

THE SARBANES-OXLEY ACT: A DETRIMENT TO MARKET GLOBALIZATION & INTERNATIONAL SECURITIES REGULATION

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INTRODUCTION

“A dramatic globalization trend . . . is presently transforming the nature of securities markets and the nature of transactions conducted in those markets. Propelled by advancing technology, global linkages are increasingly being forged and significant transnational movements of capital have become the norm rather than the exception.”¹ Arguably, at the center of market globalization lies the United States, as it maintains the world’s largest, most efficient, and most secure securities markets. There exists, however, an over protective parent of U.S. securities markets, the U.S. Congress. Congress, through legislation enforced by the U.S. Securities and Exchange Commission (“SEC”), governs the U.S.’s global securities markets. For example, Congress’ Sarbanes-Oxley Act of 2002 (“SOx”) sets new requirements and standards for public companies traded on U.S. securities markets. SOx creates considerable national and international controversy, however, because it exercises significant, contentious, and harmful control over foreign companies, who trade publicly on U.S. securities markets. All together, SOx is a detriment.

This Note illustrates, in light of current market globalization, how (1) SOx is a detriment to market globalization, and (2) how the International Organization of Securities Commissions (“IOSCO”) is better suited than the SEC to govern and regulate international securities trading. First, this paper defines and examines market globalization, as well as U.S. and non-U.S. involvement (i.e., foreign involvement) in market globalization. Second, it addresses the means by which Congress regulates U.S. securities markets, specifically focusing on SOx and its affect on foreign companies traded on U.S. securities exchanges. Finally, this paper considers which regulatory body, the SEC or the IOSCO, would best serve the international securities market,

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1. Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 928 (1994).

and thus market globalization, through commitment, independence, and repute.

I. MARKET GLOBALIZATION

To understand SOx's affect on market globalization, one must first establish a working definition and understanding of "market globalization" and why it is so significant.

A. Internationalization

From an economic standpoint, little else is as impressive as the current state of market globalization.² But, what is "market globalization?" In general, globalization means "to extend to other or all parts of the globe; make worldwide."³ There are, however, various forms of and perspectives on globalization.⁴ For example, some examine globalization in terms of activity amongst governments.⁵ Others examine it as a spreading of modern social structures, at the expense of pre-existing cultures.⁶ This Note, however, focuses on globalization in terms of capital markets, or more broadly, "internationalization," as defined by Jan Aart Scholte, Professor in Politics and International Studies, and Acting Director of the Center for the Study of Globalisation and Regionalisation at The University of Warwick, England.⁷

Globalization as internationalization . . . is viewed 'as simply another

2. ROBERT HEILBRONER & LESTER THUROW, *ECONOMICS EXPLAINED: EVERYTHING YOU NEED TO KNOW ABOUT HOW THE ECONOMY WORKS AND WHERE IT'S GOING* 195 (1998).

3. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 812 (2d ed. 2001).

4. Infed, Definitions of Globalization, at http://www.infed.org/biblio/defining_globalization.htm (last visited Dec. 30, 2005) [hereinafter *Definitions of Globalization*].

5. *Id.*

6. *Id.*

7. *Id.* The University of Warwick: Politics and International studies, at <http://www2.warwick.ac.uk/fac/soc/pais/staff/scholte> (last visited Dec. 30, 2005). Mr. Scholte's credentials on globalization are extensive: Co-Editor of *Global Governance*; Member of the Steering Committee of the Globalization Studies Network; Vice-President for Politics and International Studies of the Global Studies Association; Member of Advisory Boards for the Global Accountability Project, One World Trust, United Nations University Comparative Regional Integration Studies, Global Institutional Design Project, and Globalization and Autonomy Project; Member of the Editorial Boards for *Global Social Policy*, *Globalizations*, *Journal of Civil Society*, *Journal of International Relations and Development*; past Chair of International Organization Section of the International Studies Association; and past visiting fellow at Cornell University, the London School of Economics, and the International Monetary Fund. *Id.*

adjective to describe cross-border relations between countries.’ It describes the growth in international exchange and interdependence. With growing flows of trade and capital investment there is the possibility of moving beyond an inter-national economy, (where ‘the principle entities are national economies’) to a ‘stronger’ version—the globalized economy in which, ‘distinct national economies are subsumed and rearticulated into the system by international processes and transactions.’⁸

This definition of globalization is most applicable, here, for two reasons. First, like this Note, it addresses globalization from a market perspective, as opposed to one of the other aforementioned perspectives.⁹ Second, it encompasses both the expanding international trade markets of goods and “capital investment,” as well as the theory that globalization shifts a country’s point of view from “intrastate” to “interstate.”¹⁰ The importance of the second prong will become more apparent when this Note addresses who is in the best position to regulate international securities trading, the SEC or the ISOCO.

B. *Globalization’s Permanent Mark*

Globalization is not just a theory; it is a real and permanent phenomenon, which draws the attention of global organizations. For example, the rise of globalization is so steep that it was a focus of the 2004 United Nations Conference on Trade and Development (“U.N. Conference”).¹¹ More specifically, the U.N. Conference measured and evaluated the impact of globalization on the global economy.¹² The U.N. Conference examined the value of “international trade in merchandise and services” as one technique to measure and evaluate the impact of globalization.¹³ The dollar values that the U.N. Conference reported are staggering:

8. Definitions of Globalization, *supra* note 4. In addition to Mr. Scholte’s definition of globalization as “internationalization,” he also defines globalization in terms of “liberalization,” “universalization,” “westernization or modernization,” and “detritorialization,” which this Note will not address due to their social, rather than economic, focus. *Id.*

9. *See id.*

10. *See id.*

11. U.N. Conference on Trade and Development 2004, *Development and Globalization: Facts and Figures*, U.N. Doc. UNCTAD/GDS/CSIR/2004/1 (2004), available at http://www.unctad.org/en/docs/gdscsir20041_en.pdf (last visited Feb. 8, 2006) [hereinafter U.N. Conference].

12. *See id.*

13. *Id.* at 48.

In 2002, the value of total merchandise exports from all countries of the world was \$6,414 billion (in current U.S. dollars). Two-thirds of these exports were from developed countries.¹⁴ The value of total exports of services was \$1,611 billion (in current U.S. dollars), and almost three-fourths of these were from developed countries.¹⁵

Viewed as a percentage, the increase in “the share of world merchandise exports in the world gross domestic product” is just as impressive.¹⁶ From 1960 to 2000, the percentage doubled from ten percent to twenty percent.¹⁷ Similarly, the “share of services in world output” increased from three percent in 1960 to five percent in 2000.¹⁸

The U.N. Conference also calculated Foreign Direct Investment (“FDI”) stock as a second technique to measure and evaluate globalization.¹⁹ The U.N. Conference defines FDI stock as:

[T]he value of the share of the capital and reserves, including retained profits, attributable in an affiliate enterprise to the parent enterprise, plus the net indebtedness of the affiliate to the parent enterprise. For branches, it is the value of fixed assets and current assets and investment, excluding amounts due from the parent, less liabilities to third parties.²⁰

Over the past twenty years, world inward FDI stock—“stock [that] reflects the position at the end of a reporting period of a country’s external financial liabilities, owned by direct investors either directly or through other related enterprises, in foreign affiliates”—grew exponentially.²¹ By 2002, it reached a staggering \$7.1 trillion.²²

Surprisingly, the recent economic recession, which the U.S. endured from March 2001 through November 2001, did not stifle FDI.²³

14. “Developing countries’ merchandise exports grew, on average, 12% a year in the period 1960-2002.” *Id.*

15. *Id.* “Exports of services grew 9% a year in developing countries and 8% in developed countries during 1980-2002.” *Id.*

16. U.N. Conference, *supra* note 11, at 48.

17. *Id.*

18. *Id.*

19. *Id.* at 34.

20. *Id.*

21. U.N. Conference, *supra* note 11, at 34.

22. *Id.*

23. Associated Press, *It's Official: 2001 Recession Only Lasted Eight Months*, USA TODAY, July 17, 2003, available at <http://www.usatoday.com/money/economy/2003-07-17->

Rather, FDI stock continued to increase, although not as quickly as previously observed.²⁴ More specifically, by 2002 outward FDI stock—stock that “reflects the position at the end of a reporting period of a country’s external financial assets, owned by direct investors either directly or through other related enterprises, in affiliates abroad”—originating from emerging countries made up twelve percent of the global FDI stock.²⁵ The European Union provided the largest amount of outward FDI stock at \$3.4 trillion in 2002, surpassing the U.S.’s amount by more than double.²⁶

On a macro-level, globalization is here to stay, for better or for worse. “In a shrinking world featuring a growing number of emerging market economies, this trend is not likely to abate.”²⁷ Under SOx, however, the U.S.’s central role in globalization, specifically international securities trading, will likely subside.

C. *U.S. Involvement in Globalization*

On a more micro-level, globalization makes a substantial mark in the U.S. For example, despite the recent recession, which began in the U.S. in early 2001, labor force productivity, which one calculates by summing the “growth in the labor force and output per work hour,” improved at an average rate of five percent.²⁸ This improvement, which baffles many economists, is a direct result of global competition between producers of goods and services because even though the U.S. was in the midst of a recession, global supply and demand continued.²⁹ The astounding increase of U.S. labor force productivity vividly demonstrates the affect of globalization on, and in, the U.S.³⁰ Simply put, the U.S. and its companies today “are competing in a world market,” a global market.³¹

The U.S. is central to globalization in two respects: (1) its rate of

recession_x.htm (last visited Dec. 30, 2005) [hereinafter *2001 Recession*]; U.N. Conference, *supra* note 11, at 34.

24. U.N. Conference, *supra* note 11, at 34.

25. *Id.*

26. *Id.*

27. Testy, *supra* note 1, at 928.

28. *2001 Recession*, *supra* note 23; William J. McDonough, Speech at the Fourth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law (2004), in 9 FORDHAM J. CORP. & FIN. L. 583, 588-89 (2004) [hereinafter McDonough].

29. See McDonough, *supra* note 28, at 588-89.

30. *Id.* at 589.

31. *Id.* at 590.

consumption, and (2) its securities exchanges or markets.³² First, U.S. participation in economic globalization, through its rate of consumption, is substantial. Just a few years ago, the combination of U.S. imports and exports surpassed twenty-five percent of the U.S.'s Gross Domestic Product ("GDP"), which "measures the value of all goods and services produced within the [U.S.], regardless of whether the producer is a U.S. firm or a foreign one located here [in the U.S.], or whether it is an American worker or a national resident here [in the U.S.]."³³ Just as there are markets for domestic goods and services, like lumber and lawyering, a market for money developed in excess of one trillion dollars, for the sole purpose of exerting foreign exchange purchasing power.³⁴ As a result, the names and products of foreign companies, such as Sony, Honda, and Nokia, are commonplace in American households.

Second, the U.S. is home to arguably the world's most prestigious and influential securities markets, such as the New York Stock Exchange ("NYSE").³⁵ There are approximately fifteen exchanges in the U.S., including the options, commodity, and mercantile exchanges.³⁶ Of all the U.S. exchanges, though, the NYSE sets the world's bar for securities exchanges:

The NYSE is the world's leading and most technologically advanced equities market. . . . On an average day, 1.46 billion shares, valued at \$46.1 billion, trade on the NYSE. In 2004, the NYSE was again the

32. "Securities" are investment instruments, which generally come in two types, debt and equity. See ROBERT W. HAMILTON, MONEY MANAGEMENT FOR LAWYERS AND CLIENTS: ESSENTIAL CONCEPTS AND APPLICATIONS 300 (1993). Debt securities are, basically, "loan interests" between a company and an investor, where the company borrows money from the investor under an agreement that the company will pay the loan back with interest. See *id.* Equity securities are, on the other hand, "ownership interest" where a corporation sells an interest in its ownership to an investor. See *id.* "Exchanges" are markets where investors are able to trade both their debt and equity securities. See *id.* at 322.

33. HEILBRONER & THUROW, *supra* note 2, at 195.

34. *Id.* at 195-96.

35. See generally HAMILTON *supra* note 32, at 299-356 (1993) (discussing securities markets as places where, or means by which, equity and debt securities, such as stock and bonds respectively, are traded between buyers and sellers).

36. CPAnet.com, U.S. Exchanges, at <http://www.cpanet.com/finance/sitesonly.asp?LIST=0208&Lists=U.S.%20Exchanges> (last visited Dec. 30, 2005). U.S. securities exchanges include the AMEX, Arizona Stock Exchange, Chicago Board of Trade, Chicago Board Options Exchange, Chicago Mercantile Exchange, Chicago Stock Exchange, Kansas City Board of Trade, MidAmerica Commodity Exchange, NASDAQ, New York Cotton Exchange, New York Mercantile Exchange, NYSE, Pacific Stock Exchange, and the Philadelphia Stock Exchange. *Id.*

most competitive venue for trading its listed stocks, providing investors with the lowest costs, deepest liquidity and best prices.³⁷

Not only is the NYSE “the world’s leading and most technologically advanced equities market,” it is “the largest equities marketplace in the world, [and] is home to about 3,000 companies worth more than \$17 trillion in global market capitalization.”³⁸ The NYSE, alone, would likely place the U.S. at the center of the globalization map. Yet, thanks to SOx, the interest of foreign issuers in U.S. capital markets, such as the NYSE, will likely deteriorate.

D. Foreign Companies’ Access to U.S. Capital Markets

The ability to access U.S. markets is not reserved solely for U.S. companies. Foreign companies are also able to access these markets, although the means and extent of access varies.³⁹ The reach of a foreign company’s hand into U.S. securities markets, specifically, may be limited, depending on the means in which a foreign company wishes to access these markets.

There are three, primary ways in which a foreign company may access markets in the U.S.: (1) private placements, (2) over-the-counter offerings, or (3) fully registered public offerings.⁴⁰

1. Private Placements

Private placements are where foreign companies sell their securities directly to large institutional investors. “Institutional investors are large investors who primarily invest other people’s money. They include insurance companies, pension funds, investment companies . . . bank trust departments, charitable foundations, educational institutions, and similar organizations.”⁴¹ One reason these placements are termed “private” is because the institutional investors cannot freely trade the securities on secondary exchanges, like the

37. New York Stock Exchange, About the NYSE, <http://www.nyse.com/about/1088808971270.html> (last visited Dec. 30, 2005).

38. MarketVolume.com, What is the New York Stock Exchange Indicator?, <http://www.marketvolume.com/content/products/indicators/details/nyse.asp> (last visited Dec. 30, 2005). “Market capitalization” is “the price per share times the number of shares outstanding.” DAVID G. EPSTEIN ET AL., BUSINESS STRUCTURES 407 (2002).

39. Hannah Buxbaum et al., *Regulating Corporations: Who’s Making the Rules?*, in 97 AM. SOC’Y INT’L L. PROC. 269 (2003) [hereinafter *Regulating Corporations*].

40. *Id.* at 269-70.

41. HAMILTON, *supra* note 32, at 530.

NYSE.⁴² Dealing in such a restricted trading market can be a drawback for foreign companies who are looking to tap the deep pockets of U.S. securities exchanges.⁴³ One reason, however, foreign companies partake in private placements is because the companies do “not have to comply with [the SEC’s full] disclosure requirements, although there must be some compliance with [the SEC’s] procedural requirements relating to private offerings.”⁴⁴ In other words, the SEC’s regulation of private placements by foreign companies is minimal.⁴⁵

2. *Over-the-Counter Offerings*

The over-the-counter (“OTC”) market is a market amongst brokers, dealers, and market makers.⁴⁶ “A ‘dealer’ is a securities firm trading for its own account while a ‘broker’ is executing an order for a customer.”⁴⁷ The biggest player in an OTC market, however, is the “market maker.”⁴⁸ “A ‘market maker’ is a dealer who announces its continued willingness to both buy and sell a specific security.”⁴⁹ The OTC market is not a very liquid or transparent market.⁵⁰ Also, unlike the NYSE, whose building is “located in the central part of the financial district on Wall Street in New York City,” the OTC market does not exist in a set geographic location.⁵¹ Instead, brokers, dealers, and market makers buy and sell securities via computer or telephone.⁵²

Foreign companies who enter the OTC market, like those who make private placements, undergo “minimal contact with the SEC, and these companies do not have to comply with SEC disclosure requirements.”⁵³ In return, however, the ability of such foreign companies to reach the full benefits of U.S. securities markets is limited—like foreign companies who make private placements—because they cannot make a public offering, as discussed later, and be freely traded on a liquid, secondary market, like the NYSE.⁵⁴

42. See *Regulating Corporations*, *supra* note 39, at 269-70.

43. See *id.*

44. See *id.* at 269.

45. *Id.*

46. HAMILTON, *supra* note 32, at 336-37.

47. *Id.* at 336.

48. *Id.* at 337.

49. *Id.*

50. *Regulating Corporations*, *supra* note 39, at 269.

51. HAMILTON, *supra* note 32, at 336.

52. *Id.*

53. *Regulating Corporations*, *supra* note 39, at 269.

54. *Id.*

3. *Fully Registered Public Offerings*

In order for a foreign company to access the complete financial depth and liquidity of U.S. securities exchanges, such as the NYSE, the foreign company may make a full registration with the SEC.⁵⁵ A full registration with the SEC requires foreign companies to make a number of disclosures:

The registration forms companies file provide essential facts while minimizing the burden and expense of complying with the law. In general, registration forms call for: [1] a description of the company's properties and business; [2] a description of the security to be offered for sale; [3] information about the management of the company; and [4] financial statements certified by independent accountants. Registration statements and prospectuses become public shortly after filing with the SEC.⁵⁶

A U.S. company who wants to access U.S. securities markets would undergo a very similar registration process.⁵⁷ Once the SEC deems the foreign company's registration "effective," (i.e., approves it) the company becomes a legitimate foreign issuer.⁵⁸ At such a time, the company may finalize its initial public offering ("IPO"), and its stock may "hit" the market, where it will be freely traded on a U.S. securities exchange, like the NYSE.⁵⁹

E. Active Foreign Issuers in U.S. Capital Markets

The willingness of foreign companies to complete full registrations with the SEC and access U.S. securities markets changed over the years.⁶⁰ "In the early 1980s, relatively few foreign firms chose to list in the United States. This changed dramatically as many foreign firms listed in the mid-1990s,"⁶¹ when the SEC altered its attitude toward

55. *Id.* at 270.

56. U.S. Securities and Exchange Commission, *The Laws That Govern the Securities Industry*, <http://www.sec.gov/about/laws.shtml> (last visited Dec. 30, 2005).

57. *Regulating Corporations*, *supra* note 39, at 270.

58. See DAVID G. EPSTEIN ET AL., *BUSINESS STRUCTURES* 409 (2002); *see also Regulating Corporations*, *supra* note 39, at 270.

59. *See* EPSTEIN, *supra* note 58, at 409; *see also Regulating Corporations*, *supra* note 39, at 270.

60. *See Regulating Corporations*, *supra* note 39, at 271.

61. Christopher Woo, *The Effects of the Sarbanes-Oxley Act on Foreign Private Issuers* 1, http://www.law.harvard.edu/programs/pifs/pdfs/christopher_woo.pdf (last visited Dec. 30, 2005) [hereinafter Woo].

foreign issuers, as discussed later. Today, hundreds of foreign companies trade on U.S. exchanges. The number of foreign issuers rose from 173 in 1981 to over 1,300 today.⁶² This phenomenon (or strategy) often occurs in the form of “cross-listing”—where a company lists on both its domestic securities exchange and a U.S. securities exchange.⁶³

The origins of foreign issuers span the globe to include North America, Latin America, Europe, Eastern Europe, Africa, and Asia.⁶⁴ There are many reasons why foreign companies are attracted to U.S. securities markets.⁶⁵ First, U.S. investor demand for foreign securities is abundant in U.S. markets.⁶⁶ This means that “the U.S. capital markets are deep and liquid,” and “foreign firms can raise funds at lower costs than at home.”⁶⁷ Second, “[s]tudies have found that cross-listing in the [U.S.] leads to increased . . . visibility” (i.e., the ability for investors to monitor and understand the financial statements and corporate structures, which the company must disclose).⁶⁸ Third, “listing on an exchange with [a] stricter disclosure environment than the home country exchange conveys a management’s confidence in its future earnings.”⁶⁹ Fourth, foreign issuers are able to piggyback the high level of protection that U.S. investors enjoy, when they cross-list on U.S. markets.⁷⁰ Finally, cross-listing on a well-known exchange, such as the NYSE, provides “exposure and prestige” for the foreign issuer.⁷¹

The benefits of cross-listing on a U.S. exchange are valued differently by different companies in different parts of the world. For example, the Israeli Parliament permits Israeli companies who are issuers on a U.S. exchange “to list their stocks on the Tel Aviv Stock Exchange based on voluntary disclosures or disclosures they make under U.S. law.”⁷² Better pricing and prestige are the reasons European companies issue on a U.S. exchange.⁷³ For Japanese issuers, prestige is

62. *Regulating Corporations*, *supra* note 39, at 271.

63. See Craig Doidge et al., *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. FIN. ECON. 205, 206 (revised Sept. 27, 2001).

64. *Regulating Corporations*, *supra* note 39, at 271.

65. *Id.*; see also Woo, *supra* note 61, at 3-7.

66. *Regulating Corporations*, *supra* note 39, at 271.

67. Doidge, *supra* note 63, at 208.

68. See Woo, *supra* note 61, at 4.

69. Woo, *supra* note 61, at 5.

70. Doidge, *supra* note 63, at 209.

71. *Id.* at 206.

72. Woo, *supra* note 61, at 6.

73. *Id.*

almost the sole reason.⁷⁴

Altogether, foreign issuers make a large financial impact on, and in, U.S. securities markets. For example, the thirty-one German companies listed on U.S. exchanges have approximately “\$287 billion in market capitalization.”⁷⁵ Even more impressive are the thirty Japanese companies, which have approximately “\$420 billion in market capitalization.”⁷⁶

The financial impact of these and other foreign issuers is not only beneficial for U.S. markets and foreign companies, but benefits extend back to the many regions of the world from where the foreign companies originate.⁷⁷ A study of the “[a]ggregate market capitalization for foreign stocks listed on . . . [the] NYSE over market capitalization of home country stock exchange for different regions” demonstrates that “[t]he overall U.S. market is important for Israel and Latin America.”⁷⁸ The study also shows that U.S. markets were not as important for Europe and East Asia, initially, but their importance increased steadily since 1997.⁷⁹

SOx, however, diminishes the current extent and future prospects of these benefits, as it alters the SEC’s treatment of foreign issuers and their ability to enter U.S. markets.

II. THE SEC’S TREATMENT OF FOREIGN ISSUERS

The SEC’s regulation of foreign issuers changed over time. Starting with the Securities Act of 1933 and Securities Exchange Act of 1934 through Congress’ most recent securities legislation regulation, SOx,⁸⁰ the SEC has implemented three approaches, generally, in its treatment of foreign issuers: Isolationist, Internationalist, and Unilateralist.⁸¹

A. *The Isolationist Approach*

The SEC adopted an “isolationist” approach between 1933 and the

74. *Id.*

75. Jonathan Shirley, *International Law and the Ramifications of the Sarbanes-Oxley Act of 2002*, 27 B.C. INT’L & COMP. L. REV. 501, 512 (2004).

76. *Id.* at 513.

77. Woo, *supra* note 61, at 36-61.

78. *Id.* at 55.

79. *Id.*

80. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, and 29 U.S.C.) [hereinafter Sarbanes-Oxley Act of 2002].

81. See generally Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, 33 STETSON L. REV. 849, 853-56 (2004).

late 1970s or early 1980s.⁸² The isolationist approach segregated U.S. issuers from foreign issuers and significantly restricted foreign issuers' access to U.S. securities markets.⁸³ For example:

This [isolationist] attitude was manifested in such policy initiatives as the Canadian and then the foreign restricted list to keep out unregistered foreign companies. The SEC also made very aggressive claims of extraterritorial application, and a whole series of cases was [sic] brought under the antifraud provisions of the Securities Exchange Act of 1934.⁸⁴

In other words, the SEC was building a great wall around U.S. securities markets, through various initiatives, to keep foreign companies out of U.S. markets. As a matter of fact, some say that Congress, when it enacted the 1933 and 1934 Acts, did not even consider foreign issuers.⁸⁵ This, however, is not entirely true because "special registration forms for foreign sovereign debt" were included in the 1933 Act, and Congress defined interstate commerce to include "commerce between states and foreign jurisdictions."⁸⁶ Although foreign companies were able to access U.S. securities exchanges, there were significant restrictions—restrictions that resurface with the enactment of SOx.

B. *The Internationalist Approach*

Beginning in the early 1980s, the SEC migrated from the self-centered attitude of the isolationist approach to an "internationalist" approach, which embraced foreign issuers.⁸⁷ The SEC's change in attitude is attributable to a number of catalysts. First, a global capital market emerged in London as a European securities market began to blossom.⁸⁸ The U.S. government did not consider this development a positive occurrence, as it deflated the importance of U.S. capital markets.⁸⁹ Second, better cooperation developed between the SEC and foreign regulators, with the creation of the IOSCO, "a truly international

82. *Regulating Corporations*, *supra* note 39, at 272 (quoting Roberta Karmel).

83. *See id.* at 272-73; *see also* Karmel, *supra* note 81, at 853-56; Shirley, *supra* note 75, at 516.

84. *Regulating Corporations*, *supra* note 39, at 273.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See Regulating Corporations*, *supra* note 39, at 273.

regulatory body.”⁹⁰ Third, the SEC recognized that the listing of foreign companies on U.S. exchanges provided numerous benefits.⁹¹ For example, U.S. investors benefit through the increase in investment opportunity, while foreign issuers benefit through the increase in liquidity, capital, and diverse investors, which U.S. markets provide.⁹² Capital markets, in general, benefit through the increased integration of the global economy.⁹³

During the internationalist era, the SEC provided a number of accommodations to foreign investors in order to entice them to register with the SEC and cross list on U.S. exchanges. For example, foreign issuers were exempt from “proxy solicitation regulations,” to which U.S. companies are subjected.⁹⁴ In addition, the SEC allotted more time to foreign issuers to file their annual reports.⁹⁵ Moreover, the SEC did not require foreign issuers to disclose executive compensation, although there is a global trend to disclose executive compensation today because of its relevance when analyzing potential investments.⁹⁶ The SEC also permitted more flexible accounting standards for foreign issuers.⁹⁷ In particular, the SEC permitted foreign issuers to use International Accounting Standards (“IAS”), rather than the U.S.’s Generally Accepted Accounting Principles (“GAAP”).⁹⁸

The most important aspect of the SEC’s new relaxed stance toward foreign issuers was, arguably, that “the SEC did not attempt to regulate the corporate governance of foreign corporations,” who, in order to increase their marketability on U.S. securities exchanges, fully registered with the SEC.⁹⁹ This leniency was not extended to fully registered U.S. companies. Rather, the SEC attempted to regulate the corporate governance of public U.S. companies as far as the law would permit it, which the U.S. Court of Appeals for the District of Columbia eventually addressed in *Business Roundtable v. SEC*.¹⁰⁰

Business Roundtable reigned in the SEC’s ability to regulate the corporate governance of domestic, and consequently foreign,

90. *Id.*

91. *Id.* at 270.

92. *Id.*

93. *Id.*

94. Karmel, *supra* note 81, at 858; *see also* Buxbaum, *supra* note 39, at 271.

95. *Regulating Corporations*, *supra* note 39, at 271.

96. *Id.*

97. Karmel, *supra* note 81, at 860.

98. *Id.*

99. *Id.* at 850.

100. *Id.* at 849, 852; *Bus. Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990).

companies.¹⁰¹ The court held that Congress, in the Securities Exchange Act of 1934, did not empower the SEC with unhindered authority to regulate corporate governance.¹⁰² Congress, however, would later provide the SEC with the authority to regulate corporate governance, with the passage of SOx.¹⁰³

C. *The Unilateralist Approach*

Today, with the enactment of SOx, the SEC utilizes a “unilateralist” approach in its treatment of foreign issuers, in that very few registration and disclosure exemptions are granted to foreign issuers.¹⁰⁴ Instead, the SEC presents foreign issuers with an all or nothing deal—either comply with SOx and the enumerated requirements or look to other securities markets.¹⁰⁵

SOx employs unilateralism on its face, as the “statutory provisions make no real exceptions for foreign issuers.”¹⁰⁶ In addition, its provisions are retroactive because they apply to the foreign issuers already fully registered with the SEC and trading their securities on U.S. exchanges.¹⁰⁷ Furthermore, the timeframe in which Congress required the SEC to create rules for the implementation of SOx was “intolerably short.”¹⁰⁸ Consequently, the SEC did not have sufficient time to create rules to appropriately accommodate foreign issuers.¹⁰⁹ In all, the enactment and implementation of SOx is a return to the isolationist approach, as discussed earlier.

101. See *Bus. Roundtable*, 905 F.2d 406.

In 1984 General Motors announced a plan to issue a second class of common stock with one-half vote per share. The proposal collided with a longstanding rule of the [NYSE] that required listed companies to provide one vote per share of common stock. The NYSE balked at enforcement, and after two years filed a proposal with the [SEC] to relax its own rule. The SEC did not approve the rule change but responded with one of its own. On July 7, 1988, it adopted Rule 19c-4, barring national securities exchanges and national securities associations, together known as self-regulatory organizations (SROs), from listing stock of a corporation that takes any corporate action “with the effect of nullifying, restricting or disparately reducing the per share voting rights of [existing common stockholders].”

Id. at 406.

102. *Id.*

103. Karmel, *supra* note 81, at 852.

104. *Id.* at 856.

105. See *id.*

106. *Id.*

107. *Id.*

108. Karmel, *supra* note 81, at 856.

109. See *id.*

III. THE SARBANES-OXLEY ACT

SOx's purpose is not to restrict foreign issuers' access to U.S. securities exchanges. Rather, it was a reaction to the demise of a number of domestic, not foreign, corporations.

A. *The Reasons for SOx*

A direct correlation exists between SOx and the 2001 economic recession.¹¹⁰ Although there are a number of catalysts that prompted the recession, one is most responsible for the enactment of Sox—U.S. corporate corruption, which resulted in the largest U.S. corporate bankruptcies ever recorded.¹¹¹

The bankruptcy of Enron Corporation (“Enron”), in December 2001, began a hemorrhage of historic bankruptcies, pregnant with accounting, investment, and management fraud.¹¹² Alone, Enron recorded over \$40 billion in debt, liabilities, and operating losses because of misappropriated funds, undisclosed fees, and general corporate fraud.¹¹³ Global Crossing, Inc. quickly followed Enron and recorded “liabilities of \$12.4 billion” in its Chapter 11 bankruptcy filing, brought on by deceptive derivative investments.¹¹⁴ In the spring of 2002, Adelphia, Inc., disclosed \$2.3 billion in misappropriated funds.¹¹⁵ These three, however, pale in comparison to WorldCom's \$41 billion bankruptcy filing, a result of deliberate misclassification of assets and liabilities.¹¹⁶

B. *The Goals and Means of SOx*

SOx, as a result of the aforementioned corporate scandals that currently plague the U.S., is a Congressional attempt “[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.”¹¹⁷ In brief, Title I of SOx creates the Public Company

110. See *2001 Recession*, *supra* note 23; see also *Regulating Corporations*, *supra* note 39, at 271; Shirley, *supra* note 75, at 501.

111. *Regulating Corporations*, *supra* note 39, at 271; see also Shirley, *supra* note 75, at 501.

112. Shirley, *supra* note 75, at 501-04. For an in-depth discussion of Enron, see generally ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

113. Shirley, *supra* note 75, at 502-03.

114. *Id.* at 503.

115. *Id.* at 504.

116. *Id.* at 504-05.

117. Sarbanes-Oxley Act of 2002, *supra* note 80.

Accounting Oversight Board (“PCAOB”) to regulate the public accountants who audit issuers traded on U.S. exchanges; Title II addresses auditor independence and places a five year rotation requirement on auditing partners; Title III, a contentious section for foreign issuers, deals with corporate responsibility; Title IV enhances financial disclosures for issuers; Title V is aimed at conflicts of interest created by the analysts for public issuers; Title VI increases SEC resources and authority; Title VII requires that studies and reports of the industry be conducted; Title VIII sets a higher standard of accountability for corporate and criminal fraud; Title IX enhances penalties for white collar crimes; Title X requires CEOs to, literally, signoff on their company’s federal income tax return; and Title IX, again, addresses accountability for corporate fraud.¹¹⁸ Together, the sections of SOx increase financial and corporate governance disclosure requirements, while increasing the penalties for lack of disclosure and fraud, for both domestic and foreign publicly traded companies.¹¹⁹

C. *The Benefits of SOx*

Issuers derive a number of benefits from SOx. For example, Title IV of SOx increases financial disclosure standards for issuers.¹²⁰ Although a likely hindrance upon first impression, the increase benefits issuers because most investors believe companies that meet higher disclosure standards have greater value; thus, investors are more likely to invest in the issuer.¹²¹ Similarly, Title IX increases punishment for white-collar crime.¹²² Investors, in return, feel that their investment is more secure because company directors have more to lose when engaging in fraudulent activity.¹²³ Altogether, SOx increases investor protection—a reason with which foreign companies look to enter the U.S. markets to start, as discussed previously.¹²⁴

Nevertheless, the burdens SOx creates drastically overshadow its benefits, a result of legislative haste.¹²⁵

118. *Id.* §§ 101-1106.

119. *See generally* Sarbanes-Oxley Act of 2002, *supra* note 80.

120. *See id.* at §§ 401-09.

121. *See* Doidge, *supra* note 63, at 208-09.

122. *See* Sarbanes-Oxley Act of 2002, *supra* note 80, at §§ 901-1001.

123. *See* Doidge, *supra* note 63, at 208-09.

124. *See id.* at 209.

125. *See* Shirley, *supra* note 75, at 501; *see also* Karmel, *supra* note 81, at 862.

D. SOx: Legislative Haste

There is a general sentiment that Congress enacted SOx in haste.¹²⁶ A number of aspects illustrate this idea. First, “[t]he speed with which [SOx] became law was startling.”¹²⁷ It took Congress only seven months to pass SOx after Enron’s bankruptcy filing in December 2001.¹²⁸ Typically, Congress “acts slowly at best.”¹²⁹ Second, it is apparent that “[t]he criminal provisions of [SOx] were drafted with extraordinary haste, a haste that produced inartful and sometimes vague or duplicative provisions.”¹³⁰ Third, the actual financial cost in complying with SOx is extraordinary, as discussed later, which demonstrates that Congress enacted SOx quickly, giving its ultimate effects little, if any consideration.¹³¹ Most importantly, the three bills that form SOx were merely “cut-and-pasted” together:

Due to the haste with which the final Sarbanes-Oxley legislation was assembled, Congress made no serious attempt to harmonize the three different precursor bills. Instead, Congress simply eliminated some (but by no means all) of the most obvious duplications and inconsistencies and inserted all three bills into the final legislation, giving each its own title.¹³²

A parallel exists between the haste in which SOx was enacted and the haste in which the September 11th Victim Compensation Fund of 2001 and the Airline Assistant Program (“the Funds”) were enacted.¹³³ For example, Congress enacted the Funds within one week of the September 11th attacks, an even quicker enactment than that of SOx.¹³⁴ Although the Funds are Congress’ honest attempt to rectify some of the

126. See Shirley, *supra* note 75, at 501; see also Karmel, *supra* note 81, at 862.

127. Shirley, *supra* note 75, at 501.

128. See Sarbanes-Oxley Act of 2002, *supra* note 80; see also Shirley, *supra* note 75, at 501-02.

129. Harvey L. Pitt and Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead At the Next Decade*, 7 YALE J. ON REG. 149, 165 (1990).

130. Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 376 (2004).

131. See Shirley, *supra* note 75, at 501; see also Karmel, *supra* note 81, at 862.

132. Bowman, *supra* note 130, at 403.

133. September 11th Victim Compensation Fund of 2001, tit. IV, Pub. L. No. 107-42, 115 Stat. 237 (2001) (codified as 49 U.S.C. 40101); see also, Raymond L. Mariani, *Industry in Crisis: A Progress Report on Victim Compensation and the Airlines After the September 11th Legislation*, 68 J. AIR L. & COM. 253, 253 (2003).

134. Mariani, *supra* note 133, at 253.

financial damage caused by the attacks, they are a significant source of discourse.¹³⁵ Many commentators believe the Funds, like SOx, are more of a burden than a benefit, as they do not appreciate and identify the true needs of the victims, nor offer adequate means of redress.¹³⁶ Instead of providing a solution, the Funds and SOx, simply provided fertile ground for contentious litigation.¹³⁷

E. The Burdens of SOx on Foreign Issuers and Globalization

1. Difficulty in Compliance

Compliance with SOx is often quite difficult for foreign issuers. For example, under SOx, disclosure requirements become more rigorous.¹³⁸ Also, the SEC no longer permits foreign issuers to use IAS in lieu of GAAP.¹³⁹ Furthermore, foreign auditing firms, who audit foreign and U.S. issuers, must register with SOx's newly created PCAOB.¹⁴⁰ This regulation, in particular, is hard for foreign auditing firms to swallow because:

[SOx] makes it illegal for a foreign accounting firm to participate in the preparation and issuance of audit report of an issuer without having been registered with the PCAOB. Not only does this impose restriction on activities of foreign accounting firms but also cause concern with respect to encroachment of PCAOB in their business practices. . . .¹⁴¹

2. Increased Costs

Compliance with SOx's numerous regulations and corporate governance stipulations, which all issuers must meet regardless of origin, is a considerable expense for public, global companies.¹⁴² For example, Business Objects, a French company, is the third largest software company in Europe.¹⁴³ In 2004, it had sales of \$926 million

135. *Id.* at 254.

136. *Id.*

137. *See generally id.*

138. Karmel, *supra* note 81, at 862.

139. *Id.*

140. Sabyasachi Ghoshray, *Impact of Sarbanes-Oxley on Multiple Listed Corporations: Conflicts in Comparative Corporate Laws and Possible Remedies*, 10 ILSA J. INT'L & COMP. L. 447, 450-51 (2004).

141. *Id.* at 450.

142. *Id.* at 452; *see also* Shirley, *supra* note 75, at 511.

143. Richard Waters, *A Technology Success A La Silicon Vallee: A French Software*

dollars, giving it a market capitalization of \$2.4 billion dollars.¹⁴⁴ However, “the regulatory burden placed on companies by the recent Sarbanes-Oxley legislation has cost Business Objects ‘multiple millions of dollars.’”¹⁴⁵

The extensive financial costs of SOx are not limited to large, international companies. Small and mid-size companies bear the hefty costs of SOx, as well.¹⁴⁶ For example, the costs for such companies grew “130 percent since 2001, and are expected to keep increasing in the near future. Due to the Sarbanes-Oxley regulations and increases in shareholder litigation, smaller companies will spend between [one] million and [two] million for legal and accounting fees, insurance and investor relations.”¹⁴⁷ Clearly, money spent meeting SOx requirements is less money spent on global investment.

3. *Conflicts with International Law*

It is common knowledge that, at times, domestic laws will conflict with foreign laws. SOx, however, goes beyond general conflicts and creates a number of excessive conflicts with the domestic laws of foreign issuers. For example, SOx requires all members of an issuer’s audit committee to sit on the issuer’s board of directors.¹⁴⁸ This requirement is in direct conflict with “Section 85.6 of the Russian law governing joint stock companies . . . which prohibits members of the audit committee from serving on the board of directors.”¹⁴⁹ Another direct conflict arises between SOx and German law.¹⁵⁰ “Section 301 of [SOx] stipulates that a company’s Audit Committee be directly responsible for the appointment, compensation, and oversight of the company’s auditor. On the contrary, German law requires shareholders to appoint the auditor at their annual general meeting.”¹⁵¹ In Japan, a point of contention arises in the translation of SOx:

Company has Drawn Lessons from US Enterprise Culture to Achieve Impressive Results, FIN. TIMES (LONDON), Mar. 9, 2005.

144. *Id.*

145. *Id.*

146. John Sinnenberg, *The Pros and Cons of Going Private: Going Private is Not a Panacea for an Ailing Public Company, but There is No Question that the Downsides of Being Public, Especially for a Small Company, May Be Bigger than Ever*, FIN. EXECUTIVE, Jan. 1, 2005, at 24.

147. *Id.*

148. Ghoshray, *supra* note 140, at 453.

149. *Id.*

150. *Id.* at 454.

151. *Id.*

[SOx] often uses the term “officer” to refer to the management of the company. In Japan, corporations are run by boards of directors that are divided into complex hierarchies of committees. These committees, in turn, govern the corporation through collective decision-making. Thus, those who would be considered officers in the United States are really board members in Japan who operate through a committee.¹⁵²

Section 203 of SOx states that a registered public accounting firm may not lawfully provide auditing services to an issuer if the audit partner of the accounting firm “performed audit services for that issuer in each of the [five] pervious fiscal years of that issuer.”¹⁵³ This SOx requirement that issuers rotate their auditor every five years poses significant difficulties for Chinese issuers.¹⁵⁴ In China, “there is approximately one certified public accountant per 13,000 [Chinese] persons.” In the U.S., however, there is “one certified public accountant per 1000 [sic] persons.” This leaves Chinese issuers scrabbling for certified public accountants.¹⁵⁵

In general, “[t]he imposition of [SOx] on foreign corporations has promoted objections from all corners of the world even from countries whose laws do not outwardly conflict with [SOx].”¹⁵⁶

F. The Post-SOx Options for Foreign Issuers

The initial reaction to SOx from European and other commentators was of frustration and anger.¹⁵⁷ SOx’s stringent requirements leave foreign issuers with limited options. SOx simply forces many foreign issuers to comply with the corporate governance structure that Congress lays out in SOx and the SEC enforces.¹⁵⁸ As a result, it is “feared that the burdensome provisions of [SOx] will drive issuers away from U.S. capital markets.”¹⁵⁹ That fear is real, for SOx “appeared to cause a sharp decline in the number of foreign listings” on U.S. exchanges.¹⁶⁰ Some of the decline in foreign listings is, however, attributable to the global recession, which followed shortly after the enactment of SOx, as

152. Shirley, *supra* note 75, at 513.

153. Sarbanes-Oxley Act of 2002, *supra* note 80, § 203.

154. Shirley, *supra* note 75, at 514.

155. *Id.*

156. *Id.* at 515.

157. Karmel, *supra* note 81, at 857.

158. Shirley, *supra* note 75, at 525.

159. *Id.* at 526-27.

160. Karmel, *supra* note 81, at 857.

discussed previously.¹⁶¹

Regardless of the degree of blame that one allocates to either the recession or SOx, there is no question that SOx's impact on foreign issuers and globalization is negative and significant. This detrimental impact, however, is not limited to just those two factors, but also includes the factor of international securities regulation.¹⁶² SOx unquestionably creates a rift in the relationship between the SEC and foreign regulators:

[T]he unilateralism of Sarbanes-Oxley has created a political obstacle to joint efforts by foreign regulators and the SEC in adopting a common approach to corporate governance problems. Although the EU has some reform ongoing with respect to corporate governance, Sarbanes-Oxley has engendered hostility toward the SEC in Europe and elsewhere.¹⁶³

IV. THE REGULATORS

A. *A Need for Regulation Harmony*

The current degree of globalization, as discussed previously, highlights a need to unify and harmonize the legal standards that will govern cross-border trading.¹⁶⁴ A couple of issues fuel the current movement towards unifying international standards, as opposed to following individual, domestic standards. First, proponents of unifying and harmonizing such standards advise that “[c]ountries around the world compete for capital and in order to attract foreign capital they tend to offer lax rules in the relevant areas of the law, including tax, torts, environmental protection, and financial market regulation.”¹⁶⁵ In other words, it is a “race to the bottom theory,” which suggests that both those offering and those seeking investment capitals will migrate toward jurisdictions with the lowest standard of regulation.¹⁶⁶

Second, “[a]n important justification for harmonization is the interface of different jurisdictions in cases that involve more than one

161. *Id.*

162. *See id.*

163. *Id.*

164. Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 100 (2002).

165. *Id.* at 104.

166. *Id.* at 106.

jurisdiction and the difficulty in reconciling different legal regimes.”¹⁶⁷ In other words, in addition to the general complexity in understanding cases involving financial transactions, courts now face issues regarding proper jurisdiction and applicable law because such transactions occur between international parties.¹⁶⁸ Many times “conflicts among national regulatory regimes may encourage regulatory arbitrage as well as ill will among and between nations.”¹⁶⁹ Therefore, in order to sustain an ever-growing global securities market, the securities industry needs to develop and harmonize universal legal standards.¹⁷⁰

This is not to say that establishing harmony will be an easy task. “World stock markets differ considerably in terms of investors’ access to information, the market’s financial stability, and other important characteristics that determine market efficiency.”¹⁷¹ In the attempt to create an ideal set of legal norms, framers cannot forget the key components of a vibrant market, such as a company’s need to be dynamic and agile in order to compete.¹⁷²

In addition, harmonization is a costly endeavor, in both time and money.¹⁷³ Yet, the benefits are potentially expedient, for “standardization will accelerate the process of legal convergence with the double benefit of reducing transaction costs for transnational investors and increasing the quality of legal institutions in countries whose institutions are less developed.”¹⁷⁴

Thus, the issue arises, who should set the standard? Currently, the number of governments, committees, action groups, associations, etc., involved in the regulation or governance of international securities trading is staggering, with each offering their own input on the various concerns associated with such regulation or governance.¹⁷⁵ For example:

167. *Id.* at 105.

168. Testy, *supra* note 1, at 928-29.

169. *Id.* at 929.

170. *See* Pistor, *supra* note 164, at 100.

171. Matthew F. Gorra, *On-Line Trading and United States Securities Policy: Evaluating the SEC’s Role in International Securities Regulation*, 32 CORNELL INT’L L. J. 209, 219 (1998). “One striking difference between U.S. securities regulation and other countries’ regulation is that in some countries, such as Germany, Austria, and Switzerland, banks, rather than national governments, are the primary securities market regulators. The regulation in these countries is, therefore, vastly different than the U.S. governmentally-led regulatory regime.” *Id.*

172. Pistor, *supra* note 164, at 99.

173. *See id.* at 103.

174. *Id.* at 97.

175. *Id.* at 101.

Some are professional interest groups whose members come primarily from the private sector. An example is the International Federation of Accountants (IFAC). Others recruit their members from national regulatory agencies. Both the International Association of Insurance Supervisors (IAIS) and the International Organization of Securities Commissions (IOSCO) represent this category of international standards setters. In addition, several multilateral organizations are involved in building the legal architecture for global markets. The United Nations Commission on International Trade Law (UNCITRAL) has a long record of developing model laws and international conventions and has recently adopted a Model Law on cross-border insolvency. UNCITRAL collaborates with the World Bank and the International Bar Association (IBA) in developing a model law for domestic bankruptcy law. The Organization for Economic Cooperation and Development (OECD) has recently adopted standards for corporate governance, the so-called "Principles of Corporate Governance." In addition, the OECD has developed a separate set of corporate governance principles for transition economies. Finally, the World Bank is also engaged in improving the framework for corporate governance in many of its lending countries.¹⁷⁶

Clearly, "[t]o create an effective system of regulation will mean overcoming turf-wars."¹⁷⁷

Regardless of all the regulatory parties involved, their efforts to set universal standards results only in non-binding recommendations because they do not have regulatory authority.¹⁷⁸ "Rather than harmonizing highly-specified rules, the standards aim only at establishing the principles for such rules."¹⁷⁹ In addition, there is a lack of leadership and central authority among the group, which is worrisome.¹⁸⁰ "There are simply too many trade associations and working parties, dissipating the force of their message and . . . needlessly duplicating effort."¹⁸¹ Furthermore, "[t]hese groupings are further discredited by the fact that the same faces from the same firms almost inevitably appear on the roster of every new organization, and

176. *Id.* at 101.

177. Alex Brummer, *Saturday Notebook: Regulators Must Talk to Each Other*, THE GUARDIAN (London), Aug. 12, 1995, at 34.

178. Pistor, *supra* note 164, at 101.

179. *Id.* at 102.

180. Richard Greensted, *Committee Fails to Show Leadership*, FIN. NEWS, Sept. 11, 2000.

181. *Id.*

yet still fail to provide true leadership.”¹⁸²

The issue thus remains, who should fulfill the international leadership position and set global securities standards?

B. *The SEC*

One candidate for the lead role in establishing standardized international securities regulation is the SEC. The SEC is a logical choice given that its primary function is securities regulation and market efficiency:

The SEC grew out of the stock market crash of 1929, as people felt that speculation and fraud in the stock market led to the Great Depression. Originally instituted as part of the New Deal in the 1930s, the Securities Exchange Act of 1934 regulates the exchange of securities. The Act's major provisions cover the initial securities registration, the filing of periodic financial reports, the registration of broker-dealers, and general disclosure and anti-fraud provisions. The regulation of securities exchange was based on the notion that the government should promote efficient stock markets. An efficient stock market is deemed to be essential to the efficient allocation of capital and other resources. SEC regulation of securities markets thus grew out of a fear of economic collapse and showed a concern for the most efficient allocation of resources in the market. . . . Hence the SEC spends significant resources to reduce fraud or deception in securities transactions. From the outset, one of the SEC's major devices for protecting the efficiency of markets was to prevent fraud and price manipulation. . . .¹⁸³

Overall, the SEC is dedicated to protecting U.S. investors and U.S. markets, which are both significant, as discussed earlier. It does so by “preserving market-wide transparency, fairness, and integrity.”¹⁸⁴ As a result, the SEC expanded tremendously, and it is no longer contained within U.S. borders.¹⁸⁵ “[T]he internationalization of securities markets has encouraged the SEC to regard itself as an international policing agency . . . it would appear that internationalizing its efforts is now a major SEC priority. Indeed, the SEC now employs a whole division

182. *Id.*

183. Gorra, *supra* note 171, at 218-19.

184. *Id.* at 222.

185. *Id.* at 224-25.

devoted to this subject.”¹⁸⁶

Despite the SEC’s efforts and reputation, it is not the proper organization for the task of harmonizing international securities regulation, for many reasons. For example, under the Third Restatement of the United States’ Foreign Relations Law, the SEC’s jurisdiction should be limited to within U.S. borders. The Third Restatement advises that “one country’s law can only compel a person in another country to perform an Act ‘to the extent permitted by the law of his home jurisdiction.’”¹⁸⁷ Although section 416 of the Third Restatement provides the U.S.’s securities law with a long jurisdictional reach,¹⁸⁸ it acknowledges jurisdiction over “conduct occurring predominately in the [U.S.] that is related to a transaction in securities, even if the transaction takes place outside the [U.S.]”¹⁸⁹ This “broad reach . . . has been the subject of significant criticism at home and abroad, including being denounced as a form of legal and economic imperialism.”¹⁹⁰ The fear of being brought under U.S. jurisdiction and subjected to SEC regulation leaves many foreign-broker dealers unwilling to do business with U.S. investors.¹⁹¹

C. *The IOSCO*

A second qualified candidate for the leadership position in creating international standards for securities regulation is the IOSCO. The birth of the IOSCO dates back to 1947, when “nations of the Western Hemisphere . . . organized the Inter-American Association of Securities Commissions to provide a forum for consideration of securities regulation matters of common interest and to assist capital formulation in the Western Hemisphere.”¹⁹² Despite its western origins and headquarters in Canada, the IOSCO transformed itself into a worldwide, international regulator.¹⁹³

Although the organization adjusted its focus over the years, its members¹⁹⁴ are still committed to their purpose, stated in the

186. *Id.* at 225.

187. Ghoshray, *supra* note 140, at 451.

188. Testy, *supra* note 1, at 936.

189. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416(1)(d) (1987).

190. Testy, *supra* note 1, at 932-33.

191. Gorra, *supra* note 171, at 214.

192. A.A. Sommer, Jr., *IOSCO: Its Mission and Achievement*, 17 NW. J. INT’L L. & BUS. 15 (1996).

193. *Id.* at 15-16.

194. “IOSCO has three classes of membership: regular, affiliate, and associate.

organizations' bylaws:¹⁹⁵

[1] to cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets; [2] to exchange information on their respective experiences in order to promote the development of domestic markets; [3] to unite their efforts to establish standards and an effective surveillance of international securities transactions; [and 4] to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.¹⁹⁶

The IOSCO, however, does not always agree with other securities regulators, such as the SEC, and occasionally fails to reach agreements on critical issues. For example, in 1992 “[t]he gap between the [SEC] and most other regulators appear[ed] wider than ever, following the failure of the [IOSCO’s] technical committee to reach an agreement” on international capital requirements for securities firms.¹⁹⁷

Regardless of periodic struggles, the IOSCO is successful in setting international securities regulation standards. For example, in the midst of the aforementioned 1992 dispute, the SEC chairman acknowledged that the IOSCO “had made considerable progress on standards for the much larger market in debt securities.”¹⁹⁸ In 2003, the SEC again praised the IOSCO, this time for its Multilateral Memorandum of Understanding Concerning Consultation and the Exchange of Information (“IOSCO MOU”). The SEC held that “[t]he IOSCO MOU, which is the first global information-sharing arrangement among securities regulators; [sic] sets a new international benchmark for cooperation critical to combating violations of securities and derivatives laws.”¹⁹⁹

The SEC is not the only group or individual following the IOSCO.

Regular members are either government regulators of securities markets, or a self-regulatory agency, such as a stock exchange, when there is no government regulator. . . . Associate members are associations of public regulatory bodies having jurisdiction in the subdivisions of a country when the national regulator is a member. . . . [A]ffiliate members are international organizations with a universal or regional scope. . . .” *Id.* at 17.

195. *Id.* at 16.

196. OICV-IOSCO, General Information on IOSCO, <http://www.iosco.org/about/> (last visited Dec. 30, 2005).

197. Tracy Corrigan, *SEC and Regulators Deadlocked Over Capital Requirements*, FIN. TIMES (LONDON), Oct. 30, 1992.

198. *Id.*

199. Vanguard (Nigeria), *International Organization of Securities Commission Warns On Illegal Dealings in Capital Market*, reprinted in AFRICA NEWS, Oct. 27, 2003.

At the IOSCO's annual conference, "large numbers of persons in the securities industry, lawyers, and others interested in international financial matters attend as 'observers.'"²⁰⁰ This "following" suggests that the IOSCO is a regulatory body that commands the attention of groups and individuals who hold an interest in the international securities industry.

V. THE IOSCO: BEST SUITED FOR LEAD INTERNATIONAL REGULATOR

The IOSCO is better suited than the SEC as lead international securities regulator for three specific reasons: its global commitment, its independence, and its reputation. First, the IOSCO is not committed to one specific market.²⁰¹ The IOSCO's focus is specifically international securities trading and the global market.²⁰² In contrast, the SEC is mostly committed to, focused on, and interested in, one place, the U.S.²⁰³ Despite maintaining divisions which focus on international trading, the SEC is committed to protecting U.S. investors and U.S. markets, not global investors and global markets.²⁰⁴

Second, the IOSCO lacks self-interest because it holds no allegiance to one specific country or market.²⁰⁵ As a result, the IOSCO can exercise independence in making decisions in the best interest of the global market. The IOSCO's regulations have "the single goal of facilitating cross-border access to capital by issuers."²⁰⁶ The SEC, however, is a U.S. federal agency; thus, it is dependent upon and at the mercy of the U.S. Congress.²⁰⁷ It conducts itself in the best interest of U.S. markets, not global markets.²⁰⁸

Finally, the IOSCO, through achievements like its IOSCO MOU, is an attractive and respected option for countries looking to partake in a global market.²⁰⁹ For example, as of October 2003, twenty-four

200. Sommer, *supra* note 192, at 21-22.

201. *See generally* Sommer, *supra* note 192.

202. *See generally id.*

203. *See generally* Gorra, *supra* note 171.

204. *See generally id.*; *see also* U.S. Securities and Exchange Commission, *The Investors Advocate: How the SEC Protects Investors and Maintains Market Integrity*, <http://www.sec.gov/about/whatwedo.shtml> (last visited Dec. 30, 2005) [hereinafter SEC Protects].

205. *See generally* Sommer, *supra* note 192.

206. *See id.*

207. *See generally* Gorra, *supra* note 171; *see also* U.S. Securities and Exchange Commission, *The Laws That Govern the Securities Industry*, <http://www.sec.gov/about/laws.shtml> (last visited Dec. 30, 2005).

208. *See generally* Gorra, *supra* note 171; *see also* SEC Protects, *supra* note 204.

209. Vanguard, *supra* note 199.

countries had already signed onto the IOSCO MOU, with the acknowledgment that it “truly reflects an international census[. . .]”²¹⁰ Furthermore, the IOSCO’s Objectives and Principles of Securities Regulation is “recognized today by the world financial community as international benchmarks for all markets.”²¹¹ Whereas, the SEC is currently in an unpopular position, from an international perspective, because of its unilateralist approach under SOx and its deference to Congress, as discussed earlier.

For these reasons, the IOSCO would best serve as the lead governing body for international securities regulation.

CONCLUSION

Globalization through blossoming financial markets, more specifically international securities trading, brings about a global assimilation of capital markets. Although this development holds benefits, such as increased efficiency in capital allocation and economic stimulation, there are also drawbacks, such as a domino effect whenever an economic disruption, in almost any form, occurs somewhere in the global economy. In order to avoid or survive such a disruption and to better secure investors, comity and cooperation are a must among financial regulators and their laws. Domestic, self-interested laws and regulators, such as the U.S.’s SOx and SEC, are unsuited for and detrimental to globalization, regardless of the U.S.’s central position within the international securities trading market. Rather, to establish and sustain comity and cooperation, a committed, independent, and favorable governing body, such as IOSCO, should take a leadership position, set uniform, international standards, and be afforded the authority and respect to govern international securities markets.

210. *Id.*

211. OICV-IOSCO, IOSCO Historical Background, <http://www.iosco.org/about/index.cfm?section=history> (last visited Dec. 30, 2005).