

The Future of Global Securities Transactions: Blocking the Success of Market Links

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**THE FUTURE OF GLOBAL SECURITIES TRANSACTIONS:
BLOCKING THE SUCCESS OF MARKET LINKS**

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I. INTRODUCTION

The internationalization of the securities markets¹ is progressing rapidly.² Corporations are approaching foreign market places for the

1. See Pozen, *Disclosure and Trading in an International Securities Market*, 15 INT'L LAW. 84 (1981) [hereinafter Pozen (Disclosure)] (the internationalization of the securities markets occurs when a corporation sells its securities in countries other than its principal place of business, or when the same class of securities is listed on more than one exchange, creating a secondary market).

2. See Exchange Act Release No. 21958, 50 Fed. Reg. 16,302 (1985) (to be codified at 17 C.F.R. pt. 240) (proposed Apr. 25, 1985) (discussing the increase in equity through international securities trading). The factors prompting international stock liquidity include the technological progress in communications and transportation throughout the world, prosperity in developed nations, the relaxation of foreign exchange controls, the abandonment of United States investment controls, efforts by investors and corporations to alter funding and investment sources, differentials in interest rates, and the advent of floating exchange rates. *Id.* at 50 Fed. Reg. 16,302; see also Exchange Act Release No. 6568, 50 Fed. Reg. 9281 (1985) (to be codified at 17 C.F.R. pt. 230) (proposed Mar. 7, 1985) (presenting some reasons for the expanding international stock markets); Williams & Spencer, *Regulation of International Securities Markets: Towards a Greater Cooperation*, 5 J. COMP. CORP. L. & SEC. REG. 279 (1982) (explaining that advancements in communication and technology are encouraging multinational corporations to invest in international exchanges); Letter from the London Stock Exchange to John Wheeler, Secretary, SEC (Aug. 8, 1985) (asserting that improvements in communications prompted the internationalization of the securities market).

Technological change has led to the increase in the internationalization of the securities markets. See Debs, *The Development of International Equity Markets*, 4 B.U. INT'L L.J. 7 (1986) (explaining how the advancements in technology affected the global expansion in securities markets). The modernizing effects of technology allow investors to obtain information and to have access to markets more quickly and with greater ease. See Letter from Toronto Stock Exchange to John Wheeler, Secretary, SEC, (Jul. 5, 1985) [hereinafter Toronto Letter] (recognizing the informational benefits individuals will receive through international markets).

In addition, investors observe foreign market growth through exchange mechanisms to obtain the best investment. See Du Bois, *The Year Eight Foreign Markets Outpaced Wall Street*, Barrons, Jan. 7, 1985, at 63, col. 1 (discussing the greater performance by the following eight foreign markets when compared to the United States markets: United Kingdom, Mexico, Spain, Italy, Holland, Japan, France, and Belgium). Many issuers list outside the domestic market because they outgrow the domestic market's capacity for providing liquidity, their potential for shareholders increases, the foreign markets relax requirements and there are cultural similarities among the various foreign markets. See *More U.S. Concerns Seek to be Listed Overseas*, Wall St. J., Jun. 10, 1985, at 6, col. 2 (noting the increased interest of foreigners in trading on global markets to expand their portfolios). Multinational transactions are encouraged by deregulation of financial markets, the restructuring of financial communities through increased merger and acquisition endeavors, the continued reduction of foreign barriers to entry, and major U.S. investors' growing awareness of international

sale of securities.³ Investors are looking toward foreign markets as an alternative to domestic exchanges.⁴ This recent amplification of international securities transactions prompted proposals designed to form an international framework within which securities transactions can transpire spontaneously among nations with differing securities laws.⁵ The initial plan establishes market links among various nations' securities exchanges.⁶ Eventually, these market links will likely include other for-

investment opportunities. See Shopkorn, *Global Trading: The Current and Future Impact on United States Markets and United States Portfolio Managers*, 4 B.U. INT'L L.J. 25, 26 (1986). Others believe that the trend towards internationalization results from global recovery in the wake of the 1982 recession. Key factors include reduction of oil prices, interest rates, inflation and regulatory standards. Address by John Shad, Chairman, SEC, XI Annual Conference of the International Association of Securities Commissions (Jul. 16, 1986) [hereinafter Shad's Speech].

3. See Release No. 21958, *supra* note 2, at 16,302 (exemplifying the increase in corporations investing abroad).

4. See *id.* (discussing the increase in equity through international securities trading); see also *U.S. Investors Slash Foreign Portfolios as Domestic Vigor Lures Back Dollars*, Wall St. J., Feb. 25, 1985, at 58, col. 3. About \$10 to \$13 billion is held by United States investors in foreign equities compared to \$1 to \$2 billion in the late 1970's. See Kristoff, *World Financial Curbs Eased by Technology and Ideology*, N.Y. Times, Jan. 26, 1985, at 1, col. 3 (describing the historical factors leading to the internationalization of the securities markets); U.S. Department of Commerce, *The International Investment Position of the United States, 1970-1983*, 64 SURVEY OF CURRENT BUSINESS 40 (August 1984) (providing statistics on foreign investors). Nineteen foreign private issuers raised \$2.3 billion through debt offerings in the United States in 1983. See Release No. 21958, *supra* note 2, at 16,303. In addition, foreign government issuers offered \$3.1 billion in debt in the United States in 1984. *Id.* (citing 44 SEC MONTHLY STAT. REV. 14 (Feb. 1985)). Net foreign purchases of United States equities increased from \$3.9 billion in 1982 to \$5.2 billion in 1983. The gross of transactions made by foreign investors in United States equities totaled \$134.3 billion in 1983. *Id.* In 1984, the foreign securities volume was greater than 817 million shares on the NYSE (3.5% of the total market volume), 197 million shares on the AMEX (12.8% of the total market volume), and 906 million shares on NASDAQ (5.9% of the total market volume). See Release No. 21958, *supra* note 2, at 16,303 (stating the various foreign securities volumes for domestic exchanges). By 1988, researchers anticipate that domestic activity in foreign securities will increase from \$30 billion to \$60 billion and foreign activity in domestic stocks will elevate from \$134 billion to \$167 billion. Letter from National Association of Securities Dealers, Inc. (NASD) to John Wheeler, Secretary, SEC (Nov. 4, 1985) [hereinafter NASD Letter] (citing statistics researched by Arthur Anderson & Company and the Securities Industry Association). Furthermore, the market is expected to have a fivefold increase in the number of companies that trade around-the-clock and throughout the globe. Shad's Speech, *supra* note 2, at 3.

5. See *infra* notes 8-47 and accompanying text (discussing proposals to internationalize the securities markets).

6. See *infra* notes 14-47 and accompanying text (discussing the various market linkage proposals).

eign exchanges and facilitate the development of a 24-hour around-the-globe market system.

The progress of the market linkage system, however, is inherently hindered by blocking laws. Generally, blocking laws bar investigation of transactional evidence. These laws may impede surveillance of the markets and prevent enforcement of securities laws in international transactions. Once foreign investors and issuers begin to manipulate SEC enforcement and surveillance tactics, havoc will ensue.⁷ Foreign market participants will not be prevented from engaging in fraudulent market transactions and soon will totally manipulate the market. In this way, what appears to be an advance in global exchange trading may eventually result in market collapse.

This Comment examines the internationalization of the securities markets as it has grown through electronic market links and has been impeded by blocking laws. Part II examines the current market links and future linkage plans that will facilitate the development of a system of internationalized markets. Part III provides a general overview of secrecy and blocking laws and their effects on international securities transactions. Part IV evaluates the market linkage plans in light of foreign nations' use of blocking laws, a practice which will occur more frequently as multinational market trading increases. Finally, Part V recommends proposals to alleviate the problems that arise when blocking laws are imposed after transactions occur within the market links. Orderly implementation of proposals for internationalizing the markets requires cooperation and uniformity in the laws of participating nations, cemented by bilateral and multilateral agreements.

II. INTERNATIONALIZATION: MARKET LINKAGE PLANS

Securities professionals are proposing and experimenting with methods to promote an orderly internationalization of the securities markets. The major proposals include market linkages⁸ and a 24-hour market.⁹ Market links presently exist under certain linkage

7. See *infra* notes 109-193 and accompanying text (describing the methods of obtaining information and the SEC's surveillance tactics).

8. See *infra* notes 14-47 and accompanying text (describing the development of United States-Canadian and United States-United Kingdom market links).

9. The 24-hour market is a concept envisioning the trading of securities around-the-world on an around-the-clock basis. See Shopkorn, *supra* note 2, at 26 (describing the 24-hour market in greater detail); see also Moessle, *The Basic Structure of U.S. Securities Law Enforcement in International Cases*, 16 CAL. W. INT'L L.J. 1 (1986) (recognizing the future proposal of a 24-hour around-the-globe market). *Internationalization of Capital Markets: Hearings Before Senate Committee on Banking, Housing*

plans.¹⁰ As these linkage plans become more sophisticated, the transna-

and Urban Affairs, 99th Cong., 2d Sess. 94 [hereinafter Hearings] (statement of Charles N. Villiers, director, National Westminster Bank, PLC). Other approaches have been taken to implement this proposal. Under one concept, public offers are passed from a closed market place to an open market place. Author's interview with Andrew Feldman, Esq., Division of Market Regulation, SEC, in Washington, D.C. (Jul. 30, 1986) [hereinafter Interview]. See Letter from Securities Industry Association to John Wheeler, Secretary, SEC [hereinafter SIA Letter] (Oct. 17, 1985). One example of a premature implementation is when Shearson Lehman/American Express transacts in London before the United States markets open, then shifts the securities in United States issues to New York when that market opens, and finally moves the transactions in foreign issues to New York after the London market closes. NASD Letter, *supra* note 4, at 4. International brokers or dealers pass the internal order books from time zone to time zone so that foreign equities may be traded around-the-clock. See Release No. 21958, *supra* note 2, at 16,302 (noting the markets' ability to pass the books, extending the exchange's working hours); see also Letter from Samuel E. Hunter, Senior Vice President, Merrill Lynch Capital Markets to John Wheeler, Secretary, SEC (Sept. 30, 1985) [hereinafter Merrill Lynch Letter] (discussing how transactions take place over a 24-hour period through the passing of books). Merrill Lynch trades NASDAQ on a 24-hour basis by moving its book from New York to Tokyo to London and back to New York. The foreign equities traded by Merrill Lynch around-the-clock are the following: Japanese, Amsterdam, Singapore and Hong Kong. See NASD Letter, *supra* note 4 (illustrating how companies utilize the 24-hour market mechanism).

A problem arises, however, regarding the shifting of the books from one time zone to another. There exists a two hour lapse in time because Tokyo is twelve to fourteen hours ahead of New York. When the New York market closes at 5:00 p.m., the Tokyo market is closed as well since it is only 7:00 a.m. in Japan. Unaccounted hours, therefore, occur when transactions take place between Japan and the United States. See Hunter, *The Status and Evolution of Twenty-four Hour Trading: A Trader's View of International Transactions, Clearance and Settlement*, 4 B.U. INT'L L.J. 15 (1986) (illustrating the problem of a time gap when implementing a Japanese market in the 24-hour market scheme). The second concept envisions markets located in different time zones that would stay open for 24 hours. See *id.* (discussing an alternative to passing the books by having each market stay open for 24 hours). The New York Stock Exchange may alter its hours and propose that its market stay open around-the-clock. *Id.* at 9. If the markets stay open for extended hours or even for 24 hours, then the problem of gaps in the 24-hour system may be resolved. *Id.* at 16.

Surveillance of this around-the-clock proposal will likely be developed through agreements. See Letter from the American Stock Exchange to John Wheeler, Secretary, SEC (Dec. 13, 1985) [hereinafter AMEX Letter] (explaining how the AMEX-TSE linkage has established an agreement to develop surveillance mechanisms). This will enable AMEX to make transactions in off-hours if a 24-hour proposal is implemented. *Id.*; see *infra* notes 129-163, 248-264 and accompanying text (discussing the use of bilateral or multilateral agreements in order to ensure surveillance over international securities transactions).

10. See *infra* notes 14-47 and accompanying text (describing the implementation of market linkage proposals).

tional exchange system will become more elaborate. This system will ease the transition from separate markets to a 24-hour world-wide market system.

The Securities and Exchange Commission (SEC),¹¹ in conjunction with United States securities professionals outside the Commission, is currently studying ways to establish greater liquidity in international stock transactions without jeopardizing the regulatory structure.¹² The United States and the more developed foreign nations have the greatest opportunity for success in establishing securities market links between their respective exchanges because they share similar cultures and legal systems.¹³

Currently, market linkage proposals are under expansive development. These linkage plans are catalysts for investment trade at an international level. Through these proposals, investors and issuers are involved in international trading not only through links among the foreign exchanges but also through a 24-hour market. The Canada-United States link was the first linkage structure established; later this system was expanded to include the United Kingdom-United States link.

A. *Market Links Between Canada and the United States*

1. *Market Linkage Plans*

The SEC approved a linkage between the Boston Stock Exchange (BSE) and the Montreal Exchange (ME) in November 1984. This plan was the first formal international linkage.¹⁴ This linkage established an

11. See 10 H. BLOOMENTHAL, *INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION* § 3.01 (1986) (describing the obligations and nature of the SEC); see also *infra* notes 88-89 and accompanying text (noting the background and responsibilities of the SEC).

12. See NASD Letter, *supra* note 4, at 8 (discussing the creation of "market center-to-market center" linkages providing for trade and price information while establishing surveillance and market regulations implemented throughout the linkage systems).

13. Cf. Exchange Release No. 21958, *supra* note 2, at 16,302-16,309 (commenting on the possibility of expanding the market links to other countries which exhibit fewer cultural similarities to the United States, such as Japan); Letter from Amsterdam Stock Exchange to John Wheeler, Secretary, SEC (Jun. 27, 1985) (noting the benefits of a link between the United States and an Amsterdam market); Letter from Tokyo Stock Exchange to Richard G. Ketchum, Director, Division of Market Regulation, SEC [hereinafter Tokyo Letter] (Jun. 29, 1985) (expressing the Tokyo Stock Exchange's desire to become involved in a market linkage proposal, but also realizing the problems of implementing such a plan).

14. Exchange Act Release No. 21449, 49 Fed. Reg. 44,575 (1984) (proposed

electronic connection between the ME and BSE allowing ME traders to execute transactions on the floor of BSE.¹⁵ The successful link between the BSE and the ME expedited efforts to increase the internationalization of the securities markets and led the SEC to approve a linkage between the American Stock Exchange (AMEX) and the Toronto Stock Exchange (TSE).¹⁶ The tie between AMEX and TSE was the first link between a primary market in the United States and a primary market in a foreign nation.¹⁷ This plan benefited both countries by giving American and Canadian investors access to the best price on either exchange.¹⁸ Subsequently, the Midwest Stock Exchange, Inc. (MSE) proposed a link with the TSE similar to the AMEX-TSE link.¹⁹ The MSE-TSE link created a new way for orders to flow between the United States and Canada. This plan provided greater liquidity for both issuers and investors from these countries.²⁰ These three market links are seminal ties that may lead to other market links, around-the-clock trading, and universal securities trading.

Nov. 1, 1984). The BSE-ME linkage became the first of its kind between Canada and the United States. *Id.*; see *infra* notes 29-32 and accompanying text (noting the implementation of this linkage proposal through "Phases").

15. Release No. 21449, *supra* note 14, at 44,575. The SEC will only allow the linkage involving Montreal orders in 40 United States-listed Canadian stocks. See Exchange Act Release No. 21925, 50 Fed. Reg. 14,480 (1985) (proposed Apr. 12, 1985) (noting the electronic mechanism used in linkage proposals); Release No. 21958, *supra* note 2, at 16,304.

16. See Exchange Act Release No. 22442, 50 Fed. Reg. 39,201 (1985) (proposed Sept. 27, 1985) (showing how the BSE-ME link led to the AMEX-TSE link). The Commission found trading procedures, including surveillance and cooperation between the regulatory agencies of the SEC and the Quebec Securities Commission, to be satisfactory. On April 4, 1985, the AMEX proposed to the SEC a link between their exchange and the Toronto Stock Exchange. *Id.* The SEC approved this proposal on September 20, 1985. See also Exchange Act Release No. 23075, 51 Fed. Reg. 11,854 (1986) (proposed Apr. 7, 1986) (comparing the BSE-ME and the AMEX-TSE linkage proposals).

17. See Release No. 22442, *supra* note 16, at 39,201 (noting the linkage between two primary markets). The Toronto Stock Exchange is Canada's largest public securities market, with approximately 74 percent of the dollar value of all shares in Canada. The American Stock Exchange is the primary United States market with regard to total equity securities traded on the floor. *Id.*; see also AMEX Letter, *supra* note 9 (discussing the characteristics of AMEX and TSE); Letter from Toronto Stock Exchange to John Wheeler, Secretary, SEC (Jul. 23, 1985) (explaining how the AMEX-TSE proposal links two major markets).

18. See Release No. 22442, *supra* note 16, at 39,202 (noting how the linkage between two major markets will be advantageous to both domestic and foreign investors).

19. Release No. 23075, *supra* note 16, at 11,855.

20. *Id.* (noting the flow of orders between MSE and TSE).

2. *Traffic Routes for Securities Orders*

In the BSE-ME link, trades are generated only from ME to BSE²¹ and thus the transactions are only "southbound." Future plans, however, contemplate "northbound" traffic.²² This proposed traffic scheme would enable orders to originate from the floor of BSE, while the transaction takes place on ME.²³ Other market link proposals include similar traffic plans.

The AMEX-TSE linkage plan differs slightly from the BSE-ME link. Because both the AMEX and the TSE are primary markets, orders are dually listed.²⁴ The traffic route for transactions, therefore, is not only "southbound"²⁵ but also "northbound,"²⁶ enabling stock trading to occur from Toronto to New York as well as from New York to Toronto. This dual order traffic scheme increases the domestic transactions from a major United States market to a primary foreign market.²⁷

Initially, the order traffic in the MSE-TSE link is on a one-way basis "southbound." Orders, therefore, will only originate on the MSE floor and will travel through the link to TSE. Once the TSE becomes capable of simultaneous currency transactions, the traffic will move "northbound" as well.²⁸

21. Release No. 22442, *supra* note 16, at 39,202.

22. *Id.* (describing the traffic route established for the BSE-ME link).

23. *Id.* (explaining where the market traffic will take the securities orders).

24. *See* Release No. 22442, *supra* note 16, at 39,202 (illustrating that traffic will be going both northbound and southbound since both linked markets are major exchanges). A market limit order will take approximately 30 seconds to enter the system. Later, the link will include all limit orders, not just marketable limit orders. Toronto Letter, *supra* note 2, at 10.

25. *See* Release No. 22442, *supra* note 16, at 39,202 (describing the northbound traffic traveling from TSE to AMEX).

26. *See id.* (noting the traffic pattern going from AMEX to TSE). Initially, orders may be executed only at the originating market. Eventually, the linkage will include all limit orders. Toronto Letter, *supra* note 2. Linkage will allow the direct flow of orders between the AMEX and TSE. *See* AMEX Letter, *supra* note 9 (describing the process transactions encounter when participating in linked markets).

27. *See* Release No. 22442, *supra* note 16, at 39,203-39,204 (noting the effects of international market transactions).

28. *See* Release No. 23075, *supra* note 16, at 11,855 (explaining the future proposals regarding traffic patterns and market quotations for the MSE-TSE link). Once the transactions become northbound and southbound, the MSE's quotes will be the best national bid and offer made by the Consolidated Quotation System whereas the TSE's obligation does not necessitate the quotation of the Canadian best bid and offer. *Id.*

3. *Plans Establishing the Linkage Proposals and the Procedures to be Followed*

The BSE-ME linkage plan operates in phases.²⁹ Phase I established the initial link between the two exchanges. Recently, BSE planned Phase II, implementing an Intermarket Trading System (ITS)³⁰ via the Montreal Exchange's Registered Representative Order Routing and Execution System (MORRE).³¹ The BSE and the ME, in addition, created a Joint Floor Committee to supervise the development of the linkage between these two exchanges.³²

The AMEX and the TSE established a Trading Linkage Plan. This plan confirmed the agreements of the two exchanges regarding the linkage.³³ In addition, the AMEX created a new set of rules³⁴ to implement the Trading Linkage Plan as well as ensure application of the other rules of the Exchange.³⁵ Furthermore, the rules of the market receiving the order apply to all linkage transactions.³⁶

The TSE and the MSE agreed to a Memorandum of Understanding Respecting a Trading Linkage.³⁷ This Memorandum covers all as-

29. Release No. 21449, *supra* note 14, at 44,575. The BSE planned the second phase (Phase II) which built upon the initial proposal through expanding the list of securities through the Intermarket Trading System (ITS). Exchange Act Release No. 21925, 50 Fed. Reg. 14,480, 14,481 (1985) (proposed April 12, 1985). ITS links the over-the-counter (OTC) market for multiple traded and listed securities and participating exchange floors. The ITS utilizes the ordering system via the Montreal Exchange's Registered Representative Order Routing and Execution System (MORRE) and allows trades of approximately 200 BSE stocks. Release No. 21958, *supra* note 2, at 16,304.

30. See Exchange Act Release No. 21925, *supra* note 29, at 14,480 (discussing how the ITS benefits the surveillance mechanisms of the market links). The ITS is a computer linked electronic intermarket routing order system permitting multiple traded stocks to be sent directly from one exchange to another. Exchange Release No. 18713, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,214 (May 6, 1982).

31. Release No. 21925, *supra* note 29, at 14,481. MORRE is an automated small order routing and execution system containing a library of eligible stocks. The MORRE price or higher will be given to every order executed from BSE. *Id.*

32. See *id.* (discussing the use of a committee to enforce the laws of the market links).

33. See Release No. 22442, *supra* note 16, at 39,203 (explaining how the plan will be used to benefit the proposal); see also Exchange Act Release No. 22001, 50 Fed. Reg. 19,507, (May 8, 1985) (discussing the description of the Trading Linkage Plan).

34. See Release No. 22442, *supra* note 16, at 39,201 (noting AMEX Rules 240 to 244).

35. See *id.* at 39,202 (recognizing the application of the new set of rules to the AMEX-TSE link).

36. See *id.* (illustrating situations in which the plan will be implemented).

37. Release No. 23075, *supra* note 16, at 11,857; see *infra* notes 132-138 and

pects of the MSE-TSE linkage, including administration, enforcement and surveillance.³⁸ The Memorandum also establishes a six-member joint operating committee that oversees the linkage.³⁹

The linkage of the markets between the United States and Canada set a precedent for other market links providing investors and issuers an increased opportunity to obtain greater liquidity and better prices.⁴⁰ Issuers looked to United Kingdom stocks as an alternative to the stocks listed on the Canadian exchanges.

B. *Market Links Between the United Kingdom and the United States*

London is an appealing market for foreign investment.⁴¹ The London Stock Exchange (LSE) and the United States National Association of Securities Dealers (NASD), desiring to participate in international securities transactions, developed the first transatlantic exchange of stock quotations.⁴² The LSE and the NASD agreed to a two-year

accompanying text (describing the Memorandum of Understanding between the United States and Canada).

38. See Release No. 23075, *supra* note 16, at 11,857 (describing how the Memorandum will benefit the market links); see also Exchange Act Release No. 22156, 50 Fed. Reg. 24,902 (1985) (proposed Jun. 12, 1985) (suggesting the establishment of the Memorandum in order to develop surveillance agreements).

39. Release No. 23075, *supra* note 16, at 11,856. The committee's duties involve developing and implementing the proposed linkage, monitoring its operation, exploration of any potential expansion or enhancement of the linkage, and addressing any potential problems or deficiencies with the linked markets. *Id.*

40. *Id.* at 11,855; see Letter from the law firm of Whitman & Ransom to John Wheeler, Secretary, SEC (Jul. 12, 1985) [hereinafter Whitman & Ransom Letter], at 10 (expressing the viewpoint that the British investors realized the changes in the Canadian investors' status since the Canadian law is similar to the United States securities procedures).

41. See Letter from New York Stock Exchange, Advisory Committee on International Capital Markets to John Wheeler, Secretary, SEC (Jul. 15, 1985) [hereinafter NYSE Letter] (discussing the equitable benefits a United States-United Kingdom link will bring to foreign investors). For instance, Japanese companies traded about 60 equity-related offerings on the London market compared to only one on the New York market. See *id.* at 8 (illustrating the increasing popularity of the London market to foreign investors).

42. See Shad's Speech, *supra* note 2, at 6; see also Exchange Act Release No. 23158, 51 Fed. Reg. 15,989 (1986) (proposed Apr. 29, 1986) (describing the proposed market link between the United States and the United Kingdom). Prior to the planned link between LSE and NASD, the Philadelphia Stock Exchange, Inc. (PHLX) proposed a linkage between their exchange and the London Stock Exchange to trade foreign currency options on both floors. See Exchange Act Release No. 22351, 50 Fed. Reg. 25,340 (1985) (proposed Aug. 30, 1985) (noting the proposal of a PHLX-LSE

pilot program through which the two exchanges sought to develop a linkage plan.⁴³ The pilot program provides for an automated quotation and order mechanism through the LSE's Stock Exchange Automated Quotation (SEAQ) system⁴⁴ and the NASD's automated quotation system (NASDAQ).⁴⁵ The proposed relationship between NASD-LSE differs from the plans linking Canadian and United States markets in that the United States-Canadian exchange linkage contemplates trading links. Purchases of securities between the United States and the United Kingdom will occur in the process each market separately uses.⁴⁶ This procedure is similar to the order execution process and traffic routes the Canadian-United States market links implement.⁴⁷ When fraudulent activities occur within the established market links, participating countries may impose their blocking laws to hinder an investigation of these illegal events.

III. BLOCKING LAWS: THE ROADBLOCKS TO UNITED STATES INVESTIGATIONS

A. *Background on Secrecy and Blocking Laws*

1. *General Secrecy and Blocking Laws*

Canada and the United Kingdom are among the numerous countries that have secrecy or blocking laws.⁴⁸ Secrecy laws primarily pro-

market link).

43. See Release No. 23158, *supra* note 42, at 15,990 (explaining how NASD and LSE created the link between their two exchanges). The proposed linkage attempts to establish the exchange of information between these two nations and increase traders' interest in over-the-counter (OTC) securities in London and LSE stocks traded in the United States. *Id.*

44. See SIA Letter, *supra* note 9, at 5.

45. See Release No. 23158, *supra* note 42, at 15,989-15,991 (explaining the application of NASDAQ system for executing transactions as well as describing the entire proposed NASD-LSE link).

46. *Id.*

47. See *supra* notes 14-20 and accompanying text (describing the transaction procedures developed for Canadian-United States linkage proposals).

48. See Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 INT'L LAW. 89, 91 (1984) [hereinafter *Policing Internationalized U.S. Capital Markets*] (discussing the imposition of secrecy or blocking laws when a foreign participant invests in the United States securities markets). The countries' secrecy statutes vary among the approximately twenty nations which enacted these laws. The Federal Republic of Germany, Austria, El Salvador, Switzerland, Greece, the Bahamas, Costa Rica, Liechtenstein, Cayman Islands, and Panama have established bank secrecy statutes. The United Kingdom, the Netherlands, Israel, Bermuda, Montserrat, Anguilla, Caicos, Turkey, Antigua, Barbados, and St. Vincent do

tect the confidentiality of information of banking and financial institutions.⁴⁹ Secrecy laws often are not merely regulatory measures but reflect national public policy.⁵⁰ These laws view confidentiality as a fundamental right.⁵¹

The rationale behind secrecy statutes is analogous to the attorney-client privilege in the United States. Both theories prohibit the disclosure of confidential information in order to protect the parties involved.⁵² Specifically, secrecy laws prevent any disclosure of a customer's financial information, including the individual's identity, business records and accounts, unless the client consents to revealing these facts.⁵³ Without these laws, disclosure may expose a person accused of violating securities laws to criminal or civil liability.⁵⁴

not have secrecy statutes but have customs similar to secrecy laws. Letter from James D. Cockwell, Chairman, Institute of Foreign Bankers, Inc. at 4 n.3 (Dec. 1, 1984) [hereinafter Cockwell Letter] (Comment on SEC Release No. 21186, File No. 7-27-84 "Waiver by Conduct"); Fedders, Wade, Mann & Beizer, *Waiver by Conduct— A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MKT. L. 1, 3 (1984) [hereinafter *Waiver by Conduct*]. The information, however, differs from source to source. See Note, *Foreign Bank Secrecy and the Evasion of United States Securities Laws*, 9 N.Y.U. J. INT'L L. & POL. 417, 422 n.24 (1977) [hereinafter N.Y.U. Note] (noting that a recent report found 27 jurisdictions enacted some variation to bank secrecy laws); Release No. 21186, [Jul.-Dec.] 16 Sec Reg. & L. Rep. (BNA) 1305, 1307 (Aug. 3, 1984) (recognizing only 15 countries with secrecy laws).

49. Moessle, *supra* note 9, at 21.

50. *Id.* (noting that German banking secrecy reflects public policy). The Swiss established the bank secrecy laws to protect its bank customers from foreign governments' oppression. In the 17th century, the Swiss protected the French Huguenots who used Switzerland as a haven from religious persecution. During World War II, Switzerland codified this custom into its secrecy statute in order to protect the identity of German Jews, fleeing Nazi Germany, who opened Swiss bank accounts. The Swiss government wanted to prevent any bank employee from assisting Nazi investigation. *Waiver by Conduct*, *supra* note 48, at 31.

51. Moessle, *supra* note 9, at 21.

52. Letter from the law firm of Baker & McKenzie to Shirley E. Hollis, Acting Secretary, SEC (Nov. 29, 1984).

53. See Moessle, *supra* note 9, at 21 (discussing the concept of an individual's opportunity to waive his right of privacy). Some nations mandate an express waiver, while others allow simply an implied waiver; *Waiver by Conduct*, *supra* note 48, at 31; see also *supra* notes 194-224 and accompanying text (analyzing the concept of waiver by conduct).

54. N.Y.U. Note, *supra* note 48, at 417. Usually criminal proceedings will ensue when bank secrecy laws are violated. See *Waiver by Conduct*, *supra* note 48, at 33 (listing penalties for violations of bank secrecy laws). Specifically, Switzerland's Article 47 of the Federal Banking Law provides that knowing intent or inducing a violation will lead to imprisonment for up to six months or a fine of up to Sfr. 50,000. H. SCH-

Blocking laws, like secrecy statutes, prohibit the disclosure, investigation, duplication, and removal of documents from a country.⁵⁶ Blocking laws, however, differ from secrecy laws in that blocking statutes protect state interests.⁵⁶ In addition, the waiver concept, utilized in secrecy statutes proceedings, may not be implemented with respect to blocking laws because the primary rationale behind blocking provisions is the protection of national rather than individual interests.⁵⁷

Foreign nations enact blocking statutes for two reasons: first, to prevent the disclosure of information by their citizens as parties to United States litigation, and second, to prevent the United States government from conducting investigations and imposing its regulations within their borders.⁵⁸ These countries criticize as an invasion of sovereignty⁵⁹ actions of the United States and attempts of foreign countries to impose extraterritorial substantive laws, especially in antitrust proceedings.⁶⁰

ULTZ, *BANKING SECRECY AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS* 8 (1983); see also Moessle, *supra* note 9, at 21 (describing the peculiarity of Swiss bank secrecy laws).

55. Note, *Secrecy and Blocking Laws: A Growing Problem As the Internationalization of the Securities Markets Continues*, 18 VAND. J. TRANSNAT'L L. 809, 821-822 (1985) [hereinafter Vanderbilt Note] (defining the concept of blocking statutes). Nations with blocking laws are Great Britain, Canada, France, the Federal Republic of Germany, Australia, Denmark, Finland, Belgium, Greece, Italy, the Netherlands, New Zealand, Norway, the Philippines, Sweden, and Switzerland. Release No. 21186, *supra* note 48, at 11, [Jul.-Dec.] 16 Sec. Reg. & L. Rep. at 1307; *Waiver by Conduct*, *supra* note 48, at 36.

56. Moessle, *supra* note 9, at 22.

57. *Id.* Blocking laws do not provide a private right of action while secrecy laws do. *Id.*; see *infra* notes 211-224 and accompanying text (criticizing the application of the waiver by conduct approach because an individual cannot give consent for the disclosure of evidence relevant to national interests).

58. See Comment, *Arbitration, Forum Selection & Choice of Law Agreements in International Securities Transactions*, 42 WASH. & LEE L. REV. 1069, 1091 (1985) [hereinafter Washington & Lee Comment] (discussing the rationale behind the enactment of blocking statutes); see also Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 698-699 (1982) (illustrating foreign countries hostility towards the United States imposing its laws on transactions involving their nations); Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 234-268 (1982) [hereinafter Loyola Comment] (describing the foreign blocking laws of various nations and how these nations oppose the United States' application of extraterritorial laws).

59. *Waiver by Conduct*, *supra* note 48, at 36; Letter from Andress F. Lowenfeld (Nov. 26, 1984) (Comment on SEC Release No. 21186, File No. S7-27-84 "Waiver by Conduct") [hereinafter Lowenfeld Letter].

60. *Waiver by Conduct*, *supra* note 48, at 37. When the United States applies its

There are two types of blocking laws: discovery blocking laws and judgment blocking laws. Discovery blocking laws bar any request for documents by foreign courts, agencies or individuals.⁶¹ Judgment blocking laws prohibit the domestic enforcement of foreign courts' or administrative agencies' decisions.⁶² As is true with secrecy laws, violation of either discovery or judgment blocking laws may lead to imprisonment and/or fines.⁶³

2. *Canadian and United Kingdom Secrecy and Blocking Laws*

As a result of Canada's experience with the United States' anti-trust enforcement laws,⁶⁴ the 1980 session of the Canadian Parliament enacted the Foreign Proceedings and Judgment Bill of 1980.⁶⁵ The Canadian government consistently asserted that United States laws and extraterritorial authority infringed upon Canadian national sovereignty.⁶⁶ While this Act covers all provinces in Canada, provincial blocking laws also exist.

In Canada, the provinces generally pass laws on a territorial rather than on a federal level. In response to anti-trust suits, the provinces of Quebec and Ontario also developed Acts that bar disclosure of business documents.⁶⁷ These Acts are general discovery blocking statutes that prevent the disclosure of documents related to litigation from the provinces.⁶⁸ The Quebec Business Concerns Records Act⁶⁹ and the Ontario

broader antitrust laws to foreign countries, the foreign countries are usually unable to bring a private suit. Nations, therefore, retaliate by enacting blocking laws. *Id.*

61. *Waiver by Conduct*, *supra* note 48, at 35.

62. *Id.* at 36-37.

63. *Id.* at 39.

64. See Loyola Comment, *supra* note 58, at 253 (describing the history behind the Canadian blocking laws).

65. Foreign Proceedings and Judgments Bill 1980, Bill C-41, 1st Sess. 32d Parliament, 29 Eliz. II (1980), *cited in* [July-Dec.] *Antitrust & Trade Reg. Rep. (BNA) No. 973*, at A-19 (July 17, 1980); see *infra* notes 74-80 and accompanying text (discussing the British Protection of Trading Interests Act).

66. Loyola Comment, *supra* note 58, at 256 (citing the Task Force on the Structure of Canadian Industry, Canadian Privy Council Office, *Foreign Ownership and the Structure of Canadian Industry* (1968)).

67. *Id.* (discussing the enactment of blocking laws and their effect on antitrust cases); see *In re Grand Jury Subpoenas Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

68. Davidson, *The Canadian Response to the Overseas Reach of United States Antitrust Law: Stage I and Stage II Amendments to the Combines Investigation Act*, 2 CAN-US. L.J. 166, 167 (1979).

69. QUE. REV. STAT. ch. 278 (1964) (redesignated QUE. REV. STAT. ch. D-12 (1977)).

Business Protection Act⁷⁰ cover not only anti-trust suits but also general requests to the Canadian court to bar disclosure.⁷¹ These provincial laws, however, only apply within the respective jurisdictions.⁷² Moreover, documents cannot be taken out of the jurisdiction of the province.⁷³

The United Kingdom, like Canada, encountered problems when the United States imposed its extraterritorial jurisdiction and thus enacted several statutes to counter the United States' authority.⁷⁴ The Parliament legislated the Protection of Trading Interests Act of 1980⁷⁵ to counter United States discovery procedures.⁷⁶ The Protection of Trading Interests Act (the PIA) affects foreigners' ability to obtain evidence in England, specifically in anti-trust suits or awards of significant damages.⁷⁷

Under the PIA, the British Secretary of State can circumvent certain "measures" that are destructive of the United Kingdom's trading interests.⁷⁸ The PIA applies not only to business transactions and anti-trust laws but also to securities laws. The British Secretary of State has extraterritorial control over anyone subject to a civil or criminal United States suit while doing business in the United Kingdom.

The PIA allows the British Secretary of State to protect persons in the United Kingdom from being subject to disclosure requirements. The individual will not have to produce a court requested document, disclose the existence of any document, or publish any data that is not

70. ONT. REV. STAT. ch. 54 (1970). The Ontario Business Records Protection Act prohibits the disclosure of any information involving Ontario business in any foreign proceeding. If, however, another law of Canada or a province provides for disclosure, then the information may be revealed. Washington & Lee Comment, *supra* note 58, at 1091.

71. Loyola Comment, *supra* note 58, at 253.

72. See Myrick and Love, *Obtaining Evidence Abroad for Use in United States Litigation*, 35 Sw. L.J. 585, 613 (1981) (discussing various cases that illustrate conflict between being subject to sanctions for not disclosing information, and not complying with Canadian blocking laws).

73. *Id.*

74. See Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 262-82 (1981) (describing how the British attempt to circumvent the United States extraterritorial authority).

75. The Protection of Trading Interests Act, 1980, ch. 11.

76. See Lowe, *supra* note 74, at 273 (describing the principles of the Protection of Trading Interests Act).

77. Loyola Comment, *supra* note 58, at 240.

78. The Protection of Trading Interest Act, 1980, c. 11, § 1(1). The "measures" that may be taken by the Secretary are administrative, judicial and other governmental actions. *Id.* at § 1(2) and § 1(3).

within the court's jurisdiction. The Secretary of State was given the power to prohibit compliance out of concern that disclosure would infringe upon the sovereignty, national interests or international relations of the United Kingdom.⁷⁹ Similarly, the United Kingdom's Act allows the British Secretary of State to bar implementation of foreign discovery requests. When requests infringe upon British jurisdiction, security, governmental relations or sovereignty, the United Kingdom may impose its blocking laws.⁸⁰

IV. THE APPLICATION OF THE BLOCKING LAWS: OBTAINING INFORMATION WITHIN THE MARKET LINKS

The internationalization of the securities markets, specifically the implementation of market links, may be hindered when a country imposes its blocking laws. Enforcement conflicts will arise among the regulatory agencies because of the differences in their structure and methodology.⁸¹ Discrepancies in disclosure and insider trading laws will cause surveillance problems. Regulatory agencies will be unable to control the market, and inadequate enforcement will lead to fraud and manipulation.⁸² Chaos will ensue and may extend to investors who will "market shop" for the most lenient exchange,⁸³ and this scenario may lead to the collapse of established market links.

A. Regulation of Enforcement and Surveillance

Each country has its own unique methods for enforcing securities laws and regulating securities transactions within its borders.⁸⁴ Difficulties may arise when two countries with different regulatory procedures interact. This dissonance in the system inevitably leads to market linkage problems. In order to neutralize the disparities, the various regulatory agencies must come to a mutual understanding as to their function and role.

While securities regulatory agencies function with similar underly-

79. *Id.* at § 2.

80. *Id.*

81. *See infra* notes 84-112 and accompanying text (discussing the type of regulatory function of the United States, Canada and United Kingdom agencies).

82. *See infra* notes 84-108 and accompanying text (evaluating the regulatory agencies problems in combatting fraud and manipulation in the market place).

83. *See infra* notes 108-109 and accompanying text (recognizing the ability of traders to choose which market they will be able to manipulate).

84. *See generally* 10 H. BLOOMENTHAL, *supra* note 11, at §§ 3.01, 4.01, 6.01 (examining the securities regulatory agencies of the United States, United Kingdom and Canada).

ing goals, their modes of regulation differ. Canada regulates all securities transactions through provincial agencies. The provinces generally attempt to cooperate with each other on regulatory matters in order to establish a uniform enforcement system.⁸⁵ But Canadian federal legislation does not exist; each provincial jurisdiction has its own laws.⁸⁶ A federal statute, however, covers securities transactions through the application of the Criminal Code and the Canada Business Corporations Act.⁸⁷ These Canadian regulatory policies are similar to those of the United States.⁸⁸

The primary regulator in the United States, the Securities and Exchange Commission (SEC), is an independent governmental agency. The SEC enforces United States securities laws by investigating civil and criminal actions. Through its rule-making authority, the SEC supervises and manages the stock exchanges and the NASD.

In the United Kingdom, the Department of Trade and Industry performs a similar function but differs greatly from the SEC. The Department of Trade supervises unlisted companies (covered by the Third Schedule of the Companies Act 1985).⁸⁹ This agency has the authority to license securities dealers. The police are involved in criminal securities actions except when the statute imposes upon the Department of Trade the obligation of prosecuting or investigating the incident.⁹⁰ The United States and Canada rely more upon governmental agencies whereas in the United Kingdom the self-regulatory agencies act as enforcers.

Canada's two self-regulatory agencies are the stock exchanges and the Industry Association.⁹¹ The Canadian stock exchanges are generally smaller than United States markets. The Industry Association, a national organization establishing financial requirements and monitoring the market standards, has fewer supervisory responsibilities than

85. See 10 H. BLOOMENTHAL, *supra* note 11, at § 4.01[2].

86. See *id.* (indicating that four Canadian provinces model their own statutes after the Ontario Uniform Act).

87. See Release No. 21449, *supra* note 14, at 44,576 (stating the two federal laws that Canadian regulatory agencies apply).

88. See 10 H. BLOOMENTHAL, *supra* note 11, at §4.01 (comparing the similar goals of Canadian regulatory agencies to the objectives of American agencies).

89. Release No. 6568, *supra* note 2, at 9385; see 10 H. BLOOMENTHAL, *supra* note 11, at § 6.01 [1] (describing the role the Department of Trade takes in regulating securities transactions).

90. See 10 H. BLOOMENTHAL, *supra* note 11, at § 6.01[2] (describing the role the police take in regulating the stock market and noting how the police handled the criminal offenses dealing with illegal securities acts).

91. See *id.* at § 4.01[4].

the stock exchanges.⁹²

In the United States, a system of self-regulatory organizations regulates the stock exchanges and securities industry.⁹³ These self-regulating agencies are made up of ten active, registered national securities exchanges and NASD.⁹⁴ The role of the United States securities market regulators as well as the SEC is to prevent injustice in the United States securities market.

In the United Kingdom, self-regulatory agencies are more dominant because governmental controls are generally relaxed. The British market relies upon the professional bodies in the field. The London Stock Exchange regulates trading without government supervision.⁹⁵ The United Kingdom has begun to rely upon a self-regulatory system that will be similar to that of the United States.⁹⁶

Brokers or dealers conduct their transactions based upon the rules and regulations of the London Stock Exchange.⁹⁷ The disciplinary function of the London Stock Exchange is performed through an Appeals Committee and penalties range from censure to expulsion.⁹⁸ In addition, the London Stock Exchange analyzes and scrutinizes the information supplied by offerors of securities who wish to be listed on the Exchange.⁹⁹

The stock exchanges in London work in conjunction with London's Panel on Take-overs and Mergers.¹⁰⁰ The Panel¹⁰¹ interprets and administers the London City Code on Take-overs and Mergers.¹⁰² This organization performs an advisory role regarding take-overs and merg-

92. *See id.*

93. Karmel, *Regulatory Aspects of Securities Trading*, 4 B.U. INT'L L.J. 105, 108 (1986).

94. *See* 10 H. BLOOMENTHAL, *supra* note 11, at § 3.01[2].

95. Karmel, *supra* note 93, at 108.

96. *Id.* The United Kingdom, however, is cautious not to have a governmental body such as the SEC "compel effective self-regulation." *Id.*

97. Pimlott, *The Reform of Investor Protection in the U.K.—An Examination of the Proposals of the Gower Report and the U.K. Government's White Paper of January 1985*, 7 J. COMP. & CAP. MKT. L. 141, 144 (1985).

98. *Id.* In addition, the Stock Exchange requires each firm to have a "minimum solvency ratio," to disclose annual statements, and to submit a quarterly, unaudited balance sheet. *Id.*

99. *Id.*

100. *See* 10 H. BLOOMENTHAL, *supra* note 11, at § 6.01[3](b) (describing the role of the Panel on Take-Overs and Mergers).

101. *See id.* (defining the Panel on Take-Overs and Mergers).

102. Pimlott, *supra* note 97, at 145. The Panel controls only take-over offers and other similar issues specifically concerned with the method in which the bid is offered. *Id.*

ers but has no legal status.

London securities professionals established the Council for the Securities Industry (CSI).¹⁰³ The CSI supervises transactions, upholds ethical standards, develops new codes of conduct and resolves differences within the London securities market.¹⁰⁴ This organization's obligations are to control the areas of the City Code that are not managed by the Panel.

The differences in mechanisms of the various countries' regulatory agencies may lead to conflicts in enforcement of their respective securities laws, particularly with disclosure and insider trading. Surveillance is the primary means of enforcing the securities laws.¹⁰⁵ Surveillance, however, will become more difficult as a result of the internationalization of the securities markets.¹⁰⁶ Because the SEC has jurisdiction only over citizens of the United States and individuals within the United States, enforcement of foreigners' transactions will be very complex. The SEC maintains its function as a regulatory body while being flexible in controlling foreign investors.¹⁰⁷ When foreign nations impose their blocking laws, the SEC will be hindered in investigating and prosecuting fraudulent actions.

Foreign participants may choose to trade in the United States because of their ability to use their country's blocking laws to circumvent discovery proceedings. Foreigners engaged in transactions involving the United States, through the market links, may participate in fraudulent transactions if they believe the SEC will be unable to enforce United States securities laws. Insider trading will then escalate and induce market manipulation. This cycle may continue until market links are corrupted by the lack of any surveillance. The entire exchange system may eventually collapse if market nations do not cooperate to develop an international enforcement system.

Alternatively, foreign issuers may look to non-United States markets to completely circumvent SEC surveillance. The implementation of existing linkage proposals encourages issuers to "market shop" to find the most profitable exchange.

103. *Id.* at 145.

104. *Id.* Many securities professionals, however, envision the CSI as more of a discussion group rather than a regulatory body. See L.C.B. GOWER, REVIEW OF INVESTOR PROTECTION: A DISCUSSION DOCUMENT, 38-39 (1982).

105. See Release No. 21958, *supra* note 2, at 16,309.

106. *Id.*

107. See Whitman & Ransom Letter, *supra* note 40 (examining the degree of control the SEC has over foreign investors). The SEC struck a balance that accommodated foreign investors and treated domestic issues fairly. *Id.*

Generally, issuers offer their securities in the jurisdiction where the cost of debt capital is lowest. Issuers prefer to participate in simultaneous offerings in several jurisdictions. For example, an issuer with securities listed on stock exchanges in various jurisdictions may offer its equity securities in each of the jurisdictions in order to provide an investment opportunity to all of its shareholders. Offering securities in foreign jurisdictions may also help to raise the corporate profile of an issuer in those jurisdictions. Furthermore, when offerings are made available in several jurisdictions, professional investors have a greater opportunity to search for more profitable investments¹⁰⁸ by trading in the jurisdiction with the best currency exchange rate and the best quotations. Overall, foreign issuers will ultimately benefit from "market shopping" by selecting an exchange that is subject to lenient securities laws and has regulators who will not interfere with the sovereignty of the issuer's nation.

B. *Methods for Obtaining Information in a Market Linkage System*

If a nation whose issuers trade through a market link imposes its blocking laws, the SEC may employ various tactics to obtain information about possible fraudulent activity. The success of a procedure often depends upon the relationship of the countries involved. These tactics may be costly and time-consuming no matter what country the SEC investigates.

1. *Voluntary Cooperation*

Occasionally, foreign suspects may divulge information voluntarily. The concern about adverse publicity and retribution from United States courts often leads suspects to produce their records.¹⁰⁹ Foreign issuers and individuals, however, rarely volunteer to produce requested documents.

When a country imposes its secrecy or blocking laws, the SEC first responds through diplomatic channels. The goal is mutual cooperation between the SEC and the foreign nation. Diplomatic means, however, usually result in failure.¹¹⁰

In a few circumstances, individuals or institutions have complied

108. Merrill Lynch Letter, *supra* note 9.

109. *Policing Internationalized U.S. Capital Markets*, *supra* note 48, at 99.

110. Vanderbilt Note, *supra* note 55, at 827.

with SEC investigations voluntarily.¹¹¹ Voluntary cooperation and SEC diplomatic measures are generally unsuccessful.¹¹² If attempts at mutual cooperation fail, the SEC must utilize other means of obtaining information.

2. *International Efforts to Gather Evidence*

a. Hague Evidence Convention

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Convention),¹¹³ provides procedures for obtaining evidence permitted by the State authorities, as long as the information is "utilizable" in the State where the trial is held.¹¹⁴ The Convention establishes two devices for gathering evidence: 1) letters of request, and 2) the use of diplomatic officials, consular agents, and commissioners.¹¹⁵

The Convention's letters of request may only be executed through orders from a United States District Court.¹¹⁶ Orders may not be denied, even when a State's internal law gives exclusive jurisdiction over the subject matter of the action or the State's internal law does not give a right of action.¹¹⁷

The Convention instructs diplomatic officers and consular agents in foreign countries to secure evidence only without compulsion¹¹⁸ or if

111. *Policing Internationalized U.S. Capital Markets*, *supra* note 48, at 99.

112. *Id.* Great Britain usually refuses to cooperate in investigatory requests during the pre-indictment stage. See Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999, 1006 (1984).

113. 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C. § 1781 (1982 & Supp. I 1983)) [hereinafter Hague Convention].

114. See Von Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner*, 16 N.Y.U. J. INT'L L. & POL. 985 (1984).

115. See *infra* notes 118-120 and accompanying text (examining the utilization of consular agents, commissioners and diplomatic officers).

116. See Myrick and Love *supra* note 72, at 592 (describing Article 1 of the Hague Convention that defines "other judicial act" as not encompassing any judicial discovery procedures).

117. *Id.* at 593. English courts, however, have broad discretion with respect to Letters of Request. Courts may deny execution if requirements are not strictly followed. If the order interferes with a state's sovereignty, the court may not execute the action. *Id.*

118. See *id.* at 595 (describing the implications of Article 21 with respect to obtaining evidence). Article 21 provides in pertinent part:

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence-

the foreign nation grants permission for disclosure.¹¹⁹ Information may be obtained when a foreign nation gives permission for parties to proceed with discovery.¹²⁰ Thus, the Convention limits the process individuals may use to gather evidence but does not remove the barrier established by secrecy and blocking laws, because the Convention does not force disclosure.

The Convention will only be effective if American discovery requests are made in accordance with the Convention rules and if American courts comply with these rules. Although the United States has ratified the Convention, few courts look to it when making judicial de-

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

* * *

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Id.

119. *Id.* at 596. Article 16 of the Convention states:

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, *without compulsion*, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if-

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Id.

120. *Id.* Article 17 of the Convention states:

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if -

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Id.

cisions. Amendments to the Convention may increase its usefulness in securing foreign information.¹²¹

Canada has not ratified the Convention because of concerns that difficulties may arise.¹²² The absence of a federal state clause in the Convention creates a barrier which restricts Canada from implementing the Convention. If Canada ratifies the Convention, alterations must occur in order for the treaty to be successfully applied. First, the Convention would have to mandate that Canadian courts grant disclosure orders rather than permit the courts to use discretion.¹²³ Second, Article 11 would integrate the evidence provisions of each provincial jurisdiction.¹²⁴ Third, the Evidence Act of Ontario allows a court to execute letters of request.¹²⁵ Article 2 of the Convention establishes a separate process for executing letters of request and appointing officials to supervise procedures. Moreover, ratification of the Convention will lead to a separate process for letters of request and court appointments of supervision. The Convention may include Canada, but most likely this application will fail.

Generally, foreign nations can circumvent the Convention. The Convention allows parties to refuse to disclose information, by invoking a privilege under the law of the executing state.¹²⁶ The United Kingdom declared that it has the right, under Article 23 of the Convention,¹²⁷ to choose not to execute letters of request. The reason for this declaration possibly is British disenchantment with the expansive pre-trial procedures and evidence gathering sanctions of the United States.¹²⁸ Thus, the Convention permits the application of secrecy and blocking laws to avoid compliance with disclosure laws. The implementation of the Convention may remove some of the barriers to obtaining

121. See Von Mehren, *supra* note 114, at 992 (analyzing the effectiveness of the convention in judicial proceedings).

122. Myrick and Love, *supra* note 72, at 613.

123. See Hague Convention, *supra* note 113, at Art. 12 (establishing that the Convention makes it mandatory for a court to require disclosure of evidence). Specifically, Article 12(b) would limit the public policy argument of refusing to grant letters of request to protecting the sovereignty of Canada. *Id.*

124. *Id.* at 614.

125. See *id.* at 612-13.

126. *Id.* at 614.

127. See *id.* at 594 (citing Article 23 of the Hague Convention which provides: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common Law countries.")

128. See Myrick and Love, *supra* note 72, at 594 (examining foreign nations' agitation towards United States procedures and how they apply the Hague Convention in order to circumvent these measures).

evidence but also may create new problems.

b. Bilateral and Multilateral Agreements

The United States, in an attempt to eliminate the barriers of blocking and secrecy laws, began cooperating with other market link countries through the development of separate mutual assistance treaties.¹²⁹ The United States and Canada enacted a Memorandum of Understanding (the 1984 Understanding) in 1984, reaffirming their mutual commitment to cooperation in matters related to the internationalization of the securities markets.¹³⁰ Recently, the United Kingdom entered into a Memorandum of Understanding with the United States that allows parties to obtain evidence in a cooperative manner.¹³¹

The 1984 Understanding between Canada and the United States¹³² purports to eliminate the possibility of misunderstandings.¹³³ To accomplish this goal, the 1984 Understanding establishes procedures for consultation with, and advance notification of, each country.¹³⁴ Furthermore, the agreement addresses restricted access to evidence in anti-trust suits. The agreement enables the United States and Canada to solve conflicts between disclosure obligations and the security of national interests.¹³⁵ Moreover, a provision exists to minimize

129. See Olsen, *supra* note 112, at 1009-10 (discussing the United States negotiation with various countries which have secrecy and/or blocking laws).

130. See Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 NW. J. INT'L L. & BUS. 1066, 1067 (1984-85) [hereinafter *Northwestern Comment*] (examining the establishment of an agreement between Canada and the United States with respect to international transactions).

131. See also *infra* notes 155-57 and accompanying text (examining the Memorandum of Understanding with respect to interactions between the United States and the United Kingdom).

132. *Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws*, reprinted in 23 I.L.M. 275 (1984) [hereinafter *1984 Understanding*].

133. *Northwestern Comment*, *supra* note 130, at 1086.

134. *Id.* These specific guidelines should be extremely helpful in diminishing conflicts in antitrust transactions. *Id.* at 1088-89 (analyzing the notification and consultation guidelines).

135. *Id.* at 1093. The 1984 Understanding provides, "[i]f one Party seeks to obtain information located within the territory of the other in furtherance of an antitrust investigation or inquiry, the other Party will not normally discourage a response." *Id.*

conflicts¹³⁶ and to encourage mutual cooperation in enforcement, through exchange of records between the two nations.¹³⁷ Generally, the 1984 Understanding is a compromise with Canada; Canada agreed not to restrict disclosure of information, while the United States agreed to consider the sovereignty of Canada when requesting information.¹³⁸

The United States and Canada established the Mutual Legal Assistance Treaty to regulate their market links. This Treaty provides procedures to deal with illegal actions arising out of the linkage mechanism. This agreement's success will depend upon the cooperation of participating parties.

The market linkage plans need to develop surveillance mechanisms. These mechanisms can only be developed through the cooperation of all nations involved in the proposal.¹³⁹ The linked markets realize that enforcement tactics must be implemented in order for these linkage proposals to be successful.¹⁴⁰

The BSE-ME linkage proposal includes surveillance mechanisms for all the future trading market links.¹⁴¹ One method these linked exchanges use is cooperative agreements that establish standards of enforcement. The BSE and the ME mutual agreements rectify discrepancies in the proposed market linkage plan between these two exchanges.¹⁴²

AMEX and TSE officials worked together to coordinate the surveillance tactics that regulate both exchanges.¹⁴³ TSE bylaws prohibit trading through deceptive and fraudulent means.¹⁴⁴ The Criminal Code of Canada¹⁴⁵ and the Ontario Securities Act control other illegal mar-

136. *Id.*

137. *Id.*

138. *See id.* (describing the major considerations of the 1984 Understanding).

139. *See supra* notes 29-40 and accompanying text (discussing surveillance mechanisms utilized in internationalization proposals).

140. *See supra* notes 29-40 and accompanying text (discussing the implementation of enforcement tactics with respect to foreign transactions).

141. *See* Release No. 22442, *supra* note 16, at 39,203 (discussing the similarities in surveillance between BSE-ME and AMEX-TSE linkages).

142. *See* Release No. 21449, *supra* note 14, at 44,579 (noting the development of methods to encourage cooperation by the markets in the area of surveillance).

143. *See supra* notes 29-32 and accompanying text (discussing the surveillance mechanisms used in the BSE-ME linkage).

144. *See* Section 11.17 of the Toronto Stock Exchange by-laws (discussing the fair and equitable principles of trade implemented by the TSE); *see also* Section 11.26 of by-laws ("Manipulative or Deceptive Methods of Trading") (providing examples of manipulative and deceptive activities).

145. *See* Criminal Code, R.S.C., §§ 338(2), 340, 341 (1980) (discussing the application of Canadian laws to illegal securities transactions).

ket activities.¹⁴⁶ The Ontario Securities Commission and the SEC entered into an agreement, through an exchange of letters, to cooperate with surveillance of American and Canadian markets. Although the SEC and the Ontario Securities Commission have cooperated in the past,¹⁴⁷ the SEC seeks to prevent the application of the Canadian blocking statute. The statute limits investigations in foreign transactions involving Canada or Canadian citizens.¹⁴⁸ The Parliament of Canada passed the blocking statute in the Foreign Extraterritorial Measures Act (FEMA).¹⁴⁹ Through the cooperative efforts of both exchanges as well as the enforcement agencies, the securities transactions taking place through the linkage proposals may be regulated.¹⁵⁰

The surveillance procedures of the MSE-TSE linkage, discussed in the Memorandum,¹⁵¹ establish guidelines to maintain fairness and an orderly market.¹⁵² In addition, the SEC and the OSC plan to continue their cooperative relationship that developed through the other market links (BSE-ME and AMEX-TSE) between Canada and the United States.¹⁵³ Furthermore, the Canadian laws regarding fraud also apply with respect to the MSE-TSE linkage.¹⁵⁴

The United Kingdom followed Canada's approach. The United Kingdom Department of Trade and Industry signed a Memorandum of

146. See Ontario Securities Act, Part XXII ("Civil Liability") (applying the Canadian securities laws to fraudulent activities).

147. See Release No. 22442, *supra* note 16, at 39,203 (explaining which United States laws apply to illegal securities transactions). Under 28 U.S.C. § 1782 (1982), the United States Federal district court may assist foreign courts in discovery efforts. *Id.*

148. *Id.*

149. See Toronto Letter, *supra* note 2 (applying the Canadian blocking statute to international transactions). FEMA authorizes the Canadian Attorney General to prevent the disclosure of information to foreign jurisdictions and to prevent any Canadian person from complying with foreign laws and orders. The Attorney General implements the blocking statute if these actions "adversely affect[s] significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or that otherwise infringes Canadian sovereignty." See *id.* (commenting on the utilization of the Canadian blocking laws); see also Release No. 22442, *supra* note 16, at 39,204 (describing the implementation and exemptions of the Canadian blocking statute in securities transactions).

150. See *id.* (illustrating that a method of reducing problems in enforcement among the various linked markets is through a mutual understanding of the differing statutes).

151. Release No. 23075, *supra* note 16, at 11,858. The Memorandum establishes an agreement to develop a series of surveillance tactics. *Id.*

152. *Id.*

153. See *id.* (evaluating the implications of using FEMA in market links).

154. *Id.*

Understanding (MOU) with the SEC on September 23, 1986.¹⁵⁵ The MOU creates a reciprocal assistance program in which a country can gain access to information through voluntary cooperation.¹⁵⁶ The agreement applies to investigations and market surveillance. Specifically, the agreement covers market manipulation, insider trading, requirements for financial institutions and securities transaction misrepresentations.¹⁵⁷

The SEC, however, is concerned about surveillance and access to regulatory information in this linkage.¹⁵⁸ NASD responds that the LSE will cooperate in the disclosure of information, investigations, and other observations of mutual market transactions.¹⁵⁹ The SEC is specifically concerned with the United Kingdom's blocking laws.¹⁶⁰ The Protection of Trading Interests Act of 1980¹⁶¹ allows the British government to curtail the disclosure of documents or information between the United Kingdom and a foreign jurisdiction. The SEC believes that this statute may impede any transaction between the United States and the United Kingdom.¹⁶² The SEC, therefore, believes that the NASD and LSE must come to an agreement regarding the implementation of the British blocking laws prior to the establishment of links between these two markets, in order to regulate the linkage transaction.¹⁶³

These agreements are an initial step in developing a comprehen-

155. See Memorandum from Gary Lynch, Director, Division of Enforcement, to Chairman Shad (February 6, 1987) [hereinafter Lynch Memo] (describing the bilateral agreement between the United Kingdom and the United States regarding mutual disclosure of information).

156. *Id.*; see *infra* notes 194-224 and accompanying text (evaluating the concept of waiver by conduct).

157. See Lynch Memo, *supra* note 155.

158. See Release No. 23158, *supra* note 42, at 15,990 (recognizing the surveillance problems that arise from the implementation of market links).

159. See *id.* (describing the cooperative efforts taken by the exchanges to reduce surveillance problems). The NASD-LSE agreement provides for access to the regulatory items of the other party, inevitably benefitting the linkage plan. *Id.*

160. *Id.* In the case of the linkage between Canadian and United States exchanges, the AMEX and the TSE agreed to apply the blocking laws only in unusual circumstances. *Id.*; see also *supra* notes 129-154 and accompanying text (analyzing the market linkage agreements between Canada and the United States in order to reduce the differences between these two countries).

161. Release No. 23158, *supra* note 42, at 15,990.

162. *Id.*

163. *Id.* The LSE began to harmonize its disclosure laws with other member nations of the EEC which may eventually lead to greater uniformity in the laws among the linkage countries. See Whitman & Ransom Letter, *supra* note 40 (recognizing the United Kingdom's attempt to reconcile differences in its disclosure laws with the laws of various other nations).

sive understanding and fostering cooperation in the regulation of securities transactions among the Canadian-United States and United States-United Kingdom market links. The reliance on voluntary cooperation, however, may jeopardize the success of the MOU. Therefore, additional devices for obtaining evidence from the United Kingdom and Canada are warranted, to deter the application of blocking laws.

C. *Litigation: The Procedure for Obtaining Information*

Despite voluntary cooperation, the Hague Evidence Convention, and bilateral and multilateral treaties, evidence is often obtained through litigation.¹⁶⁴ Litigation is generally pursued after the SEC establishes a cause of action. Discovery is initiated and promoted through the Federal Rules of Civil Procedure. When discovery is sought from unwilling third parties in foreign nations, non-disclosure laws may curtail the investigation. Initially, when a United States litigator goes against a foreigner, he should consider the applicable United States laws and rules, foreign law and practice, and any pertinent treaties.¹⁶⁵

After the commencement of the suit, the court may serve a subpoena upon the parties to request disclosure of information.¹⁶⁶ In order to have authority under international law, a foreign nation may require a citizen to give testimony through a properly served subpoena.¹⁶⁷ If the parties fail to comply with the subpoena, the SEC can petition the court to order the disclosure or requested documentation under Rule 37 of the Federal Rules of Civil Procedure.¹⁶⁸ If the parties ignore this court order, the court may impose sanctions. Parties could be fined, held in contempt, or barred from introducing evidence.¹⁶⁹

The courts use a balancing test to determine whether they will

164. Myrick & Love, *supra* note 72, at 586.

165. See Myrick & Love, *supra* note 72, at 587 (describing the litigation procedure when dealing with foreign parties).

166. See Consolidated Rendering, 207 U.S. 541, 552 (1908); *In re Equitable Plan Co.*, 185 F. Supp. 57 (S.D.N.Y. 1960), *modified on other grounds*; *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960); *In re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

167. See Myrick and Love, *supra* note 72, at 588. Congress enacted the Walsh Act to allow courts to exercise this control over foreign citizens. This Act requires foreign nationals to be present and testify or reveal any information and documents requested by a court order and properly served subpoena. See *id.* (describing the procedure used to obtain evidence abroad).

168. FED. R. CIV. P. 37; see *Policing Internationalized U.S. Capital Markets*, *supra* note 48, at 97 (examining the application of Rule 37 to obtaining evidence from foreign parties).

169. *Policing Internationalized U.S. Capital Markets*, *supra* note 48, at 97.

issue an order requiring disclosure of information.¹⁷⁰ *SEC v. Banca Della Svizzera Italiana* (the "St. Joe" case) shows how a Swiss bank with offices in the United States may be compelled to reveal its customers' identities. The Banca Della Svizzera Italiana (BSI) failed to comply with the SEC's request for disclosure. BSI claimed the request violated Swiss secrecy laws.¹⁷¹ The court applied section 40 of the Restatement (Second) of Foreign Relations,¹⁷² balancing the vital national interests of a country against the hardship this decision imposes on the individuals involved.¹⁷³ BSI, fearful of the possibility of significant fines, received a waiver of the secrecy laws from its principles, allowing it to disclose the requested information.¹⁷⁴ The application of Rule 37 and, in particular, the balancing test of section 40 of the Restatement (Second) of Foreign Relations in these cases is extremely

170. See *id.* at 97-98 (explaining the process used by the court in applying Rule 37 in obtaining information from foreign financial institutions); see also *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981) (analyzing how the commission circumvented secrecy laws of Switzerland in order to enforce compliance of the United States discovery procedures).

171. *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. at 111. The Banca Della Svizzera Italiana (BSI), which had subsidiaries in the United States, refused to disclose the identity of its customers, as well as other pertinent data, in a transaction involving BSI's purchase of common stock and call options of common stock in St. Joe Minerals Corporation. *Id.* at 111. The SEC claimed that insider trading occurred during the transaction of the St. Joe's stock purchase. The SEC obtained an order from the court to compel BSI to divulge the identity of its customers. *Id.* at 113. BSI, however, did not disclose this information claiming this request violated their bank secrecy laws. The court then entered a motion stating that if BSI did not comply with the previous court order, then contempt sanctions would be imposed. *Id.* at 112-14.

172. RESTATEMENT (SECOND) OF FOREIGN RELATIONS §40 (1965): *Limitations on Exercise of Enforcement Jurisdiction*:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:

- (a) vital national interests of each of the states;
- (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person;
- (c) the extent to which the required conduct is to take place in the territory of the other state;
- (d) the nationality of the person; and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

173. *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. at 117.

174. See *Policing Internationalized U.S. Capital Markets*, *supra* note 48, at 98 (examining the court's ruling and results of the St. Joe case).

beneficial.¹⁷⁵ Despite the success rate of using section 40, potential foreign violators will continue to use their blocking or secrecy laws unless the fear of court action deters them.

Canadian evidence laws are not as complicated and do not hinder foreign litigants to the same extent as laws in other countries. The blocking laws are the only barriers to the evidence gathering process. Generally, foreign parties can obtain data without the intervention of a Canadian court, through the application of the United States Federal Rule of Civil Procedure 28(b).¹⁷⁶

All Canadian proceedings are controlled under the jurisdiction of a specific cause of action under the British North America Act.¹⁷⁷ Each province establishes its own provincial courts, that impose penalties and fines and enforce the provincial laws. The federal government has the power only to protect rights under the federal laws and to enact criminal provisions.¹⁷⁸

A Canadian attorney, however, may obtain evidence through an application to the Canadian court for an order under section 43 of the Canada Evidence Act.¹⁷⁹ In addition, section 2 of the Canada Evidence Act covers all civil, criminal, and any other proceedings within the jurisdiction of the Parliament of Canada.¹⁸⁰ Furthermore, section 37 of the Canada Evidence Act extends to the courts an evidentiary authority despite the legislative authority of the Canadian Parliament.¹⁸¹ Because the provinces can apply their own evidence provisions, such as those for the Province of Ontario,¹⁸² an application can be founded on either federal or provincial laws.¹⁸³

In the United Kingdom, the civil court procedures are complex.¹⁸⁴

175. *See id.* at 98 (examining the results of numerous cases and the varying success rate of the application of Rule 37).

176. FED. R. CIV. P. 28(b).

177. The British North America Act, 1867, 30 & 31 Vict., ch. 3, § 92(14) (Can.).

178. Myrick and Love, *supra* note 72, at 609.

179. *Id.*

180. *Id.*

181. *Id.* at 610.

182. *See id.* (explaining how Chapter 151, Section 60, of the Ontario Revised Statutes provides a statutory basis for obtaining evidence specifically related to the Ontario province).

183. *See id.* (citing *Medical Ancillary Servs. v. Sperry Rand Corp.*, 23 Ont. 2d 406 (1979), which ruled that although both Acts may be utilized, the court generally prefers to apply the Ontario Act in civil suits).

184. *Id.* at 597. The English court distinguishes between evidence and discovery. Depositions and other statements may be obtained voluntarily. When evidence cannot be obtained through an agreement, English courts require, however, the initiation of certain procedures. *Id.*

English courts follow the Evidence (Proceedings in Other Jurisdictions) Act, 1975 (the 1975 Act),¹⁸⁵ and Orders 39 and 70 of the Rules of the Supreme Court (R.S.C.)¹⁸⁶ to obtain evidence.¹⁸⁷ Initially, the litigator should explain the rationale for seeking evidence abroad and must specify which documents are to be revealed.¹⁸⁸ The English court then has the discretion to grant or deny¹⁸⁹ the request under the 1975 Act.¹⁹⁰ Once the request is granted, the party desiring the evidence must go to the designated central authority to obtain an affidavit which sets forth the details regarding the type of evidence to be obtained and the rea-

185. *Id.* (presenting the application of the Evidence (Proceedings in Other Jurisdictions) Act).

186. *Id.*

187. *See id.* (examining the governing law and procedural rules pertaining to evidence gathering).

188. *See id.* at 599 (describing the procedure used in obtaining evidence in the United Kingdom). The English court may subpoena a witness or third party to testify at trial. Unlike the U.S. practice these documents may not be inspected before the trial. *Id.*

189. *See Myrick & Love, supra* note 72, at 601-02 (noting the power of the court to permit or set aside an order). The court may deny orders requiring disclosure of evidence if they are oppressive or based on the lack of relevant material the witness may give, the protected privilege of the evidence, insufficient particularized documents, or the lack of proper procedures employed in obtaining the request. *Id.*

190. *See id.* at 599 (discussing the Evidence (Proceedings in Other Jurisdictions) Act). Requests may be written or oral under Section 2(2) of the 1975 Act which states: Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision-

(a) for the examination of witnesses, either orally or in writing;

(b) for the production of documents;

(c) for the inspection, photographing, preservation, custody, or detention of any property;

(d) for the taking of samples of any property and the carrying out of any experiments on or with any property;

(e) for the medical examination of any person;

(f) without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person.

Id. at 600.

Section 2(4) bars certain types of discovery:

An order under this Section shall not require a person-

(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, to be likely to be, in his possession, custody or power.

Id.

sons for the importance of this evidence.¹⁹¹ Blocking laws, such as the Protection of Trading Interests Act of 1980,¹⁹² however, may be invoked to bar any disclosure of information.¹⁹³

D. Waiver By Conduct Approach

John Fedders, former Director of the Division of Enforcement at the SEC, addressed¹⁹⁴ the problems that result when foreign parties participate in transactions in the United States and then apply their secrecy or blocking laws to circumvent American discovery laws.¹⁹⁵ His "waiver by conduct" proposal would have required that a purchase or sale of securities from abroad, in a domestic market, be characterized as constructive consent to the disclosure of any relevant materials needed in an enforcement investigation.¹⁹⁶ The underlying rationale was that a state long arm statute extends to an international forum and gives that state jurisdiction. Any participant would waive all rights to

191. *Id.* at 600-01 (describing the application process given to the English court).

192. *See id.* at 602 (citing the Protection of Trading Interest Act, 1980).

193. *See supra* notes 74-80 and accompanying text (describing the British blocking laws, the Protection of Trading Interests Act, 1980, and the objectives of this legislation).

194. *See Waiver by Conduct, supra* note 48; Fedders, *Foreign Secrecy: A Key to the Lock*, N.Y. Times, Oct. 16, 1983, § 3, at 2, col. 3; Fedders & Mann, *Waiver by Conduct vs. Fraud*, Wall St. J., Dec. 21, 1984, at 18, col. 4. The SEC unanimously commented to Congress that Fedders' proposal of waiver by conduct should receive legislative consideration, but the Commission was apprehensive about this policy and thus remained neutral on this matter. *See SEC Issues Release Seeking Comments on "Waiver by Conduct" Legislation*, [July-Dec.] 16 Sec. Reg. & L. Rep. (BNA) 1285 [hereinafter *Waiver by Conduct Release*] (commenting on the SEC's opinions of the implementation of the waiver by conduct proposal); *SEC Moves on Bank Plan*, N.Y. Times, July 27, 1984, at D6, col. 6. (examining the reaction of the SEC to the possible effects of Fedders' idea). To further the SEC's investigation on the application of waiver by conduct on transactions in which foreign nations imposed their secrecy or blocking laws, the Commission issued a release for comment. *See Request for Comments Concerning a Concept to Improve the Commission's Ability to Investigate and Prosecute Persons Who Purchase or Sell Securities in the U.S. Markets from Other Countries*, Release No. 21186, [July-Dec.] 16 Sec. Reg. & L. Rep. (BNA) 1305 (Aug. 3, 1984) (requesting comments in order to advance their opinion on the concept). The SEC, however, did not endorse the waiver by conduct proposition because of "factual, legal and policy questions that require further evaluation." *Id.*

195. *Waiver by Conduct Release, supra* note 194, at 1311.

196. Karmel, *supra* note 93, at 109; *see Waiver by Conduct Release, supra* note 194, at 1311 (commenting on the SEC's involvement in extraterritorial jurisdictional situations); *see also* Release No. 6568, *supra* note 2, at 9284 (encouraging discussion regarding the enforcement of the jurisdictional problems through the implementation of "waiver by conduct").

limit enforcement of a judgment arising out of a transaction in a foreign nation's market.

Specifically, under waiver by conduct, any securities transaction in a United States market would act as an irrevocable consent to compliance with a United States court order and administrative investigations that require disclosure of information.¹⁹⁷ The waiver, however, would be limited to evidence relevant to the transaction, the purchaser or seller, or the actual securities and proceeds of the transaction.¹⁹⁸ The proposal would allow the foreign law of the foreign participant to govern the proceedings,¹⁹⁹ and the statutory rules would govern the method of notification for the parties.²⁰⁰ In terms of the adequacy of notice, the SEC commented that additional notice would encourage greater compliance with this waiver proposal by foreign governments and courts.²⁰¹

The waiver by conduct proposal would invoke the implied waiver when the broker-dealer's order ticket was presented, thus informing the specific financial institution that a transaction had occurred.²⁰² The foreign financial institution could then accept the validity of the customer's implied waiver or turn to its government or courts. A court could issue an order granting permission for disclosure of the evidence. If, however, the foreign government did not accept the validity of the consent, the SEC would have to petition a United States court for an order requiring disclosure. If the SEC could obtain a waiver, the court would grant the order. The balancing principles in Restatement Section

197. Waiver by Conduct Release, *supra* note 194, at 1311.

198. *Id.*

199. *Id.*

200. *Id.*

201. *See id.* (commenting on the various methods of notice to insure greater acceptance of the proposal). Furthermore, the legislation may impose sanctions to force parties to reveal the requested documents. These sanctions include the following:

[I]mpoundment or withholding of any dividends or interest payable to the person by a U.S. issuer; revocation or suspension of voting rights with respect to securities of any U.S. issuer involved in the Commission's investigation; an order to any U.S. issuer or transfer agent to refrain from effecting a registration or transfer with respect to a particular purchase or sale by any person having an interest in the securities involved; an order directing a U.S. issuer to suspend the subject person from serving as an officer or director of the issuer; a decree prohibiting any U.S. broker or dealer known to have effected transactions on behalf of the person to refrain from effecting such transactions in the future; and an order providing such other relief as the court may deem necessary or appropriate under the circumstances.

Id. 1313-14.

202. *Id.* at 1311.

40 would be substituted by the waiver by conduct principle if the court found that the law enforcement issues outweigh the foreign state's sovereignty interests.²⁰³

Fedders proposed waiver by conduct because he saw this approach as beneficial in reducing the problems that arise with multinational securities market links,²⁰⁴ specifically when foreign nations invoke their blocking and secrecy laws. This waiver proposal would protect the integrity and reputation of the United States securities markets by giving American courts the authority to control foreign transactions on domestic exchanges.²⁰⁵ In addition, this concept would reduce conflicts between foreign nations and the United States.²⁰⁶ Furthermore, the proposal would be efficient and cost effective.²⁰⁷

First, waiver by conduct would protect United States markets by deterring investors from making fraudulent trades within the market links. Foreign investors would be unable to circumvent domestic enforcement tactics through secrecy and/or blocking laws. In addition, the discovery process would be more efficient because this proposal would permit the SEC to gather information with greater ease. With the reduction of fraudulent actions and the increased supervision of the exchanges, investors would become more confident trading within the market links. This positive impression portrayed by the exchanges would promote the integrity of the markets in the United States, encouraging future capital investments.

Second, waiver by conduct would reduce tension among the linked nations. The plan is narrow in application, because it compels foreign investors to disclose only the documents relevant to a transaction, allowing any supplemental information to be protected under the secrecy or blocking statutes of a country.²⁰⁸ The foreign nations would feel that

203. See *id.* at 1312 (discussing the procedures for applying waiver by conduct principles in United States courts).

204. See *supra* notes 14-47 and accompanying text (describing the internationalization of the securities markets through the proposal of market links).

205. See Waiver by Conduct Release, *supra* note 194, at 1309 (discussing the benefits of waiver by conduct in giving the United States jurisdiction over foreigners conduct in its securities markets); see also Waiver by Conduct Release, *supra* note 194, at 1314 (recognizing the potential advantages to be gained through the application of waiver by conduct).

206. Waiver by Conduct Release, *supra* note 194, at 1314 n.43.

207. See Spencer, *The Reaction of the Securities and Exchange Commission to the Internationalization of the Securities Markets: Three Concept Releases*, 4 B.U. INT'L L.J. 111, 113 (1986) (discussing the efficiency aspect of the waiver by conduct approach).

208. See Waiver by Conduct Release, *supra* note 194, at 1315 (examining how

the United States is infringing less upon their state sovereignty, thus promoting greater cooperation among the involved nations.²⁰⁹

Third, waiver by conduct would reduce costly measures that presently are utilized to obtain evidence from foreign parties. Specifically, fewer cases would be litigated, saving time, money, and other resources needed to investigate fraudulent transaction suits. Furthermore, no major alterations of existing procedures would be required.

Despite benefits which might result from the implementation of Fedders' proposal, there are potential disadvantages. One problem is the extraterritoriality of the United States securities laws. Second, the United States courts would impose waiver by conduct unilaterally. This procedure would create tension among the nations involved.²¹⁰ These disadvantages make the proposal ineffective.

First, the waiver by conduct concept may be seen as a way for United States regulators to intervene in the domestic affairs of a foreign country.²¹¹ Foreign countries would view the proposal as an extraterritorial application of United States securities laws. Initially, the proposition diminishes the significance of foreign laws, specifically blocking and secrecy provisions.²¹² Furthermore, this approach allows the United States to secure evidence either without receiving the express consent of the foreign country or without any consideration for the secrecy or blocking laws.²¹³ Moreover, foreign nations may conclude that waiver by conduct gives United States courts too much control over transactions occurring in a foreign jurisdiction.²¹⁴ Even if the approach properly establishes that an *individual* waived his interest in

the waiver by conduct proposal may preserve the foreign national sovereignty while permitting the application of United States extraterritorial laws).

209. *Id.* at 1314 n. 44.

210. *See* Spencer, *supra* note 207, at 113 (noting the unilateral concept of the waiver by conduct approach).

211. Letter from the law firm of Baker & McKenzie to Shirley E. Hollis, Acting Secretary, SEC (Nov. 29, 1984) (Comment on SEC Release No. 21186, File No. S7-27-84 "Waiver by Conduct").

212. *Id.*

213. *See* Letter from Guenther van Well, the Ambassador of the Federal Republic of Germany, at 8 (Dec. 10, 1984) (Comment on SEC Release No. 21186, File No. S7-27-84 "Waiver by Conduct") (commenting on how the waiver by conduct proposal infringes upon the sovereignty of foreign nations).

214. *See* Letter from Jon-Jo A. Douglas, Investigation Counsel, to John F. Leybourne, Deputy Director, Enforcement, Ontario Securities Commission at 4 (Nov. 1, 1984) (Comment on SEC Release No. 21186, File No. S7-27-84 "Waiver by Conduct") (stating that not only will United States courts control proceedings within its jurisdiction, but will also project this concept of waiver in securities transactions to suits in other countries).

confidentiality and his right not to produce evidence, this privilege may belong to the state.²¹⁵

Second, the unilateral aspect of Fedders' approach would produce tension between the United States and the foreign nations.²¹⁶ This friction could hinder the enforcement tactics of the SEC by undermining cooperative efforts made by foreign nations.²¹⁷ These efforts are essential to any proposal.²¹⁸ Furthermore, countries may retaliate and enact harsher secrecy or blocking laws,²¹⁹ may prevent United States investors from participating in their markets,²²⁰ or may send foreign investors to other international markets, where this problem will not arise.²²¹

The problems with Fedders' proposition would make it ineffective in accomplishing its intent. Foreign governments and courts would challenge its validity and thus impose their blocking and secrecy laws. Also, foreign issuers could circumvent waiver by conduct through the use of an additional layer of financial institutions to disguise the identity of purchasers or sellers.²²²

215. See Spencer, *supra* note 207, at 114 (illustrating the problems arising from the implementation of the waiver by conduct approach); Waiver by Conduct Release, *supra* note 194, at 1316 (suggesting that private parties may not waive laws that are national interests); see also *supra* notes 48-80 and accompanying text (describing the concept of blocking laws and the confidentiality issue founded upon these laws).

216. See Ingersoll, *SEC Proposal to Override Foreign Laws on Bank Secrecy Draws Wide Criticism*, Wall St. J., Feb. 11, 1985, at 13, col. 1 (quoting critics who warn that the ratification of this approach would augment bilateral conflicts).

217. See Letter from Charles H. Ross, Jr., Chairman, Merrill Lynch International, Inc. at 2 (Nov. 29, 1984) (Comment on SEC Release No. 21186, File No. S7-27-84 "Waiver by Conduct") (recognizing the retaliatory actions foreign countries might take against the extraterritorial application of United States laws); Cockwell Letter, *supra* note 48, at 11-13 (exemplifying foreign responses to United States court proceedings involving secrecy and blocking laws).

218. See *infra* notes 237-252 and accompanying text (proposing the need for cooperation in order to diminish any conflicts involved in the implementation of the internationalization of the securities markets).

219. Cockwell Letter, *supra* note 48, at 11-13.

220. *Id.* at 13. Letter from Mary Condeelis, Executive Director, Bankers' Association for Foreign Trade (Nov. 30, 1984) (Comment on SEC Release No. 21186, File No. S7-27-84 "Waiver by Conduct").

221. See Spencer, *supra* note 207, at 114 (illustrating a major opposition to the waiver by conduct approach). For example, a London investor, who does not want to be forced into disclosing information, may choose to trade in the Tokyo market rather than be confronted with the waiver by conduct law in the United States. *Id.*

222. Letter from Robert V. Roosa, Committee Chairman, Advisory Committee on International Capital Markets to the NYSE Board of Directors, N.Y. Stock Exchange, at 1-2 (Nov. 7, 1984) (Comment on SEC Release No. 21186, File No. S7-27-84 "Waiver by Conduct").

Although initially waiver by conduct appears to alleviate the conflict between the discovery proceedings in the United States and foreign secrecy and blocking laws, the proposal contains too many policy defects to be successful.²²³ Other nations will not comply with its terms and might retaliate with defensive tactics.²²⁴ Therefore, the implementation of this proposal would harm rather than benefit the United States and could harm foreign relations. These disadvantages, among others, make the proposal ineffective and unacceptable.

V. DEALING WITH BLOCKING LAWS IN THE CONTEXT OF MARKET LINKS

Securities transactions are destined to transpire within an international framework.²²⁵ At their inaugural stage, the linkage proposals are the best option for internationalizing the securities markets.²²⁶ Market links can establish a foundation for the future.²²⁷ Eventually, the linkage proposals may expand to incorporate 24-hour around-the-world trading. Internationalization plans will benefit foreign investors and issuers, yet problems will arise from the implementation of these plans.

Issuers and investors alike will gain economic advantages from international securities transactions. International trading will ultimately

223. See Liftin, *Our Playing Field, Our Rules: An Analysis of the SEC's Waiver By Conduct Approach*, 11 BROOKLYN J. INT'L L. 525, 555-56 (1985) (concluding that the proposal is legally faulty and could never actually achieve its objectives); Ingersoll, *supra* note 216, at 13, col. 1 (commenting on the criticism of the SEC's consideration of waiver by conduct proposal).

224. See *supra* notes 194-224 and accompanying text (describing the measures foreign nations would undertake to counter the application of waiver by conduct).

225. Release No. 21958, *supra* note 2, at 16,302.

226. Letter from B. Imseng, Chairman and K. Menche, Secretary, International Symposium of Securities Administrators (ISSA) to John Wheeler, Secretary, SEC (Jun. 25, 1985); Release No. 21958, *supra* note 2. The TSE prefers the linkage plan between markets over a proposal of a single international market. *Id.*; see also NASD Letter, *supra* note 4 (commenting on which would be the best proposal to implement); Letter from Walter R. Diehl, Jr., Vice President and Associate General Counsel, ITT Corporation to John Wheeler, Secretary, SEC (Jun. 27, 1985) (same). Other commentators, however, tend to desire an around-the-clock proposal over a worldwide network (either a single international market or market linkage). *But see* Release No. 21958, *supra* note 2 (summarizing an alternative position that 24-hour markets would be more successful than a linkage plan).

227. See Release No. 21958, *supra* note 2 (suggesting how the present market linkage proposals will lead to future internationalization plans). Commentators generally support the linkage proposals even over the development of "a central international market." *Id.*

improve the world capital market.²²⁸ First, multinational transactions expand investment opportunities.²²⁹ Second, extended trading arrangements give investors the opportunity to make offerings when regional exchanges are closed.²³⁰ International market links will eliminate intermediaries, expedite the exchange process, and reduce transaction costs. Linkages will allow investors to buy at the best price and promote greater liquidity among markets.²³¹ Furthermore, the ability of corporations to invest in foreign markets improves their portfolios.²³² The internationalization of the securities markets has encouraged regulators and various governments to continue expanding global stock trading, but barriers have slowed the progress.

Problems surface when foreign nations impose their blocking laws. These laws hinder the development of an international network.²³³ These conflicts can be alleviated by determining which actors will become involved, stipulating qualifications for issuers, harmonizing disclosure standards and surveillance mechanisms, creating multinational treaties in order to establish a cooperative effort of all who participate, and developing a formal organization to supervise all international securities transactions.

A. *Cooperation and Uniformity: The Crucial Elements*

Cooperation is the prerequisite for harmonizing the securities laws and procedures among various nations.²³⁴ Uniformity is also essential to the harmonization of the laws. Overall, the standards must be higher in

228. See Shad's Speech, *supra* note 2 (citing the advantages of universal securities trading).

229. *Id.* Investors may benefit from increased access to capital from the global markets. In addition, individuals have the opportunity to participate in multinational securities transactions. *Id.*

230. Toronto Letter, *supra* note 2.

231. AMEX Letter, *supra* note 9. The letter discusses the advantages specifically related to the AMEX-TSE link. The internationalization proposal will increase the membership of both exchanges, reduce intermarket transactional expenses, and benefit communication between these two exchanges. *Id.* Overall, United States investors will benefit from trading on foreign markets. Thomas, *Internationalization of the Securities Markets: An Empirical Analysis*, 50 GEO. WASH. L. REV. 155, 167 (1982).

232. See Toronto Letter, *supra* note 2 (exhibiting the benefits foreign investors receive through participating at an international level).

233. See SIA Letter, *supra* note 9 (discussing the problems that arise through the implementation of proposals for the internationalization of the securities markets).

234. Tokyo Letter, *supra* note 13. The Tokyo Stock Exchange acknowledges the differences existing in the present markets but through sharing of information, the system may become more secure and uniform. *Id.*

order to ensure that those who participate are qualified and devoted to cooperation in global trading. Harmonizing the laws will allow foreign investors to profit without taking unfair advantage of domestic investors. One alternative is third party examinations of certain foreign issuers.²³⁵ The best alternative, however, would be an organized system of mutual understanding in which many governments would participate.²³⁶

The SEC can remain flexible in order for this process of the internationalization of the securities markets to evolve naturally.²³⁷ Regulators should require all foreign issuers investing in the United States to disclose the same information required of domestic investors.²³⁸ Uniform principles will ensure high enforcement standards for all securities transactions.²³⁹ The SEC, however, should reevaluate its policies in order to reduce the barriers, in particular the application of foreign blocking laws,²⁴⁰ that hinder the SEC's investigations of global securities market transactions. This reappraisal will eliminate unnecessary laws while stabilizing regulations to ensure fair dealing in international trading.

Cooperation is crucial in dealing with foreign blocking laws as well as harmonizing surveillance and enforcement tactics. Recently, the United States increased its efforts to regulate the securities markets. Specifically, the SEC began using electronic surveillance systems, imposing large penalties, and seeking cooperative support from other nations.²⁴¹ A formalized system of coordinated surveillance must be developed to ensure stability and fair dealing and to allow the internationalization of the securities markets to continue. These plans will be carried out in part through bilateral or multilateral agreements. The Canadian-United States and the United Kingdom-United States links are attempts to achieve this type of cooperation.²⁴²

235. Williams & Spencer, *supra* note 2, at 283. This harmonization would be reached through a process of negotiations between the exchange and the proposed member. *Id.*

236. *Id.*

237. AMEX Letter, *supra* note 9.

238. Thomas, *Increased Access to United States Capital Markets: A Brief Look at the SEC's New Integrated Disclosure Rules for Foreign Issuers*, 5 J. COMP. BUS. & CAP. MKT. L. 129, 132 (1983). This requirement enables all investors to be completely knowledgeable regarding a particular investment. *Id.*

239. See Hearings, *supra* note 9, at 240 (statement of Senator Alfonse M. D'Amato).

240. *Id.*

241. Shad's Speech, *supra* note 2, at 9.

242. See AMEX Letter, *supra* note 9 (discussing the bilateral agreements estab-

The United States should not relax its enforcement of liability provisions.²⁴³ The SEC should employ a hard-line approach to policing any market that United States citizens or corporations enter.²⁴⁴ Control must be asserted to ensure the disclosure of information and the enforcement of regulatory policies.²⁴⁵

Cooperation should exist in both disclosure and surveillance.²⁴⁶ Nations should reach formal agreements. Members of the participating exchanges should establish a surveillance organization.²⁴⁷ Unifying the regulatory agencies, however, may be difficult because the various nations have different regulatory procedures and some regulate only states or provinces. Nonetheless, some degree of uniformity, through cooperation, must be the goal of the internationalization process, in order to ensure that the best interests of all nations are protected.

B. *Enforcing Cooperation and Uniformity: Bilateral and Multilateral Agreements*

Many organizations support the development of bilateral or multilateral treaties.²⁴⁸ Treaties are often used to enforce agreements made

lished to deal with surveillance situations). This method has already been implemented with the linkage proposals between the United States and Canada. *Id. But see* Merrill Lynch Letter, *supra* note 9 (suggesting that only certain markets have the ability to cooperate with the requirements from other foreign regulatory agencies, making foreign linkage proposals difficult to manage). Merrill Lynch believes it would be difficult to get all the investors to follow another country's requirements. *Id.* The Canadian regulatory commission's cooperation demonstrates that the OSC is not only willing to cooperate with the SEC in terms of investigations in its own province, but also willing to assist in gaining access to documents present in other provinces in Canada although its investigatory authority reaches only to those located in the interior of Ontario. Release No. 22442, *supra* note 16, at 39,205.

243. *See* Whitman & Ransom Letter, *supra* note 40 (suggesting that high standards should be set for liability provisions). This view is based upon a public policy rationale in that all investors should know the laws of the country in which they choose to invest. *Id.*

244. *See* Karmel, *supra* note 93, at 109 (implying a stricter stance in regulating international securities transactions).

245. *Id.*

246. Release No. 21958, *supra* note 2. The CBT, Amsterdam Stock Exchange, Toronto Stock Exchange and AMEX stress their desire for mutual agreements. The Tokyo Stock Exchange suggests the close surveillance of individual exchanges and the trading of information regarding multinational listed securities. *Id.*

247. *Id.*

248. *See* Release No. 21958, *supra* note 2 (consolidating comments by The Treasury, AMEX, ABA, SIA, National Companies, and the Securities Commission of Australia (NCSC) who support the development of treaties in order to ensure cooperation among those nations involved in international securities transactions).

between countries.²⁴⁹ The SEC attempts to negotiate agreements with foreign governments, imposing surveillance mechanisms through the cooperation of all interested countries desiring to enforce securities laws.²⁵⁰

Bilateral and multilateral cooperation agreements will help to alleviate problems arising from discrepancies in disclosure laws and enforcement of the securities laws.²⁵¹ Bilateral agreements help nations to cooperate²⁵² and enable multinational securities trading to increase without jeopardizing market fairness. An effective method for avoiding illegal securities transactions would be the implementation of a treaty such as the Mutual Assistance in Criminal Matters (MACM).

Multinational treaties could also establish a multinational organization charged with supervising all securities transactions as well as future developments in existing internationalization agreements.²⁵³ A worldwide regulatory commission may be necessary to uniformly control not only domestic but also foreign transactions.²⁵⁴ Those governments agreeing to a bilateral or multilateral treaty would not only be bound to follow the laws set down in their agreements but also the policies of the international securities organizations.

These organizations may become a strong, cohesive group, able to deal with problems of the internationalization of the securities markets.²⁵⁵ Today, organizations provide an international forum for securities transactions. The Federation of International Stock Exchanges promotes cooperation among the member stock exchanges and associations of stock exchanges.²⁵⁶ The International Association of Securities Com-

249. Greene, *U.S. Enforcement in International Cases*, 16 CAL. W. INT'L L.J. 1, 49-51 (1986) (discussing the agreement between the United States and Switzerland that illustrates the benefit of bilateral treaties in enforcing cooperation when disparities exist in the laws of various nations). The MOU is an example of how two countries rectified certain discrepancies, specifically problems with the Swiss blocking laws, through the establishment of bilateral agreements.

250. Release No. 21958, *supra* note 2, at 16,305; *see supra* notes 194-224 and accompanying text (discussing the concept and application of "waiver by conduct").

251. *See* Shad's Speech, *supra* note 2, at 9 (emphasizing that these bilateral or multilateral agreements must respect the individual standards of every nation involved).

252. *Id.*

253. Williams & Spencer, *supra* note 2, at 284.

254. Karmel, *supra* note 93, at 106. The organizations that are present now, such as the International Association of Securities Commissions, concentrate on assisting and educating the exchanges, whereas the international regulatory organization would regulate multinational transactions. *Id.*

255. Toronto Letter, *supra* note 2.

256. *Id.* This organization involves a membership of over 30 stock exchanges and

missions and similar organizations also supervise world-wide markets.²⁵⁷ These organizations, however, act more as counselors than as international regulatory agencies.

An International Committee of Securities Regulators may be established to informally regulate international securities transactions.²⁵⁸ This informal committee, however, would not effectively manage international securities transactions. An international judicial body may enjoy more prestige and have more authority to harmonize disparities among international markets as well as decide questions of law and jurisdiction.²⁵⁹ This organization would take an enforcement role, without overstepping individual countries' regulatory control over domestic affairs.²⁶⁰

The SEC should encourage the creation of a multinational commission of multinational regulatory agencies.²⁶¹ In some of the linkage proposals, such as the Memorandum,²⁶² a six-member joint committee would establish linkages and monitor the operation of the markets.²⁶³ Currently linked countries realize the importance of international regulation, cooperation, and uniformity. This understanding must expand and become more sophisticated as the internationalization proposals develop.

C. *Ensuring Cooperation and Uniformity: Qualifying Factors Required for Participation*

In order to secure the cooperation and enforcement of bilateral and multilateral agreements, the exchanges and regulatory agencies

stock exchange associations throughout the globe. *Id.* The Federation established minimum listing standards regarding disclosure for foreign issuers. Pozen (Disclosure), *supra* note 1, at 89.

257. Toronto Letter, *supra* note 2. This organization is a forum for regulatory agencies to evaluate the supervision of various securities markets. *Id.*

258. See Williams & Spencer, *supra* note 2, at 284 (suggesting the establishment of an informal international organization to control global markets).

259. See Interview, *supra* note 9 (suggesting the benefit of multinational committees).

260. Williams & Spencer, *supra* note 2, at 285.

261. Whitman & Ransom Letter, *supra* note 40 (commenting on benefits of a multinational committee created to supervise international securities transactions). The commission would also reduce the repetitiveness of regulations on international issuers while protecting all who are involved. *Id.*

262. See *supra* notes 132-154 and accompanying text (comparing the Memorandum in Canada-United States links in order to come to an agreement over surveillance techniques and other disparities).

263. Release No. 23075, *supra* note 16, at 11,856.

must establish qualifying criteria to be met prior to participation in transactions within the market links. Those involved in the internationalization of the securities markets should include current participants as well as establish an opportunity for other countries to join those already linked. For example, the international securities linkage proposals should include Japan.²⁶⁴ The Securities Bureau of Japan wishes to become linked with the United States markets, as its agreement on cooperation with the SEC shows.²⁶⁵ Initially, market linkage proposals may be based upon geographic proximity,²⁶⁶ but Japanese markets are appealing to American investors.²⁶⁷

Among those nations, only qualified issuers should be allowed to trade. Participation in market links should only be available to those who are qualified to be listed. Qualified issuers must be of sufficient financial size and must have a sound business record.²⁶⁸ The issuers may also become qualified by agreeing to follow international disclosure standards.²⁶⁹ The International Federation established extremely low standards, increasing the likelihood that foreign issuers would adequately meet the requirements of many world exchanges.²⁷⁰ While

264. NYSE Letter, *supra* note 41. Japan is becoming a major market of the world and a major source for foreign investments. *Id.*

265. Shad's Speech, *supra* note 2.

266. *But see* Tokyo Letter, *supra* note 13 (commenting on the disadvantages of Japan becoming linked to the United States, United Kingdom and Canada). Tokyo's main justification for this viewpoint is their geographical distance from other major stock exchanges and their position in the time zones. Therefore, the Exchange envisions numerous problems arising if it participates in simultaneous trading at this time. *Id.*

267. Thomas, *supra* note 231, at 160. Canada is the most popular foreign market for United States investors with Japan and the United Kingdom in second place. *Id.*

268. Whitman & Ransom Letter, *supra* note 40. A determination of a good "track record" would include an examination of such factors as dividends, share prices and experience on the markets. *Id.*

269. Pozen (Disclosure), *supra* note 1, at 87 (1981). A prerequisite for foreign issuers to be listed upon an international exchange is their conformity with the international disclosure standards. This requirement may be a greater incentive for foreign issuers to be listed. *Id.* at 89. This criterion would be in addition to the other qualifications that are necessary. If these requirements were associated with the ability to be listed upon foreign exchanges, then this would be a control that could be used by that nation's markets and regulatory agencies. *Id.* The markets in each country, however, should have the ability to distinguish their disclosure laws that are applied to domestic issuers versus foreign issuers. *Id.* at 90.

270. *Id.* at 89. Yet higher minimum standards have been rejected because these standards would discourage many issuers from investing in the markets. Higher standards may make trading extremely difficult for small investors. *Id.* Thus many commentators support higher standards that would enable those issuers to have the ability to trade on major markets in order to qualify for all the standards in the major ex-

higher qualifications may exclude many small issuers, their exclusion will not greatly affect the international market because their size is not substantial.²⁷¹

World class issuers would automatically qualify to be listed upon any international exchange.²⁷² These qualified issuers would have to follow established international standards in order to permit their participation in any world-wide market.²⁷³ A foreign country's refusal to accept the United States' definition of a "world class"²⁷⁴ issuer, however, may hamper the progress of internationalizing the securities markets.

In addition to the issuers, clearing houses should meet the established requirements before qualifying to participate in securities transactions. The SEC evaluates the eligibility of foreign clearing houses involved in international linkages through its no-action letters.²⁷⁵ Foreign clearing houses need to become members of United States clearing agencies to ensure uniform membership among the countries' clearing houses.²⁷⁶ This requirement, however, may eliminate some potential issuers not desiring to have numerous clearing house affiliations²⁷⁷ although these clearing houses, cooperating with the established requirements, could be allowed to participate in the linkage between markets through no-action letters.²⁷⁸

VI. CONCLUSION

The internationalization of the securities markets is well underway. The survival of the exchange linkage concept indicates that market links will be the foundation from which securities transactions will extend beyond domestic borders. The success of the linkage proposals will eventually lead to 24-hour around-the-world markets and an in-

changes. *Id.*

271. Pozen, *International Securities Markets: Comparative Disclosure Requirements*, 3 J. COMP. CORP. L. & SEC. REG. 194, 197 (1981) [hereinafter Pozen (International)].

272. *Id.*

273. *Id.* at 195.

274. Exchange Release No. 6360, 46 Fed. Reg. 58,511, 58,512 (1981) (to be codified at 17 C.F.R. pts. 210, 229, 230, 239, 240, 249, 260) (proposed Nov. 20, 1981). A world class issuer is defined as a foreign private issuer that has equity of no less than \$500 million, at least \$150 million of which is beneficially held by United States residents, or an issuer that is registering "investment grade debt securities." *Id.*

275. See Release No. 21958, *supra* note 2.

276. *Id.*

277. *Id.*

278. *Id.* (mentioning the application of no-action letters).

crease in international exchange links. Secrecy and blocking laws, however, threaten the future of this new internationalized securities markets system.

The regulatory agencies of participating nations must coordinate their efforts in order for an international system to be fair and to thrive. With the establishment of multinational treaties and a formal international securities organization of judicial stature, any enforcement problems that arise could be solved in a uniform fashion. The internationalization of the securities markets is inevitable. The future success of the international market linkage structure depends upon the cooperative efforts of the participants and their willingness to construct a viable international securities framework.

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