non-permanent members of the Security Council to balance off the world's various regions, and areas of diversity (differing levels of education and development, etc.). It is hoped that this process provides this forum with a more balanced and representative group of decision-makers. Thus, one member--one vote, is not always necessary in international decision making and consensus-building exercises, but an International "Star Chamber" (secret, elite "court" or decision making body) is not acceptable.

Consensus may be preferable to an O.E.C.D.-type of "Star Chamber", but it takes longer to build. Even some of the more successful exercises in this area, such as the W.T.O. process, take a ponderously long time to play out. As mentioned earlier, time is of the essence with this newly expanding global market for securities. Building upon the continuous reform process ("Top Down" etc.), and consolidating the reforms already in the pipeline, means that, perhaps, less effort may need to be expended upon building consensus, or that, based upon ongoing collaborations that consensus will be easier to create.

What Do Nation-States Prefer?

Nation States, since the treaty of Westphalia in 1648,⁶⁰⁷ have been the primary building blocks and players on the international scene.⁶⁰⁸ Even in an era of globalization, where the U.N. now has more members than at any time in its history,⁶⁰⁹ each of these state actors wishes to retain as much influence as possible. This means that state actors, and their leaders, want to be, and to be seen as being, strong and influential players on the world stage. This means that they want an international agreement, which is more of a consensus solution not a "one size fits all" type of imposed formula. The problem arises, from the fact that besides joining "International Clubs" (U.N., Commonwealth, N.A.T.O., G 7, O.E.C.D., U.P.U. etc) and attending international "photo ops", leaders and their nations, seek to negotiate their state's positions, based upon local

⁶⁰⁶ "Gamble and Ku", supra, note 254 at 255.

⁶⁰⁷ "Ready", supra, note 7 at 1935

⁶⁰⁸ Ibid. Please see, also, "Boutrous-Ghali", supra, note 7 at 1609.

⁶⁰⁹ De-colonization, from 1945 onwards, and the break up of entities, such as the former Yugoslavia, have swollen the ranks of the "Nation State Club".

conditions, politics, and self interest. In a multi-level world (as far as economic and political development goes) we see that what is "good for" the United States, in the realm of financial reform is not necessarily "good for" Latvia or Nigeria.⁶¹⁰ This, in part, causes the "log jam" in the negotiating process, and helps explain why the W.T.O. rounds seemingly take forever to complete.⁶¹¹ In the realm of nation states, however, all is not lost; there are some, who can seemingly, present a more united front.

How About Europe?

The Lamfalussy process,⁶¹² and the stellar work of the European Commission in the realm of Financial Service reform, has already been discussed in some detail.⁶¹³ I have also examined the pros and cons of this process in great length.⁶¹⁴ Suffice to say, the E.U. experiment proves that consensus and compromise is possible, but it is labourious and can only work, when those advancing this process agree to respect one another's negotiating boundaries, and not push people beyond where they feel comfortable going.⁶¹⁵ This process works best when it is on-going, and when the same people are involved over a long period of time.

This on-going process in Europe is analogous to the varying processes simultaneously occurring throughout the world by the various kinds of globalization actors and agents.⁶¹⁶ The success of the European Commission's efforts proves that you can't start from ground zero and expect to build an effective structure overnight. These inter-relationships must be built up, over time. The downside of building something over time between state and semi-state actors is that you run the risk of an organization or inter-agency relationship getting so caught up in their own actions, politics and process, that they forget about, or do not pay sufficient heed to, external relations and inter-bloc, or group, relations.⁶¹⁷ In other words, sometimes the wider picture gets

⁶¹⁰ At least in the short term. Cracking down on fraud is good for everyone in the end, but, in the short term, many states make or manage significant amounts of money by allowing shady characters to call their jurisdictions "home". Please see "Griffiths", supra, note 106. Please see also, Smellie, The Hon. Mr. Justice Anthony, "The Work of the Caribbean Regional Division of the Financial Action Task Force" The Commonwealth Law Bulletin (October 1993) 1830 at 1831. Hereinafter, "Smellie".

⁶¹¹ "Thomas and Meyer", supra, note 112 at 12-15.

⁶¹² "E U Committee", supra, note 256.

⁶¹³ Please see Chapter 3 Section III, of this work, and especially notes 257-264 and Chapter 4 especially notes 391-412.

⁶¹⁴ Ibid.

⁶¹⁵ "Arner", supra note 283 at 1552-1554, who compared earlier attempts at harmonization with more contemporary attempts at creating "Community Standards" or a common flooring beneath which legal standards could not sink.

⁶¹⁶ Ibid at 1559.

⁶¹⁷ "Zaring", supra, note 105 at 317.

lost in the narrower one. At times, for example, the E.U. can come across as a tad too self-absorbed, for its own good. For many within this bloc, relations between France and Germany are far more important than relations with the United States or the W.T.O., which in some ways defeats the purpose of grouping together to foster globalization.

Can We Find A "Happy Medium" Between Coercion And Consensus?

Since coercion (external imposition) is ineffective against sovereign nation states, and consensus might take too long to emerge, we are left wondering what to do. The natural instinct might be to draw a line down the middle and try to arrive at a compromise, which draws the best from both worlds. So far as "external imposition goes", this has been proven to work, only in cases where the nation state in question has had a role in the drafting process (or at least representation within the organization that crafts an initiative). This means that W.T.O. and I.O.S.C.O.-imposed rules stand a significantly greater chance of being accepted by nations, for the reasons stated above. Consensus usually has been reached on these ideas before they are adopted as a policy, by the International actor in question.⁶¹⁸ In effect, then, there is a significant degree of "consensus" in this "coercion". Due to the fact that investors cannot wait for the dawning of global consensus (and a truly integrated global market), and the fact that securities administrators, the world over, cannot wait for various states to make up their minds, in their own time, some coercion may be necessary. Again, not to belabor the point, the ongoing simultaneous processes ("Top Down", etc.) will likely move and advance globalization or regulation forward, ever so slowly, while new initiatives, to expedite the process of unification are considered. This combination of the "tortoise"⁶¹⁹ and the "hare"⁶²⁰ will move the process of unification forward and hopefully do so at a reasonable pace.

Can Accounting And Corporate Governance Standards Save The Day?

One of the keys to building a consensus on securities regulation is to establish a universal notion of what constitutes acceptable commercial practices, the fiduciary duties of directors and the rights of shareholders. One of the ways of determining this is by examining corporate results (reports).⁶²¹ The method of interpretation applied are usually by the utilization of numerical

⁶¹⁸ Ibid. at 319-320.

⁶¹⁹ Simultaneous process

⁶²⁰ New unifying initiatives

⁶²¹ Usually Financial Reports in the Corporate sense, "Bruner", supra, note 94.

reports prepared according to an agreed upon reporting formula.⁶²² In effect, corporate governance and accounting are intertwined.

To ease the way in a globalizing world, it would be optimal if corporate governance norms and accounting standards were similar. As we have seen, this can become quite political⁶²³ and, in some cases, jurisdictions would be loath to surrender a cherished standard,⁶²⁴ or legal maneuver, especially one which made their economy an advantageous place to do business.

Do We Need to Change the Laws to Change the Standards?

Since much in the world of corporate governance is customary or established practice various codes of conduct notwithstanding,⁶²⁵ on the surface, it should not be too hard to change corporate governance standards without changing the positive law. This is underlined by the fact that many of the codes are set by professional organizations, special institutions, and various self-regulating organizations. Some aspects of a given nation's corporate governance have been influenced by the commercial customs and practice in a given nation, which have developed over time (say the functions played by banks, the role of banks in the economy [unless this has been legislated by the government], duties of directors, role of cash vs. credit in the economy, the role of shareholders, etc). Codes of practice, in many nation states, are still usually enacted by groups other than the nation state's Ministry of Finance, although they are cleared with the Finance Ministry.

How Would This Work in Practice?

For example, the Stock Exchange in country C could decide that insider dealing was a "sin" and then create a rule or other normative notation (Ordinance, By-Law, Regulation, National Policy), which prohibits such behaviour, by any of its members. The positive criminal law of the jurisdiction and/or their Securities Act (or equivalent governing statute) need not change, to accommodate this new normative reality. This new regulation would be in the form of an administrative penalty.⁶²⁶ Similarly, a securities governance body⁶²⁷ can decide to adopt the corporate governance norms of another jurisdiction.

⁶²² In other words, accounting Standards. For a discussion of their significance, please see "Arner", supra, note 283.

⁶²³ "Brunner", supra, note 94 at 930-932.

⁶²⁴ Ibid.

⁶²⁵ Ibid. at 911.

⁶²⁶ Perhaps a small monetary fines, temporary suspension from the exchange, or even the cancellation of their professional designation.

The European Direction

The European Union is moving in this direction, by adopting I.A.S., as the benchmark community wide standard for financial reports, and as the accounting standards used by companies who wish to list on Member states' Exchanges, and make use of the "Single Passport" means of floating their shares community wide. The prospectus Directive, along with other Community legislation and draft legislation, also makes extensive use of I.O.S.C.O. standards and benchmarks, as a "community standard" for all member states. Taken together these various policies, standards and procedures, begin to resemble the basis of a European system of corporate governance. This is not the only way in which corporate governance standards can and are being unified.

Legal Revisionism in the United States

In examining the way the United States tends to view securities laws, and when considering the S.E.C.'s anxiety to "properly" shield their investors from foes all around the world, it is not too far a stretch to conclude that one day, very soon, any transaction, which could conceivably affect an American investor, somewhere, somehow, will be subject to American corporate governance norms.⁶²⁸ Since the S.E.C. has tried to use this formula with internet transactions also, the same technology (the computer driven Internet), which delivers a world of opportunity to your computer portal will also now also deliver the entire panoply of American corporate governance norms, complete with the S.E.C.. This legal arrangement would only apply to your online transaction to the extent that it conceivably affects an American, somewhere, somehow, in the world. Of late, on the front of new issue offerings, the United States has backed away from this position, and has included some reservations and caviets which absolves a shareholding from the full thrust and force of American Securities Laws.⁶²⁹ This is different than the foisting described previously, in that domestic laws are not being replaced, or run over by these new innovations, merely subverted or shunted aside in areas where American interests, and investors, can in some way be affected.⁶³⁰

⁶²⁷ The Stock Exchange, the Securities Commission (or similar body). Different jurisdictions give their regulators different names, depending upon how their organization is set up and how government's are structured. Even institutions with similar names, "Stock Exchange" or "Securities Commissions" have different powers, depending upon the roles they are assigned by their respective national governments.

⁶²⁸ The U.S. S.E.C. has already concluded that an offer on the Internet could conceivably affect U.S. Investors, and therefore they are subject to American Securities laws.

⁶²⁹ "S.E.C. Clarifies ", supra, note 65.

The advent of Sarbanes-Oxley, with its enhanced corporate governance requirements and specific formula for the composition of corporate Boards, Director's duties, and specific requirements for auditors and financial advisors, represents a sea change in American corporate governance. The S.E.C.'s insistence on foreign issuers using American standards if they wish to list on American Exchanges, means that via the back door, American corporate governance norms could become the world's norms. Their earlier notion that any transaction which affects Americans was something under American jurisdiction, which they, the S.E.C., were interested in monitoring, might well end up forcing (or transforming) U.S. corporate governance norms into global ones. Some argue that this is not a bad thing, while others recognize the value of some regulatory competition.⁶³¹

How Important Are Accounting Standards?

The differences in Accounting Standards, and methods of Financial reporting, are very significant. The results reported by these different standards can vary widely.⁶³² For example, the balance sheet item, goodwill is treated differently in different jurisdictions. It was traditionally undervalued in the financial statements of many companies, then over-valued, and now its means of valuation is being reviewed by the Accounting profession. The use of consolidated financial statements gives the financial records of diverse corporate entities a more focused and complete presentation. U. S. G.A.A.P. remains the preferred format of the U. S. S.E.C., even though the N.Y.S.E is more back upon the use of I.A.S.⁶³³ The U.S. method of financial reporting is not universal, however.⁶³⁴ In Germany, for example, different accounting principles are used (they were specifically German, before E.U. adoption of I.A.S. for those companies wishing to list upon other member states' Stock Exchanges), and these do not provide the same financial "snapshot", as U.S. G.A.A.P.⁶³⁵ Daimler Benz, for example, upon listing on the N.Y.S.E. showed a \$354 Million profit, under the then prevailing German Accounting Standards, yet when the results were converted to U. S. G.A.A.P., their financial position became

⁶³⁰ This might, also, not sit too well, with some commentators, but that is a debate for another time and space.

⁶³¹ Choi, Stephen, "Channeling Competition in the Global Securities Market" (2002) 16 The Transnational Lawyer 111 at 118-119. Hereinafter, "Channeling".

⁶³² Forgetting about the "creative accounting" applied in the Enron case, where Gas Future Contracts (and Account Payable or future liability [and potential future asset]) were listed as Capital Investment.

⁶³³ "Brunner", supra, note 94 at 925-926.

⁶³⁴ Cox, James D., "Regulatory Duopoly in U. S. Securities Markets", (1999) 99 Columbia Law Review 1200 at 1203. Hereinafter, "Regulatory Duopoly".

⁶³⁵ Ibid.

a \$1 Billion loss.⁶³⁶ U.S. standards require Executives to exercise greater transparency in managing their companies, and provide investors with greater knowledge of the true state of their companies' financial affairs than the German executives felt comfortable with. The adoption of a global standard, acceptable to all, would make it that much harder for management to hide behind their decisions by making use of a "looser" or more liberal set of accounting standards. This would be good for all stakeholders, but especially for the investing public.

Politics and Accounting Standards

The refusal of the U.S. authorities to recognize I.A.S., is largely a political one.⁶³⁷ There has been significant progress, in the unification of standards, and in building consensus between I.A.S. and the American authorities.⁶³⁸ More work, however, needs to be done on certain aspects of these standards⁶³⁹ before the Americans will sign onto this regime.⁶⁴⁰ I.O.S.C.O., and others, have played a significant role in trying to bring about accounting standards unification.⁶⁴¹ This bodes well for the future, as the more parties, involved in this debate, the stronger the chorus will be to have one set of standards, for one unified international market.⁶⁴² The rules, or standards, of corporate governance, and the methods used to report results,⁶⁴³ influence markets, reporting issuers, and legal affairs, greatly. One set of universal standards (corporate governance standards and accounting standards) is the optimal solution, yet it will likely be some time before this comes to pass. We shall presently examine who, or what level of organization, should create these global regulations.

Who Should Promulgate These Regulations?

If our goal is a universal set of regulations, then a body which enjoys international respect and support, would be the ideal one to task with their creation. Identifying that body is a difficult task. The United Nations would be ideal, from a universal membership perspective (thereby not

⁶³⁶ Ibid.

⁶³⁷ "Brunner", supra, note 94 at 925-926.

⁶³⁸ Ibid at 924. Please see also, "Garten", supra, note 70 at 30.

⁶³⁹ "Brunner", supra, note 94 at 927-930.

⁶⁴⁰ Ibid at 926.

⁶⁴¹ Ibid at 919-921. Please see also, "Zaring", supra, note 105 at 296, as well, please see "Sommer", supra, note 103 at 23-26, and "Arner", supra, note 283 at 1572-1573.

⁶⁴² There is a downside to this as well, as "too many cooks may well spoil the soup", but the chances of the former, as opposed to the latter occurring, under this scenario, are greater by far! For a snapshot of the players involved in normative standardization, please see "Zaring", supra, note 105, "Arner", supra, note 283, also introduces the players in an effective manner.

⁶⁴³ Accounting Standards, in other words. To understand their value in international transactions, please see "Cox", supra, note 630 at 1203.

repeating the mistakes of the O.E.C.D./M.A.I. disaster),⁶⁴⁴ but since the U.N. doesn't usually deal with economic matters, as mentioned previously, either this would have to be added to their mandate or another group must be selected, to create these standards.

The W.T.O.--Right Candidate For The Job?

As mentioned previously, the W.T.O. would be the natural place for these regulations, to originate. The W.T.O., is also, a body to which most of the world's nations belong.⁶⁴⁵ Negotiations are conducted by all member states, and agreements proceed according to a form of consensus.⁶⁴⁶ These rounds of negotiations, however, have sometimes been contentious, in the history of the W.T.O.⁶⁴⁷ The demonstrations against the W.T.O., such as the "Battle of Seattle," have resulted in greater instances of civil disobedience, violence and rioting in the west, than have been seen, since the turbulent days of the late '60's. Large constituencies would likely have many negative things to say about having the W.T.O. take responsibility for drafting these regulations.⁶⁴⁸ This could prove problematic, from a legitimacy perspective, if these groups chose to challenge the validity of having the W.T.O. involved with this. Currently, the W.T.O. is trying to push through, or negotiate, "The Son of M.A.I.", and disagreement among nations, (especially between the "First" and "Third" worlds) over investment provisions, and agricultural subsidies,⁶⁴⁹ have led to the creation of the Group of 21.⁶⁵⁰ These same types of divisions could arise over corporate governance standards, if these same groups continue their vehement opposition to the W.T.O. If the W.T.O. can broker a set of investment principles, acceptable to all players (including some of the N.G.O.'s who "broke the back" of the O.E.C.D.'s M.A.I.),⁶⁵¹ they may be the best group to create these principles. We shall return to this discussion later.

The O.E.C.D.--Playground Of The Rich?

Asking the O.E.C.D. to promulgate these sorts of enlightened global rules would also be an option. The O.E.C.D. has already done some work in the realm of draft corporate governance

⁶⁴⁴ "Gamble and Ku", supra, note 2541 at 255.

⁶⁴⁵ "Thomas and Meyer", supra, note 112 at 24.

⁶⁴⁶ Once acceded to, however, these agreements become part of the positive law of their respective member states, and are binding.

⁶⁴⁷ "Thomas and Meyer", supra, note 112 at 18-25.

⁶⁴⁸ Since this group already negotiates the trade agreements, this might be too much power to hand them, or so their critics will claim.

⁶⁴⁹ "Thomas and Meyer", supra, note 112 at 18-24.

⁶⁵⁰ "Rudd", supra, note 28 at 1.

⁶⁵¹ "Gamble and Ku", supra, note 254 at 254-255.

codes.⁶⁵² This work is well regarded, but the O.E.C.D. is not!⁶⁵³ The O.E.C.D.'s crack down on money laundering and corruption has been quite successful,⁶⁵⁴ but they have made a number of enemies along the way.⁶⁵⁵ Many Commonwealth Caribbean Countries are no fans of the Paris - based organization of Economic Co-operation and Development.⁶⁵⁶ The perception, in other quarters, is that the O.E.C.D. represents a fairly narrow cross section of interests.⁶⁵⁷ It also has been accused of euro-centrism.⁶⁵⁸

Forces in the United States,⁶⁵⁹ some possibly with the ear of the current administration, were very opposed to the statements of the O.E.C.D. regarding taxation and economic structure,⁶⁶⁰ and may, therefore, regard this organization as "Un-American". The United States, in the post-911 climate, is not known for tolerating activities, they consider to be "Un-American". This could cause difficulty in some quarters, and might well debar the O.E.C.D. from having an ongoing role in establishing these norms. Since many Third World countries might be opposed to the O.E.C.D.,⁶⁶¹ for reasons of their non-representation within the organization's ranks (and the perception that they are very First World biased),⁶⁶² this might be another reason why they would not get selected. This odd alliance, between the U. S. and the third world, might finally put an end to the O.E.C.D.'s.

Create a Special Purpose Body.

A further option would be to create a special purpose body, such as the I.A.S.B.,⁶⁶³ to supervise the administration of an international system of corporate governance standards. I.A.S.B. has done a very good job at sorting the differences in accounting standards (the United States, notwithstanding).⁶⁶⁴ The I.A.S.B. has also demonstrated an ability to work with other

⁶⁵² "Wallace", supra, note 503 at 145.

⁶⁵³ "Gamble and Ku", supra, note 254 at 255-256.

⁶⁵⁴ "Griffiths", supra, note 106 For a more fulsome collection of sources, please refer back to notes 581-583.

⁶⁵⁵ Please refer back to notes 586-589 for a complete listing of contrary minded organizations.

⁶⁵⁶ Please see "Underhandedness", supra, note 586 at 1.

⁶⁵⁷ "Gamble and Ku", supra, note 254 at 254-255.

⁶⁵⁸ "Scott-Joynt", supra, note 587 at 2.

⁶⁵⁹ "Center For Freedom and Prosperity", supra, note 106. Please see also, "New Coalition", supra, note 104.

⁶⁶⁰ "Bahamas Defend", supra, note 517 at 1. Please see also "Amery Aide", supra, note 100 at 2.

⁶⁶¹ "Rudd", supra, note 28 at 1. Please see also, "Gamble and Ku", supra, note 254 at 255-256.

⁶⁶² Ibid.

⁶⁶³ "Brunner", supra, note 94 at 912-913. Please see also, "Garten", supra, note 70 at 30.

⁶⁶⁴ "Brunner", supra, note 94 at 925. Please see also, "Cox", supra, note 630 at 1203.

groups, among them I.O.S.C.O.,⁶⁶⁵ on eliminating problems and discrepancies, so it is a respected body. Perhaps, in light of the baggage carried by the W.T.O. and the O.E.C.D., and the fact that, with the United Nations you'd have to start from scratch anyway, an international corporate governance body might be a good thing.

How To Put This Into Operation

Perhaps it (this new corporate governance supervisory Board) could exist under the aegis, or tutelage, of the W.T.O. Secretariat in Geneva; conversely, the W.T.O. could incorporate a provision into its agreement, which specified that member states had to adopt the international corporate governance principles, as enshrined in the W.T.O. regime into their domestic positive law, and practice. As the European Commission has done with their Prospectus Directive (and other pieces of legislation), using I.A.S. and I.O.S.C.O. formulas and legislation as their common set of base standards for all of the Community's member states.⁶⁶⁶ Finding the organization, and setting up the protocol is the easy part. The hard part is agreeing to these principles and ensuring that the signatory nations abide by them. This special purpose group would have to be composed of representatives from most of the world's nations, and they would have to pattern themselves upon the process and procedures followed by the I.A.S.B. They might, however, also have the same dark horse lurking in the background--The United States.

What Nation's Don't Like

Most nations, as mentioned previously, will not tolerate one or two states foisting their will and laws upon them, witness the O.E.C.D.'s conflict with the Commonwealth Caribbean Countries,⁶⁶⁷ and the tussle between Switzerland and the S.E.C..⁶⁶⁸ States do not like seeing other nation states refuse to live up to their international obligations. When a state signs a protocol the expectation is that they will live by it. Furthermore, the world's major states, are more or less expected to be "team players" and sign onto, and live by, most of the major international protocols of the day.

⁶⁶⁵ "Brunner", supra, note 94 at 919. Please see also, "Zaring", supra, note 105 at 296.

⁶⁶⁶ "Prospectus Directive", supra, note 119 at 4.

⁶⁶⁷ "Scott-Joynt", supra, note 587 at 2.

⁶⁶⁸ "Mahoney", supra, note 11 at 518.

"Damn Yankees"⁶⁶⁹

The Americans' refusal to be bound by various international agreements,⁶⁷⁰ or to participate in the processes of groups, to which they belong, is therefore an unsustainable strategy over the long term. The U.S.'s refusal to recognize the jurisdiction of the World Court in certain instances, or to support the establishment of an International Criminal Court, are cases of this jurisdictional avoidance in action. Simply put, it increasing seems, that if the U.S. doesn't like the decision, can't have its own way, or play by its own rules, it simply "picks up its marbles and goes home!"

"No Country Is An Island"

"No man is an island"... and no country, or even an entire continent can, for long, avoid the pull of international responsibilities nor risk the isolation, which absenting itself from decision making fora, would entail. The United States might have to sacrifice a cherished principle or two, to get the international system, the world so needs set up--now! Time is always of the essence when dealing with the globalization of securities markets,⁶⁷¹ and since the pace of global expansion proceeds daily,⁶⁷² there is not a moment to lose in trying to reach a consensus on the best means forward. A consensus on corporate governance norms will emerge-- but the key is to have it emerge sooner as opposed to later, and to lead the path towards new vistas of opportunity, not follow in the train of recent events and developments. We shall presently examine global securities trading and endeavour to determine what level of institution should be in charge of administering a system of international securities trading.

Who Should Administer International Securities Regulations?

As we saw in the section above, the creation of an international market brings forth a new set of challenges and opportunities. Since we now have international transactions and trading,⁶⁷³ we also have de-facto international laws and regulations.⁶⁷⁴ Some of these laws are truly

⁶⁶⁹ The name of a famous Broadway Musical and also an expression lobbed at the United States on occasion.

⁶⁷⁰ The recent softwood lumber debacle, between Canada and the U.S., is a case in point. The U.S. countervailing duties are illegal, under the W.T.O regime, but, until November/December, 2003, the position of the U.S. has been to refuse to settle or concede.

⁶⁷¹ "Khoury", supra, note 5 at 8-10.

⁶⁷² Ibid.

⁶⁷³ Ibid at 10.

⁶⁷⁴ Even if domestic laws are not incorporated ostensibly to police international transactions, the conclusion of the S.E.C. (any international transaction which affects Americans, is under S.E.C. jurisdiction) certainly proves that nations will take domestic laws abroad, where their nationals are concerned. There is also a long-standing tradition most nations adhere to of looking after their nationals when abroad (even to the

international, as set out in U.N. Resolutions, and under the W.T.O. regime.⁶⁷⁵ Many nation states have compatible positive laws in areas touched on by securities trading and/or the issuance of a prospectus (Fraud, Breach of Contract [for the issuance of a fraudulent prospectus], insider dealing, etc.).⁶⁷⁶ There are also harmonization efforts currently ongoing, especially in regional trading blocs, such as the N.A.F.T.A. Zone or the E.U. The sum total of these significant efforts, notwithstanding at some point we will need special purpose regulations for an increasingly globally integrated securities market.

As with many other issues in international legal inquiry, this raises the eternal question: who will establish and administer them? The analysis, I conducted above, to determine the "correct home" for International Corporate Governance principles and the conclusion I drew, namely that the U. N., W.T.O. and O.E.C.D, were unsuitable, for various reasons, holds true for International Securities Regulations. If many "poor" or "underdeveloped" countries will not accept having the O.E.C.D. in the "business" of establishing and administering International Corporate Governance standards,⁶⁷⁷ they are unlikely to want this organization in charge of regulating International Securities Transactions.

Globalization and National Authority

In the case of securities regulation, the rapid establishment of a global securities commission is not on. Nor is the creation of a stand-alone global securities regulation standards body. For the foreseeable future, the securities industry will (and should) remain under the nominal control of each nation state's treasury. Should globalization proceed to the point where the nation state and national currencies are subsumed into supra-national bodies and currency units, perhaps we should consider vesting jurisdiction elsewhere. The countries within the Euro-zone are currently trying such an experiment, and their efforts merit further examination. In

point of going to war to defend their interest on occasion [as happened in China, in 1839, {the First Anglo-Sino War}]]. This does not happen too often in the modern world, but a nation will sometimes go to great lengths to defend their nationals incarcerated in foreign jails, etc, or to stand up for the rights and interests of merchants or business people taken advantage of in foreign lands. This is especially true when the protest launched, conforms to national policy initiatives, or advances the foreign policy objective of the nation state in question.

⁶⁷⁵ Our earlier section, in Chapter 4, dealing with the establishment of International Law into domestic statutes, notwithstanding.

⁶⁷⁶ Needless to say, that some do not. Please see, "Mahoney", supra, note 11 at 518 (on the Swiss domestic law on insider dealing).

⁶⁷⁷ "Gamble and Ku", supra, note 254 at 255-256.

situations, such as the Euro Zone, control will eventually shift from national treasuries, to the European Central Bank.⁶⁷⁸

How To Be Both "Global" and "Local"

For regulations to be both "global" and "local", the secret is to establish a new form of global securities regulation by building upon existing administrative structures, and taking advantage of new methods of global interconnectedness. These new "laws" would work by using established administrative bodies, who would partner with each other and other stakeholders. The best means to build these partnerships is to employ the global securities Q.U.A.N.G.O.S. It is to an examination of their roles, in all of this, that we now turn.

"Q.U.A.N.G.O. Tango"--Do Q.U.A.N.G.O.S Hold The "Key" To Administering Securities Laws Effectively And Globally?

These International Financial Services Q.U.A.N.G.O.S have come a long way in a short period of time.⁶⁷⁹ They have been around for less time than the W.T.O., yet they seem to be almost as adroit at getting their own way, with a minimum of fuss, either from national governments or the general public.⁶⁸⁰ Part of the reason for their success is the fact that on so many issues they fly below the radar screen of public concern and/or public consciousness (in effect, people don't know and they don't much care).⁶⁸¹ A second reason for their success is the fact that they are composed of the national representative of their nation's specific financial services sector governing body (be it Stock Exchanges, Central Bankers or Securities Commissions).⁶⁸² Delegates to these bodies can effectively "think globally--and act locally!"

Connectivity

There is also a connection between the person making the decision or proposing the policy, and the person carrying out the decision or enforcing the regulation. This, as mentioned earlier, has its advantages.⁶⁸³ This system encourages representatives to propose things, which they can deliver upon (because they will be charged with implementing these policies in their

⁶⁷⁸ In effect, the analogy would remain intact as the focus would shift from national to supra national jurisdiction and control.

⁶⁷⁹ "Zaring", supra, note 105, and "Sommer", supra, note 103.

⁶⁸⁰ "Zaring", supra, note 105 at 301-303.

⁶⁸¹ Ibid.

⁶⁸² Ibid.

⁶⁸³ Some aspects of this nearness of decision maker to policy execution also detracts from the use of QUANGO actors. Please see "Sommer", supra, note 103 at 24-26.

home jurisdictions). The three-day settlement rule in international securities transactions and the Bank deposit reserve requirements stand as good examples of this "connectivity" in action.⁶⁸⁴ Since there is a great deal of institutional contact, between these QUANGOS already, placing the Q.U.A.N.G.O.S., such as I.O.S.C.O., in charge of implementing international securities regulations, would build upon existing informal networks, and give them greater opportunity to develop.⁶⁸⁵ The people within these organizations, also, have a closeness to the decision-making institutions, and to the regulations' implementation (which is also a mixed blessing).⁶⁸⁶

Q.U.A.N.G.O. Advantages

Since these financial services Q.U.A.N.G.O.S. are international, they have connections with their compatriots in other jurisdictions, which, as mentioned before, makes them well placed to administer global regulations. In effect they are, in their I.O.S.C.O.⁶⁸⁷ guise, one step removed from their national finance ministries' and their national identities; this should, in theory, give them the ability to be objective and independent.⁶⁸⁸ Their close connection, to national government's (they are made up of members of each nation's securities commissions {I.O.S.C.O.} Stock Exchange officials {F.I.B.V.} and central Bankers {basic committee on International Banking}) should expedite decision making and provide ease of communications between the "global" and "local" actors.⁶⁸⁹

Build Upon Current Practice

Since these Q.U.A.N.G.O.S., in effect, exercise de facto devolved power from their national governments, currently, it is arguable, that putting them in charge of administering these global securities regulations, is an extension of current practice. The transition from national regulation and statute, to a system administered by International Q.U.A.N.G.O.S., would be easy and seamless, and may well dilute criticisms that national sovereignty was being "sold out" to

⁶⁸⁴ Some of these terms (connectivity, for example) are my own terms for the relationships, and actions described herein.

⁶⁸⁵ There is, as has been alluded to earlier, a down side to this relationship, also. Please see "Sommer", supra, note 103 at 24-26.

⁶⁸⁶ "Zaring", supra, note 105.

⁶⁸⁷ F.I.B.V., Basle Committee on International Banking (or whatever Financial Services QUANGO). For a description of these actors, please see Ibid at 292-295.

⁶⁸⁸ There are likely more than one interpretation to this notion, but based upon the evidence so far, these groups have not been afraid to be at variance with their members' national governments. Please see Ibid.

⁶⁸⁹ Keeping in mind the down-side of all of this, at all times, most notably the present democratic deficit and the danger of Neo-Functionalism, which is always omnipresent when giving non-elected, non-sovereign bodies significant power in international affairs, or over a nation's affairs. Please see "Zaring", supra, note 105 at 303-304.

some international regime, which had, at its heart, an agenda to destroy and undermine national sovereignty and jurisdiction. It might, also, be easier to introduce new rules and regulations, this way (via. I.O.S.C.O. et al), than through the W.T.O. or G.A.T.S. As has been constantly noted, the globalization of securities markets is proceeding apace daily, as are the opportunities for fraudsters, so speed is definitely of the essence. These two factors would seem to recommend a reform process, which is seamless and quick.

"Q.U.A.N.G.O. LAW"--The Drawbacks

There are, as mentioned previously, some drawbacks to "Q.U.A.N.G.O.-Law". The chance that the Q.U.A.N.G.O. may try to appropriate more power and influence for itself, at the expense of national governments (and sometimes without even consulting national governments) has been mentioned.⁶⁹⁰ So, too, the conundrum of "democratic deficit", which can effect peoples and governments, when the decision-makers, are too far removed from those affected by the decisions.⁶⁹¹ "No man" (or Q.U.A.N.G.O.) "is an island", and by walling themselves up in plutocratic ivory towers, some financial decision makers run the risk of being out of touch with public opinion and of adopting policies not in the public interest.

Cyber Revolution--The Silicon "Barricade"⁶⁹²

In the information age--people who feel aggrieved will go set up a web site, form a web community of like-minded people, stir up a ferment, and then, often, mass their forces and take to the barricades! In the opposition to M.A.I., we saw what this non-visible, web-based "civil disobedience" could do.⁶⁹³ In "the Battle of Seattle", we saw an "army" mobilize, then take over and effectively shut down the W.T.O. meeting. The authorities did not know what hit them at first.

"The Battle of Seattle"

During the Seattle W.T.O. meetings, in 2000, there were mass demonstrations and civil disobedience by several groups who exerted a very prominent presence. The levies of this army

⁶⁹⁰ "Zaring", supra, note 105 at 319.

⁶⁹¹ Ibid at 327.

⁶⁹² A classic image from the 19th Century, the age of revolution, saw the "aggrieved Proletariat" "rise up" against their "masters", stage an insurrection, and mass their forces behind barricades, in the attempt to hold back the government's police, infantry, and especially cavalry. In 1793 the French Directorate was threatened with revolt, and a certain General Bonaparte scattered the demonstrators, with Artillery fire! Barricades weren't and aren't infallible! The classic image of barricades as a revolutionary symbol remains, however.

were often composed of brigands and troublemakers (along with the sincerely convinced). This "army", which, converged upon Seattle, was composed of far more than the usual "peasants with pitchforks"⁶⁹⁴; while people believed in their cause, this was certainly no "pilgrimage of Grace"⁶⁹⁵ these people (and their leaders) were web-savvy, well-trained urban protest warriors. They possessed defined strategic objectives, maps, crude weapons and many other aspects of a military organization. Above all, they had great deal of information about the conference venues (intelligence), knew where to strike, and where they should mass and muster their forces. This made them particularly effective. The police and security forces, particularly in the post-911 world, are especially careful at international conferences, but in this pre-911 period security forces were less prepared for such problems, and needed to draft in extra police levies, to bottle up stiff resistance.

The foregoing example is provided to show what can happen in the modern world, when decision-makers don't bring the people with them as they seek to shift the boundaries of globalization forward. While there were no protests in the street over the three day settlement rule (in international securities trades), there is the chance that, should international bodies make decisions with which certain groups disagree, the protestors will take to the streets. These caveats, notwithstanding, the use of Q.U.A.N.G.O.S., to enhance the globalization process and administer an international system of securities regulations, is not without its merit. We shall presently review what we have proposed to date, in the hopes of determining the optimal policy for a globally integrated market for securities, and the legal and regulatory system necessary to make this an honest, effective, well-functioning and regulated reality.

How Do We Create An Optimally Structured And Regulated International Securities Market?

In Trying to understand what a globally integrated market would look like the recent past, in Canada, is a good indicator of the direction of the world might take. In Canada there were formerly Exchanges in Toronto, Montreal, Winnipeg, Calgary (Alberta) and Vancouver. In the last few years the T.S.E. has purchased, or merged, with most of them. The Montreal Exchange is currently independent and trying to specialize in traded options, while the Winnipeg Exchange

⁶⁹³ "Gamble and Ku", supra, note 509 at 255-256.

⁶⁹⁴ To borrow Pat Buchanan's phrase.

⁶⁹⁵ A famous revolt in 15th Century England, where a few organizers stirred up the peasantry to march on the King and try to make their religious beliefs known to him (as opposed to his ministers, whom they were led to believe were keeping the truth from the King!). Please see "Elton", supra, note 388 at 144-147.

specialized in futures. Such change has been seized upon by the Wise Person's Committee as justification for creating a national securities law for Canada, and a national securities regulator. This sort of regulatory reform and consolidation has already happened in Australia, and could, and likely will, happen in other countries, in the future.⁶⁹⁶

Modern communications technology allows an Exchange's trading nerve center to be located anywhere. The Exchange's venue location is now less important. In the Canadian context, regulation has switched from regulation of a purely local market centred upon a regional exchange, to regulation for an entire country's financial system, with one or two exchanges serving niche functions. In the U. S. a similar situation occurs, as the financial services legislation and regulatory authorities regulate the N.Y.S.E. (stocks), Chicago Exchange (Futures), the N.A.S.D.A.Q. (Technology and Biotechnology and medium sized companies), and the American Stock Exchange (those New York based firms, who don't make it to the "Big Board" [N.Y.S.E]). The same technology which allows the trading nerve centre to be located anywhere also allows the sales force, and customer service functions, to be located at low wage off-shore outsourcing centres (such as India [often used for data processing]) or in a great Canadian (or other nation's) business centre, at a major broker's branch office, a local brokers' office, or on the computer screen of an on-line investor or Day Trader.

The "Big Bang" And Exchange Consolidation

In Britain, too, similar consolidation occurred in the period running up to "The Big Bang," in September 1986,⁶⁹⁷ when all of Britain's regional Stock Exchanges (such as Manchester) along with those of the Irish Republic, came together to form the International Stock Exchange of the United Kingdom and Republic of Ireland (this is the L.S.E., or London Stock Exchange).⁶⁹⁸ Attempts were made in the 1990's to federate London and Frankfurt Exchanges, but these fell through. Some continental Exchanges have combined, and more will try to in the years ahead⁶⁹⁹ (in a process separate from that being followed by the European Commission and the Lamfalussy process).⁷⁰⁰ The experiments in North America, with the M.J.D.S. initiative,

⁶⁹⁶ "C.S.C.", supra, note 379 at 46. Please see, "It's Time", supra, note 264 at 6 and at 7-8.

⁶⁹⁷ "Khoury", supra, note 5 at 8-10, please see also, "Macrae and Caincross", supra, note 51 at 133-139.

⁶⁹⁸ "Macrae and Caincross", supra, note 51 at 134.

⁶⁹⁹ "Arner", supra, note 283 at 1588.

⁷⁰⁰ For one thing, this will be done within the borders of Member states themselves as opposed to combining the exchanges of Member states.

paves the way towards an eventual continental--wide equity market.⁷⁰¹ This is likely what the face of traditional Stock Exchanges will look like in the near future. There are a whole host of new creatures, such as Bulletin Boards, and off exchange dealing networks,⁷⁰² which the web has made possible. These innovations have presented a whole host of potential regulatory headaches for the S.E.C.⁷⁰³ The way in which the S.E.C. responds to these challenges will tell us much about how effective and transparent the modern "global" market will be.

New Technologies--Old Games!

Although the problems presented by these new markets do not differ greatly than those posed by the on-line trading of NYSE stocks, or from the perils posed by the latest Nigerian based "Get rich quick" schemes, they are more invasive and harder to fight than traditional scams. There is also the growth of the NASDAQ market, (which looks set to become the Stock Exchange's answer to E.bay) to consider. This "OTC", or "between dealers," market's expansion, in the U.S., is due, in part, to less vigorous regulatory requirements, and lower disclosure standards, than the N.Y.S.E. This "Exchange" (for it is not a dealing platform rooted in space) is beloved by such biotechnology and hi-tech companies as Microsoft. NASDAQ has recently forged a series of alliances with similar markets in other countries, and now has, among other things, a European Subsidiary. This market will likely expand, (at least the "brand" NASDAQ will!), so will the regulatory requirements (and problems) created by a completely virtual, seamless, and global market. This, again, underlines the need for speed, on the part of regulators, in creating a system of feasible global regulations, and reinforces the importance of the many simultaneously ongoing processes of globalization. From speculations on the form of stock exchanges in the future, we now turn our attentions towards the optimal policy (means of creating and administering this system of laws and regulations).

How to Create These Regulations?

The best way to create global securities regulations is to build upon the concurrent, ongoing, process of globalization. As mentioned extensively throughout our investigation, these globalization processes are simultaneously being conducted at the "Top Down", "Bottom Up" and "Side to Side" levels to create the world standard. These processes, when combined with one

⁷⁰¹ There are some commentators, who claim that the S.E.C. was less than impressed with this system in operation, and that they wanted to review and possibly cancel this enterprise. It is likely that this system, in some shape or form, will remain in place.

⁷⁰² "Big Board", supra, note 206 at 275-277.

⁷⁰³ Ibid.

specifically tasked to create global standards and regulations, will eventually form a comprehensive and coherently integrated system of securities trading. It is hoped that these processes and regulatory combinations can be utilized to form a system, which is workable and effective. This effective and workable system of regulation will hopefully allow for the development of a globally interdependent and interconnected stock exchange. The desire to create such a global exchange, underlines the importance of having the right kind of organization create regulations which are both effective and respected by those who are to be bound by them.

What Will Not Work?

Remembering the credibility problem of the O.E.C.D., in regards to M.A.I.,⁷⁰⁴ it is very clear that the organization negotiating these regulations must be a one member--one vote type of entity, not an elitist selective sort of group. The W.T.O., its one member one vote character notwithstanding, would in certain quarters, be deemed unsuitable. The W.T.O. is also actively involved in the "Top Down" process, so it has enough to do. There are, also, a large number groups who would not support the W.T.O.'s being given this task.

What Should this Group Possess?

It might be useful for this regulation creating entity to have its own legal identity, even if some of the same types of people, or even some of the same individuals, are involved in this process by membership in two different groups. This group should have an independent and continuous existence. One model to follow would be the I.A.S.B. This group (I.A.S.B.) has been very successful in its efforts to reduce the barriers and reconcile differences between differing accounting standards.⁷⁰⁵ They have, also, partnered with other groups to assist in the process of Accounting Standards harmonization.⁷⁰⁶ An independent organization, provided it could engender a similar degree of good will, would be ideal for creating, and monitoring, the effectiveness of global securities regulations.⁷⁰⁷

Who Will Control These Standards And Laws?

Creating an independent organization to set and monitor compliance with global securities regulations, would be a good thing. However, giving this independent organization

⁷⁰⁴ "Gamble and Ku", supra, note 254 at 255-256.

⁷⁰⁵ "Brunner", supra, note 94 at 918-920.

⁷⁰⁶ Ibid. Please see "Zaring", supra, note 105 at 296-297, and "Arner", supra, note 283 at 1572-1576.

⁷⁰⁷ It would eliminate the problems, which placing an O.E.C.D.-type of organization in charge of creating these standards, would otherwise produce.

criminal jurisdiction, above and beyond that of national governments, would not. For the foreseeable future, Criminal Law, and Jurisdiction, must vest in the Nation State. For one thing, if this power were taken away from Nation States, a hue and cry, among national governments and special interest groups, would ensue. Under this scenario, those states who refused to surrender their sovereignty (read the United States) would either opt out of, or refuse to sign onto, the new International regime,⁷⁰⁸ or, in the very least, ignore those provisions with which they did not agree. Having an independent international organization prosecute one state's nationals, in their own countries under some other country's laws, raises extraterritoriality concerns (although in this case it would be "international law" some of the arguments against enforcing it would be the same).

There would, as just mentioned, be great resentment if International laws, International regulatory authorities and International courts came into a nation state, arrested tried and imprisoned one of that state's nationals, thereby usurping national jurisdiction. There are ways around this rather unpleasant scenario. One way in which International law and legal conventions have worked, in other contexts, is by using the nation state model. In effect the nation state would enact enforce and prosecution of breaches of international laws. Currently, International Law and legal conventions, such as the U.N, Convention on human rights, etc. are enforced through the powers of national laws and national courts. Finally, the Securities Industry affects the financial and economic systems of the nation state, and therefore should remain under the nominal control of a given nation's treasury and national government.⁷⁰⁹ Placing the enforcement and coercive powers, of international conventions, into the hands of national authorities, has the added advantage of placing this authority into the hands of actors who have both the capacity to enforce these directives at the local level, as well as experience with policing their own nationals. They are, furthermore, better equipped to monitor actions within their own jurisdictions than an externally based group. The local authorities, also, have knowledge "of the ground," within their jurisdictions, and can prosecute, or investigate, their own nationals who take advantage of certain aspects of their nation's laws and economies, for the furtherance of their fraudulent purposes.

⁷⁰⁸ In much the same way as the United States has refused to recognize the International Criminal Court.

⁷⁰⁹ For both political reasons (control of national currency, economics, etc) and for reasons of democratic accountability.

How To Enshrine This Into Law?

National governments, under this proposal, are to control promulgation of these international standards and laws, as well as their administration. Each jurisdiction has its own set of legal traditions, and procedures, as well as a process for enacting laws. To ensure that these international standards and regulations "fit" into each nation's legal canon, it is best to have each nation introduce these laws and ordinances into their positive law, in the normal way.⁷¹⁰ To compel, or "encourage," these nations to enact the appropriate provisions into their positive law, the laws themselves, should become part of the W.T.O. regime. This does not mean that the W.T.O. must be too intimately involved with the establishment of these laws, but it merely means that the W.T.O., through G.A.T.S. the W.T.O. Treaty process itself, or through the Annex on Financial Services, should require that its members incorporate, into their positive laws, the Securities Regulatory provisions, negotiated and agreed to, by the International Securities Regulation Organization (I.S.R.A.).⁷¹¹ This would ensure functional compliance, and hopefully, systemic commitment to the new laws, their enforcement, and their success.

Will This Encourage Greater Global Integration?

By successfully creating an internationally enforceable, and seamless, set of global securities regulations one hurdle, to the creation of a truly global and integrated market for capital, will have been removed. The three simultaneous processes of globalization are working to break down barriers in other areas. G.A.T.S., especially, will assist in the creation of such a market, as barriers to trade in services come down, and as more nation states sign onto the Annex on Financial Services, and voluntarily open up select segments of their markets to further competition.⁷¹² The emergence of storm clouds, such as the Group of 21,⁷¹³ and the "new post-911 world,"⁷¹⁴ notwithstanding, the path for further global integration seems certain, even if at the beginning it begins to resemble what President Bush (in another context) termed "A coalition of

⁷¹⁰ The "normal way" in law is passed and promulgated, within that jurisdiction, keeping in mind at all times the experience of the U.S. S.E.C. and the Swiss government, in the creation of the Swiss Code's Insider Dealing Provisions. This stands as a monument of what not to do! Please see "Mahoney", supra, note 11 at 518, who would disagree with me on the results, if not the process, of this action.

⁷¹¹ Or whatever it is eventually called (ISRO is my creation!).

⁷¹² "Annex on Financial Services", supra, note 248 at 2.

⁷¹³ "Rudd", supra, note 28 at 1.

⁷¹⁴ Certainly in the wake of the terror attacks, of September 11, 2001, and the war on terror, the pace of economic globalization and integration has slowed somewhat, and given several commentators cause for a re-think of the "inevitability" of such "progress" and "integration".

the willing".⁷¹⁵ This will, in some way, assist with enhancing the interconnectedness and seamless-ness of the world's capital market even if this "coalition" formula means that some nations are more closely joined together than others.

Other Spin-Offs And Benefits.

Whether we have a "one speed" world capital market integration (or a multi-speed one), the truth of the matter is that the process of trying to unify standards and markets will bring people and groups together.⁷¹⁶ Enhanced co-operation, and the sharing of knowledge and information, will occur between all players in this process. Government and non-government, Q.U.A.N.G.O., and supranational governance bodies (read I.A.S.B. or I.S.R.O.), will have to work together on this project. This will bring these actors into closer contact with one another and force them to deal with, and engage in dialogue with, others (despite the fact that they might not agree upon some points of issue [or with other groups involved] within this process). This will lay the groundwork for further co-operation in the future. Enhanced co-operation, on issues related to the securities industry, and the creation of a Global set of regulations, can also lead to dialogue and enhanced co-operation on issues of a wider scope (such as combating cyber crime, identity theft or telephone scams [whether it's investments or lotteries,⁷¹⁷ the principle is the same]). Dialogue and consensus, in one or two areas of endeavor, will frequently set the stage for future agreements or issue resolution in other areas. In concluding our examination of this topic, we shall presently examine whether the proposed solutions for the challenges posed by globalization, and the rise of the internet in the realm of securities trading and regulation, will effectively deal with the complexities of the problem, while also, keeping all of the stakeholders and interested parties, in this debate, happy.

In The Final Analysis, Will This Proposed System Work, And Will It Keep Everyone Happy?

A Recap

To date we have examined much about the world around us. We have learned and discussed how most nations of the world came to be within one of 6 linguistic and Imperial

⁷¹⁵ Those nations "willing" to integrate their capital markets further with other nation states of a similar bent of mind. Although President Bush was actually referring to those who were willing to go to war against Iraq.

⁷¹⁶ In much the same way as we talk of a "one speed" or "two speed" process of European integration.

groupings. We have discussed the benefits of the spread of the Common Law and of the Roman (or Napoleonic) Civil Code, throughout the world. We have examined the notion of cultural diffusion, and observed how ideas are spread between nations. Globalization and the development of computer technology have accentuated these advantages and built upon these previous achievements, allowing them to be utilized upon a global scale. The development of the International Trading System to the point where trades, open markets and global interconnectedness are now becoming the norm presents us with a giant canvas to paint our global financial services mural upon. Some of the colour pigments are called W.T.O., some I.O.S.C.O., and some S.E.C., while in one corner we must paint "The Jolly Roger",⁷¹⁸ a symbol of Cyber Piracy--always a threat on the internet's "Spanish Main."⁷¹⁹ All of these colours come together to paint the picture of global finance. It is a work in progress, a picture still being painted.

Search For the Optimal Solution

Throughout our discussions, we have examined the issues outlined above, and tried to create the optimal solution for the problems created by the globalization of finance and advent of the Internet. We have done this in the hopes of creating a workable system of regulation. "No Man is an Island"... and no more so than on the web--which places the world, in all its glories, opportunities, temptations, and villainy, at the edge of your Internet portal.

National Regulators--International Problems

Regulatory authorities are hard pressed to monitor content on the Internet,⁷²⁰ and block unscrupulous parties from taking advantage of "gullible investors". What's even worse, today's "gullible investors", can seek out "opportunities" wherever cyberspace will take them. This is the absolute worst nightmare of a nation state's securities regulator. For a nation state's securities regulators, life, today, is very tough. Even after doing their best to filter the internet's content and protect investors, their "enterprising" nationals can still break through these nations' national standards and regulatory protection measures, and gain access to and participate in these

⁷¹⁷ Canada is a world-renowned leader in this type of fraud or scam. It seems particularly prevalent in the Province of Quebec, but the application of modern technology gives them a worldwide range of operations.

⁷¹⁸ A white Skull and Cross-Bones on a black background, the Pirate flag! "Pirates", supra, note 547 at 51-54.

⁷¹⁹ The Information Super Highway. The original Spanish Main was a favorite hunting ground for Pirates. Ibid at 2.

⁷²⁰ As so many, including the U.S. S.E.C., have found out.

felonious opportunities.⁷²¹ This must sometimes make national regulators feel like giving up in disgust! This underlines the limits of national regulation and shows the inadequacy of using purely nationally based regulations in an international market.

How To Help The "Good Guys" Get One Back

To combat these nefarious activities, on the part of some jurisdictions, the new "push" on the part of many national regulators (the U.S. S.E.C. among them) is for a set of globally harmonized corporate governance standards. This system, if implemented, would hold business, and business leaders, accountable for their decisions, and would ensure that when a company experienced problems that there was a clear delineation of what occurred, by whom, who knew what, and when they knew it.⁷²² Whether these new and revamped standards will be effective is anyone's guess. In the wake of Enron,⁷²³ opinion is divided as to whether the new regulations proposed, will prevent a similar thing from happening in the future.⁷²⁴ Time and the march of events will tell. In the hopes of avoiding such problems in the future, on an international scale, I have made a series of proposals in the course of this discussion. I shall examine and discuss some of them below.

How Adequate Will The System Be?

The proposed system of global securities regulations and corporate governance standards represents a giant leap forward in the cause of global integration, and in the struggle to control undesirables. Having a unified system of regulations and corporate governance standards in place means that there will be fewer places for miscreants to hide. There will be a protocol for trying to stop them and, with unified corporate governance standards in place, someone to hold accountable for financial mismanagement or incompetence. This system should be able to keep pace with technology. Filtering the internet is a difficult thing to do--even Communist China cannot keep its nationals from accessing all "decadent" or "subversive" web sites, nor can the government effectively control their citizen's participation in all aspects of cyberspace. Certainly if the government of China cannot "control" the internet--then what hope does the S.E.C. have? It is hoped that these regulations and corporate governance standards, outlined above, can keep pace with the development of technology. Although these rules, as outlined above, are not

⁷²¹ Taking the position here, that if the S.E.C., or some other regulatory body has gone to the trouble of trying to block their national's access to the offers, or outside bodies access to their nationals, that breaching these defenses constitutes a violation of national law and regulation, and is hence, illegal.

⁷²² "Challenging", supra, note 627 at 120.

⁷²³ "Coffee and Flom", supra, note 82 at 1.

technology-dependant they do require all parties to enact and apply the same rules and standards, on a global scale. Getting this done will not be easy, but it is one of the keys to success in the international normative unification of securities trading rules and governance standards.

How Can The Key To Success Successfully Open The Door?

The key to success, with these standards and initiatives as outlined above, is to get all nations to sign this new protocol, and to establish these standards in all countries. Once this occurs, efforts must be expended to ensure that signatory nation states ENFORCE these provisions! This will seal up the "Pirate dens" by forcing the Pirates' host government to no longer provide hospitality to the Pirates. Since sending in a flotilla is no longer the same kind of strategic option that it was for the Royal Navy in the 1820's--1830's,⁷²⁵ a way must be found to "encourage" nation states to enforce the protocols they have already signed. Some "positive reinforcement" can be obtained through the good offices of groups, such as the O.E.C.D. Their "Shame the crooked financial sector players (or "Johns")"⁷²⁶ campaign has borne some fruit. Additional leverage can be employed by organizations, such as the S.E.C., who have shown that they are not shy when it comes to "encouraging" foreign governments to adopt a certain policy or enact a specific law.⁷²⁷ Once all nations sign onto these regulations, and standards, and commit to enforcing them, we are well on our way towards a global system of securities trading, in a unified market.

Roles And Tasks.

This proposed system does ask players to think "globally" but it places power firmly in the hands of "local" officials. This delicate balancing of local actors, and global laws, has as good a chance as any, of success. Legal sanction, enforcement and control over the enforcement of these regulations are left in the hands of the nation state and within national jurisdiction. National laws (though international context and standards), national courts, and national enforcement, are all hallmarks of the proposed international system. There are certainly ample precedents for this type of arrangement, based upon the large number of International agreements, which become part of Domestic law (G.A.T.S. and N.A.F.T.A. are just two examples). The European Union has had a long history of member states having to translate and enact a

⁷²⁴ Ibid.

⁷²⁵ "Pirates", supra, note 547 at 2.

⁷²⁶ This is again my terminology for the efforts of the O.E.C.D., and not anything which is use, officially. For a clear picture of what the O.E.C.D. is up to in this area, please see, the sources cited at note 543.

Commission Directive, or a decision from the European Court, into their Domestic Law and practice. This can, and has, been done throughout the world, with other sorts of regulations and legislation (from the Treaty on the International Law of the Sea Convention, the Universal Postal Union Agreements, down to the U. N. Charter), and it can, and will, continue to be done into the future. Nation states and national regulators should feel included, within this system, and not be "left out" of this process.

"Culture--Culture"--What Will Happen To Legal Culture?

The downside to having international standards is that they potentially carry with them certain normative values and assumptions, which may not necessarily be shared among all members of the community of nations. However, since the common values proposed for the functioning of a global market, in securities, are the same values which are essential for private markets to thrive, and for fraudsters to be kept out, most nations should find themselves able to incorporate these laws into their national legal canons, and facilitate the globalization process. In this process the importance of a functioning, clean, efficient, global market for securities--one that investors have confidence in, and one that efficiently transacts the business asked of it--would seem to take precedence over some arcane element of local legal culture or any parochial precedent. The W.T.O. Agreements, G.A.T.S., The Annex on Financial Services, N.A.F.T.A., The Treaty of Rome, and other international conventions, already often over-ride, or sideline, local legal customs and practices. This proposed process is no different from G.A.T.S. Under our proposed system national jurisdictions, and national regulators, hold sway over the enactment, implementation, and enforcement, of these provisions. Under our proposed system, the regime will come about through negotiation between all nations. This agreement's adoption is to be consensual. In light of this fact, it is hoped that any signatory nation, who finds that they must change their law, will have time to get used to the erosion of any cherished legal standard. Furthermore, by using a consensus model and involving all signatory nations in the negotiating process, all nations will have the opportunity to craft the global system for the regulation of trade in securities, and each nation can negotiate its position and argue its case in light of their own national legal experience.

⁷²⁷ Their actions with Switzerland in the incident over the adoption of insider dealing provisions within the Swiss Criminal Code, as a prime example. Please see "Mahoney", supra, note 11 at 518.

The Public Will Love It.

An added advantage, of this proposed system, is that the public is likely to go along with it. The investment public has already voted with their feet, modems, etc., and seems relatively unafraid to speculate, or invest, in foreign shares. This desire, on the part of the investing public to "embrace the world", indicates that they are now ready for a set of **global** regulations and standards. The fact that their "local" (or Domestic) regulator will be in charge of ensuring compliance with these regulations, will likely give domestic investors an enhanced "comfort zone" (because of their familiarity with the regulations, language in which the laws are written, the national regulators themselves, and their domestic judicial process).

Opaque Or Transparent?

The system outlined above has a great many safeguards placed within it. There is to be a supervisory body, independent from other market participants. The securities regulations will be devised by an independent group modeled upon the I.A.S.B.; this should ensure fairness and objectivity. "On the ground," the local regulator and local (national) government will be in charge, which may be a good or bad thing, depending upon their track record. If the regulator is generally perceived to be transparent (S.E.C.) then this is a good thing. If the regulator is more opaque, then using these agents to enforce the international regime is not going to be good for the cause of transparency. This may also mean that some nation's regulatory systems will be more effective than others. Only time will tell.

Bridging The "Islands" Together.

"No man is an Island"... but we are all connected in the modern computer driven world. Global Commerce can only flourish where there is legal normative consensus and agreed enforcement procedures and standards. The securities industry is essential to all of our futures, and deserves a modern and effective set of regulations. By closing down the "Pirate Dens", bringing in unified Securities Regulations, and adopting compatible global corporate governance standards, the men and women of the 21st century will have bridged the gap between islands, peoples and cultures and be truly on the way to creating a securities market and a society worthy of the name **Global!**

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