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Dr. Barry A.K. Rider

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Global Trends in Securities Regulation: The Changing Legal Climate

Dr. Barry A.K. Rider*

I. Introduction

This article boasts the title “Global Regulatory Trends” and then in parenthesis “The Changing Legal Climate.” It is of course, bold if not foolish, to try and distill “global” trends when in most countries, even the national approach to securities regulation is ambiguous and often inconsistent. Governments like to speak in terms of deregulation today.¹ What this means in the context of the financial markets is not always clear. Of course, over the last decade capital has become significantly more mobile both domestically and internationally. Freedom of establishment in foreign markets has also increased and today, in many cases international markets are contemplated not only in terms of the paper in which the trading occurs, but also with regard to the players and intermediaries.

In the same manner, today’s international community is far more aware of the dangers to the economic and political stability of matters such as economic crime and money laundering. Such awareness, in large part, may be attributed to the efforts of the United States.² The United States has advanced the fight against drug barons and insider dealers almost to the level of a crusade or *jihad*. Its agencies, such as the Securities and Exchange Commission, have pursued those who have apparently impugned the integrity of U.S. capitalism to the ends of the earth. Further, the United States has “encouraged” the world to legislate against the dreaded crime of insider dealing, which after all, has been and still is, almost endemic in many developing and not so new markets, particularly in Asia and the Far East. The United States has cajoled and

* Dean, Tutor, Director of Studies and Fellow of Jesus College, University of Cambridge; Lecturer in Financial Law, University of Cambridge; President of The British Institute of Securities Laws and Executive Director of The Centre for International Documentation on Organised and Economic Crime. This article is based upon a paper presented at an international conference on securities regulation, which took place in 1994 in Kuala Lumpur, Malaysia and at the Cambridge International Symposium on Economic Crime. The views expressed are those of the author and should not be regarded as necessarily reflecting the opinion of those agencies with whom he has and is still connected.

1. See generally U.S. SECURITIES AND EXCHANGE COMMISSION STAFF REPORT 1994, MARKET 2000 (1994).

2. U.S. Senator Kerry has recently stated that the fight against economic crime in the United States should be considered as issue in national defense. See generally Barry Rider, Organised Economic Crime, Report to Home Affairs Committee, House of Commons, U.K. Parliament (1994).

coerced countries as powerful as Japan, Germany, and Switzerland to enact laws against insider dealing. These laws can then provide a basis for mutual assistance for U.S. authorities when they seek to pursue their own insiders overseas. The same has occurred in regard to money laundering, not just in relation to the proceeds of drug trafficking, but in regard to the proceeds of other forms of serious crime.

The United States, rightly or wrongly, has required the world to declare war on the money launderer. The result of these initiatives has, to the mind of a simple lawyer, been to create a good deal more regulation and control. Such has indeed been the case in Britain and Malaysia. Now, in Britain, for the first time since the abolition of the feudal offense of misprision of felony, persons who in the course of his work or profession learns facts that leads them to suspect that someone else, perhaps a client or colleague, is laundering the proceeds of a criminal offense involving drugs, and fails to report their suspicions, commit a serious offense.³ Is this really a manifestation of deregulation? By the same token, Britain's new law on insider dealing is so encompassing, it imposes regulation on a number of activities that were previously undertaken with impunity.⁴ As such, while the British Government proclaims deregulation, it nevertheless now has over twenty regulatory authorities with responsibility for overseeing the financial services industry. In Malaysia, the debate on deregulation seems to favor more laws and more "policemen."

Another, so called "global trend" is the pursuit of greater transparency. It is said that "sun light is the best disinfectant and electric light the best policeman." In other words, more disclosure will inevitably discourage wrongdoing and abuse. In the context of the financial markets, however, this is not a proven thesis. Much depends upon the matter being disclosed and to whom the matter is disclosed. A great deal also depends upon the willingness of the press to pursue and to expose. Furthermore, it has to be seriously doubted whether most investors are really concerned about the morality of corporate management. Are they not more concerned with obtaining a good return on their investments? It is, of course, the case that the more disclosure of reliable and relevant information, the more sensible and, thus, economic, will be the investment decisions of investors. However, as the main medium of corporate disclosure is the financial statement, it must be asked how effective this form of disclosure actually is. For

3. Criminal Justice Act, 1993, s. 19 (Eng.).

4. See generally BARRY RIDER & T.M. ASHE, *INSIDER CRIME* (1993).

example, how many investors in Malaysia significantly rely on published financial information when making investment decisions?

Perhaps a more important trend in securities regulation is for regulation to become increasingly proactive. Traditional policing, is quite properly, essentially reactive. On the other hand, banking regulators have long recognized that once there has been a run on a bank, it is usually too late to do much. Therefore, to be effective in insuring the integrity of the banking system, banking regulation must be proactive. Securities regulators have also acknowledged—often with the urging of those in central banking systems—that becoming proactive ensures that those permitted to handle other peoples' money are fit and proper persons and remain so.

This article focuses on the role of securities regulators in ensuring the integrity of the capital market, using Britain and Malaysia as case studies. While it is appreciated that the North American reader may well consider the choice of these jurisdiction as arbitrary, the English securities market has had a long history of regulation, although only relatively recently through legal mechanisms. Reliance has been and still is placed, on the efficacy of self-regulation to an extent probably greater than anywhere else. The selection of Malaysia is justified on the basis that it is a relatively new market, although with an impressive turnover and capitalization. In so far as the regulators and legislators in Malaysia have looked to the experience of other jurisdictions, most noticeably Australia and the United States, it provides an interesting counterpoint to what has taken place in recent years in Britain.

It is a simple, but true observation, that investors both at home and abroad cannot be expected to have confidence in a market that is manifestly corrupt and tainted. Those who do not care and are prepared to enter such a market irrespective of its character are exactly the kind of investor who no country needs. They are the crooks and con-men or those who would subvert the values that we all have.

II. Policing the Markets

When questioned as to how far his Writ ran, King Henry II responded as far as his arrows reached! Given the developments that have since taken place in ballistics, such an approach to jurisdiction might accommodate the extraterritorial zeal of the U.S. Securities and Exchange Commission.⁵ Unfortunately, however, Henry II's response

5. See, e.g., *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). See generally D. Chaikin, *Fraud, Securities Laws and Extraterritoriality in the U.S. in THE*

characterizes a more restrained, and even parochial, attitude toward jurisdiction in England. In England and those jurisdictions that follow English common law, such as Malaysia, the criminal law⁶ confines itself within the straight-jacket of the territorial principle.⁷ In other words, the Queen's writ in criminal matters⁸ generally runs to the edge of the territorial waters and no further. In a world where transactions can occur on an almost instantaneous basis in or through a number of sovereign jurisdictions, the limits of the criminal justice system become immediately apparent.⁹

III. The International Dimension

It is not only for such anti-social reasons that so much in the world of finance and commerce today stretches beyond national frontiers.¹⁰ Development in communications, technology, and the general mobility of capital and persons have all irresistibly contributed to a highly interdependent world economy, with truly international markets.¹¹ For a host of sound commercial reasons, a significant proportion of any nation's business transaction will involve a multiplicity of jurisdictions.

REGULATION OF THE BRITISH SECURITIES INDUSTRY (Barry Rider ed., 1979); A. NEALE AND M. STEPHENS, *INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION* (1988). Perhaps one of the most drastic illustrations of the so-called unilateral approach is the U.S. Security and Exchange Commission's proposal for 'waiver by conduct' jurisdiction, see SEC. EX. ACT REL. No 21186 (1984), discussed in W. Hasetine, *International Regulation of Securities Markets*, 36 I.C.L.O. 307 (1987).

6. For example, a murder or manslaughter committed by a British citizen outside the United Kingdom may be tried in England as though it had been committed there. See *Offences Against the Persons Act*, 1961, s. 9 (Eng.). Under the same Act, bigamy committed outside the United Kingdom is an offense within English jurisdiction. *Id.* s. 57. For an example of extraterritoriality under Malaysian law, see *Penal Code*, s.4 (Malay.) (regarding offenses against the state).

7. LAW COMMISSION, *THE TERRITORIAL AND EXTRATERRITORIAL EXTENT OF THE CRIMINAL LAW* (1979) (Eng.). With regard to economic crimes, see L.H. Leigh, *Territorial Jurisdiction and Fraud*, [1988] Crim. L.R. 280 (Eng.); J. Breslin, *Extraterritorial Control of Securities Frauds* (1989) (unpublished Ph.D. thesis, University of Cambridge) (on file with author).

8. In fact, the main basis for the common law is territoriality, whether liability be civil or criminal. See *DPP v. Stonehouse* [1978] AC 55 (Keith, L., opinion) (Eng.).

9. See generally BARRY RIDER, *THE PROMOTION AND DEVELOPMENT OF INTERNATIONAL CO-OPERATION TO COMBAT COMMERCIAL AND-ECONOMIC CRIME*, (Commonwealth Secretariat, 1980). Today, it is only the most casual or incompetent economic criminal who would venture to confine his illicit activities to within a single jurisdiction. Y.B. Dato-Syed Hamid Syed Jaafar Albar, Minister of Law of Malaysia, Opening Address at Third Regional Symposium on Economic Crime in Kuala Lumpur (Mar. 28, 1994). By involving others in the contemplation or execution of the offense, economic criminals dramatically reduce the chances of detection and effective investigation, let alone the even more remote possibility of having to atone for their actions before court. *Id.*

10. See generally U.S. SECURITIES AND EXCHANGE COMMISSION REPORT, *INTERNATIONALISATION OF THE SECURITIES MARKETS* (1987).

11. D. AYLING, *THE INTERNATIONALISATION OF STOCK MARKETS* (1986).

GLOBAL TRENDS IN SECURITIES REGULATION

This is perhaps no more so apparent as in the corporate securities industry.¹² The international "character" of securities markets is nothing new. Some of the earliest English joint stock companies were concerned with foreign trade. For example, in February, 1553, Sebastian Cabot formed a company with 240 shareholders to trade with Russia. A year earlier a company had been chartered with the rather more romantic object of "discovery of regions, dominions, islands and places unknown." Indeed, some of the earliest recorded trading in script and bonds within the City of London was in regard to such companies.¹³ In fact, some of the most ancient "markets" appear to have been primarily concerned with "foreign goods."¹⁴ The securities markets of today often constitute markets for paper issued by foreign issuers and may be operated by members who have direct or indirect foreign interests, trading for or on behalf of persons outside jurisdiction. While the degree of internationalization obviously varies from one market to another, virtually every market is subject, to some extent, to the essentially international imperative of money.¹⁵ Surprisingly, little attention has been given to the implications of internationalization of the securities markets on what are essentially domestic structures of securities regulation.¹⁶ While economists and even politicians have long recognized the significance of internationalization, few lawyers have, and those that have, have perceived relevant issues solely in terms of national jurisdiction.¹⁷ This somewhat parochial approach is not confined to

12. P. STONHM, *GLOBAL STOCK MARKET REFORMS* (1987).

13. See A. JENKINS, *THE STOCK EXCHANGE STORY* (1973); H. BERMAN, *THE STOCK EXCHANGE* (1962); E. MORGAN & W. THOMAS, *THE STOCK EXCHANGE* (1962).

14. See R. HODGES, *PRIMITIVE AND PEASANT MARKETS* (1988); M. SILVER, *ECONOMIC STRUCTURES OF THE ANCIENT NEAR EAST* (1985).

15. See generally *THE MARKET FOR INTERNATIONAL ISSUES* (OECD Committee on Financial Markets, 1972); B. BROWN, *THE FLIGHT OF INTERNATIONAL CAPITAL - A CONTEMPORARY HISTORY* (1987); *THE STOCK EXCHANGE - AIMS AND EFFICIENCY OF THE EXCHANGE IN THE MODERN ECONOMIC AND SOCIAL CONTEXTS* (G. Pivato ed., 1972). Even the most undeveloped markets are unable to ignore the impact of internationalism. See K. DOODHA, *STOCK EXCHANGES IN A DEVELOPING ECONOMY* (University of Bombay, 1962); BARRY RIDER AND S. FUNG, *REGULATING THE CHINESE STOCK MARKET* (1989).

16. See generally S. Heberton & B. Gibson, *International Aspects of Securities Legislation in 3 PROPOSALS FOR A SECURITIES MARKET LAW FOR CANADA*, (Government of Canada, 1979); BARRY RIDER, *FINAL REPORT TO THE GOVERNMENT OF BARBADOS ON THE SECURITIES EXCHANGE OF BARBADOS AND A REGIONAL CAPITAL MARKET* (1979).

17. See Barry Rider, *Combating International Commercial Crime*, 2 LLOYDS MAR. & COM. L.Q. 217 (1985); D. Chaikin, *Combating International Fraud* (1983) (unpublished Ph.D. dissertation, University of Cambridge) (on file with author). Indeed, even Professor L.C.B. Gower, in his review of investor protection in Britain, barely mentioned the impact of internationalization, devoting only a few paragraphs to the "off shore problem" in his initial Discussion Document and Final Report. See e.g. L.C.B. GOWER, *DEP'T OF TRADE, REVIEW OF INVESTOR PROTECTION—A*

Britain. In fact, other than North America, where jurisdictional disputes are endemic, very few jurisdictions have given any real consideration to the problem. It is almost entirely futile to search for learned writings on the impact of transnational transactions in securities on traditional models of regulation in the Commonwealth or Europe. Of course, to some extent this reflects the undeveloped stage of learning and research in corporate securities regulation in these jurisdictions.

IV. Securities Regulation

A. *The Historical Approach*

Traditionally, the approach of the common law to the control and regulation of foreign transactions has been to simply assert domestic jurisdiction through whatever normative system was applicable. Thus, in England, a foreign issuer desirous of seeing its securities quoted on The Stock Exchange was required to comply with English law as scrupulously as was possible. This naturally varied in practice considerably, given the general requirements available for domestic issuers. Indeed, in some instances, because specific statutory exemptions might not be available for a foreign company, the more demanding "self-regulatory" requirements of the market would be applied. Until recently, members of the various organized markets¹⁸ were required to be domestic and the strict requirements of exchange control regulation¹⁹ effectively separated the domestic and international financial worlds.²⁰ In large measure, this is also the experience of Malaysia.

DISCUSSION DOCUMENT (1982) (Eng.); L.C.B. GOWER, DEP'T OF TRADE, REVIEW OF INVESTOR PROTECTION—FINAL REPORT, CMND. 9125 1.19 (1985) (Eng.) [hereinafter FINAL REPORT].

18. In Britain, the securities industry has been more or less confined within the "square mile" of The City of London. See generally W. CLARKE, *INSIDE THE CITY* (1979); A. HILTON, *CITY WITHIN A STATE* (1987); H. MCRAE AND F. CAIRNCROSS, *CAPITAL CITY* (1985); Barry Rider & E. Hew, *The Regulation of Corporation and Securities Law in Britain - The Beginning of The Real Debate* 19 MALAY. L. REV. 144 (1977) (Malay.). The over-the-counter market did not really exist on an organized basis.

19. See J. PLENDER & P. WALLACE, *THE SQUARE MILE* (1985); T.M. Ashe, *Securities Transactions and Exchange Control in THE REGULATION OF THE BRITISH SECURITIES INDUSTRY* (Barry Rider ed., 1979).

20. See BARRY RIDER ET AL., *CCH GUIDE TO THE FINANCIAL SERVICES ACT* (2d ed. 1986) (Eng.) [hereinafter CCH GUIDE].

B. The Current Approach

1. Britain

(a) *Criminal Law*.—In Britain, the criminal law was and still is, equally simplistic and parochial. In the context of the securities markets, the most relevant area of the criminal law is that of fraud and cheating.²¹ A special working party of The English Law Commission has recently described the primary feature of the present common law rules on jurisdiction in fraud matter as that of “insularity.”²² These rules generally provide that a triable crime will be committed where and only where its last element takes place within territorial jurisdiction.²³

The common law distinguishes between so called result-crimes and conduct-crimes. In the case of the first category, there will be jurisdiction if the proscribed result occurred within territorial jurisdiction. In the case of conduct-crimes, it does not generally matter that the consequences occurred beyond the shores, if the proscribed result occurred within the territorial jurisdiction. This seemingly clear application results in ludicrous decisions. The development of electronic and other modern methods of transferring money and dealing in securities across national boundaries has naturally produced further problems. The implications of the restrictive attitude of the English courts were manifest in *R. v. Tomsett*,²⁴ where a telex operator employed by a Swiss bank in London wrongfully diverted a large sum of money in an account in New York to another account in Geneva. English common law rules exclude from jurisdiction conspiracies to commit frauds outside the country. Consequently, when the operator successfully argued that the theft did not take place in England, he was successful in avoiding the jurisdiction of the English courts.

21. Barry Rider, *Policing the International Financial Markets*, 16 *BROOK. J. INT'L L.* 199 (1990). See generally M. CLARKE, *REGULATING THE CITY* (1986); L. LEIGH, *THE CONTROL OF COMMERCIAL FRAUD* (1982); L. Leigh, *Securities Regulation: Problems in Relation to Sanctions*, in 3 *PROPOSALS FOR A SECURITIES MARKET LAW FOR CANADA* (Government of Canada, 1979); M. LEVI, *REGULATING FRAUD* (1987).

22. JURISDICTION OVER FRAUD OFFENCES WITH A FOREIGN ELEMENT — A CONSULTATION PAPER (The Criminal Law Team of The Law Commission, 1987) [hereinafter JURISDICTION OVER FRAUD OFFENCES].

23. See generally A. ARLIDGE & J. PARRY, *FRAUD* (1985). Of course, the Malaysian law in relation to fraud and cheating offences is not necessarily so restricted. See generally P.R. Glazabrook, *Fraud Offences in Singapore and Malaysia*, Address at First Regional Symposium on Economic Crime, Awana, Malaysia (1991).

24. [1985] *CRIM. L.R.* 369 (Eng.).

The English Law Commission's working party recognized that the approach of the English courts "may well be perceived by other countries as an insular, indeed, chauvinistic indifference to their interests, a perception that may be damaging to the interests of the United Kingdom."²⁵ Thus, the Law Commission's working party made sensible recommendations in regard to jurisdiction. Specifically, it recommended that if any "act or omission forming part of the offence, or any event necessary to the completion of any offence" occurs within England, English courts have jurisdiction to hear such matters.²⁶ The Commission excluded from its proposals offenses relating to investments, as such offenses often involve other considerations. The Law Commission's proposals have now been enacted in the Criminal Justice Act of 1993²⁷ in regard to the more general offenses in English law, and those crimes relating specifically to the financial investments are now governed by their own special rules relating to jurisdiction.

(b) *The Financial Services Act of 1986.*—In regard to British securities regulation, the Securities and Exchange Commission's Division of Corporate Finance, in its report on internationalization to the U.S. Congress in July 1987, observed that "the extent of extra-territorial jurisdiction claimed by the UK regulatory agencies has never been subject to much discussion."²⁸ The same could be said for most countries, especially Malaysia. However, Britain's Financial Services Act of 1986²⁹ created an entirely new regime of regulation and supervision of the securities industry in Britain. Prior to the Financial Services Act, the structure of control was essentially self-regulatory. Within this system of self-control there were many forms of regulation and numerous bodies, including some that exercised formal and on occasions even an official regulatory mandate, and others that functioned as little more than clubs.³⁰ While this worked well when the City of

25. JURISDICTION OVER FRAUD OFFENCES, *supra* note 22, at 24, ¶ 1.4.

26. This would be essentially the same as § 1.03(1)(a) of the American Law Institute's Model Penal Code. See MODEL PENAL CODE § 1.03(1)(a).

27. See generally Criminal Justice Act, 1993, s. 62 (Eng.) (concerning insider dealing); Financial Service Act, 1986, s. 47 (Eng.) (concerning market frauds). In relation to the position in Malaysia, see Securities Industry Act, 1983, ss. 84-91 (Malay.) (regarding market frauds).

28. U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT TO U.S. CONGRESS ON INTERNATIONALIZATION OF SECURITIES REGULATION (U.S. Securities and Exchange Commission, Division of Corporate Finance, 1987).

29. Financial Services Act, 1986 (Eng.).

30. See generally E. Hew, *The Anatomy of Regulation in the Securities Industry in THE REGULATION ON THE BRITISH SECURITIES INDUSTRY* (Barry Rider ed., 1979); Barry Rider & E. Hew, *The Regulation of Corporation and Securities Laws in Britain — the Beginning of the Real Debate*, 19 MALAY. L. REV. 144 (1977) (Malay.) [hereinafter *The Regulation of Corporation and*

GLOBAL TRENDS IN SECURITIES REGULATION

London was essentially a close knit, homogeneous "village," with the post-World War II changes in London inhabitants and business dealings—in particular with the suspension of exchange control regulation in 1979—the traditional forms of restraint provided no protection against the "incompetent, let alone the fraudulent".³¹

The various authorities that sought to "police" the City before 1986 were able to exercise their powers without strict regard to the normal constraints of legal jurisdiction. For example, the City Panel on Take-over and Mergers was prepared to "apply" the strict letter of the Take-over Code to Malaysian companies and individuals who attempted to take control over a British public company. Indeed, one of the alleged advantages of self-regulation was its ability to operate beyond the stricter constraints of jurisdiction that apply to legal rules.

In contrast, a senior civil servant in the Department of Trade and Industry has observed that "the fundamental purpose of the Financial Services Act is to create a safe environment in which those who consume investment services within the United Kingdom can do so with confidence."³² Thus, the philosophy of the Act, in so far as there is a cogent one,³³ is simply to control the financial services industry within the traditional territorial jurisdiction. Where the relevant activity occurs outside the United Kingdom, the controls "go no further than is justifiable in accordance with established rules of international law and the principles of international good manners."³⁴ Of course, the weakness with this rather gentlemanly approach is that crooks do not invariably observe "good manners." There is obviously a convincing argument in favor of responsible states not permitting their jurisdictions to be abused by crooks as "safe havens." This is surely a principle of "good neighbourness" let alone "good manners."³⁵ Malaysia has long recognized this, particularly in the area of illicit drug trafficking.

Securities Laws in Britain].

31. See BLOND BRIGGS & BARRY RIDER, *INSIDER TRADING* (1983); CLARKE, *supra* note 18, at 23; R. SPIEGELBERG, *THE CITY: POWER WITHOUT ACCOUNTABILITY* (1973); T. Haddon, *Fraud in the City: The Role of the Criminal Law*, [1985] CRIM. L.R. 500 (Eng.).

32. J. Rickford, *Developments in the U.K. — Securities Regulation, an International Perspective* (1986) (paper presented at a conference organized by the Centre for Commercial Law Studies, Queen Mary College) (on file with author).

33. See CCH GUIDE, *supra* note 20.

34. Rickford, *supra* note 32.

35. See generally Barry Rider, *Policing the City — Combating Fraud and Other Abuses in the Corporate Securities Industry* 41 CURRENT LEGAL PROBS. 47 (1988) (Eng.) [hereinafter *Policing the City*].

The Financial Services Act and the regime that it creates is essentially a "compromise package."³⁶ It makes a determined, and almost successful effort, to satisfy everyone's vested interests and preconceptions. It is no less a compromise in its attempt to accommodate the foreign aspects of securities regulation.

Of course, to some extent the hands of the Government were tied by the Treaty of Rome,³⁷ and in other cases, such as in regard to Japan, economic and political considerations dictated a spirit of compromise. Under the new regime, an investment business that is based in and regulated by the laws and regulations of another member country of the European Community (EC) is allowed to operate freely in Britain. "Harmonization" of EC regulation in this area was the goal of the bureaucrats in Brussels, and this was not only sensible in practical terms, but wholly acceptable. However, harmonization of financial services regulation has been offered as a workable and attainable goal and the guiding principal today is mere "equivalence."³⁸ The primary structure of regulation for financial and banking institutions within the EC is "home state" authorization with mutual recognition of each other's authorization procedures on the basis that they are broadly equivalent.³⁹ In practice, this might well mean that some European countries operate systems of regulation that are far less demanding than others. It is certain that some systems of regulation will be far less exacting both in terms of application and administration than those set down under the Financial Services Act in Britain. The temptation for Britain and overseas firms to relocate in a more "hospitable" and probably "warmer" jurisdiction are obvious. Consequently, it may well be that in time EC integration of financial services will, instead of enhancing the effectiveness of regulation, result in a lowering of standards, at least in Britain. Malaysia should be also be aware of these dangers in the context of regional initiatives in Asia.

While the general approach to securities regulation in Britain is essentially what it has always been, namely that foreign investors must obey British law, there are one or two exceptions where British regulations do in effect extend beyond national boundaries. High pressure selling of securities, either through cold calling or from "bucket

36. Financial Services Act, 1986 (Eng.).

37. Treaty of Rome Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 167.

38. See B. RIDER AND T.M. ASHE, EUROPEAN SECURITIES REGULATION (1993); M. Bax, Financial Services in The European Economic Community after 1992, Lecture Delivered at the University of Cambridge (1989).

39. See generally 1992 - INVESTMENT SERVICES (Linklaters & Paines, 1989).

GLOBAL TRENDS IN SECURITIES REGULATION

shops," has become an increasing problem in Europe and elsewhere in recent years.⁴⁰ Indeed, Malaysia has been used by such operators as both a base for launching attacks on investors throughout the Asia-Pacific Region and as a target itself. The "boiler room merchants" who learned their trade in Canada and the United States moved their operations to Europe, and in particular Amsterdam, during the late 1970s. They then seemingly plied their despicable trade with virtual impunity.⁴¹ Of course, the practice of "share hawking" is not new in Britain or Malaysia for that matter. The British Government set up a committee under Sir Archibald Bodkin in 1936 to inquire into such undesirable practices, and the recommendations of this committee⁴² led to the enactment of The Prevention of Fraud (Investments) Act of 1939.⁴³ Indeed, Commissioners appointed by Parliament reported in November, 1696 that fraudulent promoters of worthless shares were selling such "with Advantage, to ignorant Men, drawn in by the Reputation, falsely raised, and artfully spread, concerning the thriving state of their Stock."⁴⁴ It would seem that the profession of the "loader" is not a new one in Britain or Malaysia.

Section 56(1) of the British Financial Services Act prohibits any person from doing any investment business during or in consequence of an unsolicited call made on a person in the United Kingdom or from the United Kingdom on a person elsewhere.⁴⁵ This prohibition creates a

40. See M. BOSE & C. GUNN, FRAUD (1989); R. BOSWORTH-DAVIES, FRAUD IN THE CITY (1988); D. FRANCIS, CONTREPRENEURS (1988); D. Henry, *Funny money stocks*, FORBES, Sept. 23, 1985, at 38.

41. See D. FRANCIS, *supra* note 40, at 45. For example, Irving Kott and Thomas Quinn established their organizations and then disseminated a plethora of worthless stocks on an unsuspecting, but often greedy public, invariably employing inexperienced and dishonest salesmen to even engage in cold calling and high pressure telephone selling. See *id.* Thomas Quinn and his network was one subject of a special meeting organized by the General Secretariat of ICPO-Interpol on February 14, 1980. See *Boiler Plate at Full Steam*, 128 N.L.J. 618 (1988) (Eng.).

A number of these operations have organized crime connections and those operating in Malaysia certainly did. See, e.g. H.L. OOI, COLD CALLING AND HIGH PRESSURE SELLING OF SECURITIES (1992); M. ROWE, FRAUD IN TRADE FINANCE 43 (1989); A. SHIPMAN & BARRY RIDER, INTERNATIONAL ORGANIZED CRIME (International Chamber of Commerce, 1987); A. GIBSON, The Global Corporate Intelligence Function, Fourth I.M.B. Lecture at Queen Mary College (Nov. 15, 1988) (copy on file with author).

42. See generally R. PENNINGTON, THE INVESTOR AND THE LAW (1968); C.H. WELCH, *The Department of Trade and Supervision of The Securities Markets*, in THE REGULATION OF THE BRITISH SECURITIES INDUSTRY (B. RIDER ed., 1979).

43. The Prevention of Fraud (Investment) Act of 1939 was reenacted with minor amendments as the Prevention of Fraud (Investment) Act of 1958. Before the Financial Services Act 1986, this represented the principal piece of securities regulation in Britain.

44. HOUSE OF COMMONS J., Nov. 25, 1696 (Eng.).

45. See generally CCH GUIDE, *supra* note 20.

"civil offense" insofar as any resulting contract will not be enforceable against the investor approached, and thus, the investor will be able to recover money or property transferred under the contract or compensation. It is important to note that this provision extends to "cold calling" by individuals in the United Kingdom on persons overseas. One of the reasons that criminal liability was not imposed is that it was thought unjustifiable to extend the scope of the criminal law in this way. Where the unsolicited call is made from outside the United Kingdom, it is questionable whether a foreign court would apply English law in assisting an investor in recovering his money or property. Should the call be made from an EC country it is, at least arguable, that an English court could take jurisdiction under section 4 of the EC Brussels Convention of 1968⁴⁶ on the basis that it is a "consumer contract." An order of the English High Court would therefore be enforceable throughout the Community under the Civil Jurisdiction and Judgments Act of 1982.⁴⁷

In assessing the credibility of any new regime of regulation, however, it is necessary to measure what has so far been achieved against its guiding philosophy and objectives. Sadly, little thought has been given to the philosophical issues of securities regulation, and such debate as there has been has tended to concentrate on such matter as insider dealing.⁴⁸ While it is true that some of the earliest laws seeking to regulate markets were based upon the importance of promoting and maintaining public confidence in their integrity and thus, efficiency,⁴⁹ concentration on this aspect tends to obscure the essentially facilitative nature of securities regulation.⁵⁰ While it is also possible to discern a number of philosophical threads in for example, the Financial Services Act, not the least being the need to promote and protect public confidence, it is difficult to characterize one as dominant. For example, the British Government's White Paper,⁵¹ which sought to set out the

46. 1968/09/27, 1968 O.J. 189.

47. Civil Jurisdiction and Judgments Act, 1982 (Eng.).

48. See BARRY RIDER & H.L. FRENCH, *THE REGULATION OF INSIDER TRADING* (1979); BARRY RIDER, *INSIDER TRADING* (1983); Barry Rider, *Insider Trading? A Crime of Our Times*, 42 *CURRENT LEGAL PROBS.* 47 (1989) (Eng.).

49. In England, there were laws as early as the reign of Edward I that sought to ensure the integrity of public markets and the ancient offenses of forestalling, engrossing, and regrating still survive today within conspiracy to defraud, see RUSSELL ON CRIME (J. Turner ed., 12th ed. 1964).

50. See generally C. GOODHART ET AL., *THE OPERATION AND REGULATION OF FINANCIAL MARKETS* (1987); L.S. SEALY, *COMPANY LAW AND COMMERCIAL REALITY* (1984); L.S. Sealy, *Tomorrow's Company Law*, 2 *COMPANY LAW*. 195 (1981) (Eng.).

51. See FINAL REPORT, *supra* note 17; Barry Rider, *Analysis and Appraisal of The City Revolution*, in *THE PRACTICAL IMPLICATIONS OF THE FINANCIAL SERVICES ACT* (CCH, 1986);

GLOBAL TRENDS IN SECURITIES REGULATION

legislative aims of the new law, advocates increased competition as a means of improving both integrity and competence within the industry. Many would consider this highly debatable.⁵²

2. *Malaysia.*—The Malaysian laws are, with respect no profounder in their logic or application. The Securities Industry Act of 1983,⁵³ as amended, borrows significantly from outdated and suspended legislation in Australia. Indeed, the philosophy of the relevant New South Wales and Victorian provisions, while perhaps more discernible than the British legislation, is highly questionable as appropriate for Malaysia. The Malaysian markets and financial services industry are very different from those in Australia or for that matter anywhere else. The economic and political policies that have circumscribed the development of market capitalism in Malaysia are hardly mirrored in an economy such as that in New South Wales.

In any case, in many respects, the philosophical foundations of the Australian law have themselves been shaken if not undermined by subsequent thinking and events. Sadly, more recent Malaysian legislation, such as The Securities Commission Act of 1992,⁵⁴ indicates that few if any lessons have been learned in this context. It too is a mish-mash of philosophies that rest ill at ease with each other. To place in one agency responsibility for promoting the markets and at the same time regulating and policing them is considered by many commentators to be a recipe for disaster.⁵⁵

L.C.B. Gower, *Big Bang and City Regulation*, [1988] M.L.R 1 (Eng.); Barry Rider, *Protecting the Prudent Investor*, 6 COMPANY LAW. 54 (1985) (Eng.).

52. See generally BARRY RIDER, REPORT COMMISSIONED BY THE F.P.L.C., A MALAYSIAN S.E.C. (1991) [hereinafter MALAYSIAN S.E.C.].

53. The Securities Industry Act, 1983 (Malay.).

54. See The Securities Commission Act, 1992 (Malay.). See also Barry Rider, *Policing The Malaysian Markets*, Paper Submitted to Malaysian F.P.L.C (1992) (on file with author).

55. For example, section 15(1)(k) of the Securities Commission Act provides that the Securities Commission shall be responsible for encouraging development of the securities and future markets in Malaysia. The Securities Commission Act, 1992, s. 15(1)(k) (Malay.). At the same time, section 15(1)(i) provides that the Commission should "suppress illegal, dishonourable and improper practices" *Id.* Indeed, profound doubts have arisen as to the viability of protecting private investors and creating competitive markets for professional investors within a single law in Britain. See A. LARGE, *MAKING THE TWO TIER SYSTEM WORK* (1993).

V. The Policemen

A. Britain

Prior to the Financial Services Act of 1986, there were certain statutory provisions regulating the British investment industry and the purchase and sale of securities. Under the Companies Acts and the Prevention of Fraud (Investments) Act of 1958,⁵⁶ the structure of regulation was essentially self-regulatory. Although there was considerable discussion as to the effectiveness of this system it became increasingly apparent that it could not deal with fraud and thus, could not adequately protect investors.⁵⁷

In 1986, a committee under Lord Justice Roskill, appointed to consider the form and conduct of fraud trials, reported that "the public no longer believes that the system . . . is capable of bringing the perpetrators of serious fraud expeditiously and effectively to book. The overwhelming weight of evidence laid before us suggests that the public is right."⁵⁸ Although a certain amount of "tinkering" with the system of supervision and regulation took place prior to the Financial Services Act of 1986,⁵⁹ it was generally the view that a system of self-regulation was inadequate given the developments that had taken place in the market and the way in which business was transacted. The Government appointed Professor L.C.B. Gower in 1981 to review and report on the adequacy of the regulatory scheme and both during his inquiries and subsequently, he made it clear that he favored the establishment of a new

56. Companies Act, 1985 (Eng.); Prevention of Frauds (Investments) Act, 1958 (Eng.). See generally R. PENNINGTON, *supra* note 42, at 49. C.M. SCHMITTHOFF, *COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE* 27 (1974); C.M. Schmitthoff, Remarks at a Conference Organized by the International Faculty of Securities Regulation in London (1976) (on file with author) ("[A]s regards investor protection, it would only be a slight exaggeration to maintain that we have no law at all.").

57. See M. CLARKE, *REGULATING THE CITY* (1985); T. HADDEN, *THE CONTROL OF COMPANY FRAUD* (1968); T. Hadden, *Fraud in the City; Enforcing the Rules*, 1 *COMPANY LAW*. 9 (1980). See generally THE THIRD REPORT OF THE TRADE AND INDUSTRY SELECT COMMITTEE, HOUSE OF COMMONS, U.K. PARLIAMENT, *COMPANY INVESTIGATIONS* (1990).

58. REPORT OF THE FRAUD TRIAL COMMITTEE (1986) (Eng.). A report prepared by a special working party convened by the Director of Public Prosecutions had come to a similar conclusion in 1979.

59. See generally *The Regulation of Corporation and Securities Laws in Britain*, *supra* note 28, at 30; Barry Rider, *The British Council for the Securities Industry*, 42 *REVUE DE LA BANQUE* 303 (1978); Barry Rider & E. Hew, *THE STRUCTURE OF REGULATION AND SUPERVISION IN THE FIELD OF CORPORATION AND SECURITIES LAWS AND BRITAIN*, 41 *REVUE DE BANQUE* 83 (1977). Professor L.C.B. Gower, for one, advocated the need for a British Securities and Exchange Commission. See *supra* note 17.

GLOBAL TRENDS IN SECURITIES REGULATION

authority along the lines of the U.S. Securities and Exchange Commission — a view shared by many — outside the City.⁶⁰

It would be unjust and unhelpful to judge the Financial Services Act too harshly until the “dust settles.”⁶¹ The system established in the Act is a curious mixture, however, as it provides for both official regulation and supervision on the basis of direct statutory authority and various permutations of delegated and indirect authority.⁶²

The Financial Services Act does provide the various new regulatory bodies and the British Department of the Trade and Industry with a number of significant powers. Such powers include the ability to require cooperation in conducting inquiries, and, in certain circumstances, the ability to actually intervene and control the actual conduct of business. It is not necessary to detail all these powers here.⁶³ What is of more relevance is the scant attention that has been paid to the institutional aspects of effective supervision and surveillance in this area. To a very significant extent, various regulatory authorities are not in a position to adequately or competently exercise their various powers because they lack the resources, manpower, and perhaps even the willingness to do so.

When the Act first came into being, enforcement took a relatively low priority.⁶⁴ Few authorities sought to give any real attention to the

60. See FINAL REPORT, *supra* note 17, at 3.12. See also *Big Bang and City Regulation*, *supra* note 51, at 1. Many have expressed the view that it is inevitable that sooner or later Britain will have to establish a securities and exchange commission, see BARRY RIDER, *POLICING THE CITY IN THE 21ST CENTURY* (Kings College, London University, 1994). Already the British Securities and Investments Board, which is incorporated as a private company with limited liability, is perceived by many as taking unto itself more and more responsibility in the area of enforcement. See LARGE, *supra* note 55, at 42. See also *infra* notes 65-67.

61. The present author has already attracted criticism from none other than the Securities and Investment Board for expressing disquiet about the present arrangements, see Barry Rider, *Policing the City*, *supra* note 35.

62. See Barry Rider, *Self-regulation: The British Approach to Policing Conduct in the Securities Business, with Particular Reference to the Role of the City Panel on Take-Overs and Mergers in the Regulation of Insider trading*, 1 J. COMP. CORP. L. & SEC. REG. 319 (1978). Regardless of what jurists might argue about the normative and educative effect of rules that remain in practical terms unenforced, common sense would incline towards Professor Gower's view that a Securities and Exchange Commission needed to be established. See *supra* text accompanying note 59. The Government, which by no means was wholly receptive to Professor Gower's proposals, did accept the need to ensure that the new scheme of regulation was properly policed, however.

63. See generally CCH GUIDE, *supra* note 20, at 52.

64. See generally *Policing the City*, *supra* note 35, at 61 (citing the statement of the first chairman of the Securities and Investments Board, namely that “I [the chairman] am a regulator, a watchdog and a policeman — in that order.”). The chairman of the Malaysian Securities Commission, Dato' Dr. Munir, has taken the same stance, although he has more recently emphasized the significance of enforcement. Cf. Dato' Dr. Munir, Chairman, Malaysian Securities Commission, Address at the Second Regional Symposium on Economic Crime in Kuala Lumpur (1993); Dato' Dr. Munir, Chairman, Malaysian Securities Commission, Address at the Third

needs of this important function. In a number of instances, wholly unsuitable individuals that lacked expertise were recruited. In a system that requires confidence in its efficiency and integrity for its credibility, this was a potential disaster. Fortunately, over the last two or three years, the Securities and Investment Board (SIB) has addressed these issues with a good deal more determination and foresight, and there is now the germ of credibility in the system.⁶⁵ Unfortunately, the British Government has itself shown no greater willingness to take institutional aspects of enforcement more seriously. The Department of Trade and Industry and the Treasury,⁶⁶ aside from losing several key officials to the new authorities, has experienced considerable difficulty in recruiting competent lawyers and enforcement personnel. For example, the section that deals with insider dealing cases relies, by its own admission, almost exclusively on the Insider Dealing Unit of The London Stock Exchange for detection and preliminary investigation.⁶⁷ Given the virtual absence of effective policing in the corporate securities industry prior to 1986, it is perhaps not surprising that there is not only a dearth of suitable "regulators," but also little relevant expertise.

B. Malaysia

The experience in Malaysia, and many other countries, has not been too different. Regulatory experience in Malaysia is at a premium and the Malaysian Securities Commission must be congratulated in its ability to have attracted a number of well-qualified young professionals from

Regional Symposium in Kuala Lumpur (1994).

65. As has already been pointed out, the SIB is a private company with certain legal privileges given to it under the Financial Service Act of 1986. The SIB and its officers are immune from civil claims in regard to their official actions, unless they act in bad faith. Members of the Board are appointed by the Government and Bank of England. The SIB reports on an annual basis to the Department of Trade and Industry, which then reports to Parliament. *See also supra* note 60 and accompanying text.

66. The powers that were afforded to the Department of Trade and Industry under the Financial Services Act, have now been transferred in the main to the Treasury.

67. The London Stock Exchange's Insider Dealing Group is responsible for monitoring and investigating instances of possible insider abuse on the stock market. While it operates within a contractual and self-regulatory jurisdiction, it is possible for either the Department of Trade and Industry or the SIB to appoint members of the Unit to conduct investigations or prosecutions and thereby have access to the statutory powers of investigation in the Financial Services Act of 1986. Controversy has centered on the "economics" of the Department of Trade and Industry and Treasury appointing very expensive barristers and accountants to conduct its inspections under the provisions of The Companies Act 1985. Indeed, every effort is made to persuade the Stock Exchange to continue the investigation, given the cost implications. *See generally* THIRD REPORT OF THE TRADE AND INDUSTRY SELECT COMMITTEE, HOUSE OF COMMONS, U.K. PARLIAMENT, COMPANY INVESTIGATIONS (1990).

government departments and the private sector to its ranks. It remains to be seen, however, whether such individuals contemplate a long term career with the Commission. This is reflected in the embryo compliance industry that has been forced into an ambivalent existence in Britain. While Malaysia identifies compliance as a separate management responsibility in the case of banks, it has not yet been so recognized in the financial services industry. Of course, the Malaysian Securities Commission is well aware of the importance of creating a compliance culture serviced by a compliance industry, but at present it is doubtful whether the resources in term of manpower and expertise exist to fashion an effective compliance regime in most businesses.

An article such as this does not have the opportunity to trace the historical development of securities regulation in Malaysia. Of course, the Malaysian stock market in Kuala Lumpur is not new and has a history that dates back to the end of the last century. Securities regulation in Malaysia has developed pragmatically and has often been used to further specific economic and political objectives, in addition to simply creating an efficient capital market and financial services industry. The pragmatic development of regulation is reflected in the number and diversity of organizations involved in administering the markets. Indeed, one of the reasons for creating the Malaysian Securities Commission in 1993 was to provide a "one-stop agency."⁶⁸ As a result, however, while a good deal of centralization of authority has been achieved, there are still a number of other bodies with responsibility for matters pertaining to the nation's capital markets. Nevertheless, the Securities Commission is given regulatory and enforcement oversight over all of these entities and inevitably, it is in this oversight that the success of this new regulatory system will be judged.

C. *Enforcing Regulation in Criminal Courts*

Much of the discussion that took place as to the adequacy of the various structures of British regulation has focused on the ability of those charged with policing the British financial services industry to secure convictions before the ordinary criminal courts for fraud and abuses, such as insider dealing.⁶⁹ The same is equally true in Malaysia. Indeed, "perhaps one of the most serious ills of the securities industry is the perilous yet elusive abuse called insider trading . . . insider trading

68. See generally A MALAYSIAN S.E.C., *supra* note 52.

69. See B. HANNINGAN, *INSIDER DEALING* (1988); Strongin Dodds, *Blowing the Whistle on Foul Play in the City*, *FINANCIAL DECISIONS*, Apr. 1989, at 35.

is one of the most serious threats to the Malaysian securities markets.⁷⁰

This concern is not new. In 1878, the British Royal Commission on the Stock Exchange, appointed under Lord Penzance, reported expressing concern about the enforceability of the various rules and regulations and calling for responsibility for policing these laws to be placed on a "public functionary."⁷¹ Attempts were made during the 1970s and early 1980s to improve the prosecution of fraud cases in England, namely by the strengthening of the Director of Public Prosecutions staff and the creation of Fraud Investigation Groups.⁷² However, prosecution is only one factor in combatting fraud. As the committee sitting under Lord Justice Roskill observed,⁷³ deficiencies in the procedures for investigation and in the trial process itself are equal stumbling blocks.

1. Authority to Investigate.—As a result of the recommendations of the Roskill Committee, the Criminal Justice Act of 1987 provided for the establishment of the Serious Frauds Office (SFO).⁷⁴ The Act entrusts far-ranging powers of investigation to the Director of this Office, powers virtually analogous to those afforded by the Department of Trade and Industry under the Companies Act of 1985 and the Financial Services Act of 1986.⁷⁵ However, the powers afforded the Director of the SFO is predicated on the basis that the matter involves a "serious or complex fraud."⁷⁶

Similarly, The Malaysian Registrar of Companies, under the Companies Act of 1965 and Securities Industry Act of 1983,⁷⁷ has like powers of inquiry. However, section 38 of the Securities Commission Act of 1992 gives investigating officers appointed by the Commission the power to demand evidence, which can then be used against the alleged

70. Puan Zainun Ali, Registrar of Companies, Address at the Fifth Annual Conference of the Securities Industry in Malaysia (Sept. 5, 1989).

71. GOV'T PRINTER (1878).

72. D. LANHAM ET AL., *CRIMINAL FRAUD* (Law Book Company, 1987); S. Froomkin, *Problems of Investigating and Prosecuting Commercial Crime Offences*, [1985] II C.L.B. No. 2; Barry Rider, Report to the Attorney General of Hong Kong on Combatting Commercial Crime (1979) (on file with author).

73. See *supra* notes 58-60 and accompanying text.

74. Criminal Justice Act, 1987 (Eng.).

75. See *supra* part V. A.

76. The Director's powers of investigation under section 2 of the Act are almost a unique example of such powers being vested in the prosecutor in England. Criminal Justice Act, 1987, s.2 (Eng.). It has been remarked that in this regard the process is similar to the inquisitorial powers of an examining magistrate in civil law systems.

77. Companies Act, 1965 (Malay.); Securities Commission Act, 1992, s. 38 (1992) (Malay.).

fraud perpetrator.⁷⁸ As such, the Malaysian legislation is broader than the investigatory provisions in any of the British legislation.⁷⁹ In Britain, evidence demanded from an alleged fraud perpetrator can not be used other than in cross-examination. That is, it cannot be used in the prosecution's case-in-chief.

2. *Authority to Prosecute.*—While there is little doubt that the establishment of the SFO in Britain and the resources that it has been able to attract are more than significant advances in the right direction, its impact on the policing of securities laws remains a little uncertain. Indeed, although the Office has not shown a reluctance to concern itself with frauds in the investment world, it interprets its statutory mandate restrictively. Consequently, as stated by an Assistant Director of the SFO: "Insider dealing on its own is essentially a regulatory offence, and as such is unlikely to qualify"⁸⁰ This rather rigid and possibly naive approach is to be regretted.⁸¹

In Malaysia, all prosecutions require the consent of the Public Prosecutor, although under the Securities Commission Act of 1992, the Securities Commission can, subject to the requirement of consent from the Public Prosecutor, conduct prosecutions itself.⁸² Whether there would be advantage in Malaysia having a Serious Frauds Office is a much wider question. Malaysia, has not had a particularly good record in securing convictions for serious cases of economic crime, in common with many other countries some of which already possess a specialized prosecutorial agency that deals with investment fraud.

VI. Civil Enforcement

It is unfortunate that the foregoing discussion of the effectiveness of securities law and corporate regulation in Britain and Malaysia has focused so much on the traditional criminal justice system. It has long been recognized that effective control and regulation of financial markets

78. The Securities Commission Act, 1992, s. 38 (Malay.).

79. See, e.g., The Companies Act, 1985 (Eng.); The Financial Services Act, 1986 (Eng.); The Criminal Justice Act, 1987 (Eng.).

80. Letter from Assistant Director of the Serious Fraud Office (Dec. 7, 1988); see also Criminal Justice Act, 1987, s. 1(3) (delineating what constitutes a "serious or complex" fraud is left to the Director to determine "on reasonable grounds"); C. Wolman, *UK Treads Carefully Over Insider Dealing*, FIN. TIMES, Feb. 7, 1989.

81. For a discussion of insider dealing enforcement see BARRY RIDER & T.M. ASHE, *INSIDER CRIME* (1993); BARRY RIDER, *INSIDER TRADING* (1983); Barry Rider, *The Policing of Insider Trading in Britain, in EUROPEAN INSIDER DEALING REGULATION* (1991). In regard to Malaysia, see BARRY RIDER AND H.L. FFRENCH, *THE REGULATION OF INSIDER TRADING* (1979).

82. Securities Commission Act, 1992 (Malay.).

involves devices other and in addition to the ordinary criminal law.⁸³ For example, the Statute of 1697, "To Restrain the number and ill Practice of Brokers and Stockjobbers," contained provisions that sought to regulate the embryonic securities industry in a manner not too different from that under the Financial Services Act of 1986. Brokers had to be licensed and be of "proven value." Not only were they required to eschew fraud, but also to "adhere to good and fair principles." The Act required the posting of bonds for good behavior and indemnity. There were also provisions for the recording of bargains.⁸⁴ In this early law, one can discern such concepts as "authorization," "fit and proper" and even the notion that the "spirit" is more important than the "letter" of the rule.⁸⁵ Of course, in practical terms, adequate control and vetting of those seeking admission to the securities industry or the markets and the prudential regulation of such is likely to be far more cost effective than resort to the criminal law on an *ex post facto* basis.

The criminal law has not proven to be an efficient device in combatting economic crime for a host of technical, practical, procedural, and institutional reasons.⁸⁶ It operates at a high level of proof, is generally slow and over-exacting in its procedures, and is restrictive and unimaginative in the evidence it will allow to be adduced and applied. Few jurisdictions have achieved significant success in relying primarily, let alone exclusively, on this blunt and very expensive tool in regulating and controlling abuses in the financial markets. Even the Royal Commission sitting under Lord Penzance in 1878 recognized that the criminal law was too inflexible and slow.⁸⁷ Of course, when one considers the sort of developments that have taken place in the financial markets since the time of Lord Penzance's deliberations, the problems facing the criminal justice system are so much greater. Internationalization of the markets is a major difficulty operating to confound detection, fragment and diversify investigations, place

83. For a somewhat exotic example, see the rules relating to stabilization of the commodity markets in China, see G. BOULAIS, 55 MANUEL DU CODE CHINOIS, 754b (Varieties Sinologiques, Shanghai, 1924) (prohibiting persons from rural areas from purchasing more than a *shih* of rice in Peking). See also THE MARKET IN HISTORY (B. Anderson & A. Latham eds., 1986).

84. See AN ACT TO PREVENT THE INFAMOUS PRACTICE OF STOCK-JOBING 1734 (The International Stock Exchange, 1986).

85. See, e.g., General Principle 1, U.K. City Code on Take-Overs and Mergers and The Principles, Care Conduct of Business Rules, S.I.B. (1992).

86. See generally Barry Rider, *Combatting International Commercial Crime*, 2 L.M.C.L.Q. 217 (1985).

87. See *supra* note 71.

GLOBAL TRENDS IN SECURITIES REGULATION

witnesses and evidence out of evidential and often financial reach, and render conventional criminal processes ineffectual or excessively expensive.

A. *The U.S. Example*

The civil law is far more likely to provide a reasonably effective enforcement tool than the criminal law. In certain jurisdictions, most noticeably that of the United States, the civil law has long been used to assist in the enforcement of what are essentially penal or regulatory laws.⁸⁸ For example, under section 21(d) of The U.S. Securities and Exchange Act of 1934, the Securities and Exchange Commission is empowered to bring suit to enjoin violations not only of the federal laws but various rules and regulations made under the authority of such.⁸⁹ It is through this expedience that the U.S. Securities and Exchange Commission has achieved such comparative success in policing both the general antifraud provisions in the U.S. federal laws and insider abuse. By bringing injunctive suit against those suspected of violating the Federal law, the Securities and Exchange Commission has been relatively successful in securing a court order enjoining future violations, disgorgement of profits, and certain other undertakings, such as entering into an approved in-house compliance procedure. Given the tremendous cost involved in litigation and the stance of the Commission, in a good proportion of these proceedings, the court orders have been made consequential, as the defendants are willingly to accept the injunction and other orders, rather than risking the costs, inconvenience, and disclosures of a long trial. The importance of such an order, however, is that a further violation of the relevant law or rule will amount to contempt of court.

Regulatory authorities in other jurisdictions have shown far less courage than that of the U.S. Securities and Exchange Commission in seeking the assistance of the civil courts in policing the securities markets. Of course, much depends upon the receptiveness of the courts. For example, until recently, the English courts have not always exhibited great eagerness to become involved in this area.⁹⁰ However, section 61 of the Financial Services Act of 1986,⁹¹ now provides both the British

88. See generally L. Loss, *FUNDAMENTALS OF SECURITIES REGULATION* (Little Brown, 2d ed.) [hereinafter *FUNDAMENTALS OF SECURITIES REGULATION*].

89. 15 U.S.C. §§ 77a-80c-3 (1988).

90. For example, in *Prudential Assurance Ltd. v. Newman Industries Ltd* (No. 2) 1981 Ch. 257, Lord Justice Templeman stated that "in our view the voluntary regulation is a matter for the City. The compulsory regulation of companies is a matter for Parliament." *Id.*

91. See *The Financial Services Act, 1986*, s.6 (1986) (Eng.) (pertaining to unauthorized

Department of Trade and Industry and the Securities and Investments Board with a statutory power to apply to the courts for injunctions and restitution orders in cases of certain violations of the Act and rules made under its statutory authority.⁹² It remains to be seen whether this power will be used with the same degree of enthusiasm that the U.S. agencies have exhibited in bringing civil enforcement suits. While the British Securities and Investments Board has on several occasions indicated that it attaches practical significance to this power, it remains uncertain whether sufficient resources will be made available for it to be fashioned into the sort of weapon that plays an important role in the United States.⁹³

In the context of Malaysia, it is doubted whether the Malaysian Securities Commission has the legal power to bring similar civil actions. Section 16 of the Securities Commission Act of 1992 states that "[t]he Commission shall have all such powers as may be necessary to carry out its functions under this Act."⁹⁴ It has been contended that this broad provision gives the Commission the power to entertain civil enforcement suits. However, the flaw with this argument is that the section does not address the issue of *locus standi*. The Commission would not have *locus standi* to proceed in a civil action against someone who had breached for example a provision of the Securities Industry Act or one of the Commission's own rules. Obviously, this is a serious weakness in the Malaysian legislation and one that requires urgent attention.⁹⁵

B. International Implications

Not only is civil enforcement often quicker, cheaper and more effective than the laborious processes of the criminal law, it does have a far greater potential for reaching overseas.⁹⁶ It is an accepted, and indeed, a fundamental principal of international law that one state will

investment business). This provision has been used already on a number of occasions.

92. See generally CCH GUIDE, *supra* note 20, at 192.

93. Note also the creation of a statutory tort action for "private investors" under section 62 of the Financial Services Act of 1986 for breaches of both the anti-fraud and manipulation provisions of section 47 of the Act and the Conduct of Business Rules. See Financial Services Act, 1986, ss. 47, 62 (1986) (Eng.).

94. Securities Commission Act, 1992, s. 16 (Malay.).

95. Under section 100 of the Securities Industry Act of 1983, the Registrar of Companies does have authority to apply to the High Court for orders in relation to breaches of the Securities Industry Act 1983, as does the Kuala Lumpur Stock Exchange in regard to its own rules. Securities Act, 1983, s. 100 (Malay.).

96. See generally Barry Rider, *A safe haven for fraud?*, 10 COMPANY LAW. 46 (1989) (Eng.); BARRY RIDER & CHAIKIN, *MUTUAL ASSISTANCE IN CRIMINAL MATTERS: A COMMONWEALTH PERSPECTIVE* (Commonwealth Secretariat, 1983).

not enforce another's penal law.⁹⁷ No such rule exists in regard to the civil law. Given the incidence of serious international fraud, a number of courts have been prepared to seize this possibility to allow and facilitate the pursuit of fraudsters and their ill-gotten gains. Although it may not be acceptable for the Hong Kong courts to directly enforce U.S. anti-insider dealing laws, they can order a bank in Hong Kong to freeze money in an account that is the proceeds of insider dealing on the basis that the bank has knowledge that the money was obtained in breach of trust and, therefore, on ordinary trust law principles the bank has also become a constructive trustee.

English courts have also been prepared to order that assets should not be removed from its jurisdiction in circumstances where litigation has commenced or is about to be commenced and is likely that property within the jurisdiction will not fully satisfy a judgment.⁹⁸ Indeed, in exceptional circumstances, English courts have been prepared to order defendants to disclose not only their assets within its jurisdiction,⁹⁹ but outside the jurisdiction and to freeze the transfer of such.¹⁰⁰ The courts have also been prepared in the context of civil actions to prevent defendants and potential defendants from leaving the jurisdiction.¹⁰¹ Furthermore, courts are far more likely to respond to a decision of

97. DICEY & MORRIS, ON THE CONFLICT OF LAWS (Stevens ed., 11th ed.). See also AG of New Zealand v. Ortiz, [1984] A.C. 1 (Eng.); Re State of Norway's Applications [1989] 1 All E.R. 745 (Eng.); AG for The U.K. v. Heinemann, [1988] 78 A.L.R. 449 (Eng.).

98. Nanus Asia Co. v. Standard Chartered Bank, High Court of Hong Kong 1 H.K.L.R. 396 (H.K. High Ct. 1990). Note also the approach in AG for the U.K. v. Wellington Newspapers Ltd., [1988] 1 N.Z.L.R. 129 (New Zealand). See generally Barry Rider, *Fei Chien Laundries and The Pursuit of Flying Money*, 1 J. OF INT'L PLANNING 77 (1992) [hereinafter *Pursuit of Flying Money*].

99. See generally Supreme Court Act, 1987, s. 37 (Eng.); Mareva Comania Naviera v. International Bulk Carriers, 2 LLOYDS REP. 509 (1975); Felixstowe Dock & Railway Co. v. U.S. Lines, Inc. [1989] 2 W.L.R. 109 (Eng.). Similar proceedings to freeze money in bank accounts or other property have been brought by law enforcement agencies in relation to the proceeds of fraud. See West Mercia Constabulary v. Wagner, 3 All E.R. 378 (1981) (Eng.); Chief Constable of Kent v. V, [1983] Q.B. 34. But note the limitations of the common law in regard to derivative property in Chief Constable of Leicestershire v. M, 1 W.L.R. 20 (Eng.) (1989). Additionally, note the provisions in regard to "profitable" crimes in Part VI of the Criminal Justice Act 1988 relating to restraint of property and confiscation. See Criminal Justice Act, 1988, pt. V (Eng.); see also D. Feldman, CRIMINAL CONFISCATION ORDERS — THE NEW LAW (1988). Butterworths. In regard to disclosure of assets see Bankers Book Evidence Act, 1879, s. 7 (Eng.); A v. C, 2 All E.R. 1980 (1980); Bankers Trust v. Shapira 2 W.C.R. 174 (1980) (Eng.).

100. Babanaft International v. Bassatne, 2 W.L.R. 232 (1989); Derby & Co. v. Weldon, 2 W.L.R. 276 (1989) (Eng.); Republic of Haiti v. Duvalier 2 W.L.R. 261 (1989) (Eng.). Note also the flexibility of the English courts in regard to service of process on defendants who are out of their jurisdiction. See Barclays Bank of Switzerland v. Hahn, 1 W.L.R. 13 (1989) (Eng.).

101. See, e.g., J. McCLEAN AND W. PATCHETT, THE RECOGNITION AND ENFORCEMENT OF JUDGMENT AND ORDERS AND THE SERVICE OF PROCESS WITHIN THE COMMONWEALTH (Commonwealth Secretariat, 1979).

another tribunal in a civil matter, than they are a criminal or panel judgment.

As one might expect, U.S. courts have been no less imaginative than their English cousins. The Singapore Courts have also shown themselves willing and able to use the civil law effectively against international fraudsters, such as in the Pertamina bribes litigation. It remains to be seen whether the Malaysian Courts will be as bold.¹⁰²

More emphasis should be placed on the civil law in policing the securities markets, particularly in regard to abuses such as insider dealing and market frauds.¹⁰³ Some jurisdictions have already gone a little down this road.¹⁰⁴ Others are actively considering creating specific civil actions for breaches of regulatory provisions. While it would not be appropriate for the civil law to replace the prospect of criminal liability, the civil law should be allowed to function as a more flexible and probably efficacious tool. In the case of insider dealing regulation, there is considerable advantage in an express right of action being given by statute to the issuer of securities in which the insider dealing takes place. While it may be difficult to justify such an action on traditional principles of loss, causation and reliance, this liability would not be compensatory or for that matter restitutionary as it is, for example under the Malaysian legislation.¹⁰⁵ It would exist simply to deprive the wrongdoer of his ill-gotten gains and operate through the intermediation of the issuer which has at least some interest in achieving "a fair market" in its shares.

C. Other Means of Civil Enforcement

There are of course other devices that can be utilized to improve not only the mechanisms of enforcement, but the detection of abuse in the first place.¹⁰⁶ Increasing attention, especially by the Kuala Lumpur

102. Mr. Justice George, speaking at the Second Regional Symposium on Economic Crime, Kuala Lumpur 1993, expressed his personal support for the developments that have taken place in other Commonwealth jurisdictions and said that he would be well disposed to such authorities if cited in an appropriate case before his court. Justice George, Address at Second Regional Symposium on Economic Crime in Kuala Lumpur (1993) (copy on file with author).

103. BARRY RIDER, *THE UNACCEPTABLE INSIDER* (Legal Research Foundation, University of Auckland, 1987); *Pursuit of Flying Money*, *supra* note 98, at 77.

104. See Securities Law Reform Act, 1989, (N.Z.).

105. See Malaysian Companies Act 1965, s. 132A (Malay.); Securities Industry Act, 1983, ss. 89-91 (Malay.).

106. In regard to the use of "timely disclosure" obligations see Barry Rider, *Insider Trading — A Question of Confidence*, 77 L.S. GAZ. 113 (1980); Barry Rider, *PROPOSALS FOR A SECURITIES EXCHANGE LAW OF BARBADOS* 85 (1981). See also Securities Exchange Act, 1982, ss. 58, 59 (Barbados).

GLOBAL TRENDS IN SECURITIES REGULATION

Stock Exchange, is being given to various forms of stock market surveillance. However, little attention has been given to other forms of monitoring except in regard to the prudential regulation of financial intermediaries solvency. The area of loss prevention and minimization is probably one of the most important in the regulation and control of all forms of economic abuse. Despite the development of these various mechanisms, there is little evidence of the development or refinement of effective systems.

For example, in Britain, the various self-regulatory agencies have the primary responsibility for "authorizing" those active in the investment business. They are required to satisfy themselves that before such a person is permitted to operate such a business he is a "fit and proper person." This obviously involves applicants. While most authorities operate rather elementary "vetting" procedures, these are nevertheless capable of offering information with which application could prove invaluable in discharging other regulatory functions. Sadly, until very recently, little emphasis has been placed on the use of this information for intelligence and thus, preventative purposes. In Malaysia, there is a dearth of information that is needed for the development of efficacious screening.¹⁰⁷

Another aspect of loss prevention that receives scant attention in most jurisdictions is the adequate policing of disclosure and reporting obligations. In most regulatory systems there are various reporting obligations imposed on enterprises and those involved in the financial services industry. Usually one of the first indications that something is amiss is that the reporting obligations will be ignored or that false information will be provided. However, enforcement of these provisions is invariably given a very low institutional priority.

There are, of course, many other ways in which securities regulation can be rendered more effective. One particularly fruitful approach is to concentrate regulation and liability much more on the "facilitators" of abusive or illegal conduct. To some extent this has already occurred in the United States¹⁰⁸ and to a lesser extent in

107. See BARRY RIDER, REPORT TO THE MINISTRY OF JUSTICE, REPUBLIC OF CHINA ON THE ESTABLISHMENT OF AN INTELLIGENCE BASE FOR ECONOMIC CRIMINALS (1991).

108. The Draft Federal Securities Code, which is essentially a restatement of the present law, provides the following:

[An] agent or other person who knowingly causes or gives substantial assistance to conduct by another person giving rise to liability under the Code . . . with knowledge that the conduct is unlawful or a breach of duty, or involves a fraudulent or manipulative act, a misrepresentation, or nondisclosure of a material fact by an insider . . . is liable as a principal. A person may cause or give substantial assistance to conduct by inaction

Britain,¹⁰⁹ but not in Malaysia. By using aider and abettor concepts, and even the law of conspiracy,¹¹⁰ it is possible to throw a significantly wider net of liability at all levels of regulation — civil as well as criminal. Developing notions of “control liability”¹¹¹ and placing specific obligations on those in a supervisory role to ensure at least the minimum effectiveness of compliance¹¹² are all steps in the right direction. On the whole, the professional advisors and intermediaries who knowingly or recklessly, and perhaps even negligently, facilitate the commission of securities frauds and other abuses, betray the trust and respect that society places in professionalism and ethics.¹¹³ Furthermore, from a purely pragmatic standpoint, given their standing and the essentially facilitative role, advisors and intermediaries constitute relatively easy targets within jurisdiction. They are also, by virtue of the professional constraints within which they operate, far more susceptible to other regulatory procedures and investigations. For example, they will be bound to comply with more onerous recording and reporting provisions, violations of which are themselves grounds for enforcement action against them.

What is certain, however, is that there are no panaceas in policing the financial markets domestically, let alone internationally. Regulation in this complex area of economic activity is a multifaceted problem calling for a diversified and flexible response from law enforcement and those charged with regulatory oversight. To attempt to address these essentially property-related crimes, which generally occur within a very limited social and geographic environment, with tools fashioned by the criminal courts several hundred years ago, is like trying to fight a nuclear war with King Henry II's bow and arrow!

VII. The Violators

A factor that has not generally been recognized in policing the securities markets today, and which affects regulation at all levels, is not only the sophistication of the modern violator or offender, but the

or silence when he has a duty to act or speak.

See FUNDAMENTALS OF SECURITIES REGULATION, *supra* note 88, at 1016.

109. See, e.g., *AGIP v. Jackson*, 4 All E.R. 385, 451 (1992) (Eng.).

110. See Racketeer Influenced and Corrupt Organization Act, U.S.C. §§ 1962(a), 1964 (1988).

111. See FUNDAMENTALS OF SECURITIES REGULATION, *supra* note 88, at 101. See FUNDAMENTALS OF SECURITIES REGULATION, *supra* note 88, at 101.

112. See Insider Trading and Securities Fraud Act of 1988, 15 U.S.C. §§ 78e(a) (50), 78o(f), 78t-1, 78u-1, 78kk(c), 806-4a (1988 & Supp. 1993).

113. YB Dato' Hamid Syed Jaafar Albar, Malaysian Minister of Law, Address at The Third Regional Symposium on Economic Crime in Kuala Lumpur (Mar. 28, 1994).

GLOBAL TRENDS IN SECURITIES REGULATION

increasing amount of evidence that organized crime regards securities frauds as a low risk/high reward enterprise.¹¹⁴ Although it is dangerous and entirely counterproductive to overemphasize both the extent and capabilities of organized crime, it is even more irresponsible to ignore the very real threat.¹¹⁵ Although police agencies have different perceptions of organized crime, it is clear that in recent years both traditional and other forms of organized crime have increasingly moved into "white collar crime," in particular securities frauds.¹¹⁶ There are numerous examples where traditional organized crime families have become directly or indirectly involved in various forms of securities fraud and manipulations. Their activities have ranged from simple theft of script to sophisticated schemes to market worthless shares or manipulate markets.¹¹⁷ Some groups have used the traditional tools of violence, corruption, and extortion to enhance their frauds and manipulations. There have been instances where corporate executives have been blackmailed or bribed into betraying corporate confidences so that information can be sold and utilized for dealing or for some other profitable purpose. Indeed, some organized crime groups in Japan—the so called "Sokaiya"—have more or less moved wholly into this form of criminal activity.

Not only is organized crime concerned with engaging in various forms of fraud to make money, which can then be used for investing in

114. COMMUNIQUE TO COMMONWEALTH LAW MINISTERS MEETING, HARARE, ZIMBABWE para. 59 (1986) ("Ministers recognised an increasing trend of organised crime to become involved in economic offences, as these offer high rewards with relatively little risk of apprehension."). This development was also acknowledged by Commonwealth Law Ministers at their meetings in Canada in 1977, in Barbados in 1980, in Sri Lanka in 1983, and by the Commonwealth Heads of Government at their meeting in the Bahamas in November 1987. The United Nations has on a number of occasions specifically recognized the move of organized crime into the sphere of economic crime and destabilisation, see for example, *Report of the UNCTAD Secretariat on Maritime Fraud*, Items 3 and 4 of Provisional Agenda, U.N. Doc. TD/B/C.4/AC4/8 (1985), and the resolution of the Seventh Congress of the United Nations on Crime Prevention and Criminal Justice, on organized crime. Other organizations such as ICPO-Interpol and the Customs Cooperation Council have not been slow to acknowledge this development either.

115. See SHIPMAN & B. RIDER, *supra* note 41; Barry Rider, *Organised Economic Crime Report* to the Home Affairs Committee, House of Commons, UK Parliament (1994). See also ORGANISED ECONOMIC CRIME, (Commonwealth Secretariat 1986); Barry Rider, *The Financial World at Risk: The Dangers of Organised Crime, Money Laundering and Corruption*, 8 MANAGERIAL AUDITING J. 3 (1993).

116. See generally *Organised Crime*, 53d ANZAAS Cong., at 23 (May 20, 1983) (Australian Government Printer, D. Meagher ed., 1983); U.S. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT, THE IMPACT: ORGANIZED CRIME TODAY (1986); Papers of Conference Organized by the General Secretariat of ICPO-Interpol (Feb. 14-15, 1989) (copy on file with author).

117. See M.G. Yeager, *The Gangster as White Collar Criminal: Organised Crime and Stolen Securities* in THE CRIME SOCIETY 47 (1976).

other criminal enterprises or penetrating legitimate businesses,¹¹⁸ but various methods have been developed to launder the proceeds of various forms of crime ranging from simple robberies to illicit trafficking in drugs. Many of these methods involve the securities markets and financial intermediaries. The U.S. Presidential Commission on Organized Crime, in its Interim Report to the President, stated that "every financial institution . . . should assume it is a potential target for use by organized crime in money laundering schemes."¹¹⁹ The Presidential Commission further noted that while the risk of money laundering operations through financial institutions has been recognized for some time, at least in the United States, "existing policies have frequently proven inadequate to prevent criminals from using the services of the services of these institutions."

The Stock Exchange in Britain¹²⁰ has also recognized this the context of laundering profits from drug trafficking and has warned its members accordingly. Of course, the risk to the financial intermediary is not simply that of a criminal prosecution, but also in the attendant corruption and loss of confidence. Furthermore, if effective action is to be taken to discourage the commission of serious crimes that give rise to such profits in the first place, it is vitally important that this money should not become legitimized.¹²¹

The problems facing those charged with combatting securities offenses and abuses are bad enough, without the balance being even further tilted against them through the involvement of organized crime

118. See M. BERS, U.S. JUSTICE DEP'T, *THE PENETRATION OF LEGITIMATE BUSINESS BY ORGANIZED CRIME* (1970).

119. *THE CASH CONNECTION: ORGANISED CRIME. FINANCIAL INSTITUTIONS AND MONEY LAUNDERING 1* (1984). See also E. Nadelman, *Unlaundering Dirty Money*, 18 *INTERAMERICAN LAW REV.* 33 (1986).

120. Letter to Member Firms from M.E. Fidler, Secretary to the Council (Oct. 14, 1986). The Institute of Chartered Accountants for England and Wales issued a similar statement on Dec. 14, 1987. The Chairman of The Securities and Futures Commission also drew attention to the dangers facing those engaged in business in the financial sector in April 1993.

121. In Britain, it is considered preferable to seek the assistance of financial institutions on an informal basis in reporting suspicious transactions to the authorities than imposing a formal reporting requirement in regard to certain categories of transaction, is done under the Bank Secrecy Act of 1970 in the United States. See Bank Secrecy Act, 12 U.S.C. §§ 1951-1959 (1988). Nevertheless, persons who knowingly assist in laundering the proceeds of a serious crime are, however, guilty of an offense in Britain and this has encouraged a significant amount of cooperation in practice. Additionally, the Prevention of Terrorism (Temporary Provisions) Act of 1989 makes it a crime to be concerned in an arrangement whereby money is made available to a person "knowing or having reasonable cause to suspect that it may be used by that person for purposes of terrorism." Prevention of Terrorism (Temporary Provisions) Act, 1989 (Eng.). This imposes liability on a lower standard of *mens rea*. See D. Wheatley, [1989] N.L.J. 499. See generally Drug Trafficking Act, 1994 (Eng.); Criminal Justice Act, 1993 (Eng.).

GLOBAL TRENDS IN SECURITIES REGULATION

groups with access to very significant resources. Furthermore, organized crime groups invariably have developed lines of access to financial and other institutions overseas and operate with a considerably greater degree of circumspection than the ordinary criminal. Sadly, it is also the case that organized crime groups will generally not hesitate to use violence and corruption to further decrease the chances of effective enforcement against them.

VIII. International Cooperation

Faced with all these problems, it is not surprising that more and more attention is being given to international and regional cooperation in policing the securities markets.¹²² It is now generally accepted, even in the United States, that cooperation is far more profitable in the long-term than simply a unilateral assertion of jurisdiction extraterritorially.¹²³ On the other hand, it is possible to have some sympathy with Judge Owen, who, in an enforcement action brought by the U.S. Securities and Exchange Commission to freeze the profit that the defendant had made from insider dealing in a bank account in Hong Kong, considered that "in Hong Kong they practically give you a medal for doing this sort of thing [insider trading]" and thus, refused to defer jurisdiction to the Hong Kong courts.¹²⁴ As a result, Judge Cruden in Hong Kong took the view that "this Court will always take whatever effective steps are legally available to it under Hong Kong law, to deal with illegal or morally reprehensible commercial conduct" By way of rebuke to his New York colleague he asked "where a conflict of law does arise . . . the dispute should be approached in a spirit of judicial comity rather than judicial competitiveness. Whatever the approach of other courts, this is the sympathetic approach followed by this Court."¹²⁵

122. See *Enforcement of the Securities Laws in AN INTERNATIONAL MARKET IN INTERNATIONALIZATION OF THE SECURITIES MARKETS*, REPORT OF THE STAFF OF THE SECURITIES AND EXCHANGE COMMISSION TO THE U.S. CONGRESS (1987); S. Heberton & B. Gibson, 3 *International Aspects of Securities Legislation in PROPOSALS FOR A SECURITIES MARKET LAW FOR CANADA*, (Government of Canada, 1979); W. Hasetine, *supra* note 5.

123. See *REGULATION OF INTERNATIONAL SECURITIES MARKETS*, POLICY STATEMENT OF THE U.S. SECURITIES AND EXCHANGE COMMISSION 11 (1988); J. GRUNDFEST, *INTERNATIONAL COOPERATION IN SECURITIES ENFORCEMENT — A NEW U.S. INITIATIVE* (1988).

124. See *Nanus Asia Co. v. Standard Chartered Bank*, 1 H.K.L.R. 396 (H.K. High Ct. 1990) (H.K.).

125. *Id.* Insider dealing has long been a matter of interest to the authorities in Hong Kong, see Barry Rider, *Insider Trading: Hong Kong Style*, 128 N.L.J. 897 (1978) (Eng.). See also Barry Rider, *The Regulation of Insider Trading in Hong Kong*, 17 MALAY. L. REV. 310 (1979) (Malay.).

While most legal systems do not deliberately attempt to frustrate the law enforcement efforts of other nations, concern for sovereignty and the inevitable lack of political and cultural interface in certain areas can render meaningful cooperation unpredictable. Even in Commonwealth countries, which share a common legal heritage and where specific legal inhibitions on the exchange of information are rare, cooperation cannot always be assured. In cases where mandatory procedures are required before information can be secured, let alone furnished to a foreign agency or tribunal, it is almost always necessary to establish "double criminality" in the sense that the matter that is the basis of the inquiry or request for assistance would also be a criminal offence had the relevant conduct occurred within the jurisdiction of the country whose assistance is sought.¹²⁶ Even where mandatory procedures are not necessary the matter will generally only be considered sufficiently serious and, thus, worthy of expending precious law enforcement resources upon, if the relevant conduct is readily identifiable as criminal or highly anti-social.

This problem has manifested in countless occasions when the authorities of a developing country have sought assistance from the British government or police in regard to an exchange control matter, which no matter how seriously it may be regarded overseas, is not regarded in Britain as a crime or even a matter worthy in the main of official interest. Of course, as the English Law Commissions's Working Group¹²⁷ recognized, a failure on the part of both countries to

126. There are, of course, a variety of procedures available for taking evidence out of jurisdiction. In Britain, the main provision is contained in section 29 of the Criminal Justice Act 1988, which now governs the procedure for letters of request. See Criminal Justice Act, 1988, s. 29 (Eng.); C. EMMINS AND G. SCANLAN, BLACKSTONE'S GUIDE TO CRIMINAL JUSTICE ACT 1988 (1988). Where evidence is obtained pursuant to mandatory procedures at common law, it cannot be passed to external authorities. See *A.G. for Hong Kong v. Ocean Timber Transportation Ltd.* [1979] H.K.L.R. 298 (H.K.). Evidence can be obtained for foreign courts, where a criminal matter is pending before that court, under both section 5 of the Extraction Act of 1873 and under the Bankers Books Evidence Act of 1879. Extraction Act of 1873, s. 5 (Eng.); Bankers Books Evidence Act, 1879 (Eng.).

The procedures for assisting foreign tribunals in civil matter are far less restrictive under the Evidence (Proceedings in Other Jurisdictions) Act of 1875. See Evidence (Proceedings in Other Jurisdictions) Act, 1875 (Eng.). This Act has been generously interpreted by the English courts. In *Re State of Norway's Application*, 1 All E.R. 745 (1989), the House of Lords held that a letter of request issued by the Norwegian court did not amount to the attempted enforcement of Norwegian revenue laws in England, but was merely seeking the assistance of the English courts to obtain evidence to enable Norwegian revenue laws to be enforced.

The U.S. courts have always shown themselves willing to assist foreign agencies. See e.g., In *re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989).

127. JURISDICTION OVER FRAUD OFFENSES, *supra* note 22.

appreciate the perspective of the other is highly damaging to international cooperation in general terms.¹²⁸

A. Legislation Providing for Secrecy

In a number of jurisdictions, for a host of reasons—some more acceptable than others—legislation has been enacted that provides for secrecy of certain categories of information, or actually forbids, disclosing such information to foreign authorities.¹²⁹ These secrecy and blocking laws are usually more related to banking and financial activities, such as the special secrecy provisions that apply to offshore banks.¹³⁰ In some countries, however, they extend to professional and business information.¹³¹ While most legal systems, even those containing such provisions, permit the taking and disclosure of information in limited circumstances, in practical terms the institutional and cost factors tend to militate against the effectiveness of such procedures. Furthermore, most systems require a criminal investigation to be existent and are extremely careful to screen out “fishing expeditions.” Indeed, in the case of Offshore banks in Labuan, Malaysia, disclosure in relation to accounts can be obtained by the Royal Malaysia Police or Bank Negara upon application to the High Court in

128. Certain developing countries seriously question why they should willingly assist countries like Britain and the United States in drug inquiries when the more developed jurisdictions ignore their for assistance when seeking to protect their economies. See BARRY RIDER, U.S. DEP'T STATE, INTERNATIONAL COOPERATION—FACT OR FICTION, PAPER PRESENTED TO WHITE HOUSE CONFERENCE FOR A DRUG FREE AMERICA (1988). The then-head of C.I.D. in Malaysia, Datuk Z. Khan, criticized the attitude of U.S. law enforcement agencies in this context. According to Datuk Zaman Khan, cooperation was in practice a “one way street” leading to Washington. Datuk Amon Khan, Head of C.I.D., Address at Second Symposium on Economic and Narcotic Crimes in Taipei (1993) (on file with author).

129. See generally U.S. Senate, *Staff Study: Crime and Secrecy: The Use of Offshore Banks and Companies: Permanent Sub-Committee on Investigations* (U.S. Gov't Printer, 1983); I. WALTER, SECRET MONEY (1985); OFFSHORE HAVEN BANKS, TRUSTS AND COMPANIES, THE BUSINESS OF CRIME IN THE EUROMARKETS (1984); Prager & Barry Rider, *Money Laundering — The Risk to Small Satate in MEMORANDA FOR MEETING OF SENIOR LAW OFFICERS OF SMALL COMMONWEALTH STATES* (1983).

130. The British Protection of Trading Interests Act of 1980 requires persons doing business in Britain to report to the Secretary of State foreign compulsory orders and allow the Secretary of State to dictate the response, under threat of a criminal sanction. British Protection of Trading Interests Act, 1980 (Eng.). Under section 181 of the Financial Services Act of 1986, the Department of Trade and Industry may block the disclosure of information by regulatory authorities in Britain to an overseas agency even where the request is voluntary. Financial Services Act, 1986, s. 181 (Eng.). See also The Canadian Foreign Extraterritorial Measure Act, 1984-85, c. 49 (Can.); The French Law No. 80-538, July 16, 1980.

131. See, e.g., Swiss Civil Code, art. 28 (Switz.); BANKING SECRECY FINANCIAL PRIVACY AND RELATED RESTRICTIONS (1979).

regard to the investigation of a specific crime in Malaysia.¹³² This is a major problem in corporate securities regulation, as many matters would not be susceptible to being characterized as "criminal." For example, in Malaysia the laundering of the proceeds of insider dealing is not *per se* a crime, although it is in Britain and the United States. Hence, there may well be a problem of double criminality.¹³³ There is no doubt that some countries have deliberately created almost impenetrable secrecy barriers simply to attract business and flight money. A few have been willing to promote their confidential facilities without any proper regard as to who might wish to avail themselves of the advantage of anonymity. In addition to secrecy and blocking statutes, an ever increasing number of countries have been prepared to permit a variety of banks and other financial institutions to establish themselves within their territory primarily to engage in business overseas. These offshore banks and other institutions, operating behind a wall of secrecy, often with little prudential or other regulatory oversight over their activities, provide a marvelous facility for the international fraudster and money launderer.¹³⁴ Sadly, in some jurisdictions, it is not only the banks and other financial institutions that are prepared to in effect prostitute themselves, as there would appear to be a ready supply of lawyers and accountants to also take advantage of this type of business. Malaysia is not one of these jurisdictions, however. Nevertheless, the more egregious activities of these Labuan offshore centers have tended to deprave and corrupt not only those directly involved, but the environment within which they operate.¹³⁵

In practical terms, the insertion of a haven jurisdiction in the commission of a securities fraud will cause tremendous problems for investigators. Indeed, in many such cases it will be sufficient to frustrate any meaningful legal process. Consequently, even where there are effective procedures for cooperation between the more responsible states,

132. See Barry Rider, *Offshore Banking in Labuan*, Paper submitted to Royal Malaysian Police Force at the Symposium on The Misuse and Abuse of Offshore Banks (1992) (copy on file with author).

133. This was the problem that the U.S. authorities encountered in seek assistance from the Swiss, under their 1976 Treaty in insider dealing cases. See generally J. Siegel, *U.S. Insider Prohibition in Conflict with Swiss Bank Secrecy* 4 J. OF COMP. CORP. L. & SEC. REG. 353 (1982); D.A. Szak, *International Cooperation in Insider Trading Cases*, 40 WASH. & LEE L. REV. 1149 (1980)

134. See *Where Hot Money Hides*, BARRONS, July 11, 1983; P. Willoughby, *The Law and Practice of Tax Havens; Uses and Abuses*, Address at the Eighth Commonwealth Law Conference in Jamaica (1986).

135. See REPORT OF THE COMMISSION OF INQUIRY APPOINTED TO INQUIRE INTO THE ILLEGAL USE OF THE BAHAMAS FOR THE TRANS-SHIPMENT OF DANGEROUS DRUGS (1984) (Bah.).

much will depend upon the degree of involvement of a "haven" jurisdiction. There are, of course, "havens" or "international financial centers" that provide bone fide services and are properly run, such as Labuan, but unfortunately these are the exception rather than the rule. Where a haven is fraudulently employed, quite often a number of such jurisdictions will be involved, and it may be possible to obtain information and even evidence through ingenuity or unilateral action. U.S. agencies have shown themselves particularly resourceful, but in practice few countries have the expertise and financial resources for the sort of operations that North American authorities have undertaken. Furthermore, there is always the problem of admissibility of evidence that has been taken illegally, or in circumstances where it is difficult to adduce "proof" according to the usual rules of evidence. Information may, however, be extremely valuable in assisting in the location of evidence that is more assessable or in taking some response that does not necessarily depend upon the strict legal rules of evidence, such as a disciplinary action.

B. Memoranda of Understanding

To regularize the procedures for obtaining mutual assistance in legal proceedings there is an increasing tendency for countries to negotiate treaties, or at least sign memorandums of understanding (MOUs). Most countries have at least some bilateral arrangements for extradition, and Malaysia is no exception in this regard. Yet, in policing the securities markets, few cases ever reach the stage of an extradition request. As has already been pointed out, a serious problem on securing international cooperation in this area is that many so-called "securities offenses" are not considered "ordinary criminal law offences" or fail on the usual requirements of double criminality. For example, until comparatively recently insider dealing was not an extradition crime in English law, and consequently it would not have been possible for the British Government to "surrender" a person to the U.S. authorities, even though there are comprehensive extradition arrangements between Britain and the United States. This problem manifested itself under the U.S.-Swiss Treaty on Mutual Assistance in Criminal Matters¹³⁶ and this has also proved to be a problem between Malaysia and Hong Kong. In Hong Kong, insider dealing, while considered abusive and subjected to regulatory and investigatory procedures, is not a criminal offense as it is in Malaysia.

¹³⁶. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019, 1052 U.N.T.S. 61.

Of course, there are many other matters of concern to securities regulatory authorities that do not involve the criminal law and hence, the existence or otherwise of extradition arrangements is irrelevant.

Comprehensive Mutual Assistance treaties for cooperation in criminal matters is now the goal of many countries including Malaysia, and already some progress has been made. In 1986, Commonwealth Governments urged by Malaysia endorsed a new scheme for mutual assistance in criminal matters within the Commonwealth. The so-called "Harare Scheme"¹³⁷ provides an agreed vehicle for Commonwealth jurisdictions to furnish comprehensive mutual assistance, subject, of course, to specific enactment within their own domestic law. To some extent, the Commonwealth Scheme mirrors the European Convention on Mutual Assistance in Criminal Matters. While both the European Convention and Harare Scheme are significant steps in the direction of mutual cooperation, from the standpoint of the securities regulator, they are of little practical relevance. The European Convention is primarily directed at criminal proceedings as conceived according to civil law notions, and thus, would not comport with the procedures under which most common law countries operate. Indeed, the view of the British Home Office, until very recently, was that the two systems are wholly incompatible. It was upon this basis that the British Government refused the proposal that there should be a mutual assistance treaty between Britain and Switzerland. Of course, this rather ignores the experience that the United States and Switzerland have had under their Treaty of 1974.

Securities regulation of particular interest is the Convention on Insider Trading of the Council of Europe.¹³⁸ This Convention provides for cooperation between signatory states not only in investigating cases of insider dealing, but also in the monitoring of markets to ensure "equal access to information for all users of the stock market."¹³⁹ Similar arrangements are required for member countries of the European Economic Union in the Council Directive for coordination regulations on insider dealing.¹⁴⁰ Article 8 of this instrument provides that the relevant enforcement agency in each member state is bound to assist the

137. The Commonwealth Scheme for Mutual Assistance in Criminal Matters (1986). *See also* The Commonwealth Scheme for The Rendition of Fugitive Offenders (1966) (amended 1986); The Commonwealth Scheme for The Transfer of Convicted Prisoners (1986). *See generally* T. HUCKLE, *MUTUAL JUDICIAL ASSISTANCE AND ECONOMIC CRIME* (Commonwealth Secretariat, 1985).

138. *See* BARRY RIDER & T.M. ASHE, *THE EUROPEAN INSIDER DEALING DIRECTIVE* (Univ. of Sienna, 1993).

139. *See id.*

140. Council Directive 89/07/29, 1989 O.J. 192.

GLOBAL TRENDS IN SECURITIES REGULATION

authorities in other member countries in enforcing the law against insider abuse.¹⁴¹ There are, of course, other instruments of the European Community that also require cooperation between authorities concerned with policing the financial markets and banking institutions.¹⁴² To date, while enhancement of cooperation has been discussed by law enforcement and regulatory authorities in other regions, most noticeably Latin America, the Asia Pacific region, and Caribbean, nothing of substance has emerged to compare with developments, within Europe.¹⁴³

It is in the area of MOUs that most progress has, however, been made and is likely to be made in the foreseeable future.¹⁴⁴ As already discussed, the U.S. Securities and Exchange Commission is now well convinced that the consensual approach to cooperation is to be preferred and has signed MOUs with over thirty countries and is even about to enter into one with regulatory authority of the Peoples Republic of China. Of course, to what extent agreements that have been signed can be described as "consensual," particularly with some of the smaller Caribbean countries, has been doubted.¹⁴⁵ Nonetheless, it is perfectly acceptable for the U.S. authorities, given their expertise, resources and obvious self-interest in promoting effective cooperation in policing the world's capital markets to take the lead in this regard. Although the U.S. Securities and Exchange Commission has attempted to "standardize" the various arrangements that it has already negotiated and is presently negotiating, in the real world it has not always proved

141. *Id.*

142. *See, e.g.*, Council Directive 82/121/EEC (regarding investment services and information published by listed issuers).

143. *See generally* BARRY RIDER & C. NAKAJIMA, *INTERNATIONAL INITIATIVES IN SECURITIES REGULATION* (Cambridge, 1993).

144. *See International Securities Enforcement Cooperation Act of 1988, Report of the Committee on Banking*, U.S. Senate (1988) U.S. Govt. Printer. MOUs play an important role in other areas of law enforcement, such as narcotics and in particular the exchange of financial information in regard to assets derived from illicit trafficking in drugs. *See generally* E. Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions*, 18 *INTERAMERICAN L. REV.* 33 (1986). The Double Taxation Agreements should also be noted, *see, e.g.*, Convention Between the Government of the U.K. On Behalf of the Government of Bermuda; The Government of the U.S.A. Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters.

145. The Treaty Between the United Kingdom and the United States Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, was not universally welcomed in the Caymans, where it remains a controversial matter, *see* R. Nash, *US and Caymans Sign Crime Pact*, N.Y. TIMES, July 4, 1986. Even in Bermuda, criticism is still made of the Government and in particular, the former Attorney General for being too cooperative with Washington. Indeed, it would seem that even the Swiss required a little "inducement" before they agreed to the 1974 Treaty. *See* BARRY RIDER AND M.L. FRENCH, *THE REGULATION OF INSIDER TRADING* (1979).

feasible to achieve this. Most MOUs that the U.S. Government has negotiated provide for "cooperation" in the exchange of information not only for investigatory and traditional law enforcement purposes, but also for surveillance and monitoring. The Securities and Exchange Commission is eager to convert as many of these "agreements" into binding treaties and to add the significant obligation to use, where possible, available mandatory procedures to obtain information and evidence in furtherance of the request for assistance.

The Insider Trading and Securities Enforcement Act of 1988¹⁴⁶ dramatically expands the powers of the U.S. Securities and Exchange Commission to respond to a request for assistance from a "foreign securities authority." The Commission "in its discretion" may use its mandatory procedures for obtaining information for a foreign authority, provided that the authority confirms that the matter under inquiry relates to a violation of its securities regulations, whether or not the same conduct would amount to a violation of U.S. laws had it occurred within jurisdiction.¹⁴⁷ There must also be an undertaking of reciprocity.¹⁴⁸ This provision gives the Commission a very wide and practical means of assisting foreign agencies, and it has been indicated that even though there is no question of its use being conditional on an existing MOUs, the Commission will be far more inclined to exercise its discretion in circumstances where there is such an arrangement.

1. Britain.—Given the significance of reciprocity, a number of other jurisdictions have been "encouraged" to amend their laws to facilitate the execution of requests for colleagues overseas. Under the English Common law, it is more or less certain that statutory powers of investigation, such as those for obtaining and executing a search warrant, may only be used for matters for which there is proper jurisdiction, and even then the results of such an inquiry cannot normally be handed over to a foreign authority. This is also the legal position in Malaysia.

The British Companies Act of 1989 does seek to bring the British law in line with that in the United States, so far as securities regulation is concerned.¹⁴⁹ If necessary, it empowers the British Department of Trade and Industry to conduct an inquiry using mandatory procedures to compel production of documents and witnesses, at the request of an "overseas regulatory authority" that exercises a function corresponding

146. See 15 U.S.C. §§ 78a-80 (1988).

147. *Id.*

148. *Id.*

149. British Companies Act, 1989 (Eng.).

to the Department of Trade and Industry Securities or Securities and Investment Board under the Financial Services Act of 1986 or the enforcement of rules relating to insider dealing.¹⁵⁰ In considering whether to exercise its wide investigatory powers, the Department may take account of reciprocity and whether the relevant breach of rule has a close parallel under British law. It is important to note, however, that unlike the U.S. statute, cooperation is not ruled out by a lack of reciprocity. The British government has used these powers on behalf of a number of foreign governments, including Malaysia.

Other provisions in the Companies Act significantly strengthen the role of MOUs in policing the securities markets. Where satisfactory arrangements have been negotiated with another regulatory authority, whether domestic or foreign, it will be open to the Securities and Investment Board or one of the other self-regulatory authorities to rely on the information that other foreign authorities provide in the discharge of its regulatory and enforcement functions. While there is a widespread feeling in the various regulatory authorities that information can be as easily obtained through informal contacts other than MOUs, it is only information that is communicated pursuant to a "satisfactory arrangement" that may be directly relied upon in this manner.

At present the British Government, through the Department of Trade and Industry, has six signed MOUs. There are a number of other special agreements for financial information, but these are not primarily directed at enforcement. The Securities and Investment Board has itself negotiated a number of MOUs with a great variety of overseas authorities primarily concerned with the exchange of information for authorization purposes and its capital adequacy rules. The Securities and Futures Association has also placed on a formal basis many of the informal arrangements that it operated before the Financial Services Act of 1986 in regard to the Stock Exchange. Perhaps one of the most significant is the MOU that it has signed with the North American Securities Administrators Association (NASAA) on exchange of enforcement information. The various self-regulatory authorities in Britain have also ensured that their own rules permit a substantial degree of interface into these various arrangements.

2. *Malaysia.*—Malaysia has also recognized the importance of developing a network of formal and informal agreements designed to promote the exchange of information and international cooperation. To

150. See *supra* notes 74-76.

date, the Securities Commission has signed three MOUs. The first was with the Indonesian authorities on January 12, 1994, the second with the Securities and Futures Commission of Hong Kong on February 22, 1994 and the third, with the Securities and Exchange Commission of Thailand on April 4, 1994. Other arrangements are being negotiated with a number of other countries. Of course, the Malaysian Central Bank also has a number of similar arrangements in relation to its role as supervisor of financial institutions. The law does not, however, currently permit Malaysian authorities, such as the Securities Commission or the Registrar of Companies, to use their statutory powers of investigation on behalf of a foreign agency inquiring into matters that do not involve an infraction of the laws of Malaysia. This is considered to be a serious handicap and has meant that it has had to send its own officers to Malaysia to carry out inquiries itself as essentially private investigators. Obviously this is not satisfactory.

C. Disclosure in Conjunction with Investigatory Powers

1. *Britain.*—Reference has already been made to the almost “inquisitional” powers entrusted to the British Director of the SFO, under section 2 of the Criminal Justice Act of 1987.¹⁵¹ While the British Securities and Fraud Office is concerned with only “serious frauds,” it is possible that those charged with policing the financial markets will come within this statutory mandate. Of course, the Director has so far shown no willingness to regard crimes such as “insider dealing” as serious frauds, and a number of matters that have already been referred to the SFO have been rejected on the basis that the facts do not indicate a serious fraud protectable in England.¹⁵²

In determining whether it is appropriate for the SFO to pursue a matter that has been referred to it, inquiries may well have to be initiated and consequently the Office might well come into possession of information that cannot be handled by it, yet is highly relevant to the responsibilities of some other authority. Section 3 of the Criminal Justice Act of 1987 empowers the SFO to disclose information that is obtained pursuant to its statutory powers to various prosecutorial and regulatory authorities, including “anybody having supervisory, regulatory or disciplinary functions in relation to any profession or any area of commercial activity.”¹⁵³ Therefore, it is in order for the Office to

151. Criminal Justice Act, 1987, s.2 (Eng.).

152. See *supra* notes 80-81.

153. Criminal Justice Act, 1987, s.3 (Eng.).

GLOBAL TRENDS IN SECURITIES REGULATION

disclose relevant information to the various authorities operating under the Financial Services Act of 1986, and in practice this is regularly done.

This provision further states that the Office may disclose such information to "any person or body having, under the law of any country or territory outside the United Kingdom" corresponding powers and responsibilities.¹⁵⁴ Thus, in appropriate cases the Office could disclose information that it has already obtained pursuant to its statutory powers to a securities regulatory authority in another jurisdiction.

The Director is also authorized to enter into "agreements" to "supply information" or to "receive information" from other relevant authorities, and these can be of a general or restrictive nature. So far the Director has only sought to utilize this particular power to agree with foreign authorities that information disclosed by his office, or received by him, will be used for specific purposes. Obviously, occasions arise where other agencies are prepared to disclose information to the Office, but are concerned that it shall only be used for specific purposes. By the same token, the Director may himself wish to impose such restrictions on further disclosure or use. This can be achieved through the expedient of an "agreement" under section 3 of the Criminal Justice Act of 1987.¹⁵⁵ It should be noted, however, that under the Director's general power to disclose information to other agencies, or under his power to negotiate "agreements" for such cooperation, he is not empowered to actually utilize his investigatory powers in response to a request for assistance from either a domestic or foreign authority. Rather, he is only authorized to pass information that he has already obtained. Of course, the dividing line is not a clear one, and it may well be necessary for the Director to use his powers to obtain information upon which he can properly resolve whether a serious fraud has been committed within his jurisdiction.

While it is probable that most systems of law do not actually impose the constraints on sharing information that they are often thought to do,¹⁵⁶ it is understandable that those who might well have to face civil and other actions for alleged improper disclosure, act with a degree of circumspection. Section 179 of the Financial Services Act of 1986 provides that it is a criminal offense for certain "primary recipients" of

154. *Id.*

155. *Id.*

156. *See generally* S. Froomkin, *supra* note 72. *See also* Gartside v. Outram, 26 L.J. 113 (1856). "The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime of a Fraud"

“restricted information” to disclose it, without the authority of the person to whom it relates, or for a person who receives such information from a “primary recipient” to do so.¹⁵⁷ Restricted information is defined to include information that is obtained by a primary recipient in the discharge of, or for the discharge of its functions under the Act, or rules and regulations made thereunder. The category of “primary recipient” is limited to those agencies which have legal responsibilities and powers to obtain information under the Act. Thus, the Department of Trade and Industry and the Securities and Investments Board are included, but the other self-regulatory authorities are not. The position in regard to information that they might obtain under their own rules is governed by those rules and the general law. Of course, if a self-regulatory authority receives “restricted information” from the Securities and Investment Board, it will be subject to the restrictions in section 179.

Section 180 of the Financial Services Act contains a number of exceptions to the general prohibition contained within Section 179.¹⁵⁸ These exceptions include the disclosure of information for a criminal, civil or disciplinary proceeding, or for the proper performance of some regulatory or legal function, or where the identity of the person concerned remains confidential. Section 180(3) further provides that section 179 will not restrict the disclosure of information “for the purpose of enabling or assisting any public or other authority for the time being designated for the purposes of section 180” by the Department of Trade and Industry.¹⁵⁹ While the Department has been willing to consider “designating” a wide class of agencies and authorities under this provision, it has indicated caution in dealing with international organizations such as the General Secretariat of ICPO-Interpol under section 180(6) and has made clear that the restrictions in section 179 do not preclude the disclosure of “restricted information” to an authority outside the United Kingdom that perform functions corresponding to those of the Department of Trade and Industry under the Financial Services Act of 1986 or under the anti-insider dealing law. Of course, under section 181 the Department may direct that information shall not be disclosed to any person or authority outside the United Kingdom where the Secretary of State considers such to be against the public interest.¹⁶⁰

157. Financial Services Act, 1986, s. 179 (Eng.).

158. *Id.* s. 180.

159. *Id.*

160. See CCH GUIDE, *supra* note 20.

2. *Malaysia.*—There is no such similar provisions under Malaysian law in regard to the Securities Commission. It is to be regretted that the Malaysian authorities do not have this facility in regard to evidence obtained under their investigatory provisions. Information received by regulatory authorities in the exercise of their functions will generally be restricted in the sense that it should not be disclosed other than for the purpose for which it was obtained, or another is legally justifiable, such as the prosecution of crime. Section 43 of the Securities Commission Act of 1992 is a good example of such a provision.¹⁶¹ In many cases, there will be specific legal obligations on the recipients of such information preventing free or even controlled disclosure of this information, and even in the case of those authorities not operating under direct statutory power, the general law and their own rules may well produce a similar result.

D. Unlawful Actions

So far we have discussed “unilateral” assertion of jurisdiction extraterritorially and the various procedures have been developed for bilateral cooperation and mutual assistance within the legal system. Of course, both forms of action may not necessarily conform to acceptable legal or for that matter social standards. There have been cases where states have resorted to illegal actions in the territory of another to assert jurisdiction over an individual or obtain evidence. While the desperation felt by some agencies when faced with the various problems that have been alluded to in this article, can be readily understood, unlawful actions of this sort invariably cause profound problems and distrust which undermines future cooperation. By the same token, states have on occasion been prepared to cooperate, if not unlawfully, certainly on dubious grounds, to insure the return of a wanted fugitive under extradition arrangements. Countries have been prepared to achieve the same results through resort to deportation. Of course, how far it is acceptable for a state to go in assisting another will inevitably depend upon a host of factors, the political considerations usually being more significant than the legal.

VIII. Multilateral Initiatives

It should be clear from the discussion so far that there are inevitable limitations to the effectiveness of international cooperation through bilateral devices. Consequently, thought has been given to various

161. Securities Commission Act, 1992, s. 43 (Malay.).

multinational initiatives. Comparatively early in the life of the European Community, suggestions were made for a Euro-Securities and Exchange Commission,¹⁶² and although this is still many years off, vastly increased cooperation will lead to a *de facto* integration in many areas. The Organisation for Economic Cooperation and Development (OECD) provides a forum for specialized discussion of international fiscal matters and has shown some interest in securities regulation. However, it has never been seriously suggested that the OECD should perform a regulatory or policing function, or for that matter even coordinate such. The same is true, at even a lower level, of organization such as the International Federation of Stock Exchanges (*Federation Internationals des Bourses de Valeurs*).

Considerable ignorance exists as to the constitution and capabilities of the International Criminal Police Organisation (ICPO-Interpol). It is often assumed, quite erroneously, that ICPO-Interpol provides a facility for investigating international securities frauds and pursuing the offenders around the world. In fact, the ICPO-Interpol network is primarily directed to facilitation communication between ordinary police forces, which are its exclusive members. Securities regulatory authorities are not members of this network and in most jurisdictions are not permitted access to it. This is the position in both Britain and Malaysia for example. Furthermore, article 3 of the Constitution of ICPO-Interpol confines the organization's mandate to "ordinary criminal law offences."¹⁶³ Many of the matters that are of concern to those charged with regulating the securities markets would not fall within this definition. Finally, the General Secretariat, in Lyon, is very small and is not specialized. Its members are ordinary police officers seconded for a limited period from national police forces. Of course, this is not to say that on occasion the ICPO-Interpol network cannot be used to communicate police information concerning securities fraudsters both effectively and with security. It is clear, however, that the role of ICPO-Interpol in policing the securities markets is minimal and is most unlikely to increase. To some extent, this reflects the fact that in many countries the investigation of matters such as insider dealing and stock market fraud has been substantially taken out of the hands of the ordinary police and given to specialized agencies such as the Malaysian Securities Commission, Registry of Companies, and Bank Negara.

162. EUROPEAN COMMUNITY, REPORT OF THE COMMITTEE OF EXPERTS ON THE DEVELOPMENT OF A EUROPEAN CAPITAL MARKET 235 (1966). See generally, RIDER & FRENCH, *supra* at 145, at 275.

163. ICPO-INTERPOL CONST., art. 3.

GLOBAL TRENDS IN SECURITIES REGULATION

Commonwealth governments, recognizing the limits of "police force to police force" cooperation launched an initiative in 1977. This led to the establishment of a special office within the Commonwealth Secretariat in 1980. Unlike the General Secretariat of ICPO-Interpol, the Commonwealth Secretariat, which is based in London, is an intergovernmental organization with full diplomatic privileges. This office, did, in international law enforcement terms, enjoy a unique mandate until it was undermined and emasculated. Its officers were mandated to conduct investigations and to develop and deploy intelligence, on a proactive and preventive basis, in regard to economic crimes and related matters. This office, which was known as the Commonwealth Commercial Crime Unit consists not only police officers, but lawyers, accountants, intelligence specialists, and individuals with regulatory experience, drawn from all over the Commonwealth. During its "operational years," it had officers attached to it from not only the Royal Malaysian Police Force, but also the Malaysian Anti-Corporation Agency and Registry of Companies. Its staff were permitted to travel widely and actually take up cases and investigate them to conclusion. Of course, it is important to recognize that this initiative was not primarily concerned with securing criminal convictions but combatting economic crime and abuse at all levels. Therefore, action was not taken simply within the traditional criminal justice system, but through immigration, licensing, and other such procedures. The Commonwealth initiative was not confined to Commonwealth countries and close-working relationships were developed with the agencies in a number of non-Commonwealth countries. For example, in regard to securities regulation, officers of the Unit worked on a number of occasions with the U.S. Securities and Exchange Commission, and most successfully with various U.S. state securities administrators. Unlike the police network, the Commonwealth initiative made a point of bringing into its network any agency that has had a relevant jurisdiction or interest, even though it might not be considered to be conventional law enforcement authority with powers of arrest. In combatting serious international fraudsters, the Unit often resorted to the use of civil procedures to force disclosure and then take action against assets derived from the illicit activity in question. Indeed, the expertise that the Unit developed in identifying and tracing property derived from criminal activity led to the widening of its mandate in 1983 to organized criminal activity, at the suggestion of the Malaysian and Singapore Attorneys General.

From 1981 to 1989, the Unit responded to over 3400 requests for assistance and handled in excess of 2000 cases. About thirty-five percent of these involved securities-related offenses, and an additional twenty

percent would have been relevant to authorities charged with policing the financial markets. Commonwealth governments requested the Unit to develop a data base of individuals and organizations that have violated securities and other relevant regulations in association with other international and regional organizations. It was intended that this database would be accessible to agencies inside and outside the Commonwealth. Obviously, such a service would greatly facilitate vetting procedures and would enable regulatory authorities to far better monitor the activities of criminals in this area. A number of national governments pledged their support to this particular initiative, and it was hoped that it would be interfaced with similar data bases in the United States and other key non-Commonwealth countries. It was also hoped that Commonwealth Governments might devise a scheme, similar to the Harare Scheme, to promote and facilitate cooperation between securities and financial markets regulators.¹⁶⁴

Since 1990, however, the Commonwealth Unit has been rendered in practical terms "unoperational" and is now only a shallow reflection of what it was and what governments intended it should be. The reasons why this potentially significant initiative in international cooperation was undermined are many and unedifying. Given the exalted position of many of the Unit's targets and the political influence that they were able to wield, it is perhaps surprising that the Unit was able to function as it did between 1981 and 1989. There is little doubt that the Commonwealth Secretary General, at that time, became increasingly embarrassed by the stance of the Unit and it has been said that things were brought to a head when the Unit became involved in revealing the truth about the criminal operations of the Bank of Commerce and Credit International (BCCI)! It was later revealed that Sir Shridith Ramphal had during the period taken a substantial loan from the BCCI and was negotiating a UKstg 300,000 a year consultancy contract with the BCCI. Today, the Unit is only concerned with facilitating the exchange of legal information and is in practical terms irrelevant to the matters discussed in this article.

The International Organisation of Securities Commission and Similar Organisations (IOSCO) has aspirations to become an ICPO-Interpol of securities regulators. While this rather loose association has discussed international cooperation in policing the markets on a number of occasions, in practice little development has taken place. The Constitution of IOSCO does provide for mutual assistance between its

164. See *supra* note 137.

GLOBAL TRENDS IN SECURITIES REGULATION

members, and there is no doubt that the facility that its regular meetings provide for regulators to meet with each other and discuss common problems is highly beneficial. Consideration has been given within IOSCO to setting up a limited data base, but given the absence of a viable Secretariat or the necessary resources, little headway has been made. There are of course, other associations such as the Japan Securities Dealers Association, which have attempted to project themselves internationally.

Mention has already been made of various regional initiatives to facilitate cooperation between law enforcement agencies. Indeed, even the General Secretariat of ICPO-Interpol has been forced to recognize that such matters are particularly well-suited to be discussed and dealt with at a regional or interest group level. This approach has been encouraged by essentially regionally-promoted initiatives, often with backing from the U.S. Government and bodies such as the OECD. Regional Financial Action Task Forces have been constituted within the overall framework of the program ordained by the G7 countries, with U.N. support.

Some of the Caribbean states have also explored establishing a Carricom group, but outside the area of harmonization of company law, little has been achieved given the embryonic stage of the many of the capital markets in the region. Discussion have also taken place in Africa and the Middle East along the same lines as in the Caribbean, but to even less effect. Since 1965, various proposals have been circulating within the Asia Pacific Region for the establishment of a contact group between regulators. After abortive initiatives by the Philippine Securities and Exchange Commission in the mid-1970s and then the Taiwanese Securities Commission in the mid-1980s, there would appear to be every chance of success for the contact group launched by Dato Dr. Mohd Munir Majid at the First Symposium of ASEAN Capital Markets Regulators in Kuala Lumpur on April 5, 1994.¹⁶⁵ Of course, this particular initiative is in its infancy and it remains to be seen how effective it will be in fostering corporation within ASEAN. Experience

165. Dato' Dr. Mohd Munir, Address at First Symposium of ASEAN Capital Market Regulators in Kuala Lumpur (Apr. 5, 1994) (on file with author). Dr Munir emphasized that the group will be function based and driven and will be concerned to promote cooperation in five potential areas, namely (1) improving stock cleaning and settlement system; (2) harmonizing capital adequacy requirements for stockbrokers; (3) regulation of financial derivatives; (4) cooperation on enforcement; and (5) administering disclosure rules. Of course, it has to be remembered that this is not a regional initiative as such, and it remains to be seen how effective it can be with major players such as Japan, Hong Kong, Australia, South Korea, Taiwan, New Zealand and increasingly China left on the sidelines. Nonetheless the Malaysian initiative is to be welcomed.

would indicate that unless it has a small secretariat and a budget of its own it will be less likely to make a significant impact.

While it is beneficial for international cooperation to be promoted, there is a danger of fragmentation and rivalry. Essentially, the only national Organization that has achieved any real credibility in this regard, is the North American Securities Administrators Association (NASAA).¹⁶⁶ The British Government, through the Department of Trade and Industry has organized several informal meetings¹⁶⁷ of selected regulatory authorities, and these have no doubt promoted understanding and mutual respect.

At this point in time, however, it is difficult to predict how successful these various international initiatives will be. What is perhaps more significant, is the increasing interest in proper policing of the international financial markets taken by the central banks. The American Bar Association¹⁶⁸ has suggested that the Bank for International Settlements should assume a far greater role in coordinating enforcement in this area. Several influential Central Bankers have lent their weight to this proposal, but there is no real sign of this being taken up yet, other than in the context of anti-money laundering initiatives.

IX. Conclusion

In an article such as this, it is impossible to come to any general conclusion of substance. The subject is too disparate and the problems too intractable and complex. There are certainly no panaceas and no easy answers. Economic crime and abuse is never going to be eradicated from the financial markets, and this is so whatever political philosophy one might choose to espouse. Indeed, arguably the degree of regulation and control that would be required to attain this, even if it was acceptable and practical, would be such as to destroy the proper functioning of the markets.¹⁶⁹

What is clear, is that each market, no matter how similar to others, is nonetheless unique. Markets and securities industries are complex

166. NASAA's membership includes several Canadian Provincial securities authorities as well as Mexico.

167. These are known as the "Wilton Park" meetings.

168. Letter from the American Bar Association to the U.S. Securities and Exchange Commission (Aug. 30, 1985).

169. Regulatory overkill is just as real a threat to the financial services industry as regulatory ambivalence. As Professor Gower repeatedly emphasized in his reports on investor protection in Britain. It is not certain that we have achieved the correct balance in Britain, and it would be presumptuous to express uninvited a view as to whether other jurisdictions such as Malaysia have done so.

GLOBAL TRENDS IN SECURITIES REGULATION

structures depending on a host of political, economic and social factors. Consequently, there is a very real limit as to how far the experience of other jurisdictions is relevant in fashioning the most appropriate laws and controls for one's own markets. There is no doubt that such countries have simply "borrowed" the laws and regulations of others without any regard to the different climate and environment in which such took form and matured. Until recently, this was a criticism that could justifiably be made of securities regulation in Malaysia.

What is absolutely necessary, is a realization at all levels, that preventing fraud and abuse in the markets is an important factor in promoting confidence in the integrity and efficiency of such. It is not something that can be left to one man and his dog, any more than the protection of any other valuable national asset. Crooks will gravitate to the financial markets because at the end of the day, that is where the money is! The experience of Malaysia in relation to bank-related fraud and abuse is clear evidence of this. Furthermore, given the nature of the markets, without very developed system of international cooperation, no matter how effective national initiatives, they are almost bound to fail.¹⁷⁰

One of the greatest obstacles to effective international policing is the utter nonsense that is sometimes passed off as state of the art law enforcement. If those responsible for protecting the markets were bold enough to come out and state how bad the situation is, then and perhaps only then will the political will manifest itself in the resources necessary to make any significant impact on the international fraudsters that regularly rape and pillage our national assets with impunity. For, at the end of the day, we all share the same aspiration—"we want a market which possesses credibility, has a good image and has the confidence of investors."¹⁷¹

170. As Dato' Dr. Munir, the Chairman of the Malaysian Securities Commission, has acknowledged and emphasized on a number of occasions, international cooperation must be promoted as the primary weapon in the arsenal, although never forgetting that any international initiative will at the end of the day only achieve such effectiveness as the national authority is capable of achieving.

171. Y.B. Dato' Seri Anwar Ibrahim, Minister of Finance, Second Budget Speech (1993).

