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).


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. Investors are looking toward foreign markets as an alternative to domestic exchanges. 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. The initial plan establishes market links among various nations' securities exchanges. Eventually, these market links will likely include other for-


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 linkages\(^8\) and a 24-hour market.\(^9\) Market links presently exist under certain linkage

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\(^7\) 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
As these linkage plans become more sophisticated, the transna-

cional markets are expanding. 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 trans-

actions 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 trans-

actions 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) (il-

lustrating 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 Ex-

change 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 prob-

lem 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 imple-

mented. 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 interna-

tional 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), 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. 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.

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. 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).

electronic connection between the ME and BSE allowing ME traders to execute transactions on the floor of BSE. 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). 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. This plan benefited both countries by giving American and Canadian investors access to the best price on either exchange. Subsequently, the Midwest Stock Exchange, Inc. (MSE) proposed a link with the TSE similar to the AMEX-TSE link. 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. 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").


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).


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 BSE and thus the transactions are only "southbound." Future plans, however, contemplate "northbound" traffic. This proposed traffic scheme would enable orders to originate from the floor of BSE, while the transaction takes place on ME. 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. The traffic route for transactions, therefore, is not only "southbound" but also "northbound," 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.

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.

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

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

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

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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).


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. The Memorandum also establishes a six-member joint operating committee that oversees the linkage.

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. 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. 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. The LSE and the NASD agreed to a two-year accompanying text (describing the Memorandum of Understanding between the United States and Canada).


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).

pilot program through which the two exchanges sought to develop a linkage plan. The pilot program provides for an automated quotation and order mechanism through the LSE's Stock Exchange Automated Quotation (SEAQ) system and the NASD's automated quotation system (NASDAQ). 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. This procedure is similar to the order execution process and traffic routes the Canadian-United States market links implement. 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. Secrecy laws primarily pro-
tect the confidentiality of information of banking and financial institutions.\textsuperscript{49} Secrecy laws often are not merely regulatory measures but reflect national public policy.\textsuperscript{50} These laws view confidentiality as a fundamental right.\textsuperscript{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.\textsuperscript{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.\textsuperscript{53} Without these laws, disclosure may expose a person accused of violating securities laws to criminal or civil liability.\textsuperscript{54}

...
Blocking laws, like secrecy statutes, prohibit the disclosure, investigation, duplication, and removal of documents from a country. Blocking laws, however, differ from secrecy laws in that blocking statutes protect state interests. 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.

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. These countries criticize as an invasion of sovereignty actions of the United States and attempts of foreign countries to impose extraterritorial substantive laws, especially in antitrust proceedings.


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).


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.\textsuperscript{61} Judgment blocking laws prohibit the domestic enforcement of foreign courts’ or administrative agencies’ decisions.\textsuperscript{62} As is true with secrecy laws, violation of either discovery or judgment blocking laws may lead to imprisonment and/or fines.\textsuperscript{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,\textsuperscript{64} the 1980 session of the Canadian Parliament enacted the Foreign Proceedings and Judgment Bill of 1980.\textsuperscript{65} The Canadian government consistently asserted that United States laws and extraterritorial authority infringed upon Canadian national sovereignty.\textsuperscript{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.\textsuperscript{67} These Acts are general discovery blocking statutes that prevent the disclosure of documents related to litigation from the provinces.\textsuperscript{68} The Quebec Business Concerns Records Act\textsuperscript{69} and the Ontario

\begin{enumerate}
\item Waiver by Conduct, supra note 48, at 35.
\item Id. at 36-37.
\item Id. at 39.
\item See Loyola Comment, supra note 58, at 253 (describing the history behind the Canadian blocking laws).
\item 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)).
\item 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).
\item 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-U.S. L.J. 166, 167 (1979).
\item QUE. REV. STAT. ch. 278 (1964) (redesignated QUE. REV. STAT. ch. D-12 (1977)).
\end{enumerate}
Business Protection Act\textsuperscript{70} cover not only anti-trust suits but also general requests to the Canadian court to bar disclosure.\textsuperscript{71} These provincial laws, however, only apply within the respective jurisdictions.\textsuperscript{72} Moreover, documents cannot be taken out of the jurisdiction of the province.\textsuperscript{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.\textsuperscript{74} The Parliament legislated the Protection of Trading Interests Act of 1980\textsuperscript{75} to counter United States discovery procedures.\textsuperscript{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.\textsuperscript{77}

Under the PIA, the British Secretary of State can circumvent certain "measures" that are destructive of the United Kingdom's trading interests.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{71.} Loyola Comment, supra note 58, at 253.

\textsuperscript{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).

\textsuperscript{73.} Id.


\textsuperscript{75.} The Protection of Trading Interests Act, 1980, ch. 11.

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

\textsuperscript{77.} Loyola Comment, supra note 58, at 240.

\textsuperscript{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. 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.

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. 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. Chaos will ensue and may extend to investors who will "market shop" for the most lenient exchange, 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. 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. But Canadian federal legislation does not exist; each provincial jurisdiction has its own laws. A federal statute, however, covers securities transactions through the application of the Criminal Code and the Canada Business Corporations Act. These Canadian regulatory policies are similar to those of the United States.

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). 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. 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. 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.\footnote{See id.}

In the United States, a system of self-regulatory organizations regulates the stock exchanges and securities industry.\footnote{Karmel, Regulatory Aspects of Securities Trading, 4 B.U. Int'l L.J. 105, 108 (1986).} These self-regulating agencies are made up of ten active, registered national securities exchanges and NASD.\footnote{See 10 H. Bloomenthal, supra note 11, at § 3.01[2].} 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.\footnote{Karmel, supra note 93, at 108.} The United Kingdom has begun to rely upon a self-regulatory system that will be similar to that of the United States.\footnote{Id. The United Kingdom, however, is cautious not to have a governmental body such as the SEC "compel effective self-regulation." Id.}

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

The stock exchanges in London work in conjunction with London's Panel on Take-overs and Mergers.\footnote{See 10 H. Bloomenthal, supra note 11, at § 6.01[3](b) (describing the role of the Panel on Take-Overs and Mergers).} The Panel\footnote{See id. (defining the Panel on Take-Overs and Mergers).} interprets and administers the London City Code on Take-overs and Mergers.\footnote{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.} This organization performs an advisory role regarding take-overs and merg-
ers but has no legal status.

London securities professionals established the Council for the Securities Industry (CSI). The CSI supervises transactions, upholds ethical standards, develops new codes of conduct and resolves differences within the London securities market. 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. However, will become more difficult as a result of the internationalization of the securities markets. 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. 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.
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 investments 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. 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.

In a few circumstances, individuals or institutions have complied

110. Vanderbilt Note, supra note 55, at 827.
with SEC investigations voluntarily. Voluntary cooperation and SEC diplomatic measures are generally unsuccessful. 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), 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. The Convention establishes two devices for gathering evidence: 1) letters of request, and 2) the use of diplomatic officials, consular agents, and commissioners.

The Convention’s letters of request may only be executed through orders from a United States District Court. 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.

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

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. Information may be obtained when a foreign nation gives permission for parties to proceed with discovery. 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.\textsuperscript{121}

Canada has not ratified the Convention because of concerns that difficulties may arise.\textsuperscript{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.\textsuperscript{123} Second, Article 11 would integrate the evidence provisions of each provincial jurisdiction.\textsuperscript{124} Third, the Evidence Act of Ontario allows a court to execute letters of request.\textsuperscript{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.\textsuperscript{126} The United Kingdom declared that it has the right, under Article 23 of the Convention,\textsuperscript{127} to choose not to execute letters of request. The reason for this declaration possibly is British disenchantment with the expansive pretrial procedures and evidence gathering sanctions of the United States.\textsuperscript{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

\textsuperscript{121} See Von Mehren, \textit{supra} note 114, at 992 (analyzing the effectiveness of the convention in judicial proceedings).

\textsuperscript{122} Myrick and Love, \textit{supra} note 72, at 613.

\textsuperscript{123} See Hague Convention, \textit{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. \textit{Id.}

\textsuperscript{124} \textit{Id.} at 614.

\textsuperscript{125} See \textit{id.} at 612-13.

\textsuperscript{126} \textit{Id.} at 614.

\textsuperscript{127} See \textit{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 pretrial discovery of documents as known in common Law countries.")

\textsuperscript{128} See Myrick and Love, \textit{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. 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. Recently, the United Kingdom entered into a Memorandum of Understanding with the United States that allows parties to obtain evidence in a cooperative manner.

The 1984 Understanding between Canada and the United States purports to eliminate the possibility of misunderstandings. To accomplish this goal, the 1984 Understanding establishes procedures for consultation with, and advance notification of, each country. 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. Moreover, a provision exists to minimize

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


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).


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.
conflicts and to encourage mutual cooperation in enforcement, through exchange of records between the two nations. 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.

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. The linked markets realize that enforcement tactics must be implemented in order for these linkage proposals to be successful.

The BSE-ME linkage proposal includes surveillance mechanisms for all the future trading market links. 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.

AMEX and TSE officials worked together to coordinate the surveillance tactics that regulate both exchanges. TSE bylaws prohibit trading through deceptive and fraudulent means. The Criminal Code of Canada 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).
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).
ket activities. 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, the SEC seeks to prevent the application of the Canadian blocking statute. The statute limits investigations in foreign transactions involving Canada or Canadian citizens. The Parliament of Canada passed the blocking statute in the Foreign Extraterritorial Measures Act (FEMA). 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.

The surveillance procedures of the MSE-TSE linkage, discussed in the Memorandum, establish guidelines to maintain fairness and an orderly market. 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. Furthermore, the Canadian laws regarding fraud also apply with respect to the MSE-TSE linkage.

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

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146. See Ontario Securities Act, Part XXII (“Civil Liability”) (applying the Canadian securities laws to fraudulent activities).
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).
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.\textsuperscript{155} The MOU creates a reciprocal assistance program in which a country can gain access to information through voluntary cooperation.\textsuperscript{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.\textsuperscript{157}

The SEC, however, is concerned about surveillance and access to regulatory information in this linkage.\textsuperscript{158} NASD responds that the LSE will cooperate in the disclosure of information, investigations, and other observations of mutual market transactions.\textsuperscript{159} The SEC is specifically concerned with the United Kingdom's blocking laws.\textsuperscript{160} The Protection of Trading Interests Act of 1980\textsuperscript{161} 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.\textsuperscript{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.\textsuperscript{163}

These agreements are an initial step in developing a comprehen-
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. 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. The court applied section 40 of the Restatement (Second) of Foreign Relations, balancing the vital national interests of a country against the hardship this decision imposes on the individuals involved. 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. 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.


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.\textsuperscript{176} 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).\textsuperscript{176}

All Canadian proceedings are controlled under the jurisdiction of a specific cause of action under the British North America Act.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{180} Furthermore, section 37 of the Canada Evidence Act extends to the courts an evidentiary authority despite the legislative authority of the Canadian Parliament.\textsuperscript{181} Because the provinces can apply their own evidence provisions, such as those for the Province of Ontario,\textsuperscript{182} an application can be founded on either federal or provincial laws.\textsuperscript{183}

In the United Kingdom, the civil court procedures are complex.\textsuperscript{184}

\textsuperscript{175} See id. at 98 (examining the results of numerous cases and the varying success rate of the application of Rule 37).
\textsuperscript{176} FED. R. CIV. P. 28(b).
\textsuperscript{177} The British North America Act, 1867, 30 & 31 Vict., ch. 3, § 92(14) (Can.).
\textsuperscript{178} Myrick and Love, supra note 72, at 609.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 610.
\textsuperscript{182} 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).
\textsuperscript{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).
\textsuperscript{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), and Orders 39 and 70 of the Rules of the Supreme Court (R.S.C.) to obtain evidence. Initially, the litigator should explain the rationale for seeking evidence abroad and must specify which documents are to be revealed. The English court then has the discretion to grant or deny the request under the 1975 Act. 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-
D. Waiver By Conduct Approach

John Fedders, former Director of the Division of Enforcement at the SEC, addressed 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. 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. 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. 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. The waiver would allow the foreign law of the foreign participant to govern the proceedings, and the statutory rules would govern the method of notification for the parties. 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.

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. 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:

[Impoundment 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.\(^{209}\)

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.


\(^{208}\) 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

²⁰⁹ Id. at 1314 n. 44.
²¹⁰ See Spencer, supra note 207, at 113 (noting the unilateral concept of the waiver by conduct approach).
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.\textsuperscript{215}

Second, the unilateral aspect of Fedders' approach would produce tension between the United States and the foreign nations.\textsuperscript{216} This friction could hinder the enforcement tactics of the SEC by undermining cooperative efforts made by foreign nations.\textsuperscript{217} These efforts are essential to any proposal.\textsuperscript{218} Furthermore, countries may retaliate and enact harsher secrecy or blocking laws,\textsuperscript{219} or may prevent United States investors from participating in their markets,\textsuperscript{220} or may send foreign investors to other international markets, where this problem will not arise.\textsuperscript{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.\textsuperscript{222}

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{219}Cockwell Letter, supra note 48, at 11-13.

\textsuperscript{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”).

\textsuperscript{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. \textit{Id.}

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


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


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. First, multinational transactions expand investment opportunities. Second, extended trading arrangements give investors the opportunity to make offerings when regional exchanges are closed. 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. Furthermore, the ability of corporations to invest in foreign markets improves their portfolios. 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. 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. Uniformity is also essential to the harmonization of the laws. Overall, the standards must be higher in

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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.


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. The best alternative, however, would be an organized system of mutual understanding in which many governments would participate.

The SEC can remain flexible in order for this process of the internationalization of the securities markets to evolve naturally. Regulators should require all foreign issuers investing in the United States to disclose the same information required of domestic investors. Uniform principles will ensure high enforcement standards for all securities transactions. The SEC, however, should reevaluate its policies in order to reduce the barriers, in particular the application of foreign blocking laws, 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. 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.

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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.
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. The SEC should employ a hard-line approach to policing any market that United States citizens or corporations enter. Control must be asserted to ensure the disclosure of information and the enforcement of regulatory policies.

Cooperation should exist in both disclosure and surveillance. Nations should reach formal agreements. Members of the participating exchanges should establish a surveillance organization. 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. 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.


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

Bilateral and multilateral cooperation agreements will help to alleviate problems arising from discrepancies in disclosure laws and enforcement of the securities laws. Bilateral agreements help nations to cooperate 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. A worldwide regulatory commission may be necessary to uniformly control not only domestic but also foreign transactions. 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. 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. 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.\textsuperscript{247} 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.\textsuperscript{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.\textsuperscript{259} This organization would take an enforcement role, without overstepping individual countries' regulatory control over domestic affairs.\textsuperscript{260}

The SEC should encourage the creation of a multinational commission of multinational regulatory agencies.\textsuperscript{261} In some of the linkage proposals, such as the Memorandum,\textsuperscript{262} a six-member joint committee would establish linkages and monitor the operation of the markets.\textsuperscript{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.

\textbf{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

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

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

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

259. See Interview, \textit{supra} note 9 (suggesting the benefit of multinational committees).


261. Whitman & Ransom Letter, \textit{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. \textit{Id.}

262. See \textit{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).

\end{footnotesize}
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. The Securities Bureau of Japan wishes to become linked with the United States markets, as its agreement on cooperation with the SEC shows. Initially, market linkage proposals may be based upon geographic proximity, but Japanese markets are appealing to American investors.

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. The issuers may also become qualified by agreeing to follow international disclosure standards. The International Federation established extremely low standards, increasing the likelihood that foreign issuers would adequately meet the requirements of many world exchanges. While

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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.\textsuperscript{271}

World class issuers would automatically qualify to be listed upon any international exchange.\textsuperscript{272} These qualified issuers would have to follow established international standards in order to permit their participation in any world-wide market.\textsuperscript{273} A foreign country's refusal to accept the United States' definition of a "world class"\textsuperscript{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.\textsuperscript{275} Foreign clearing houses need to become members of United States clearing agencies to ensure uniform membership among the countries' clearing houses.\textsuperscript{276} This requirement, however, may eliminate some potential issuers not desiring to have numerous clearing house affiliations\textsuperscript{277} although these clearing houses, cooperating with the established requirements, could be allowed to participate in the linkage between markets through no-action letters.\textsuperscript{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-

\begin{thebibliography}{99}
\bibitem{272} Id.
\bibitem{273} Id. at 195.
\bibitem{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." \textit{Id}.
\bibitem{275} See Release No. 21958, \textit{supra} note 2.
\bibitem{276} Id.
\bibitem{277} Id.
\bibitem{278} Id. (mentioning the application of no-action letters).
\end{thebibliography}
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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